

CASE NOTE

*CERAMIC FUEL CELLS LTD (IN LIQ) V
MCGRAW-HILL FINANCIAL INC**

**ACCESSING THIRD PARTY DOCUMENTS IN A
FOREIGN JURISDICTION BY SUBPOENA: THE
*CERAMIC FUEL CELLS LTD (IN LIQ) V MCGRAW-
HILL FINANCIAL INC* CLASS ACTION**

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In Ceramic Fuel Cells, the Federal Court of Australia made orders authorising a subpoena for documents held by a third party located in the United States of America. This article explains and evaluates the Court's approach to the use of comity for determining if a subpoena may be used to seek documents located overseas. The article also evaluates the enforceability of a subpoena in a foreign jurisdiction and concludes that use of the subpoena is problematic as the court lacks power to enforce the subpoena. The article also considers alternatives to the subpoena for obtaining third party documents, namely the Hague Evidence Convention and the US provision for assistance to foreign tribunals and litigants.

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I INTRODUCTION

Globalisation and the associated increase in cross-border disputes mean that a party in an Australian court proceeding will often need to access documents held by a third party overseas.¹ *Ceramic Fuel Cells Limited Ltd (in liq) v McGraw-Hill Financial Inc* illustrates the growth in cross-border disputes through an international class action arising out of financial products that were ‘offered all around the world’ with a credit rating provided by United States corporations and a trustee that was based in the US.² It is likely Australian courts will see this type of litigation more frequently after the end of US hegemony over securities class actions following the decision of the Supreme Court of the United States in *Morrison v National Australia Bank Ltd*,³ the availability of a highly developed class action regime in Australia⁴ and subsequent Australian jurisprudence dealing with complex financial products.⁵

In *Ceramic Fuel Cells*, the Federal Court of Australia determined an application for orders to issue and serve a subpoena on an entity based in the US.

¹ See, eg, Chief Justice Murray Gleeson, ‘The State of the Judicature’ (2000) 74 *Australian Law Journal* 147, 156–7; Chief Justice Robert French, ‘Transnational Dispute Resolution’ (Speech, Supreme and Federal Court Judges’ Conference, 25 January 2016) 6–7 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj25Jan2016.pdf>, archived at <<https://perma.cc/KAG6-D9AD>>.

² (2016) 245 FCR 340, 357–8 [82], [84] (Wigney J).

³ 561 US 247 (2010). See Peta Spender and Michael Tarlowski, ‘Adventures on the Barbary Coast: *Morrison* and Enforcement in a Globalised Securities Market’ (2011) 35 *Melbourne University Law Review* 280, 314.

⁴ Class actions have existed in Australia since the addition of pt IVA to the *Federal Court of Australia Act 1976* (Cth) (‘FCA Act’) by the *Federal Court of Australia Amendment Act 1991* (Cth) which commenced on 4 March 1992. See also Commonwealth of Australia, ‘Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees’, Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 17.

⁵ See, eg, *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1; *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1.

Wigney J's reasons in that decision bring together and analyse an extensive line of cases in Australia on the topic of comity and how it is to be employed in relation to the court's power or discretion to permit the use of a subpoena for documents located overseas. The factual matrix of *Ceramic Fuel Cells* also provides a useful vignette on the enforceability of a subpoena overseas due to the US entity agreeing to provide the documents sought if served with a subpoena, but subsequently, after the orders were made and the subpoena served, refusing to do so as the subpoena was not enforceable in the United States.⁶ *Ceramic Fuel Cells* is a significant decision in a field of private international law and procedure almost exclusively decided at trial level.

This article explains and critiques the reasoning in *Ceramic Fuel Cells* through an evaluation of the two traditional explanations for refusing the use of a subpoena, comity and enforceability. The article also considers alternatives to the subpoena for obtaining third party documents.

II FACTS OF THE CASE

Ceramic Fuel Cells Ltd ('CFC') invested in collateralised debt obligations of mortgage-backed securities issued by Duke Funding XI Ltd and Duke Funding XI Corp (the 'CDOs'). At the relevant time, McGraw-Hill Financial Inc and Standard & Poor's International LLC (together, 'S&P') had assigned the CDOs an 'A' credit rating. After CFC lost most of the funds it had invested in the CDOs, it brought representative proceedings under pt IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*'), commonly called a class action, on behalf of itself and other investors against S&P, for losses arising out of alleged negligence and breaches of provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

The class in the proceeding was defined to be persons who had acquired an interest in the CDOs between 2006 and 2008 in reliance upon S&P's rating and who, upon that reliance, suffered a loss. CFC therefore represented a class of investors, some of whom CFC did not know. CFC wished to identify members of the class so as to provide them with notice of, and information about, the class action as required by the *FCA Act*.⁷ To that end, CFC sought leave from the Court to issue a subpoena addressed to US Bank National

⁶ *Ceramic Fuel Cells Ltd (in liq) v McGraw-Hill Financial Inc [No 2]* (2016) 245 FCR 362, 363–4 [2]–[6] (Wigney J) ('*Ceramic Fuel Cells [No 2]*').

