Subpoenas

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HANCOCK PROSPECTING PTY LIMITED -v- HANCOCK [2013] WASC 290

Jurisdiction:	SUPREME COURT OF WESTERN AUSTRALIA	**Citation No:**	[2013] WASC 290
Case No:	ARB:4/2012	**Heard:**	4 SEPTEMBER 2012, 7 MAY 2013 & 25 JULY 2013
Coram:	PRITCHARD J	**Delivered:**	6/08/13
No of pages:	65	**Judgment Part:**	1 of 2
Result:	Subpoenas set aside in part		
Category:	B	**Other Parts:**	Pages 51 to 65

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Parties:
HANCOCK PROSPECTING PTY LIMITED
JOHN LANGLEY HANCOCK
BIANCA HOPE RINEHART
HOPE GEORGINA RINEHART WELKER
GEORGINA HOPE RINEHART in her personal capacity and as trustee of the Hope Margaret Hancock Trust
HANCOCK MINERALS PTY LIMITED
HANCOCK FAMILY MEMORIAL FOUNDATION LIMITED
TADEUSZ JOSEF WATROBA
WESTRAINT RESOURCES PTY LIMITED
HMHT INVESTMENTS PTY LIMITED
150 INVESTMENTS PTY LIMITED
WEST AUSTRALIAN NEWSPAPERS LTD
STEPHEN WAYNE PENNELLS

Catchwords:
Application to set aside subpoenas
Whether subpoenas have legitimate forensic purpose
Whether subpoena is oppressive and abuse of process
Application of Evidence and Public Interest Disclosure Amendment Act 2012 (WA)
Application of International Arbitration Act 1974 (Cth)
Commercial Arbitration Act 1985 (WA) s 17(2)

Legislation:
Commercial Arbitration Act 1985 (WA)
Evidence and Public Interest Disclosure Legislation Amendment Act 2012 (WA)
Evidence Act 1906 (WA)
Evidence Act 1995 (NSW)
International Arbitration Act 1974 (Cth)

Case References:
AB v Western Australia [2011] HCA 42
AGL Wholesale Gas Limited v Origin Energy Limited [2008] 1 Qd R 305
Alinta Sales Pty Ltd v Woodside Energy Pty Ltd [2008] WASC 304
Alister v R (1984) 154 CLR 404
Alliance Petroleum Australia NL v Australian Gas Light Co (1983) 34 SASR 215
AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd [2009] NSWSC 1484
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175
Apache Northwest Pty Ltd v Western Power Corporation (1998) 19 WAR 350
Ashby v Commonwealth (No. 2) (2012) 290 ALR 148
Australian Electrical Electronics Foundry and Engineering Union (WA Branch) v Hamersley Iron Pty Ltd (1998) 19 WAR 145
British Steel Corporation v Granada Television Ltd [1981] AC 1096
Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd [2013] WASCA 66
Carr v Finance Corporation of Australia Ltd (No. 1) (1981) 147 CLR 246
Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [2012] FCA 21
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
Commissioner for Railways v Small (1938) 38 SR (NSW) 564
Commonwealth v Albany Port Authority [2006] WASCA 185
Daniel v Western Australia (2004) 138 FCR 254
Eastman v DPP (ACT) (2003) 214 CLR 318
Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498
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Jingellic Minerals NL v Beach Petroleum NL (1991) 55 SASR 424
John Fairfax and Sons Ltd v Cojuangco (1988) 165 CLR 346
Lamb v Moss (1983) 49 ALR 533
LK v Director-General, Department of Community Services (2009) 237 CLR 582
Mandic v Phillis (2005) 225 ALR 760; [2005] FCA 1279
Maxwell v Murph (1957) 96 CLR 261
Myra Pty Ltd v Thompson [2011] WASC 230
New South Wales Commissioner of Police v Tuxford [2002] NSWCA 139
NT Power Generation Pty Ltd v Power and Water Authority (2004) 219 CLR 90
Osborne v Landpower Developments Pty Ltd (In liq) [2003] WASCA 117
Police v Campbell [2010] 1 NZLR 48
Portal Software International Pty Ltd v Bodsworth [2005] NSWSC 1115
Queensland Power Trading Corporation v Xstrata Queensland Ltd and Ors [2005] QCA 477
Re Application by the Chief Commissioner of Police (Vic) (2005) 214 ALR 422
Re Australasian Meat Industry Employees' Union (WA Branch); Ex parte Ferguson (1986) 67 ALR 491
Re Commissioner of Water Resources [1991] 1 QdR 549
Rinehart v Welker [2012] NSWCA 1

Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd & Anor (2012) 43 WAR 91
Santos v Pipelines Authority of South Australia (1996) 186 LSJS 257
Scott v Jones [2003] NSWSC 169
Seven Network Limited v News Limited (No 11) [2006] FCA 174
Singh v Crafter (unreported, Full Ct Sup Ct of WA, Lib No. 8434, 15 August 1990)
Smith v New South Wales Bar Association (1992) 176 CLR 256
Smith v State of Western Australia [2005] WASCA 19
Southern Pacific Hotel Services Inc v Southern Pacific Hotel Corporation Ltd [1984] 1 NSWLR 710
TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 87 ALJR 410
Telstra Corporation Ltd v Australian Competition & Consumer Commission (2008) 171 FCR 174
Trade Practices Commission v Arnotts Ltd (No. 2) (1989) 21 FCR 306
Urban Transport Authority (NSW) v Nweiser (1992) 28 NSWLR 471
Watson v Metropolitan (Perth) Passenger Transport Trust [1965] WAR 88
West Australian Newspapers Ltd v Bond (2009) 40 WAR 164
Wran v Australian Broadcasting Commission (1984) 3 NSWLR 241

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : HANCOCK PROSPECTING PTY LIMITED -v- HANCOCK [2013] WASC 290

CORAM : PRITCHARD J

HEARD : 4 SEPTEMBER 2012, 7 MAY 2013 & 25 JULY 2013

DELIVERED : 6 AUGUST 2013

FILE NO/S : ARB 4 of 2012

BETWEEN : HANCOCK PROSPECTING PTY LIMITED
Applicant

AND

JOHN LANGLEY HANCOCK
First-named Respondent

BIANCA HOPE RINEHART
Second-named Respondent

HOPE GEORGINA RINEHART WELKER
Third-named Respondent

GEORGINA HOPE RINEHART in her personal capacity and as trustee of the Hope Margaret Hancock Trust
Fourth-named Respondent

HANCOCK MINERALS PTY LIMITED
Fifth-named Respondent

HANCOCK FAMILY MEMORIAL FOUNDATION LIMITED
Sixth-named Respondent

TADEUSZ JOSEF WATROBA
Seventh-named Respondent

WESTRAINT RESOURCES PTY LIMITED
Eighth-named Respondent

HMHT INVESTMENTS PTY LIMITED
Ninth-named Respondent

150 INVESTMENTS PTY LIMITED
Tenth-named Respondent

WEST AUSTRALIAN NEWSPAPERS LTD
STEPHEN WAYNE PENNELLS
Third Party

Catchwords:

Application to set aside subpoenas - Whether subpoenas have legitimate forensic purpose - Whether subpoena is oppressive and abuse of process - Application of *Evidence and Public Interest Disclosure Amendment Act 2012* (WA) - Application of *International Arbitration Act 1974* (Cth) - *Commercial Arbitration Act 1985* (WA) s 17(2)

Legislation:

Commercial Arbitration Act 1985 (WA)

Evidence and Public Interest Disclosure Legislation Amendment Act 2012 (WA)
Evidence Act 1906 (WA)
Evidence Act 1995 (NSW)
International Arbitration Act 1974 (Cth)
Result:

Subpoenas set aside in part

Category: B

Representation:

Counsel:

Applicant : Mr D B Studdy SC & Mr C Colquhoun
First-named Respondent : No appearance
Second-named Respondent : No appearance
Third-named Respondent : No appearance
Fourth-named Respondent : No appearance
Fifth-named Respondent : No appearance
Sixth-named Respondent : No appearance
Seventh-named Respondent : No appearance
Eighth-named Respondent : No appearance
Ninth-named Respondent : No appearance
Tenth-named Respondent : No appearance
Third Party : Mr R Anderson & Mr T McCarthy

Solicitors:

Applicant : Corrs Chambers Westgarth
First-named Respondent : No appearance
Second-named Respondent : No appearance
Third-named Respondent : No appearance
Fourth-named Respondent : No appearance
Fifth-named Respondent : No appearance
Sixth-named Respondent : No appearance
Seventh-named Respondent : No appearance
Eighth-named Respondent : No appearance
Ninth-named Respondent : No appearance
Tenth-named Respondent : No appearance
Third Party : Lavan Legal

Case(s) referred to in judgment(s):

AB v Western Australia [2011] HCA 42
AGL Wholesale Gas Limited v Origin Energy Limited [2008] 1 Qd R 305
Alinta Sales Pty Ltd v Woodside Energy Pty Ltd [2008] WASC 304
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1 **PRITCHARD J**: Hancock Prospecting Pty Limited (HPPL), Mr John Langley Hancock and a number of other parties are parties to an arbitration being conducted by an arbitrator pursuant to the *Commercial Arbitration Act 1985* (WA) (the CA Act). (Counsel for HPPL submitted that there were in fact a number of separate arbitrations. For ease of reference, I will simply refer to 'the arbitration' to encompass all of the matters before the arbitrator.)
2 In the course of the arbitration, subpoenas were issued by the Court, on HPPL's application, to Mr Stephen Pennells, a journalist employed by West Australian Newspapers Limited (WAN), and to WAN itself, for the production of documents to the arbitrator. The subpoenas were subsequently amended to refine the documents sought by HPPL (the documents sought).

3 Mr Pennells and WAN applied to the Court by Chamber Summons dated 26 March 2012 to set aside the subpoena directed to each of them.

4 Following the hearing on 7 May 2013, counsel for HPPL confirmed that HPPL no longer pursued the production of documents by Mr Pennells in answer to the subpoena directed to him. Accordingly, the resolution of the present application requires consideration only of the amended subpoena directed to WAN (the subpoena).

5 WAN seeks to set aside the subpoena on three grounds. First, WAN contends that the subpoena serves no legitimate forensic purpose because the documents sought to be produced are not relevant to the matters in issue in the arbitration.

6 Secondly, WAN contends that the subpoena is oppressive or constitutes an abuse of process as a result of an accumulation of factors to which I refer below. One of those factors was the amendments made to the *Evidence Act 1906* (WA) by the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA) (to which I will refer, using the language adopted by the parties at the hearing, as the Shield Laws) which came into force on 21 November 2012.

7 Thirdly, counsel for WAN submitted that s 17(2) of the CA Act provided an alternative basis to set aside the subpoena, having regard to the operation of the Shield Laws.

8 For the reasons outlined below, WAN's application to set aside the subpoena should be upheld in part, on the ground that the subpoena is oppressive and constitutes an abuse of process, having regard to the Shield Laws.

