Enforcing Third-Party Subpoenas in Arbitration: Supreme Court of Western Australia Rejects Oppression and Discovery Objections

September 27, 2026

The intersection of private commercial arbitration and judicial intervention frequently generates procedural friction, particularly concerning the compulsion of third-party evidence. In the recent decision of *Brackenridge -v- A.T. Brine & Sons Pty Ltd* [2026] WASC 338, the Supreme Court of Western Australia provided significant judicial insight into the legal principles and evidentiary thresholds required to set aside a subpoena issued in support of arbitral proceedings.

This ruling offers a critical reference point for the enforcement of subpoenas against non-parties, clarifying the principles governing legitimate forensic purpose, the intersection with arbitral discovery regimes, and the evidentiary burden required to establish "oppression."

The Context of the Dispute

The precedent case arose from a consolidated arbitration between plaintiff homeowners and a defendant builder concerning a lump-sum residential building contract in Cottesloe. During the arbitration, the appointed Arbitrator directed by consent that there would be no general discovery. However, the parties were permitted to apply for the production of specific documents relevant to the issues in dispute.

With the permission of the Arbitrator, the plaintiffs obtained an *ex parte* subpoena from the Supreme Court pursuant to section 27A of the *Commercial Arbitration Act 2012* (WA). The subpoena compelled a third party, the project's architect, who was also the authorized agent of the homeowners and a relative of the plaintiffs, to produce several categories of documents, including architectural drawings, correspondence, and variation approvals.

The architect applied to the court to set aside the subpoena, arguing that it lacked a legitimate forensic purpose, circumvented the agreed discovery process, and was oppressively broad.

The Court's Key Findings

Relevance and Legitimate Forensic Purpose

In addressing the objection that the requested documents lacked relevance, the Court applied the established principle that a subpoena possesses a legitimate forensic purpose if it is "on the cards" that the documents sought will materially assist a party's case.

Crucially, Justice Lundberg afforded a degree of judicial deference to the Arbitrator's initial assessment that the documents were material to the issues in dispute. Because the architect acted as the owners' authorized agent under the building contract, his drawings, site instructions, and handling of extensions of time were foundational to the core issues of the arbitration, which included defective work, delays, and variations. The judgment reinforces that a third party cannot rely on an unduly narrow conception of relevance when the arbitral pleadings clearly implicate their professional involvement.

The Discovery Objection

The applicant further argued that the subpoena was an abuse of process designed to bypass standard discovery, given that the arbitrating parties themselves likely possessed many of the requested documents.

The Court rejected this premise. While acknowledging that deploying a subpoena merely to bypass general discovery can constitute an abuse of process, the Court clarified that the mere potential for overlap does not, of itself, invalidate the subpoena. “Something more than this is required,” the Court noted.

The Court highlighted three factors validating the subpoena:

1. The arbitrating parties had expressly consented to forego general discovery, allowing instead for specific document production.

2. The Arbitrator had granted explicit permission for the subpoena, and the defendant builder did not oppose it, demonstrating it was not an attempt to circumvent or undermine the arbitral process.

3. The production of documents directly from the third party’s possession could be independently probative of the existence, content, and context of those records.

The Threshold for Oppression

Perhaps the most instructive aspect of the judgment is the Court’s treatment of the “oppression” objection. The architect contended that compliance would be “significant and onerous,” estimating that thousands of documents generated over a four-year period would need to be reviewed from unsegregated electronic folders and personal devices.

The Court dismissed this contention as “little more than conjecture,” establishing a clear evidentiary standard: assertions of oppression must be supported by cogent evidence rather than mere estimates. Justice Lundberg noted that a subpoena recipient is expected to undertake good faith efforts to assess the compliance task, such as deploying appropriate electronic search terms, to provide the court with a more granular assessment of the work and cost involved. Blanket assertions regarding the volume of emails or the duration of a project are insufficient to demonstrate an unreasonable burden.

Furthermore, the architect expressed concern that the requested documents might be used by the plaintiffs to mount a subsequent professional liability claim against him. The Court held that the evident relevance of the materials to the current arbitration outweighed this risk. Any potential misuse is robustly mitigated by the implied undertaking, which strictly restricts the use of compulsorily produced documents to the proceedings for which they were sought.

Implications and Key Takeaways

The Supreme Court's decision provides clear, direct guidance for legal practitioners, contractors, and project owners navigating arbitral disputes and third-party evidence. The message is uncompromising: general claims of burden are insufficient to avoid compliance.

For stakeholders operating in this space, the key takeaways are:

- **Arbitral Deference:** Courts are highly inclined to respect an arbitral tribunal's determination regarding the relevance of third-party documents. Securing the arbitrator's explicit permission heavily insulates the subsequent court subpoena from relevance-based challenges.
- **Overlap with Discovery is Permissible:** Utilizing a subpoena to obtain targeted documents that might otherwise be discoverable is not automatically an abuse

of process, particularly where the tribunal has actively managed the discovery regime and consented to the subpoena process.

- **Evidentiary Precision for Oppression:** Non-parties seeking to challenge a subpoena on the grounds of oppression cannot rely on theoretical estimates of burden. Detailed, empirical evidence demonstrating good faith efforts to limit the scope (e.g., through targeted technology searches) is an absolute prerequisite.

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