⁷ *FCA Act* (n 4) s 33X(1)(a), requiring notice of the commencement of the proceedings and the right to opt out before a certain date, as provided for by s 33J.

Association ('USBNA'), an entity based in the United States, which was the current trustee of the CDOs.⁸

There were two categories of documents sought in the subpoena. In the first category, CFC sought a list of noteholders of beneficiaries who acquired the CDOs in the relevant period. The second category, which was phrased much more broadly, referred to 'any underlying transaction documents relating to [the CDOs]';⁹ after which a non-exhaustive list of such documents was provided. The subpoena was drafted in the form required under the *Federal Court Rules 2011* (Cth) ('the Rules').

Prior to the hearing, CFC's solicitors had sent a letter to USBNA requesting that it provide the documents that were subsequently the subject of the subpoena. USBNA responded that it would not provide the documents sought unless it was served with a subpoena, in which case it would comply with the subpoena according to company policy.

III THE COURT'S REASONING

As explained above, the application by CFC raised for consideration whether a subpoena destined for overseas could be issued and served. In previous Australian cases, leave to serve subpoenas on a party overseas was seldom given, if at all.¹⁰ To resolve the issue Wigney J considered two questions:

[F]irst, does the Court have power, in representative proceedings, to issue a subpoena to a foreign addressee and to grant leave to serve that subpoena on the foreign addressee overseas; and second, if the Court does have that power, whether it should be exercised in this case.¹¹

A *Statutory Framework*

CFC submitted that the Court could rely on s 33ZF of the *FCA Act* to permit the use of a subpoena overseas.¹² Section 33ZF, which applies to class actions brought under pt IVA of the *FCA Act*, provides that the Court may 'make any order the Court thinks appropriate or necessary to ensure that justice is done'. Wigney J observed that whether s 33ZF permitted the Court 'to issue a

⁸ *Ceramic Fuel Cells* (n 2) 342–4 [1]–[10], 357 [80], 358–9 [86].

⁹ *Ibid* 356 [74].

¹⁰ See *ibid* 344 [11].

¹¹ *Ibid* 343 [7].

¹² *Ibid* 344 [12].

subpoena to a foreign addressee, and to grant leave to serve the subpoena outside Australia, had not previously been determined.¹³ Further, his Honour referred to the provisions in the Rules on the issue of subpoenas, rr 24.01 and 24.12(1) and (2). The former provides that '[a] subpoena may be issued only with the leave of the Court'. There is no distinction in the wording of the Rules between domestic and foreign addressees, but Wigney J raised for consideration whether a limitation should be read into the Rules so that they only apply to domestic addressees.¹⁴

Regarding the second of the two grants of leave required, Wigney J applied div 10.4 of the Rules, which outlines the procedure to be followed in circumstances to which the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ('Hague Service Convention')¹⁵ applies. Rule 10.44(1) under that division provides:

A party may apply to the Court for leave to serve a document filed in or issued by the Court, other than an originating application, on a person in a foreign country in accordance with a convention, the *Hague Convention* or the law of the foreign country.

Here also, there is no express limitation on the Court's power. Accordingly, Wigney J again observed that the question was whether it should be implied into the provision that the Court's power to grant leave for subpoenas is limited to domestic addressees.¹⁶

To answer this question, Wigney J began by comparing two recent decisions of the Supreme Court of New South Wales that had both reviewed the earlier court authorities on service of subpoenas on foreign addressees.¹⁷ The equivalent provision for New South Wales, at the time of the judgment, was r 11.5 of the *Uniform Civil Procedure Rules 2005* (NSW), which provided:

Service outside Australia of a document other than originating process is valid only if it is effected pursuant to the leave of the Supreme Court or is subsequently confirmed by the Supreme Court.

¹³ Ibid.

¹⁴ Ibid 345 [15].

¹⁵ Opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969).

¹⁶ *Ceramic Fuel Cells* (n 2) 345 [16]–[19].

¹⁷ Ibid 345 [21].

As can be seen, the procedure in New South Wales differed slightly from that in the Federal Court by permitting a party to serve a document first and seek the Court's confirmation subsequently.¹⁸

In *Caswell v Sony/ATV Music Publishing (Australia) Pty Ltd*, Hallen AsJ found that r 11.5 empowered the Court to grant leave to serve a subpoena outside Australia.¹⁹ The question was whether the court should exercise its discretion to do so. Hallen AsJ held that the discretion to confirm a subpoena served overseas should be exercised with caution to ensure that there was not an intrusion on the sovereignty of a foreign state²⁰ but declined to set aside a subpoena that had been served on a person in the United States.²¹ On the other hand, White J in *Gloucester (Sub-Holdings 1) Pty Ltd v Chief Commissioner of State Revenue* declined to follow Hallen AsJ's reasoning and found that the principle of comity operated as a 'restriction' on the power in r 11.5, and was 'not merely a guide to the proper exercise of discretion.'²²

In spite of the contrasting results, Wigney J found that common to the application of the rule in both judgments of the Supreme Court was a concern for the 'comity of nations' (international comity). What was not clear was whether that consideration meant that the rule itself should be read down to exclude subpoenas from the scope of coverage or whether the consideration only went to the exercise of the discretion to grant leave.²³ In effect, a distinction needed to be drawn between a lack of power, which would mean a subpoena could not be issued, and discretion, where comity was a factor that impacted upon whether a subpoena may be issued and served.