9 These reasons deal with the following matters:

1. The factual context and the documents sought under the subpoena;
2. The Court's jurisdiction to set aside the subpoena;
3. The grounds for the application to set aside the subpoena;
4. Principles in relation to objections to the production of documents under a subpoena;
5. Why WAN's contention - that the documents sought have no legitimate forensic purpose because they are irrelevant - fails;
6. Why WAN's contentions in relation to oppression and abuse of process - apart from its contentions in relation to the Shield Laws - fail;
7. Why the subpoena should be set aside in part, on the ground that it is oppressive or constitutes an abuse of process, having regard to the Shield Laws;
8. Why WAN's application to re-open, to permit it to make submissions that the CA Act does not apply to the arbitration - was dismissed.

10 Before turning to deal with these matters, I note that almost all details about the arbitration, including the matters the subject of the arbitration, are confidential, as a result of agreements between the parties to the arbitration. Having regard to that confidentiality, what follows is at times expressed at a relatively high level of generality, in so far as it refers to confidential information about the arbitration.

1. The factual context

11 The arbitration was commenced on 1 January 2012 pursuant to the terms of a document referred to as the Hope Downs Deed.

12 During 2012, and particularly during the first few months of 2012, Mr Pennells published a number of articles in the West Australian newspaper in which he referred to a dispute between Ms Gina Rinehart and some of her children (which is presently the subject of litigation in the Supreme Court of New South Wales) and more generally to the affairs of the members of the Rinehart family, and to the business of HPPL and related companies (the Articles).

13 In some of the Articles, Mr Pennells makes reference to conversations he has had with Mr Hancock, and attributes a number of comments to Mr Hancock. In another publication, reference has been made to exclusive interviews provided to Mr Pennells by Mr Hancock.

14 The subpoena seeks the production by WAN of documents provided to Mr Pennells (or any other journalist employed by WAN) by Mr Hancock which relate to one or other of a list of subjects, or copies of recordings or notes of conversations between Mr Pennells (or any other journalist employed by WAN) and Mr Hancock which relate to one or other of the same list of subjects.

2. The Court's jurisdiction to set aside the subpoena

15 The subpoenas were issued pursuant to s 17(1) of the CA Act, which provides:

> The Court may, on the application of any party to an arbitration agreement, and subject to and in accordance with rules of court, issue a subpoena requiring a person to attend for examination before the arbitrator or umpire or requiring a person to attend for examination before the arbitrator or umpire and to produce to the arbitrator or umpire the document or documents specified in the subpoena.

16 It is also convenient at this point to note the terms of s 17(2) of the CA Act, which provides:

> A person shall not be compelled under any subpoena issued in accordance with subsection (1) to answer any question or produce any document which that person could not be compelled to answer or produce on the trial of an action.

17 The 'Court' in s 17(1) includes the Supreme Court.1
18 Order 36B of the *Rules of the Supreme Court 1971* (WA) (RSC) – which deals with the issue and setting aside of subpoenas more generally – applies to the issue of a subpoena under the CA Act.2 Order 36B r 4(1) permits the Court, on the application of a party or any person with a sufficient interest, to set aside a subpoena in whole or in part, or to grant other relief in respect of it. The Court is also able to set aside a subpoena in the exercise of its inherent jurisdiction.3 It is well established that a subpoena can be set aside under O 36B r 4, and in the Court's inherent jurisdiction, where the subpoena does not serve a legitimate forensic purpose, or where the subpoena is oppressive or an abuse of process.4

3. The grounds for the application to set aside the subpoena

19 As I have already observed, WAN's application to set aside the subpoena was based on three grounds. First, WAN contended the subpoena served no legitimate forensic purpose because the documents sought are not relevant to the matters in issue in the arbitration.

20 Secondly, WAN contended that the subpoenas are oppressive or constitute an abuse of process as a result of an accumulation of the following factors:

> (i) The subpoena is too wide, it is premature, and the breadth of the subpoena and its timing are an indication that HPPL is fishing or is engaged in an attempt to discover whether evidence exists, as opposed to obtaining evidence;
> (ii) The subpoena requires WAN to draw its own conclusions about the extent to which documents may be required to be produced;
>
> (iii) The subpoena seeks material which on its face may be incriminating or tend to reveal incriminating material;
>
> (iv) The subpoena requires WAN to breach agreements as to confidentiality;
>
> (v) It would be oppressive to require WAN to produce documents which it could not be compelled to produce in the arbitration, or in respect of which it would have highly persuasive arguments to resist production in the arbitration, because of the operation of the Shield Laws.

21 In addition, WAN submitted that s 17(2) of the CA Act provided a basis upon which the subpoena ought be set aside, having regard to the operation of the Shield Laws in the circumstances of this case. That submission was put on the basis that s 17(2) either provided a discrete basis for setting aside a subpoena (which was different from oppression or abuse of process) or alternatively that s 17(2) meant that the subpoena shall be set aside as an abuse of process.
22 In support of its application, WAN relied on two affidavits of Mr Pennells sworn on 21 May 2012 and 20 June 2012, and an affidavit of Mr Robert Cronin, the Group Editor in Chief of the newspapers published by WAN, sworn on 22 May 2012. The deponents of those affidavits were not cross examined and I accept the evidence set out in their affidavits for the purposes of the present application.

4. Principles in relation to objections to the production of documents under a subpoena

23 The Court has jurisdiction to set aside a subpoena on the basis that it would be an abuse of the process of the court. The authorities establish that that conclusion will be warranted in a variety of circumstances,5 such as where the subpoena does not have a legitimate forensic purpose, where the documents sought in the subpoena have no apparent relevance to the issues in dispute, where the subpoena may be characterised as a 'fishing' exercise (on the basis that it does not seek to obtain evidence to support a party's case, but rather to assist that party to discover whether he or she has a case at all) or where the subpoena has been used for the purpose of obtaining discovery against a third party. A subpoena will also be an abuse of process where it would be oppressive to require a party to comply with the subpoena. These are not exhaustive categories. The power of the Court to control and supervise its process to prevent injustice is not restricted to defined and closed categories.6

24 In considering whether a proceeding, or a step in a proceeding (such as the issue of a subpoena) is an abuse of process, the purpose for that step will be relevant, as will the consequences for the those invoking the power of the Court to act (in this case the recipient of the subpoena).7 Furthermore, in determining whether a subpoena is an abuse of the court's process, the court will need to balance the conflicting rights of the party to the proceedings, who issued the subpoena, with those of the third party who objects to it. On the one hand, the issuing party has a right to obtain access to documents in the hands of a third party in order to further the ends of justice, and so that he or she may, therefore, prepare a case meeting each issue arising in the proceedings. On the other hand, compliance with a subpoena to produce will inevitably have consequences for a third party, such as the inconvenience of identifying, collating and producing the documents sought, the invasion of the subpoenaed party's right to privacy, or an undermining of the confidentiality of information contained in the documents required to be produced.8

25 The Court will also need to weigh in the balance any relevant public interests which may be invoked to resist the production of documents (such as claims to public interest privilege, for example), with the public interest in the administration of justice which may be frustrated or impaired if documents relevant to an issue in dispute are withheld, having regard to the evidentiary value and importance of those documents in the particular litigation.9

5. Why WAN's contention - that the subpoena has no legitimate forensic purpose because the documents sought are irrelevant - fails

26 In this part of my reasons, I deal with three matters:

(a) legitimate forensic purpose - the degree of relevance required;
(b) whether it is open to WAN to rely upon irrelevance as a ground for concluding that the documents have no legitimate forensic purpose;

(c) why the documents sought are apparently relevant to the issues in dispute in the arbitration.

(a) Legitimate forensic purpose - the degree of relevance required

27 The legal principles relevant to the question whether a subpoena issued in support of an arbitration serves a legitimate forensic purpose were summarised by Beech J in ***Alinta Sales Pty Ltd v Woodside Energy Pty Ltd***.10 Although that case concerned an application for the grant of leave to issue a subpoena returnable before trial, and the prior grant of leave is no longer required for the issue of a subpoena, the principles outlined by his Honour nevertheless remain applicable to assessing whether a subpoena serves a legitimate forensic purpose. I gratefully adopt his Honour's summary of the principles. His Honour observed:11

> There is a legitimate forensic purpose for the issue of a subpoena for documents in respect of a document or class of documents that is apparently relevant.
> Apparent relevance is a low threshold. It is not a question of whether it appears that the party issuing the subpoena could, or could probably, tender the document in evidence. Rather it is enough to establish apparent relevance if a document or class of documents gives rise to a line of enquiry relevant to the issues before the trier of fact, including for the purpose of meeting the opposing case by way of cross-examination.
>
> In determining relevance, the difficulty of assessing relevance prior to trial must be taken into account. The necessity for having a document in order to fairly dispose of the issues at trial might well not become apparent before trial.
>
> Ultimately the relevance of the documents produced is for the arbitrator. It is not appropriate for the court to embark on a detailed preliminary inquiry involving evidence from the party seeking to issue the subpoenas and the company (or companies) against whom the subpoenas are sought to be issued.
>
> ...
>
> Apparent relevance is to be assessed by reference to the issues in the arbitration taking into account the competing contentions of the parties.

> Generally, at least in considering questions of apparent relevance, the court should not attempt to resolve questions of construction that arise between the parties ... . (case references omitted)

28 Before dealing with the question whether the documents sought under the subpoena have apparent relevance, it is necessary to mention HPPL's contention that it was not open to WAN to resist production of the documents sought on the basis that they are irrelevant to the issues in the arbitration.

(b) Whether it is open to WAN to rely upon irrelevance as a ground for concluding that the documents have no legitimate forensic purpose

29 Counsel for HPPL submitted that it was not appropriate for a subpoenaed party to seek to set aside a subpoena on the ground of irrelevance of the documents sought. I understood that to amount to a submission that it was not appropriate for a subpoenaed party to make such a submission if it did not have a real or legitimate basis for that contention, and that WAN was not able to object on the ground of relevance in this case.

30 Counsel for HPPL submitted that in this case it was difficult to see how WAN could have any real or proper basis for objecting to the production of the documents sought when no objection was pursued by any of the parties to the arbitration. That submission cannot be given any weight. The failure by any party to the arbitration to object at this stage cannot be viewed as an indication of the acceptance by any of them of the relevance of any documents which might be produced to the arbitrator under the subpoena. A failure to object at this stage does not preclude a party to the arbitration from raising an objection to the inspection of the documents, or objecting to the admission of any documents, the tender of which is sought in the course of the arbitration.

31 In support of its primary submission, HPPL relied upon an observation made by Perry J in ***Santos v Pipelines Authority of South Australia***,**12** where his Honour said:**13**

> The concept of relevance, for the purposes of discovery or production of documents is, of course, wider than the concept of relevance for the purposes of admission. Be that as it may, generally speaking, a stranger to an action who is asked to produce documents will not be heard to object on the ground of relevance, as it is not appropriate for a non-party to peruse pleadings and the like and attempt to assess what may or may not be relevant to proceedings to which he or she is not a party.
> For similar reasons, it will be difficult for a third party to justify resistance to production on the ground that production is not necessary for disposing fairly of proceedings in which he or she is not otherwise involved.

32 Counsel for HPPL submitted that the observations of Perry J were referred to with approval by the Full Court of this Court in ***Apache Northwest Pty Ltd v Western Power Corporation***.**14**
33 I am unable to accept HPPL's submissions, for five reasons.