Wigney J's identification of the power versus discretion issue then led to a review of Australian case law dealing with subpoenas to overseas addressees, which may be divided into cases where leave to serve was refused,²⁴ cases

¹⁸ It is also worth noting that only in the Federal Court does the rule applying to service of non-originating processes list the three ways of service (*Hague Service Convention*, other treaty or according to the laws of the foreign country).

¹⁹ [2012] NSWSC 986, [101].

²⁰ *Ibid* [102], [112].

²¹ *Ibid* [126].

²² [2013] NSWSC 1419, [28]–[30].

²³ *Ceramic Fuel Cells* (n 2) 346 [24].

²⁴ *Ibid* 348–50 [33]–[41], citing: *Arhill Pty Ltd v General Terminal Co Pty Ltd* (1990) 23 NSWLR 545; *Aetna Pacific Securities Ltd v Hong Kong Bank of Australia Ltd* (Supreme Court of New South Wales, Giles J, 29 April 1993); *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391; *Ives v Lim* [2010] WASCA 136; *Schneider v Caesarstone Australia Pty Ltd* [2012] VSC 126; *Australian Securities and Investments Commission v Flugge [No 5]* (2015) 49 VR 606.

where a subpoena served overseas was set aside,²⁵ and analogous situations.²⁶ His Honour reviewed 13 decisions in total. While failing to find the clarity he sought on the principal question, Wigney J again found in all of the cases he reviewed that the chief consideration for the decision was international law and comity.²⁷

B ‘International Comity’ and Its Effect on Statutory Interpretation

What then is meant by international comity? Wigney J found the meaning of ‘comity’ in the High Court of Australia in *CSR Ltd v Cigna Insurance Australia Ltd*,²⁸ which adopted the US Supreme Court’s definition in *Hilton v Guyot*:

‘Comity’, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.²⁹

In coming to a view on what the effect of this principle is on the Court’s power to grant leave to issue a subpoena overseas, Wigney J laid out two principles of statutory interpretation. The first was

that general rules of court that, read literally, would appear to empower the court to issue and serve a subpoena on a foreign addressee are required to be ‘interpreted and applied, as far as [their] language admits, as not to be

²⁵ *Ceramic Fuel Cells* (n 2) 348–9 [36], [38]–[39], citing: *Gao v Zhu* [2002] VSC 64; *Sweeney v Howard* [2007] NSWSC 262.

²⁶ The analogous situations were: *Re Deposit and Investment Co Ltd* (1991) 30 FCR 463 (service of an examination order overseas); *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250; *Suzlon Ltd v Bangad [No 2]* (2011) 198 FCR 1; *Hua Wang Bank Berhad v Commissioner of Taxation* (2013) 296 ALR 479 (a notice to produce to be served on a foreign party); *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558 (the staying of proceedings until a sovereign nation provided discovery).

²⁷ *Ceramic Fuel Cells* (n 2) 350–1 [46].

²⁸ (1997) 189 CLR 345.

²⁹ 159 US 113, 143–4 (1895).

inconsistent with the comity of nations or with established rules of international law.³⁰

The second was that ‘a provision conferring a broad power on a court should not generally be read down by making implications or imposing limitations which are not found in the express words.’³¹

Applying the above principles, Wigney J concluded that rr 10.44, 24.01 and 24.12 should not be read down by the Court to exclude the power to grant leave in appropriate circumstances to issue and serve a subpoena on a foreign addressee.³² Rather, a court in exercising its discretion pursuant to those powers in relation to a subpoena to a foreign addressee must ‘have regard to whether the issue and service of the subpoena in the circumstances would contravene international law or international comity’.³³

Wigney J then held that the power conferred by s 33ZF is expressed sufficiently broadly to permit courts to make orders that are appropriate or necessary to resolve any issues or difficulties that might arise in representative proceedings.³⁴ However, the provision ‘must be construed in such a way as to avoid, if possible, any breach of international law and international comity’. This could be accommodated through the statutory precondition to the exercise of the power that the order be ‘appropriate or necessary to ensure that justice is done in the proceeding’.³⁵

In short, Wigney J concluded that considerations of international law and international comity operate on the Court’s discretion, rather than on the Court’s power. However, these considerations ‘are not merely matters that the court may have regard to in the exercise of its discretion. Rather they are mandatory considerations that condition the exercise of the court’s powers.’³⁶ Consequently, Wigney J’s conclusion achieves a middle ground. Although

³⁰ *Ceramic Fuel Cells* (n 2) 351 [48], quoting *Polites v Commonwealth* (1945) 70 CLR 60, 68 (Latham CJ).