34 First, I respectfully observe that there is a considerable degree of ambiguity in the remarks made by Perry J. His Honour did not say that a non-party could not object to production of documents under a subpoena on the grounds of relevance. Read in context his Honour's remarks tend to suggest that his real intention was to emphasise that it would be difficult for a non-party to make such an objection, given that the non -party would not be familiar with the issues in the litigation, and might (at best) be restricted to an examination of the pleadings in an action as the basis for submissions about relevance.

35 Secondly, I do not accept that the observations of the Full Court in ***Apache*** can accurately be described as approving the remarks made by Perry J. Prior to quoting from his Honour's judgment, the Full Court observed that '[i]n the ***Santos (No 2)*** case, in the judgment of Perry J (at 22) his Honour *went so far as to suggest* that ...' (emphasis added).**15** In addition, after quoting his Honour, the Full Court observed:**16**

> The respondent did not seek to maintain that position [that is, the position set out by Perry J] before [the judge at first instance], or before this Court, but the point still remains that, ultimately, the relevance of the material is for the arbitrator, and it is not appropriate at the present stage of the arbitration proceedings to embark upon a detailed preliminary inquiry involving evidence from the respondent and the companies against whom subpoenas are sought to be issued, although not from the sellers, as to whether the documents would ultimately be admissible in the arbitration. Without having the information contained in the documents, the respondent would be placed at a grave disadvantage in any such inquiry.

36 Thirdly, the observations made by the Full Court in respect of the remarks made by Perry J constitute *obiter dicta*. In my respectful view, when seen in their context, the Full Court's reference to those remarks was made in the course of emphasising the difficulties which arise in assessing the relevance of documents far in advance of a trial, and in the absence of consideration by all parties of the content of those documents.
37 Fourthly, there are a number of authorities which establish that the recipient of a subpoena can raise the question of the apparent relevance of the documents sought under a subpoena, even though that person, who will not be a party to the litigation, will not have a full appreciation of the issues so as to be able to demonstrate the irrelevance of the documents sought.**17**

38 Fifthly, one of the difficulties which may arise if a non-party is permitted to seek to set aside a subpoena on the grounds that it does not serve a legitimate forensic purpose is that such an application, if made without a real or proper foundation, has the potential to be used in such a way as to interfere with the administration of justice.**18** However, in the course of modern litigation subpoenas are able to be issued without the leave of the Court, and may be used to seek a wide range of documents, the production of which may incur considerable inconvenience, if not expense, for the subpoenaed party. To deny that person the opportunity to set aside a subpoena on the grounds that

the documents do not have any apparent relevance to the issues in dispute in the proceeding (to the extent that that person has any knowledge of those issues) would potentially work an injustice.

39 In any event, the resolution of this issue is not determinative of WAN's application to set aside the subpoena. HPPL submitted that the documents sought were apparently relevant to the issues in the arbitration and that the subpoena therefore served a legitimate forensic purpose. In so far as HPPL bears an onus of establishing the apparent relevance of the documents sought,19 I am satisfied that it has done so, for the reasons set out below.

(c) Why the documents sought are apparently relevant to the issues in dispute in the arbitration

40 WAN submitted that the 'pleadings' in the arbitration were not settled, with the result that the issues in dispute in the arbitration have not yet been determined. That submission cannot be accepted, having regard to the affidavit evidence adduced by HPPL, which reveals that the parties to the arbitration have now filed points of claim and points of defence. Those documents contain allegations of obligations owed by certain parties, including Mr Hancock, under the Hope Downs Deed and another agreement referred to as the Deed of Obligation and Release (the Deed of Obligation), and allege conduct by those parties in breach of those obligations. For present purposes, it suffices to say that the nature and effect of the obligations under those Deeds which are said to be relevant to the issues in the arbitration are disputed, and there are pleas of non-admission or denial in respect of the allegations of the breach of those obligations and the material facts relied upon as giving rise to those breaches.

41 Counsel for WAN also submitted that some of the documents sought did not appear to be relevant to the issues in dispute, because the subject matter to which the subpoena specifies that the documents relate (for example certain shareholdings, and documents relating to certain tenements) does not have any obvious connection to the matters referred to in the points of claim and defence.

42 I am unable to accept that submission. As the principles set out above make clear, it is not appropriate to undertake a detailed enquiry into the relevance of the documents sought. Although the proper construction of the Hope Downs Deed and the Deed of Obligation is in issue in the arbitration, at first blush it appears that the obligations created by those Deeds which are said to be relevant in this case have a wide application. If that is correct, it is difficult to see why documents as described in the subpoena would not relate to the matters referred to in the points of claim and defence. In so far as the documents sought include documents relating to certain shareholdings, and documents relating to certain tenements, if documents of that kind are held by WAN, that may give rise to a line of enquiry in relation to the matters in dispute, such as the allegations made in [65] - [71] of the Third Amended Points of Claim.

43 Bearing in mind the low threshold for apparent relevance, I am satisfied that the documents sought are apparently relevant to the issues in dispute in the arbitration. The matters referred to in the Articles suggest that Mr Pennells (and thus WAN) may have documents falling within the scope of the subpoena and that, at the least, any such documents may give rise to a line of inquiry concerning the obligation referred to in clause 10 of the Hope Downs Deed, and in clause 4 of the Deed of Obligation, or may assist HPPL to make out its case. In my view, therefore, it cannot be said that the subpoena would not serve a legitimate forensic purpose.

6. Why WAN's contention that the subpoena is oppressive and an abuse of process (other than having regard to the Shield Laws) fails

44 WAN contended that the subpoena was oppressive and an abuse of process having regard to a number of factors. Counsel for WAN made clear that those factors were not relied upon separately and alternatively but rather that WAN's case for oppression and abuse of process depended upon an accumulation of all of the factors set out in [20] above.

45 Initially, the factors on which WAN relied did not include any reference to the Shield Laws (because the Shield Laws did not come into operation until 21 November 2012. Once the Shield Laws came into operation, counsel for WAN relied upon the Shield Laws as providing an additional factor which, when considered together which all of the other factors on which he relied, supported the conclusion that the subpoena was oppressive and an abuse of process.

46 For the purposes of this part of my reasons, it is convenient to deal with all of the factors relied upon by WAN, other than the Shield Laws, in support of its contention that the subpoena is oppressive and an abuse of process. I am not persuaded that the factors relied upon by WAN (other than the Shield Laws), whether considered individually or collectively, support the conclusion that the subpoena should be set aside.

(i) WAN's contention that the subpoena is too wide, it is premature, and the breadth of the subpoena and its timing are an indication that HPPL is fishing or is engaged in an attempt to discover whether evidence exists, as opposed to obtaining evidence

47 Counsel for WAN submitted that the subpoena was too wide because the documents sought were described as those 'relating to' certain matters which themselves were very general in nature. I am unable to accept that submission for the reasons outlined above, particularly as the subpoena seeks only such documents as were received by Mr Pennells, or any journalist employed by WAN, from Mr Hancock, on or after a particular date.

48 Counsel for WAN submitted that the subpoena was premature in that the issues in the arbitration were not yet defined, and that the time frame applicable to the documents sought under the subpoena, which extended beyond the commencement of the arbitration and the filing of points of claim in the arbitration, suggested that any documents produced would go to allegations not yet formulated in the arbitration. Those submissions cannot be accepted. As I have already noted, the issues in the arbitration have now been defined by the exchange of points of claim and defences to points of claim.

49 Counsel for WAN also submitted that the subpoena was premature in that the orthodox methodology of obtaining disclosure from the parties to the arbitration had not been exhausted. The fact that documents sought pursuant to a subpoena might also be sought in discovery does not of itself mean that the subpoena is an abuse of process. In any event, I am unable to accept the submission that all of the documents sought in the subpoena could have been obtained in discovery from Mr Hancock. In so far as the subpoena seeks the production of documents provided by Mr Hancock to Mr Pennells, it is possible that copies of those documents may also be in the possession of Mr Hancock, but that is not inevitable. In so far as the subpoena seeks notes or recordings of conversations between Mr Pennells and Mr Hancock, it appears to be very unlikely that any such documents (or even copies thereof) would be in the possession of Mr Hancock.

50 Counsel for WAN also submitted that the breadth of the subpoenas and their timing were indications that HPPL was 'fishing', and attempting to ascertain whether evidence existed, rather than to obtain evidence. This submission cannot be accepted. The content of the Articles, in light of the pleadings in the arbitration which are in evidence, suggests that WAN is likely to have documents of apparent relevance to the matters in issue. There is no requirement that to avoid the stigma of 'fishing', a party must already be in possession of some evidence before issuing a subpoena. In the interests of fairness, litigation should be conducted on the footing that all relevant documentary evidence is available.**20**

51 It was also submitted that there was no justification for an early return of the subpoena. I do not accept that submission. One object of permitting the early return of subpoenas is to enable the parties to appraise the strengths and weaknesses of their case at an early stage in the proceedings.**21** That being so, the mere fact that the subpoena requires the production of the documents sought in advance of any hearing is not, of itself, oppressive.

52 It was submitted that the width of the subpoena and its prematurity suggested that the documents sought were at the periphery of, rather than central to, the arbitration. I am unable to accept that submission. Having regard to the terms of clause 10 of the Hope Downs Deed and clause 4 of the Deed of Obligation, and the allegations at par [62] - [71] of the Points of Claim, if WAN holds any documents of the kind described in the subpoena, such documents may be directly relevant to some of the factual issues in dispute in the arbitration.

(ii) WAN's contention that the subpoena requires WAN to draw its own conclusions about the extent to which documents may be required to be produced

53 Counsel for WAN submitted that the subpoena required WAN to draw its own conclusions about the extent to which material was required to be produced. This was said to result from the fact that the documents sought were described as documents 'relating to' other matters which were not defined with precision.

54 It is well established that it is not legitimate to use a subpoena for the purpose of endeavouring to obtain what would, in effect, be discovery of documents from a non-party who is not liable to make discovery. This ensures that a non-party, who will ordinarily be ignorant of the issues in dispute between other parties to litigation, is not to require to go to the trouble and expense of searching through his or her records and endeavouring to form a judgment as to whether any of those records throw light on the dispute.**22** But it does not follow that a subpoena requiring the production of documents 'relating to' a specified subject matter is necessarily objectionable on the ground that it calls for discovery.**23**

55 In my view, the subpoena does not require WAN to engage in an exercise tantamount to discovery. Although some of the subject matter to which the documents sought in the subpoena must relate is described in broad terms, the scope of the documents sought is narrowed by other criteria referred to in the subpoena including the origin of the documents, and the time frame in which the documents were received. In my view, the documents which must be produced are described with sufficient specificity that the subpoena does not necessitate WAN making a determination of the extent to which particular documents might shed light on the issues in dispute in the arbitration.

(iii) WAN's contention that the subpoena seeks material which on its face may be incriminating or tend to reveal incriminating material

56 Counsel for WAN submitted that the documents sought under the subpoena may be incriminating, because those documents pertained to a period of time in which suppression orders made by the Supreme Court of New South Wales were in place.

57 I am unable to accept that submission. It is entirely speculative whether any of the documents sought would themselves constitute, or contain, evidence which is incriminating. The time frame to which the documents sought must pertain does not appear to coincide in its entirety with the period during which the suppression order made by the New South Wales Supreme Court was in place. Given the suppression order has been lifted, it is far from apparent how the mere possession of a document containing information which might have been subject to that suppression order could, of itself, constitute evidence of a breach of the suppression order.

(iv) WAN's contention that the subpoena requires WAN to breach agreements as to confidentiality

58 Counsel for WAN submitted that it was apparent from the evidence that production of the documents sought would reveal confidential information imparted in circumstances of confidence, and the confidential sources of that information.

59 He submitted that any public benefit in requiring production of the documents sought was outweighed by the public interest in maintaining agreements of confidentiality made between journalists and their sources, and in protecting the identity of confidential sources of information. Counsel relied on a practice - which is often referred to as 'the newspaper rule' - which he submitted was to the effect that neither a media owner nor its journalists will ordinarily be required to disclose confidential information, at least at the interlocutory stage, unless necessary in the interests of justice, or for some other similarly compelling reason.

60 Counsel for WAN noted that HPPL did not contend that the production of the documents sought was necessary to do justice between it and the other parties to the arbitration, or in the interests of justice. Counsel for WAN also submitted that it could not be said that production of the documents sought was necessary to do justice between the parties to the arbitration or was otherwise in the interests of justice because the documents sought could have been obtained from Mr Hancock by way of discovery in the arbitration, and it was oppressive to seek material from non-parties when another, simpler means of obtaining them was available, but had not been pursued. I have dealt with the substance of the latter submissions already. In this section of my reasons, I deal with the following matters:

(a) the evidence as to the confidentiality of the information and the sources of the information;
(b) claims to confidentiality and subpoenas; and

(c) why WAN's submissions as to the newspaper 'rule' fail.

(a) The evidence as to the confidentiality of the information and the sources of information

61 Having regard to the evidence set out in the affidavits of Mr Pennells and Mr Cronin, I accept that Mr Pennells has given undertakings of confidentiality to a number of persons who have provided him with information - either to preserve the confidentiality of their identity, or of the information provided, or both. I also accept that Mr Pennells is subject to an obligation of confidence with respect to that information, and to an ethical obligation as a journalist to maintain the confidentiality of that information.

62 I accept that each of the communications in which Mr Pennells was provided with information by other people took place in the course of his employment as a journalist with WAN.

63 I accept Mr Pennells' evidence that production of the documents sought would cause him to breach those obligations of confidence with more than one source, as production would require him to reveal information that is confidential and which was given to him on condition that he not reveal it, or the name of the person who gave the information to him, without their prior approval.

64 I accept Mr Pennells' evidence that as a journalist, he is bound by an ethical obligation to respect and observe undertakings of confidence given to any sources, and that observing undertakings of confidentiality is fundamental to his obligation as a journalist to act in the interests of the public to ensure the open communication of information on issues of public importance.

65 I also accept that WAN regards itself as bound by the same ethical obligations as its journalists, and that it therefore regards itself as bound to respect the confidentiality of information received by Mr Pennells on the basis of an undertaking to keep that information confidential.

(b) Claims to confidentiality and subpoenas

66 Counsel for HPPL submitted that the affidavit evidence was insufficient to establish any claim to confidentiality or to some form of 'privilege' with respect to the documents sought. There were three planks to this submission. First, counsel emphasised that the terms of the subpoena made clear that the only documents sought under the subpoena were documents provided to Mr Pennells by Mr Hancock. Secondly, counsel for HPPL submitted that the subpoena did not seek any documents revealing the confidential identity of any informant, because the subpoena only sought information provided by Mr Hancock (whose identity as an informant to Mr Pennells was known by virtue of the fact that in some of the Articles Mr Pennells attributed certain information to Mr Hancock). Thirdly, counsel for HPPL submitted that the affidavit evidence relied upon by WAN was inadequate to support a claim for the confidentiality of any documents sought because Mr Pennells did not specify the source of any obligation of confidentiality.

67 Given that it appears that WAN holds documents which fall within the scope of the subpoena, then by virtue of the description of the documents sought, those documents will necessarily have been provided to Mr Pennells (or another journalist employed by WAN) by Mr Hancock, or contain references to communications between Mr Pennells and Mr Hancock.

68 The question arises as to whether any of those documents may be subject to an obligation that either the source of the information in them, or the content of that information, remain confidential. Mr Pennells does not depose that all of the information or documentation which was provided to him by third parties was provided on the basis of his undertaking that that information or documentation, or the source of it, would be kept confidential.

69 Having regard to other evidence before the Court, the latter claim could not be made. In a number of the Articles, Mr Pennells attributed information to individuals such as Mr Hancock. Mr Pennells deposes that he has only ever attributed information to particular persons where he has the express authority of those persons. It follows that the information attributed to Mr Hancock in the Articles was not provided to Mr Pennells in circumstances where either his identity or the content of the information, was subject to an obligation of confidentiality.

70 Nevertheless, the second plank of HPPL's submissions as to the adequacy of the affidavit evidence must be rejected. The fact that a journalist attributes information to a source does not exclude the possibility that other information or documentation was provided by that source on the basis that it, or the identity of the source, be kept confidential. Mr Pennells' evidence, which was not contested, is that if documents are produced under the subpoena, that will involve the breach of an agreement with more than one source to keep the information provided, and the identity of the source, confidential.

71 The third plank of HPPL's submissions as to the adequacy of the affidavit evidence must also be rejected. Counsel for HPPL submitted that Mr Pennells' evidence was deficient because Mr Pennells did not specify the identity of the persons to whom he provided undertakings of confidentiality. However, Mr Pennells deposed that production of material pursuant to the subpoena issued to him would cause him to breach agreements of confidentiality as it would require Mr Pennells to reveal information given on the condition that Mr Pennells not reveal the information, or the name of the person who provided that information to him. Given the terms of the amended subpoena, I am unable to see how Mr Pennells could have given more specific evidence in relation to the persons to whom he provided undertakings of confidentiality, without breaching those undertakings.

72 Having regard to the affidavit evidence, I draw the following conclusions. If WAN holds documents falling within the scope of the subpoena, the affidavit evidence suggests that at least some of those documents may be the subject of an obligation of confidentiality, either as to the source of the information (that is, the informant's identity) or as to the content of the information itself. However, it is not possible to say that all of the documents held by WAN would necessarily be subject to an obligation of confidentiality. That is because there is no information before the Court to indicate whether documents held by WAN contain information which has been publicly disclosed as having been provided by Mr Hancock. If WAN holds documents of that kind, then those documents (to that extent) could not be the subject of any claim to confidentiality.

73 However, even though WAN holds documents within the scope of the subpoena which contain information which is subject to an obligation of confidence, the existence of that obligation, of itself, does not mean that the subpoena is oppressive.**24** The risk to the confidentiality of documents sought under a subpoena must ordinarily be tolerated in the interests of the administration of justice.**25** Nevertheless, confidentiality is a factor which is to be taken into account in considering whether a subpoena should be set aside on the ground that it is oppressive.**26**

74 Accordingly, although I accept that some of the documents sought are subject to an obligation of confidentiality, any such confidentiality, of itself, would not warrant setting the subpoena aside on the grounds that it is oppressive.

(c) Why WAN's submissions as to the newspaper 'rule' fail

75 I am unable to accept WAN's submissions that having regard to the newspaper rule, the subpoena should be set aside on the ground that it is an abuse of process, or oppressive. At the outset, it is appropriate to make two observations. First, the so-called newspaper 'rule' is not, in fact, a rule at all, but simply a practice which has developed over time to inform the exercise of a court's discretion whether to require a journalist or news media defendant to disclose a confidential source of information.**27**

76 Secondly, despite the existence of the newspaper rule, it remains the position at common law:

> that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice ... . The point is that there is a paramount interest in the administration of justice which requires that cases be tried by courts on the relevant and admissible evidence. This paramount public interest yields only to a superior public interest, such as the public interest in the national security. The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a trial of his action on the basis of the relevant and admissible evidence. No doubt the free flow of information is a vital ingredient in the investigative journalist which is such an important feature of our society. Information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information. It stands to reason that the free flow of information would be reinforced, to some extent at least, if the courts were to confer absolute protection on that confidentiality. But this would set such a high value on a free press and on freedom of information as to leave the individual without an effective remedy in respect of defamatory imputations published in the media.
>
> That is why the courts have refused to accord absolute protection on the confidentiality of the journalist's source of information, whilst at the same time imposing some restraints on the entitlement of a litigant to compel disclosure of the identity of the source. In effect, the courts have acted according to the principle that disclosure of the source will not be required unless it is necessary in the interests of justice.**28**

77 With these observations in mind, I turn to consider the content of the newspaper rule. Although the precise area of operation of the 'rule' has been described as being 'shrouded in uncertainty,'**29** the rule has been stated as applying in a 'defamation or related action', or in proceedings for 'defamation and, perhaps, other analogous actions'.**30** Within that context, the rule will ordinarily be applied in relation to interlocutory proceedings, typically in relation to applications for discovery or interrogatories, although it has been suggested that even at trial the court will not compel disclosure unless it is necessary to do justice between the parties.**31**

78 What actions can be said to constitute 'analogous actions' or 'related' actions (vis a vis a defamation action) has not been fully explored, but despite suggestions that the newspaper rule should be understood as a rule of general application, a broad view of the rule has been rejected.**32**

79 I turn, then, to consider whether the newspaper rule assists WAN in its contention that the subpoena is oppressive. I am unable to accept that the newspaper rule, or the authorities in relation to the newspaper rule, provide support for WAN's case, because the arbitration does not involve an action for defamation, nor can the arbitration be characterised as a 'related' or 'analogous' action (as compared with a defamation action).

80 Some of the issues in dispute in the arbitration to which the documents sought are said to be relevant concern issues of confidentiality. However, the authorities do not provide support for the conclusion that the 'related' or 'analogous' actions to which the newspaper rule may extend include an action for, or arising from, an alleged breach of confidence.

81 In ***British Steel Corporation v Granada Television Ltd*****33** a majority of the House of Lords held that the newspaper rule had no application in the context of an action for the delivery up of documents said to have been given to the defendant in breach of an obligation of confidence.**34**

82 The High Court in ***John Fairfax and Sons Ltd v Cojuangco*****35** approved the decision in ***Granada*** in several respects, but the Court did not expressly address the question whether the newspaper rule extended to actions for breach of confidence. That is not surprising - the issue before the Court did not concern whether the newspaper rule applied in actions for breach of confidence. However, in view of the Court's strong endorsement of the rejection of a broad application of the newspaper rule in ***British Steel Corporation v Granada Television Ltd*** it is difficult to discern any basis upon which it might now be said that in Australia the newspaper rule applies to actions for, or arising from, a breach of confidence. In this respect, I respectfully agree with the observations made by Brereton J in ***AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd*****.36**

83 The decision of the Court of Appeal in ***West Australian Newspapers Ltd v Bond*** is not inconsistent with this conclusion.**37** Buss JA, with whom Owen JA and Wheeler JA agreed, noted that the newspaper rule only applies in the context of a 'defamation or related action' or proceedings for 'defamation and, perhaps, other analogous actions'. In support of this proposition he relied on ***Cojuangco*** and ***Granada***. The Court of Appeal (like the trial judge) dealt with the appeal on the assumption that the newspaper rule applied. Given that the pleadings involved an allegation of defamation (as well as an action for breach of confidence) that assumption is not difficult to understand. The reasoning of the Court does not support the conclusion that the newspaper rule has a wider application outside the defamation context.