³¹ *Ibid*, citing *The Shin Kobe Maru* (1994) 181 CLR 404, 421; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

³² *Ceramic Fuel Cells* (n 2) 353 [55].

³³ *Ibid*.

³⁴ *Ibid* 116 [63], citing: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq)* (2015) 325 ALR 539, 557–8 [97]; *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 182 [48]. Section 33ZF was subsequently construed by the Full Court of the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Limited* (2016) 245 FCR 191, 222–4 [160]–[166].

³⁵ *Ceramic Fuel Cells* (n 2) 355 [66]–[67].

³⁶ *Ibid* 351 [49].

framed as a discretionary factor, the exercise of power is premised on a mandatory consideration of comity.

C *When Is International Comity Impinged?*

In most of the cases reviewed in *Ceramic Fuel Cells*, Australian courts assumed that the issue of a subpoena on a person overseas impinged the sovereignty of the state in which the person was located and accordingly also international comity. Wigney J rejected this approach, stating that '[i]t should ... not simply be assumed that any subpoena issued to and served on a person in a foreign country will necessarily result in a breach of international law. There would appear to be no such universal rule.'³⁷ Wigney J cited judicial observations in *Sweeney*³⁸ and *Gloucester*³⁹ in support of this proposition.⁴⁰ In the former case, Windeyer J noted on the basis of information made public by the Attorney-General for England and Wales that the British Government would not consider a subpoena issued from a foreign court to be an interference with the United Kingdom's governance or sovereign affairs.⁴¹ In the latter case, White J noted that 'in some jurisdictions a subpoena may not be regarded as coercive, but rather as having the effect of a notice.'⁴²

Reference was also made to the so-called 'exceptional circumstances test' which has been frequently referred to in the Australian cases.⁴³ That test, which comes from the English case of *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* is as follows:

In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction.⁴⁴

³⁷ Ibid 353 [56].

³⁸ *Sweeney* (n 25).

³⁹ *Gloucester* (n 22).

⁴⁰ *Ceramic Fuel Cells* (n 2) 353 [56].

⁴¹ *Sweeney* (n 25) [11].

⁴² *Ceramic Fuel Cells* (n 2) 353 [56], discussing *Gloucester* (n 22) 18 [37].

⁴³ See, eg, *Gao* (n 25) [11] (Habersberger J); *Stemcor* (n 24) [11] (Allsop J); *Hua Wang Bank Berhad* (n 26) 484 [15] (Logan, Jagot and Robertson JJ); *Flugge [No 5]* (n 24) [11] (Robson J).

⁴⁴ [1986] 1 Ch 482, 493 (Hoffmann J), which was subsequently approved by the House of Lords in *Société Eram Shipping Company Ltd v Cie Internationale de Navigation* [2004] 1 AC 260.

Wigney J took the view that an exceptional circumstances test does not apply to all cases in which it is proposed that a subpoena be issued to and served on a foreign addressee. He accepted that the need for caution and restraint may, in practical terms, equate with a showing of exceptional circumstances, but held that ‘no such immutable requirement should be imposed in all cases.’⁴⁵

Wigney J also mentioned the observations of Giles CJ Comm D in *News Corporation Ltd*⁴⁶ that developments in modern trade and communications, in particular the rise of multinational businesses, suggest that the balancing exercise between the need to grant leave for the issue of a subpoena abroad and respect for international comity has been or is being reconfigured.⁴⁷ His Honour interpreted this observation as not undermining the significance of comity but as suggesting ‘that general concerns about comity will not always lead to the refusal of leave to issue or serve a subpoena on a foreign addressee.’⁴⁸

Wigney J held that the facts and circumstances of each case should be carefully considered in the exercise of the discretion and provided a non-exhaustive list of such considerations, being:

- ‘the nature of the subpoena’;
- ‘the nature of the particular proceedings’;
- ‘([i]n the case of a subpoena to produce documents), the importance of the documents to the issues in the proceedings’;
- ‘the attitude of the subpoenaed party (if known or ascertainable)’;
- ‘the foreign country involved’; and
- ‘the law in, and the attitude of, the foreign country regarding foreign subpoenas and whether they impinge upon the country’s sovereignty.’⁴⁹

His Honour also touched on the question of proof and suggested that, at least in some cases, the applicant would need to lead evidence about some or all of these matters. But his Honour specifically chose not to follow *Gloucester*,⁵⁰

⁴⁵ *Ceramic Fuel Cells* (n 2) 352–3 [54].

⁴⁶ *News Corporation* (n 26) 259.

⁴⁷ See generally Thomas Schultz and Jason Mitchenson, ‘Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts’ (2016) 12 *Journal of Private International Law* 344.

⁴⁸ *Ceramic Fuel Cells* (n 2) 353–4 [57].

⁴⁹ *Ibid* 354 [59]. For a similar list of considerations see American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 442(1)(c).