7. Why the subpoena should be set aside, having regard to s 17(2) of the CA Act and the Shield Laws

84 For the reasons set out below, I have concluded that having regard to the operation of the Shield Laws, the subpoena should be set aside on the ground that it is oppressive and an abuse of process, other than in so far as any of the documents sought contain information which has been attributed in the Articles to a particular informant or informants.

85 Although WAN relied on the operation of the Shield Laws, in conjunction with all of the other factors I have addressed above, as warranting the conclusion that the subpoena should be set aside, in my view the operation of the Shield Laws is a factor sufficient of itself to warrant the conclusion that the subpoena is oppressive and an abuse of process. In order to explain that conclusion, I deal with the following matters in this part of my reasons:

(a) Overview of the Shield Laws;
(b) WAN's contentions in relation to the Shield Laws;

(c) The temporal operation of the Shield Laws;

(d) The meaning and operation of s 17(2) of the CA Act;

(e) Why the subpoena should be set aside on the basis that it is oppressive and an abuse of process.

(a) Overview of the Shield Laws

86 The Shield Laws came into operation on 21 November 2012. They have two parts. First, s 20B - s 20F of the *Evidence Act* (the PCRP provisions) are concerned with protecting the confidentiality of 'protected confidences' and 'protected identity information' in a variety of circumstances. The second plank of the Shield Laws is concerned with whether journalists can be compelled to give evidence of the identity of their informants (the journalists' informants provisions).

(i) The PCRP provisions

87 Subsection 20C(1) is the source of the protection afforded to protected confidences. It provides:

> (1) A court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose -
>
> (a) a protected confidence; or
> (b) the contents of a document recording a protected confidence; or
>
> (c) protected identity information.

88 A 'protected confidence' is defined to mean:
89 'a communication made by a person in confidence to another person (the confidant) -

> (a) in the course of a relationship in which the confidant was acting in a professional capacity; and
> (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

90 The term 'protected identity information' means 'information about, or enabling a person to ascertain, the identity of the person who made a protected confidence'.**38**
91 A 'confidant' includes a journalist,**39** namely a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium.**40** A 'news medium' is 'a medium for the dissemination to the public or a section of the public of news and observations on news'.**41**

92 Section 20C does not mandate the exclusion of evidence in a proceeding on the basis that the evidence would disclose a protected confidence or protected identity information. Instead, the Court has a discretion whether to give such a direction.**42** However, the court must give the direction contemplated in s 20C(1) if it is satisfied of two things:

> (a) it is likely that harm would or might be caused, whether directly or indirectly, to the protected confider if the evidence is adduced; and
> (b) the nature, extent and likelihood of the harm outweigh the desirability of the evidence being given.**43**

93 The court has a wide discretion with respect to the matters to which it may have regard for the purpose of determining whether to make a direction under s 20C but in exercising that discretion it must have regard to ten factors, which are set out in s 20C(4) of the *Evidence Act*. The transparency of that weighing process is secured by the requirement that the court must state its reasons for giving or refusing to give a direction under s 20C of the *Evidence Act*.**44**
94 For completeness, I note that the protection afforded by s 20C may be lost (if the protected confider consents to the disclosure**45**) or unavailable (in the case of misconduct**46**).

95 In his second reading speech for the *Evidence and Public Interest Disclosure Legislation Amendment Bill* (the Bill)**47** the Attorney General indicated that the PCRP provisions:

> are intended to assist professionals in reconciling their ethical obligations to preserve their client's confidentiality and their legal obligations to give evidence when required to do so by a court. The bill reconciles these conflicting obligations by vesting a guided discretion in the court to exclude evidence of a confidential communication. The discretion vested in the court consists of two components. The first component is a threshold component, providing that the protection can apply only when the communication was made in the course of a professional relationship in which the confidant was under an express or implied obligation not to disclose its contents. The protected information can be information about the content of the communication, documents that would reveal that content or information that would make it possible to discover the identity of the maker of the communication.
> ...The bill also confirms that the PCRP provisions apply to journalists acting in a professional capacity when information was disclosed to them in circumstances of express or implied confidentiality.
>
> Under the second component, the bill requires the responsible court to determine whether or not the nature and extent of the harm that may be caused to the confidant, either directly or indirectly, outweighs the desirability of the evidence being given. If the harm outweighs the desirability of the evidence being given, a court must give a direction that evidence not be adduced. As part of this essential balancing exercise, the bill contains a series of factors that a court must take into account, including the nature of the proceedings, the importance of the evidence, and the means available to the court to limit the harm that is likely to be caused by disclosing the evidence.

(ii) The journalists' informants provisions
96 Section 20I of the *Evidence Act* is the source of the protection afforded to journalists from being compelled to give evidence as to the identity of confidential informants. Section 20I provides:

> If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor a person for whom the journalist was working at the time of the promise is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained (*identifying evidence*).

97 An 'informant' is 'a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium'.**48** The terms 'journalist' and 'news medium' are defined in terms identical to their definition in relation to the PCRP provisions.**49**
98 In the case of evidence which would disclose the identity of a confidential informant (identifying evidence), s 20I creates a presumption that neither the journalist nor his or her employer can be compelled to give that evidence. That protection is not, however, absolute. A person acting judicially may direct a journalist or his or her employer to give identifying evidence, but only if satisfied that 'having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs -

> (a) any likely adverse effect of the disclosure of the identity on the informant or any other person; and
> (b) the public interest in the communication of facts and opinions to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.**50**

99 As is the case under s 20C(4), the person acting judicially has a wide discretion with respect to the matters to which he or she may have regard for the purpose of determining whether to make a direction of this kind, but must have regard to ten factors set out in s 20J(3). The transparency of this weighing process is secured by the requirement that reasons must be given for giving or refusing a direction under s 20J.**51**
100 The protection afforded by s 20I may be lost if the informant consents to the journalist giving the identifying evidence (s 20L) or in the case of misconduct on the part of an informant or a journalist (s 20K).

101 In his second reading speech for the Bill, the Attorney General indicated that:

> This bill serves the public interest of preserving appropriate confidentiality while recognising that journalists play a vital role in ensuring the free flow of facts and information to the public. It follows that the public interest in the free flow of information is served by supporting journalists in their professional capacity. In many instances, the role that journalists play is assisted by the provision of information by sources. Such sources may often wish to remain anonymous and indeed, in some cases, a source may provide information only on the condition that their identity remains confidential.
>
> The new journalist protection provisions strengthen the capacity of journalists to maintain the anonymity of their sources by introducing a presumption that a journalist is not compellable to give identifying evidence when they have promised not to disclose the identity of their source. As with the PCRP provisions, however, the protection afforded to journalists is a qualified protection. The public interest in the free flow of information and news must always be balanced against the public interest in courts and tribunals being properly informed of all matters that could legitimately affect their decisions. The bill achieves this balance by outlining the circumstances in which a person acting judicially may direct that identifying evidence be given, notwithstanding the general presumption of non-compellability on the part of a journalist.

(iii) The Shield Laws and subpoenas
102 The Shield Laws do not contain a provision which indicates that they are to be applied directly in respect of an objection to the production of documents under a subpoena. That is a curious omission, to say the least, for two reasons.

103 First, at least in so far as the PCRP provisions are concerned, the Shield Laws were apparently modelled on the provisions in pt 3.10, div 1A of the *Evidence Act 1995* (NSW). The journalists' protection provisions were enacted in response to the *Evidence Amendment (Journalists' Privilege) Act 2010* (Cth) and the *Evidence Amendment (Journalist Privilege) Act 2011* (NSW).**52** The *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Cth) each contain a provision which expressly extends the protections afforded by the substantive protection provisions to pre-trial procedures including subpoenas. Section 131A of the *Evidence Act 1995* (NSW) expressly permits an objection to the production of documents under subpoena to be determined by applying the protection provisions (that is, those equivalent to the Shield Laws) 'as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence'. There is nothing in the second reading speech or explanatory memorandum for the Bill to indicate the reason for the omission of an equivalent provision in the Shield Laws.

104 Secondly, if the Shield Laws do not apply in respect of the production of documents under a subpoena, the very protections the Shield Laws are designed to provide could be significantly undermined, if not rendered nugatory.
105 It may be that the Parliament considered that the Shield Laws were capable of direct application in the case of subpoenas, and that the Shield Laws, properly construed, have this effect. However, it is not necessary to decide the latter point because counsel for WAN made very clear that he did not contend that the Shield Laws applied directly in this case, so as to permit WAN to apply to set aside the subpoena on the bases set out in the Shield Laws.

(b) WAN's contentions in relation to the Shield Laws

106 Instead, counsel for WAN relied on the Shield Laws in two ways. First, he submitted that the Shield Laws were a further factor which, cumulatively with the other factors to which I have already referred, support the conclusion that the subpoena is oppressive. Counsel for WAN submitted that the Shield Laws provide a protection against the compulsory disclosure of information, including information as to the identity of an informant, which is provided in confidence to a journalist, and the production of the subpoenaed documents would defeat the evident purpose of the Shield Laws, and would be oppressive or an abuse of process for that reason.

107 Counsel for WAN submitted that the operation of the Shield Laws meant that WAN could not (by virtue of s 20I) nor would not (under s 20C) be compelled to adduce or give evidence reflecting the information in the documents, or would have 'highly persuasive arguments' in the arbitration to resist doing so, and for that reason the subpoena served no legitimate purpose or was an abuse of process, or was oppressive. He also submitted that the pursuit of the subpoena in light of the Shield Laws constituted an attempt to circumvent the operation of the Shield Laws because the documents sought could not be adduced in evidence in the arbitration.

108 Secondly, counsel for WAN submitted that WAN could not be compelled to produce the documents sought under the subpoena, by virtue of the operation of s 17(2) of the CA Act, when that provision is read in conjunction with the Shield Laws. He submitted that the effect of s 17 (2) of the CA Act is that evidence which could not be given or produced to a court at trial (by virtue of the operation of the Shield Laws) cannot be the subject of an enforceable subpoena. Accordingly, he submitted that s 17(2) requires a consideration of whether the documents sought could be produced to a court on the trial of an action, having regard to the operation of the Shield Laws.

109 It is convenient to consider the meaning and operation of s 17(2) of the CA Act. before turning to consider whether the Shield Laws support the conclusion that the subpoena is oppressive or an abuse of process.

(c) The meaning and operation of s 17(2) of the CA Act

110 Counsel for WAN submitted that s 17(2) provides a basis upon which a subpoena may be set aside. As I understood the submission, it was to the effect that s 17(2) makes clear that a subpoena that seeks to compel the giving of evidence or production of documents that could not be compelled to be given to, or produced to, a court 'on the trial of an action' is unenforceable. Consequently, it was submitted that the operation of the Shield Laws in 'the trial of an action' had to be considered, so that evidence that could not be given in, or produced to, a court in a trial because of the operation of the Shield Laws could not be the subject of an enforceable subpoena, irrespective of whether the Shield Laws actually apply in the forum for which the subpoena has been issued (that is, the arbitration).

111 Counsel for WAN submitted that the reference to 'the trial of an action' indicated that the focus of s 17(2) is not on what would be admissible were the matters the subject of the arbitration heard by a court. Instead, he submitted that in considering whether the production of documents under a subpoena would be compelled, the question was whether the documents could be produced having regard to the rules applicable to courts generally. Because the Shield Laws clearly apply to proceedings before the courts, counsel for WAN saw s 17(2) as overcoming any potential issues (in relation to s 20C of the *Evidence Act* in particular) as to whether the Shield Laws were capable of application in an arbitration.

112 I am unable to accept the latter part of these submissions.

113 The questions raised by WAN's submissions do not appear to have been the subject of any judicial consideration. Accordingly, it is necessary to construe those words using well established principles of statutory construction. The starting point in the construction of any statutory provision is to consider the ordinary meaning of the words used, within their context.**53**

114 In so far as it concerns the production of documents, s 17(2) provides that a person 'shall not be compelled' to produce documents to an arbitrator under a subpoena issued under s 17(1) if the criterion in s 17(2) is satisfied. In other words, s 17(2) makes clear that a subpoena cannot be enforced if the recipient of the subpoena could not be compelled to produce documents in the circumstances described. A subpoena which could not be enforced should be set aside. In my view, s 17(2) confirms that a subpoena which is issued under s 17(1) may be set aside.

115 Subsection 17(2) then goes on to set out the circumstances in which a person will not be compelled to produce documents under a subpoena in an arbitration. The criterion is relevantly whether the person could be compelled to produce the documents 'on the trial of an action'. Although there is an ambiguity in this part of s 17(2), I have reached the conclusion that the words should be understood as referring to whether the person could be compelled to produce the documents under a subpoena returnable on the trial of an action. Consequently, s 17(2) confirms that the grounds on which a subpoena issued in respect of an action in the Court may be set aside will also apply in respect of a subpoena issued by the Court for the purpose of an arbitration. I have reached that conclusion for four reasons.

116 First, that conclusion is supported by a consideration of s 17(2) within the context of s 17 as a whole. The purpose of s 17 is clearly to enable a party to an arbitration agreement to secure the attendance of witnesses, or the production of documents, in an arbitration. Subsection 17(1) makes clear that the subpoena will be issued 'subject to and in accordance with' the rules of court. The legislature has thus adopted, in a shorthand way, the provisions of the rules of court which govern the issue of subpoenas. (Those provisions extend to applications to set aside a subpoena.**54**) As I have already observed, s 17(2) then goes on to provide for when a subpoena issued by the Court will be enforceable, and sets out the circumstances in which the recipient of the subpoena will not be compelled to produce the documents. In those circumstances, it is to be expected that the grounds for setting aside a subpoena would be referable to the grounds on which a subpoena for the production of documents to a court might be set aside.

117 Secondly, the conclusion is more consistent with existing authority in relation to s 17(2) and equivalent provisions elsewhere. In ***Re Commissioner of Water Resources***[55] Byrne J held that the equivalent provision in the Queensland commercial arbitration legislation at the time had the effect that 'the reach of [subpoenas] when deployed in aid of arbitrations [is] to be co-extensive with their effect in litigation'.[56] Furthermore, existing authority within Western Australia, while not addressing specifically the operation of s 17(2) of the CA Act, has proceeded on the basis that subpoenas issued in an arbitration may be set aside on the same bases as subpoenas issued in proceedings before the Court.[57]

118 Thirdly, in so far as s 17(2) refers to whether documents could be produced 'on the trial of an action' those words appear to reflect the position which existed when s 17(2) of the CA Act was enacted, which was that it was not then possible to obtain the production of documents on subpoena prior to the trial of an action. Rather, the subpoena required the production of documents to the Court at the commencement of the trial of the action.

119 Fourthly, WAN's contention contemplates that the Court would determine whether a subpoena in an arbitration should be set aside by reference to what would occur in the trial of any action, apparently without reference to the particular circumstances of the arbitration and without taking into account the reasons why a document cannot be produced in a court (including cases - such as s 20C of the *Evidence Act* - where the provision on its face applies only to a court). The difficulty with that contention is immediately apparent. A decision as to whether documents will be required to be produced, or evidence given, in a trial of an action will always depend upon the particular legal principles applied to the particular facts of the case.

120 Consequently, in my view, the effect of s 17(2) is that the well recognised bases for setting aside a subpoena in an action in the Court on the basis that it is an abuse of process - such as that the subpoena is oppressive or that the documents the subject of the subpoena are privileged from production - apply also to subpoenas issued for the purpose of an arbitration.

121 I turn, then, to consider WAN's submissions that having regard to the Shield Laws, the subpoena is oppressive or an abuse of process.

(d) Why the subpoena should be set aside on the basis that it is oppressive and an abuse of process

122 I understand the effect of WAN's submission to be that in considering whether the subpoena is oppressive and an abuse of process, I should consider whether the documents sought could be adduced in evidence, or whether an officer of WAN could be compelled to give evidence reflecting the content of those documents, in the arbitration. Counsel for WAN submitted that the effect of the Shield Laws was that no such evidence could be adduced nor given in the arbitration pursuant to s 20C and s 20I of the *Evidence Act*, and in those circumstances, to seek the production of the documents sought under the subpoena was oppressive or an abuse of process. In addition, counsel for WAN submitted that the Shield Laws were a statutory example of a further protection in respect of the documents sought, akin to the newspaper rule, and in that sense advanced the submission as an analogy to the newspaper rule.

123 Assessing the merit of WAN's submissions requires a consideration, first, of whether the Shield Laws would be capable of application to the documents sought, or to the information contained in those documents, and secondly, whether the likely application of the Shield Laws to the documents sought means that the subpoena is oppressive or an abuse of process.

124 WAN's contentions thus require consideration of the possible application of the Shield Laws - that is, whether Mr Pennells or WAN could be compelled to give evidence reflecting the information in the documents, or whether the documents could be adduced in evidence, in the arbitration. However, the Shield Laws do not absolutely prohibit such evidence being adduced or given. In those circumstances, in order to conclude that the subpoena would be oppressive and an abuse of process, the Court would require a high degree of confidence that the Shield Laws would operate as WAN contends. Accordingly, it seems to me that unless it can be said that the Shield Laws would be very likely to apply with the result that the documents sought could not be adduced in evidence, or that neither Mr Pennells nor an officer of WAN could be compelled to give evidence reflecting the contents of the documents sought, the conclusion could not be reached that the subpoena is oppressive and an abuse of power.

125 It is convenient to consider, first, the journalists' protection provisions.

126 For the reasons set out below, I have concluded that having regard to the operation of the journalists' protection provisions, the subpoena should be set aside on the ground that it is oppressive and an abuse of process, save to the extent that any of the documents sought contain information which has been attributed in the Articles to a particular informant or informants.

127 To explain that conclusion I deal with the following matters:

(i) Are the Shield Laws capable of applying, given that the Shield Laws commenced operation after the arbitration had commenced and after the subpoena had issued?
(ii) Does the evidence support the conclusion that the documents sought contain identifying evidence as defined in s 20I of the *Evidence Act*?

(iii) Does the evidence support the conclusion that neither Mr Pennells nor WAN could be compelled to give that identifying evidence in the arbitration, having regard to the journalists' protection provisions?

(iv) If so, why would it be oppressive and an abuse of process to require the production of the documents sought under the subpoena, to the extent that they contain identifying evidence?

(i) Are the Shield Laws capable of applying temporal application?

128 The journalists' protection provisions apply in relation to information given by an informant whether given before or after the commencement of those provisions.**58** However, those provisions do not apply in relation to a 'proceeding' the hearing of which began before the commencement of those provisions.**59**

129 A 'proceeding' is defined for the purposes of the *Evidence Act* as including an arbitration.**60** However, the definitions in the *Evidence Act* apply 'unless the context or subject matter otherwise indicates or requires'.**61** Counsel for HPPL submitted that the context and subject matter indicated that an arbitration of the kind in the present case was not a 'proceeding' as defined in the *Evidence Act*, to which s 20I applied. For the reasons explained below, nothing in the context or subject matter suggests that the arbitration is not a 'proceeding' for the purposes of the journalists' protection provisions.

130 Subsection 20H(1) draws a distinction between a 'proceeding' and 'the hearing' of that proceeding. The ordinary meaning of the word 'hearing' is capable of encompassing the trial of an action, as well as those occasions on which evidence may be received or submissions made in order to resolve interlocutory disputes within a proceeding. The word 'hearing' does not appear to be used with a consistent meaning throughout the *Evidence Act*. On some occasions it appears to refer to a final hearing or trial, while in other cases it appears to refer to a hearing of an interlocutory dispute.**62**

131 In order to determine the meaning of the word 'hearing' in s 20H(1) it is therefore necessary to focus on the precise way that that word is used in that subsection. Section 20H(1) refers to 'the hearing' rather than 'a hearing' of a proceeding. That context supports the conclusion that the word 'hearing' is there intended to refer to the trial (or the equivalent substantive or final hearing) of the proceeding in question. In other words, if a trial had already commenced when the Shield Laws came into operation, the Shield Laws would not apply in relation to that proceeding. Other than in that circumstance, the journalists' protection provisions are capable of application to all 'proceedings' to the extent that the words used in those provisions permits.

132 Although the 'proceeding' in this case, namely the arbitration, has commenced, there was no evidence before the Court to suggest that the substantive hearing of the arbitration has commenced. In my view, therefore, s 20H(1) does not operate to preclude the operation of the journalists' protection provisions in relation to the arbitration, if on their proper construction those provisions are capable of applying in that context.

(ii) Does the evidence support the conclusion that the documents sought contain identifying evidence as defined in s 20I of the Evidence Act?

133 To constitute 'identifying evidence' for the purpose of s 20I of the *Evidence Act*, three requirements must be met. First, the information must disclose the identity of a person, or permit that person's identity to be ascertained. Secondly, the information must identify an 'informant'. Thirdly, it must be the case that a journalist promised the informant that he or she would not disclose the informant's identity. The evidence of Mr Pennells supports the conclusion that the documents contain 'identifying evidence' as described in s 20I. Having regard to Mr Pennells' evidence that the production of the documents sought would involve the breach of an undertaking of confidentiality Mr Pennells has given to an informant (or informants), namely that he would keep the identity of that informant (or informants) confidential, it can be inferred that the documents sought contain information which identifies an individual or individuals, or which would permit the identity of an individual or individuals to be ascertained.

134 In addition, Mr Pennells' evidence establishes that he was given information from a number of people in the course of his work as a journalist and it can be inferred that that information was given in the expectation that it may be published in a news medium. In so far as the documents sought contain information which would identify any of those persons, that information would identify an informant. Those who gave Mr Pennells information, in that context, are 'informants' for the purposes of s 20I of the *Evidence Act*.

135 Further, Mr Pennells' evidence establishes that the documents sought contain information given to him on the condition that he not disclose that information, or the name of the person who gave it to him, without their prior approval. His evidence was that disclosure of the documents sought would result in the breach of that obligation of confidentiality.