⁵⁰ *Gloucester* (n 22) [29] (White J).

stating that ‘it may not be necessary to go so far as to show that ... the foreign country does not object to the specific subpoena in question.’⁵¹

D *Enforceability of Subpoenas Overseas*

Another reason for not allowing the issue and service of a subpoena on a foreign addressee is the inability of the court to enforce the subpoena. Concerns around enforceability, like comity, may be given effect through either finding a lack of power or as a consideration in the exercise of discretion.⁵² Wigney J concluded that the absence of the means to enforce a subpoena served overseas ‘is better viewed as a discretionary reason why a subpoena should not be issued or served on a foreign addressee, rather than a reason why it should be found that the court does not have the power to issue or grant leave to serve such a subpoena.’⁵³ Wigney J gave as an example of the lack of enforceability not being determinative — the situation that arose in *Ceramic Fuel Cells* — where the addressee indicated a willingness to comply with the subpoena. Such a situation was said to make concerns about enforcement ‘more theoretical than real.’⁵⁴

IV OUTCOME IN *CERAMIC FUEL CELLS*

Wigney J applied the law to the facts in several steps. His Honour found first that, except for the fact that the addressee was foreign, there was no direct evidence that the subpoena would breach international law or be considered by the US to impinge on or invade its sovereignty.⁵⁵ His Honour then considered whether such a breach or invasion should be inferred from all the circumstances.⁵⁶

His Honour noted that the two categories of documents sought by CFC were rather different. As outlined above, the first category sought a list of noteholders or beneficiaries of the CDOs.⁵⁷ The second category, on the other

⁵¹ *Ceramic Fuel Cells* (n 2) 354 [59].

⁵² *Stemcor* (n 24) [13]–[15].

⁵³ *Ceramic Fuel Cells* (n 2) 354 [61].

⁵⁴ *Ibid.* See also *Ceramic Fuel Cells [No 2]* (n 6) 370 [33].

⁵⁵ *Ceramic Fuel Cells* (n 2) 356 [71].

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 356 [73].

hand, was much broader and sought '[a]ny underlying transaction documents relating to the ... CDOs',⁵⁸ followed by a long list of documents.

Wigney J noted that there were a number of unique and somewhat exceptional circumstances and features of the subpoena, if limited to the first category. These circumstances and features, his Honour concluded,

tend to suggest that it cannot, or at least should not, be readily inferred that the subpoena could be regarded as necessarily being in breach of international law or international comity, or as invading the sovereignty of the United States.⁵⁹

These circumstances and features were as follows:

- 1 The documents were not directed at obtaining evidence for use in litigation, but to ascertain the identity of potential group members so they can be advised of their rights.⁶⁰
- 2 'Given that the main purpose of the subpoena is ... to advise group members of their rights, [and that potentially some group members are US citizens] the issue and service of the subpoena may ultimately be for the benefit of some United States citizens or entities.'⁶¹
- 3 'A meaningful mediation cannot realistically occur if [CFC] is unable to identify all group members.'⁶²
- 4 The 'proceedings have an international element.'⁶³
- 5 USBNA has indicated that it 'has no particular concern about being subpoenaed to produce documents by order of an Australian court' and further it 'appear[ed] to be willing to produce the documents if it receives a subpoena.'⁶⁴
- 6 If USBNA or the United States did object to the subpoena, contrary to indications before the Court, they could apply to set aside the subpoena in the Court and lead evidence, which would allow the Court then to as-

⁵⁸ Ibid 356 [74].

⁵⁹ Ibid 357 [78].

⁶⁰ Ibid 357 [79].

⁶¹ Ibid 357–8 [82].

⁶² Ibid 358 [83].

⁶³ Ibid 358 [84].

⁶⁴ Ibid 358–9 [86].

sess more properly whether and which international laws or comity had been breached.⁶⁵

Wigney J found that, given these circumstances and features, it was unlikely that the US would consider the subpoena a breach or invasion of its sovereignty.⁶⁶ To the extent that the exceptional circumstances test from *Mackinnon* applied, Wigney J also found that the test was satisfied.⁶⁷

Moreover, his Honour found that the notice requirements with which representative parties in class action proceedings are burdened by s 33X of the *FCA Act*, namely notice of the commencement of the class action and the right of group members to opt out or exclude themselves from the class action, meant that there were strong discretionary factors in favour of making the order.⁶⁸

On the other hand, Wigney J found that the second category of documents was 'extremely broad and uncertain [in] terms.'⁶⁹ Moreover, the second category, unlike the first, was 'sought for the purpose of potential use as evidence in the substantive proceedings.'⁷⁰ His Honour held that

[t]his difference is important because different considerations may apply in determining whether it is appropriate or necessary to grant leave to issue and serve a subpoena on a foreign person where the documents are for use in evidence.⁷¹

Adding to this, his Honour found that he was not satisfied that CFC had exhausted all other avenues to obtain documents in the second category, the forensic importance of the documents was unclear and it did not appear CFC had given serious attention to whether a letter of request procedure pursuant to the *Foreign Evidence Act 1994* (Cth) could be relied upon to obtain the documents.⁷²

As such, and given that the abovementioned discretionary factors applying to the first category did not apply to the documents in the second category, Wigney J severed the second category from the subpoena that he ultimately

⁶⁵ Ibid 359 [87].