136 Counsel for HPPL submitted that the latter requirement was not met because Mr Pennells' evidence did not establish that he was under an express or implied obligation not to disclose the contents of a communication with Mr Hancock specifically.**63** I am unable to agree with the foundation for this submission. I accept Mr Pennells' evidence that he reached agreement with more than one person that as a condition of their providing information to him in the course of his employment as a journalist, he would keep their identity, and the information they had provided, confidential. The link between that promise of confidentiality and the documents sought in the subpoena is established by Mr Pennells' evidence that production of the documents under the subpoena would require him to breach an undertaking or undertakings of confidentiality which he has given. Given the specific description of the documents sought in the subpoena, it is difficult to see how Mr Pennells could have given evidence which was any more specific about the persons to whom he had given undertakings of confidentiality without breaching the very promises he had made to keep their identity confidential.

137 Counsel for HPPL also submitted that Mr Hancock could not be said to be an 'informant' for the purposes of s 20I because his identity as a person who had provided information to Mr Pennells was already known and disclosed in the Articles.**64** Counsel for HPPL submitted that for the purposes of the *Evidence Act 1995* (Cth) if the identity of a person as the source of information is already known, that person cannot considered an 'informant'.**65**

138 To the extent that WAN has in its possession documents containing information which has been published in the Articles, including information which has been attributed to Mr Hancock in those Articles, clearly any reference to Mr Hancock in relation to that information would not be amenable to the protection afforded by s 20I of the *Evidence Act*. Mr Hancock could not be considered an informant in respect of that information in the documents.

139 However, as I have already observed, a person may provide information to a journalist in circumstances where the person does not require that that information, or his or her identity as its source, be kept confidential. On other occasions, the same person may give different information to a journalist on condition that the information, or his or her identity as its source, or both, be kept confidential. Whether s 20I applies to information which is sought to be given in evidence will depend upon whether that particular information was given in the circumstances referred to in s 20I.

140 In this respect, the purpose of s 20I, like that of s 126H(1) of the *Evidence Act 1995* (Cth) (which is in similar terms) is 'to ensure that a person who provides particular information can do so knowing that his or her identity *as its source* can be protected by the journalist because he or she is not compellable to disclosure that identity'.**66** Accordingly, there must be a connection between the particular information to be produced, and the promise by the journalist to keep confidential the identity of the informant as the source of that information. Mr Pennells' evidence that production of the documents sought would involve the breach of an undertaking of confidentiality given to a source or sources of the information in those documents supports the conclusion that the information in at least some of the documents sought was received on condition that the identity of the person who provided that information be kept confidential.

(iii) Does the evidence support that conclusion that neither Mr Pennells nor WAN could be compelled to give that identifying evidence in the arbitration, having regard to the journalists' protection provisions?

141 This question requires a consideration of the application of s 20I itself, and of whether a direction would be likely to be given under s 20J (1) in respect of the identifying evidence.

142 Having regard to the terms of s 20I and s 20J of the *Evidence Act*, to the terms of the subpoena itself, and to Mr Pennells' evidence, and on the basis of the evidence before me in relation to the arbitration, I am persuaded that it is very unlikely that Mr Pennells or an officer of WAN would be compelled to give identifying evidence which is contained in the documents sought.

143 The journalists' protection provisions apply so that a 'journalist', or a person for whom the journalist was working at the time the journalist gave the promise of confidentiality, is not compellable to give identifying evidence. Having regard to the evidence of Mr Pennells, and of Mr Cronin, I accept that Mr Pennells was working as a journalist for WAN at the time he received the information which is contained in the documents sought.

144 In addition, s 20I apples when the evidence which would be given by the journalist or his or her employer would reveal the identity of the informant, or enable that person's identity to be ascertained. The evidence of Mr Pennells is that the production of the documents sought would require him to reveal the identity of the person or persons who gave him the information in the documents, and that that would be a breach of his agreements with those persons not to disclose their identity without their prior approval. (There is no evidence to suggest that any such approval has been obtained.)

145 It necessarily follows that s 20I of the *Evidence Act* gives rise to a presumption that neither Mr Pennells nor an officer of WAN could be compelled to give oral evidence of the identifying evidence contained in the documents sought.

146 However, as I have pointed out, the protection in s 20I is not absolute. It may be abrogated if a direction is given under s 20J(1). Accordingly, in order to determine whether Mr Pennells or an officer of WAN could be compelled to give evidence of the identifying evidence contained in the documents sought it is also necessary to consider whether a court would give a direction under s 20J.

Whether the journalists' protection provisions are capable of applying in the arbitration

147 A direction will be given under s 20J(1) only if the criterion in s 20J(2) is met. That criterion is that a 'person acting judicially' must be satisfied that having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs the likely adverse effect of the disclosure on the informant or any other person, and the public interest in the communication of facts and opinions to the public by the news media, and the ability of the news media to access sources of facts.

148 Counsel for HPPL submitted that it was by no means clear that a private arbitrator appointed under an arbitration agreement is a person acting judicially. I am unable to accept that submission. A 'person acting judicially' is 'any person having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence'.**67** Furthermore, to 'act judicially' is to act justly and fairly.**68** Having regard to cl 20.2 of the Hope Downs Deed, and to s 19 and s 22 of the CA Act, I am satisfied that the arbitrator is a person who, with the consent of the parties to that Deed, has authority to hear, receive and examine evidence, and who is a person acting judicially, for the purposes of s 20J(1) of the *Evidence Act*.

149 Counsel for HPPL also submitted that by virtue of s 19(3) of the CA Act (which provides that the arbitrator is not bound by the rules of evidence) the arbitrator would not be bound to apply s 20I of the *Evidence Act*.**69** I do not accept that submission, for three reasons. First, s 19(3) of the CA Act refers to the rules of evidence, and not to the *Evidence Act* itself. Secondly, 'all of the provisions' of the *Evidence Act* apply to every legal proceeding, except where the contrary intention appears.**70** In my view, s 19(3) of the CA Act does not express a contrary intention with respect to the provisions of the *Evidence Act*. Furthermore, even if s 19(3) of the CA Act may be construed as

expressing an intention to exclude the operation of the *Evidence Act* more generally. s 20H(3) of the *Evidence Act* makes clear that the journalists' protection provisions apply to a person acting judicially 'even if the law by which the person has authority to hear, receive and examine evidence provides that the *Evidence Act* does not apply to the proceeding'. Clearly the Parliament intended that the journalists' protection provisions would have a wide application, consistent with the importance of the public interest underlying those provisions.

150 Finally, I understood counsel for HPPL to submit that the factors in s 20J(2), s 20J(3), and s 20K(1)(g) of the *Evidence Act* cast doubt on whether the journalists' protection provision would operate in the context of the arbitration.71 I do not see why the factors in s 20J(2) and (3) are incapable of application within the context of an arbitration. And in relation to s 20K(1)(g), there is no evidence of any misconduct on the part of any informant or on the part of Mr Pennells or any other journalist which would render the journalists' protection provisions inapplicable in the arbitration in this case.

Competing public interests

151 The balancing exercise contemplated by s 20J(2) involves the weighing of competing public interests to determine if a direction will be given to a journalist or his or her employer to give identifying evidence. On the one hand, s 20J(2) directs attention to the public interest in the communication of facts and opinions to the public by the news media, and the ability of the news media to access sources of facts. The enactment of the Shield Laws, of itself, confirms that this is a strong public interest, and the passage from the Second Reading Speech for the Bill which is set out above confirms that this strong public interest was a key reason for the enactment of the journalists' protection provisions.

152 On the other hand, s 20J(2) recognises that in some cases other public interests may outweigh this public interest in the communication of facts and opinions by the media. Section 20J(2) refers to the 'public interest in the disclosure of the identity of the informant'. This phrase appears to encompass a variety of other public interest considerations, the nature of which can be discerned from the factors in s 20J(4), such as the public interest in the administration of justice (which is usually served by all evidence relevant to the determination of a matter being before the trier of fact), the public interest in a fair trial for a person accused of a criminal offence, and the public interest in the maintenance of national security or the security of the State.

The factors for consideration in s 20J(4)

153 A person acting judicially is required to take into account a large number of considerations to determine whether a direction should be given under s 20J(2) that the journalist or his or her employer give identifying evidence.

154 There is limited information before this Court in relation to those factors. However, such information as is available leads me to conclude that it is very unlikely that a direction would be given under s 20J(2) of the *Evidence Act*, for the following reasons.

155 In so far as the matters in s 20J(3)(a) and (b) are concerned, on the information available, and particularly without any indication of the content of any documents which might be produced, it is difficult to reach a conclusion about the likely probative value, or importance, of the identifying evidence in the arbitration. However, having regard to the description of the documents sought in the subpoena, the revelation of the identity of the informant with respect to the information in those documents may have a significant probative value in relation to the allegations of breach of the Hope Downs Deed. However, it is also difficult to gauge the likely importance of such identifying information in the arbitration, particularly in the absence of any information about other evidence which may be available in the arbitration. Having said that, it appears - from the fact that the arbitration has commenced, and that allegations of the breach of the Hope Downs Deed have been made - that HPPL anticipates that the content of the documents sought may constitute evidence which would supplement existing evidence it already has in relation to alleged breaches of the Deed, or may lead to lines of inquiry about other possible breaches of the Deed.

156 The same conclusion follows in respect of s 20J(3)(d) - which looks to the availability of any other evidence concerning the matters to which the identifying evidence relates. The fact that the arbitration has been commenced suggests that evidence already exists of alleged breaches of the Hope Downs Deed, and identifying information in the documents would at best supplement that existing evidence.

157 As for s 20J(3)(c), the limited information available to the Court in relation to the nature and gravity of the matters the subject of the arbitration means that it is also not possible to form a view about those matters, other than to observe the matter involves a civil dispute (rather than the prosecution of a criminal offence where the liberty of an individual might be at stake) and that the subject matter of the dispute concerns, amongst other things, alleged breaches of their obligations by the parties to the Hope Downs Deed, and the consequences of those breaches.

158 As for s 20J(3)(e), there is limited evidence as to the likely effect of disclosure of the identifying evidence. There is no information about the harm that might be caused to an informant if evidence were given of the identifying information. However, there is evidence of the likely effect of disclosure on Mr Pennells, namely that disclosure of the identifying evidence would constitute a breach of a fundamental ethical obligation on him as a journalist.

159 In relation to the matters referred to in s 20J(3)(f), it is difficult to see how ancillary orders might be made to limit the harm or extent of the harm which might be caused if the identifying evidence were given. This would not be a case, for example, where the identity of an informant could be protected by the use of a pseudonym.

160 There is no evidence to suggest that disclosure of identifying information of the kind which may be contained in the documents sought would have any effect on prosecutions, or investigations, of the kind referred to in s 20J(3)(g) of the *Evidence Act*.

161 As for s 20J(3)(h), which looks to whether the substance of the identifying evidence has already been disclosed by the informant or any other person, it is apparent from Mr Pennells' evidence that to the extent that he has published information in the Articles, that information was not subject to any agreement, either as to the confidentiality of the information itself, or as to the confidentiality of the identity of the informants who provided that information. Accordingly, as I have already observed, that information could not constitute identifying information for the purposes of s 20I of the *Evidence Act*. There is no evidence that the identifying evidence which is contained in the documents sought has been disclosed by the informant or by any other person.

162 There is nothing to suggest that there exists any risk to national or State security as referred to in s 20J(3)(i).

163 As for s 20J(3)(j), there is no evidence to support the conclusion that there has been any misconduct (as defined in s20K) on the part of any informant, or on the part of Mr Pennells, in obtaining, using, giving or receiving the information in question.