⁶⁶ Ibid 359 [88].

⁶⁷ Ibid 359 [90].

⁶⁸ Ibid 359 [88]–[89], 359–60 [91]–[92].

⁶⁹ Ibid 356 [75].

⁷⁰ Ibid 356–7 [76].

⁷¹ Ibid.

⁷² Ibid 360–1 [95]–[97].

approved. Wigney J granted leave for the issue of the subpoena as so amended and leave to apply to the Court Registrar for service pursuant to the *Hague Service Convention*.⁷³

A subpoena was then issued, and served in accordance with the *Hague Service Convention*. However, it subsequently transpired in the course of applications for leave to issue similar subpoenas on entities in Belgium and Luxembourg that USBNA advised CFC's lawyers that 'it considered that the subpoena was not enforceable in the United States, and that it would only comply with a subpoena issued by a United States court'.⁷⁴ Leave was refused for the subpoenas addressed to the Belgian and Luxembourgish entities.

V COMMENT AND CRITIQUE

There are two reasons for not allowing the issue of a subpoena outside of the jurisdiction. The first, discussed at length in *Ceramic Fuel Cells*, is the issue of comity. The second, which was only briefly touched upon in that judgment,⁷⁵ goes to the concern that if the subpoena is not voluntarily complied with it would be unenforceable.

A Comity

In respect of the first reason, Wigney J's reasoning that the concern for comity operates on the Court's discretion, rather than power, is cogent. While Wigney J found that past authority was unclear as to whether comity impacted the Court's power or discretion, the conclusion reached by Wigney J is consistent with the often cited decision of Rogers CJ Comm D in *Arhill*.⁷⁶ There the Court was required to interpret pt 10 div 1 r 3 of the *Supreme Court Rules 1970* (NSW) (as it was then in force) which was in the same form as r 11.5 discussed above.⁷⁷ The Court concluded that

[p]art 10, r 3 is in terms clear authority for the Court to give leave to serve a subpoena outside Australia. The fact that an order made pursuant to it could, in

⁷³ Ibid 361 [99]–[101].

⁷⁴ *Ceramic Fuel Cells [No 2]* (n 6) 363 [1]–[2].

⁷⁵ *Ceramic Fuel Cells* (n 2) 349 [37], 354 [60].

⁷⁶ *Arhill* (n 24). See also *Ceramic Fuel Cells* (n 2) 348 [34].

⁷⁷ Rule 3 provided: 'Service outside the State of a document other than originating process is valid if the service is in accordance with the prior leave of the Court or is confirmed by the Court'.

some instances, involve an infringement of the sovereignty of another country does not mean that it is a reason for holding the rule to be invalid. Nonetheless, the rule should be construed consistently with 'the established criteria of international law with regard to comity' ...⁷⁸

Rogers CJ Comm D, in ruling out invalidity of the rule, found that comity does not remove the Court's power to permit service of a subpoena outside Australia. Instead the rule is to be interpreted in accordance with comity, which is what Wigney J does. However, Wigney J then goes further and conducts a detailed examination of when comity may be impinged by the issue of the subpoena, drawing on the novel facts before him.

The issue of comity may not be as problematic as it has been in the past due to Australia becoming a party to the *Hague Service Convention*, on 1 November 2010, as the *Convention* permits service between states parties. This was recognised by White J in *Re Clifton*, where, after referring to past cases that had refused a grant of leave to issue or serve a subpoena in another country on the basis that it would be an infringement of the sovereignty of the other country stated:

The present application is for leave to serve the orders of this court in accordance with the *Hague [Service] Convention* to which Australia subscribed with effect from 1 November 2010. Both Germany and China have also acceded to the *Hague [Service] Convention*. They can, therefore, be taken to have accepted the course of action contemplated by the present application, namely, the issue of a letter of request by the Registrar of this court under r 10.64 to the Central Authority in their countries. Their sovereignty will not be infringed by the forwarding of the request to the Central Authority and, if that Central Authority considers that some infringement of their country's sovereignty is involved, it may refuse to effect that service.⁷⁹

The procedure which allows the state receiving a request for service to reject the request if its sovereignty or security would be infringed is provided in art 13 of the *Hague Service Convention*. White J suggests that it is difficult to envisage sovereignty being infringed where states have agreed by treaty to the very thing to be undertaken — service of documents — and where, addition-

⁷⁸ *Arhill* (n 24) 553. See also *Aetna Pacific Securities* (n 24) 7; *Schneider* (n 24) [5]–[6]; Andrew Bell, 'Getting to the Forum: Witnesses in Transnational Commercial Litigation' (2011) 85 *Australian Law Journal* 562, 574.

⁷⁹ [2014] FCA 891, [12]. See also *Re Rennie Produce (Aust) Pty Ltd (in liq)* [No 2] [2016] FCA 449, [18]–[19].

ally, they have permitted themselves a method of refusing to effect service if they consider their sovereignty to have been impinged.⁸⁰

However, this elegant solution to concerns about comity may not be as straightforward as it appears in relation to subpoenas. A difficulty with White J's reasoning relates to the extent to which the *Hague Service Convention* potentially overlaps with the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* ('*Hague Evidence Convention*').⁸¹ Article 1 of the *Hague Evidence Convention* provides for a Letter of Request to be used 'to obtain evidence, or to perform some other judicial act'. However, many states have made a reservation under art 23 of the *Hague Evidence Convention*⁸² to exclude pre-trial processes in the nature of discovery from Letters of Request.⁸³ This was primarily aimed at resisting US-style discovery, which is characterised by broad document requests and the oral deposition.⁸⁴ It has been argued that employing the *Hague Service Convention* to serve a subpoena may permit a litigant effectively to circumvent a reservation under art 23 of the *Hague Evidence Convention*.⁸⁵ If that is correct, then the proposition that comity or sovereignty is not impinged because of international agreement would be difficult to maintain.

However, the circumvention argument may be refuted. First, it may be doubted that the conventions actually overlap. The expression 'judicial document' in the *Hague Service Convention* has been held to include a

⁸⁰ See also *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522, 559 (1987), making the same observation in relation to the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 817 UNTS 241 (entered into force 7 October 1972) ('*Hague Evidence Convention*'): 'Use of the *Convention* advances the sovereign interests of foreign nations because they have given *consent* to *Convention* procedures by ratifying them' (emphasis in original).

⁸¹ *Hague Evidence Convention* (n 80).

⁸² Article 23 provides: 'A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.'

⁸³ See 'Status Table: 20 — Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,' *HCCH* (Web Page, 2017) <www.hcch.net/en/instruments/conventions/status-table/?cid=82>, archived at <<https://perma.cc/25RZ-CUYX>>.

⁸⁴ The reasoning behind the inclusion of art 23 is discussed in *British American Tobacco Australia Services Ltd v Eubanks for the United States of America* (2004) 60 NSWLR 483, 495–8 (Spigelman CJ).

⁸⁵ Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed, 2014) 278–9 [11.35], citing *Laker Airways Ltd v Pan American World Airways*, 607 F Supp 324, 327 (Briant DJ) (SD NY, 1985).

subpoena.⁸⁶ However, art 1 of the *Hague Evidence Convention* provides that the expression ‘other judicial act’ does not cover the service of judicial documents. On that basis, the *Hague Evidence Convention* does not deal with subpoenas meaning that it is not being circumvented. However, if the niceties of construction are put to one side, a second response is that if service of the subpoena takes place through the Central Authority mechanism, a party that objects to the service of a subpoena, including if it seeks documents in the nature of discovery rather than evidence for trial, may refuse to comply on comity grounds.

Thirdly, circumvention also needs to be considered on a state-by-state basis. The Hague Conference on Private International Law (‘HCCH’) website reported in 2014 that of the 58 states parties to the *Hague Evidence Convention*, 26 had made a general declaration (a ‘full exclusion’), 17 had made a particularised declaration qualifying the circumstances in which they would or would not execute such Letters of Request (a ‘qualified exclusion’), and 15 had made no declaration under art 23.⁸⁷ For example, the United States has not entered any reservation in relation to art 23. Australia has adopted full exclusion, while France has adopted a qualified exclusion which permits pre-trial discovery only if the documents sought are ‘enumerated limitatively’ and each document has a ‘direct and precise link with the object of the procedure.’⁸⁸ Consequently, a subpoena would not circumvent the *Hague Evidence Convention* where no reservation exists or where there is a qualified reservation with which the subpoena complies.⁸⁹

⁸⁶ *Schneider* (n 24) [11]; *Caswell* (n 19) 12 [29], both citing Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Wilson & Lafleur Ltée, 3rd ed, 2006) 84 [66]. See also R Doak Bishop, ‘Service of Process and Discovery in International Tort Litigation’ (1987) 23 *Tort and Insurance Law Journal* 70, 131 n 371.

⁸⁷ ‘Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the Hague Evidence Convention’, *HCCH* (Web Page, May 2014) 1 <<https://assets.hcch.net/docs/627a201b-6c7a-4dc2-86ad-c1da582447d4.pdf>>, archived at <<https://perma.cc/6YYK-SWEN>>.

⁸⁸ *Ibid* 3, 4. See also ‘Declaration/Reservation/Notification’, *HCCH* (Web Page, 2017) <www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=501&disp=resdn>, archived at <<https://perma.cc/D7B3-M72F>>.

⁸⁹ It is necessary to consider the text of each reservation under art 23 and any domestic legislation giving effect to the *Convention*. However, this is not necessarily straightforward. See, eg, the United Kingdom’s reservation. The wording of the reservation is unclear on its face as to its effect: ‘Declaration/Reservation/Notification’, *HCCH* (Web Page, 2017) <www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=564&disp=

However, in *Ceramic Fuel Cells*, the purpose of the subpoena in respect of the first category of documents (although drafted in terms of specific documents), was neither discovery nor obtaining evidence for trial. Rather, it was to obtain information about group members so the requirements for notice and information about the class action could be complied with. Consequently, the *Hague Evidence Convention* may not have applied to the document sought pursuant to CFC's subpoena, in which case there would have been no overlap.