164 Taking all of these factors into account, I return to the balancing exercise contemplated by s 20J(2). There are some factors which would tend to support the public interest in the disclosure of the identity of the informant in this case. The arbitration involves a civil dispute, and the identifying information in the documents sought, if given in evidence, appears likely to have significant probative value in respect of the allegations of breach of the Hope Downs Deed. However, the strength of this consideration is ameliorated by the fact that it appears that this identifying evidence would supplement existing evidence already available in respect of the alleged breaches of the Deed. (I note that in New Zealand, where similar legislation has been enacted, it has been held that where a prosecution has sufficient evidence of the identity of an informant from other sources, it is unlikely that a direction would be given to a journalist to give identifying evidence.**72**)

165 On the other side of the equation, there is no evidence as to the likely effect of the disclosure of the identifying evidence on any informant, but there is evidence that disclosure of the identifying information would involve requiring Mr Pennells to breach a fundamental ethical obligation. In addition, there is the strong public interest in the communication of factors and opinions to the public by the news media and in the ability of the news media to access sources of facts. In my view, the presumptive right to the protection in s 20I should not be departed from lightly, and only after a careful weighing up of the competing considerations.**73**

166 Having weighed these competing considerations, I am not satisfied that the public interest in the disclosure by Mr Pennells or WAN of identifying information of the kind contained in the documents sought, would outweigh the likely adverse effect of that disclosure by Mr Pennells and the public interest in the communication of facts and opinions to the public by the news media, and the ability of the news media to access sources of facts.

167 Accordingly, I accept WAN's submission that it is highly unlikely that either Mr Pennells or an officer of WAN would be compelled to give evidence of identifying information of the kind contained in the documents sought in the course of the arbitration.

(iv) In those circumstances, why would it be oppressive and an abuse of process to require the production of the documents sought under the subpoena, to the extent that they contain identifying evidence?

168 Having regard to the conclusions set out above, I have reached the view that to require the production of the documents sought would be oppressive and an abuse of process. To require the production of the documents sought under the subpoena would permit HPPL to obtain access to identifying information in circumstances where neither Mr Pennells nor any officer of WAN could be compelled to give evidence of that kind in the arbitration itself. In my view, to permit the subpoena to be used in that way would constitute an abuse of process because it would wholly undermine the protection afforded to the identifying evidence under s 20I of the *Evidence Act*.**74**

169 In reaching this conclusion, I have not overlooked the fact that there are a number of competing arguments which suggest that the subpoena does not constitute an abuse of process in the present circumstances. Some of these were referred to by counsel for HPPL in the course of his submissions.

170 First, as I have already noted, the Parliament did not include within the *Evidence Act* a provision in similar terms to s 131A of the *Evidence Act 1995* (NSW). That omission might suggest a deliberate decision by the Parliament not to extend the protection provisions to subpoenas. However, there is nothing in the Shield Laws themselves, or in the second reading speech or explanatory memorandum for the Bill, to support that conclusion. An alternative conclusion is that the Parliament intended that the Shield Laws would apply directly to pre-trial subpoenas, even in the absence of a provision equivalent to s 131A of the *Evidence Act 1995* (NSW). Another possibility is that the Parliament unintentionally omitted to include such a provision. In these circumstances, there is in my view nothing to preclude the conclusion that the subpoena constitutes an abuse of process.

171 Secondly, there is no doubt that the argument that the subpoena constitutes an abuse of process would be stronger if the protections afforded by the Shield Laws were absolute. They are not. However, s 20I of the *Evidence Act* establishes a presumption that a journalist or his or her employer cannot be compelled to give identifying evidence, and the evidence available does not support the conclusion that that presumption would be likely to be negated in relation to the identifying evidence in this case.

172 Thirdly, I have not overlooked the fact that the subpoena has been issued in advance of the arbitration hearing, and the purposes for which a subpoena may be issued prior to trial extend well beyond obtaining evidence which may be used in the trial. The authorities to which I have already referred make clear that a legitimate forensic purpose of a subpoena in such circumstances is to obtain material which may lead to further lines of enquiry relevant to the issues in dispute, or to obtain material which ultimately will permit an assessment of the strengths and weaknesses of the case, as well as to obtain material which may ultimately be used in the trial, either for the purposes of cross examination, or for admission into evidence. However, notwithstanding those wider forensic purposes for the subpoena, the impact of the subpoena on WAN, having regard to the legislative landscape that now prevails following the enactment of the Shield Laws, cannot be ignored.

173 Fourthly, the analysis of whether the journalists' protection provisions might apply if Mr Pennells or an officer of WAN were called to give evidence in the arbitration involves considering the issues in the arbitration, when those proceedings are apparently at an early stage, and when the Court does not have all of the information which would be available to the arbitrator. However, the application falls to be determined on the basis of the information the parties have chosen to put before the Court. Within the confines of those circumstances, the Court's role is nevertheless to ensure that its processes are utilised in the arbitration in accordance with the law.

174 Fifthly, I have not overlooked the fact (as I have noted above) that private interests in maintaining the confidentiality of information in documents sought under a subpoena will ordinarily give way to the public interest in the administration of justice.**75** However, the enactment of the Shield Laws means that the confidentiality of information provided to journalists by informants is no longer (if it ever was) a matter of purely private interests, but is now recognised as a strong public interest, which may outweigh other public interests which apply in relation to the production of documents for the purposes of litigation.

175 Notwithstanding these considerations, I have reached the conclusion that if Mr Pennells, or an officer of WAN, were called to give identifying evidence of the same kind as is contained in the documents sought, then on the basis of the information presently available, it is very unlikely that they could be compelled to do so. To require the production of documents containing the same identifying information under a subpoena would negate the very protection that the Parliament has sought to create. All a litigant would need to do to avoid the protection in s 20I would be to subpoena a journalist's notes in advance of a trial.

176 I would, however, emphasise that the conclusion I have reached in this case is entirely confined to its facts, both as to the terms of the subpoena itself, the nature of the issues in dispute in the arbitration, and the evidence before the Court. The result in this case does not mean that a subpoena for the production of documents held by a journalist or his or her employer could never be enforced.

177 The conclusion I have reached means that it is unnecessary to consider the possible operation of the PCPR provisions. The terms of those provisions raise a number of additional, difficult questions about their operation in circumstances of the present kind. Those questions should be left for another day.

8. Why WAN's application to re-open, to permit it to make submissions that the CA Act does not apply to the arbitration - was dismissed.

178 By Chamber Summons dated 9 July 2013, WAN made an application to re-open the proceedings so that WAN could make submissions to the effect that this Court did not have jurisdiction pursuant to the CA Act to issue the subpoenas, and continued to lack jurisdiction to deal with the subpoenas that issued, by virtue of the operation of the *International Arbitration Act 1974* (Cth) (IA Act) (the jurisdictional argument).

179 In short, the jurisdictional argument that WAN sought to advance was that the Model Law (namely the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law, which is set out in Schedule 2 to the IA Act) applies to the arbitration because the Hope Downs Deed is an international arbitration agreement within the terms of the Model Law, and s 21 of the IA Act applies so that the CA Act does not apply to the arbitration.

180 I heard WAN's application to re-open on 25 July 2013. At the conclusion of that hearing I made an order that WAN's application should be dismissed, and indicated that I would provide my reasons for that decision in conjunction with my reasons for decision in respect of its application to set aside the subpoena. These are my reasons for my decision to dismiss WAN's application to re-open.

181 In this section of my reasons, I deal with the following matters:

(a) principles in relation to applications to re-open;
(b) factors relevant to the exercise of the discretion to re-open in this case; and

(c) WAN's foreshadowed jurisdictional argument: WAN's contention that the IA Act applies to the arbitration in this case.

(a) Principles in relation to applications to re-open

182 A court clearly has power to re-open a case after a hearing has concluded but before judgment is delivered for the purpose of hearing additional submissions or admitting new or additional evidence. The decision to do so involves an exercise of discretion. WAN sought to re-open its case to advance legal submissions to the effect that the Court did not have jurisdiction to issue the subpoena or to deal with the subpoena, on the basis that that jurisdiction had been excluded by s 21 of the IA Act. However, in order to make that submission, WAN would need to demonstrate that the factual basis for the application of the IA Act existed, and hence it would need to adduce additional evidence in support of that submission. For that reason, although WAN's application to re-open was primarily for the purpose of advancing a legal submission, its application to re-open was for the purpose of adducing further evidence.

183 A variety of factors will be relevant to the exercise of the discretion to re-open. The guiding principle is whether the interests of justice are better served by allowing, or rejecting, the application to re-open.**76** Other factors which will be relevant include:

(i) the time at which the application is made (leave to re-open will more readily be given where the application is made after judgment has been reserved and before judgment has been given**77**);

(ii) the likely prejudice to the party resisting the application;

(iii) the public interest in the finality of litigation and the clear expectation that parties will advance all of their arguments at the time of the hearing;**78**

(iv) case management principles, especially the need for the Court to manage litigation efficiently, having regard to the limited resources of the courts and the demand for those resources.**79**

184 In the case of an application to re-open to admit fresh evidence, additional factors will be relevant, including:

(v) why that evidence was not called at the hearing, and in particular whether a deliberate decision was made not to call it, or whether the evidence would have been available had reasonable diligence been exercised;**80**
(vi) the materiality of the evidence to the issues in dispute and whether the admission of the evidence would have produced a different result.**81**

185 In addition, in a case where the argument sought to be advanced concerns whether the court has jurisdiction, in my view a court would be slow to refuse leave to re-open and determine that question, at least where it appeared that the jurisdictional argument may have some merit, or was at least arguable.

(b) Factors relevant to the exercise of the discretion to re-open in this case

186 I concluded that the interests of justice would not be served by granting WAN leave to re-open its case, having regard to the following considerations.

187 First, although judgment has not yet been delivered, argument had been concluded and judgment reserved for some weeks before WAN brought its application for leave to re-open its case. That application was made well over a year after the subpoena was served on it. Furthermore, there had already been a significant delay in the resolution of WAN's application to set aside the subpoena, occasioned by the re-opening of the case to permit the parties to make submissions in relation to the effect of the Shield Laws.

188 Secondly, in these circumstances there was a strong public interest in the finality of this litigation, bearing in mind of course that it is simply an adjunct to the arbitration in respect of which the subpoenaed documents are sought.

189 Thirdly, the only explanation for WAN's failure to advance its jurisdictional argument, and to adduce the evidence it needed in support of that argument, in the course of the hearing of its substantive application was the failure by its legal representatives to identify the potential argument. It is apparent from the affidavits filed in support of WAN's application to re-open that efforts have only been made recently to obtain evidence in support of that argument. However, there has been ample time for its legal representatives to consider and canvas all arguments on which they wished to rely in support of WAN's application to set aside the subpoena. The nature of the additional evidence put forward in the application to re-open is such that it is difficult to envisage any reason why this evidence would not have been able to be obtained earlier, had WAN considered it necessary to do so.

190 Fourthly, the additional evidence disclosed by WAN in the hearing of the application to re-open, suggested that putting that evidence at its highest, WAN had only a weak evidentiary basis for its jurisdictional argument. As I have already indicated, WAN's jurisdictional argument depends firstly on whether the Hope Downs Deed is an international arbitration agreement. The evidence produced by WAN in relation to this

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