Lastly, the coercive nature of collecting evidence through the *Hague Evidence Convention* renders the process in essence different from that of the *Hague Service Convention*.⁹⁰ Article 10 of the *Hague Evidence Convention* provides that

[i]n executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

No such provision exists in the *Hague Service Convention*. That directs attention to the second reason for not issuing a subpoena.

B *Unenforceability*

The source of the concern that a court should not be seen to be making orders that are unenforceable appears to be an old one. In *Ceramic Fuel Cells*, Wigney J cited the Federal Court's decision in *Stemcor* and noted Allsop J's concern in that decision that a subpoena addressed to a German company was not capable of enforcement.⁹¹ Wigney J even quoted Allsop J's strongly worded concern that in such circumstances 'the Court was making "a mere request couched in imperative terms" and the Court should not be seen to

resdntable/notifications/?csid=564&disp=resdn>, archived at <<https://perma.cc/JX32-FFWR>>. See also the *Evidence (Proceedings in Other Jurisdictions) Act 1975* (UK), which gives effect to the UK's obligations under the *Hague Evidence Convention*, and the case law interpreting the legislation: *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547; *Re Asbestos Insurance Coverage Cases* [1985] 1 All ER 716.

⁹⁰ Davies, Bell and Brereton (n 85) 264 [11.5]. See also *Water Splash Inc v Menon*, 581 US ___ (2017), where the Supreme Court of the United States held that the *Hague Service Convention* 'is limited to service of documents'.

⁹¹ *Ceramic Fuel Cells* (n 2) 349 [37].

“engage in such conduct”⁹² Nevertheless, Wigney J interpreted the concern merely as a discretionary consideration.⁹³

Tracing the source of authorities for the concern, as cited in *Ceramic Fuel Cells*, one comes to a 1902 decision of the King’s Bench. In *Stemcor*, Allsop J cites *Aetna Pacific Securities*.⁹⁴ In that decision, Giles J in turn cites *Arhill*,⁹⁵ in which Rogers CJ Comm D adopts the submissions made by the Solicitor-General of New South Wales (Mr K Mason QC, as he then was),⁹⁶ which relied on *Re Tucker (a bankrupt); Ex parte Tucker*.⁹⁷ In *Re Tucker*, Dillon LJ, who delivered the leading judgment of the Court of Appeal, relied on *Re Drucker [No 2]; Ex parte Basden*.⁹⁸ The brief judgment of Wright J in *Re Drucker [No 2]*, made in the context of cross-border bankruptcy proceedings, is where the trail ends.

However, the concern that a court should not make orders that are unenforceable, or futile, seems to be more general and can be observed in a broad range of cases.⁹⁹ The concern is captured by two legal maxims, *lex nil frustra facit* (the law will not itself attempt to do an act which would be in vain) and *lex neminem cogit ad vana seu inutilia* (the law will not force anyone to do a thing vain and fruitless).¹⁰⁰ These may in turn be related to the Roman law maxim *impossibile nulla obligatio est* (no-one has any obligation to the impossible).¹⁰¹

This of course begs the question of why the subpoena is unenforceable so as to render the making of an order futile, which in turn requires an examina-

⁹² Ibid 354 [60], quoting *Stemcor* (n 24) [12].

⁹³ Ibid 349 [37], 354 [61]. In the second decision, *Ceramic Fuel Cells [No 2]* (n 6) 370 [32]–[33], Wigney J gave more weight to the unenforceability of subpoenas directed overseas, this time to Belgium and Luxembourg, in his decision to refuse leave to issue them. His Honour nonetheless framed unenforceability as one in a number of considerations relevant to the decision, a list which this time included the financial industry secrecy laws of Belgium and Luxembourg, which intruded upon, amongst other matters, comity: at 368–9 [24]–[25], 370 [35].

⁹⁴ *Stemcor* (n 24) [12], [14], citing *Aetna Pacific Securities* (n 24).

⁹⁵ *Aetna Pacific Securities* (n 24) 7, 9–10, 13, citing *Arhill* (n 24).

⁹⁶ *Arhill* (n 24) 553–4.

⁹⁷ [1990] 1 Ch 148, 158.

⁹⁸ Ibid 159–61, citing *Re Drucker [No 2]; Ex parte Basden* [1902] 2 KB 210.

⁹⁹ See, eg, *Wimalaratne v Minister of Immigration and Multicultural Affairs* [2000] FCA 964 (migration proceedings); *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 71–3 [72]–[78] (suppression orders); *Halkias and Whitwell* [2014] FamCA 1166, [237]; *Oaks and Shields* [2016] FamCA 28, [24] (Family Court proceedings). See also *Sweeney* (n 25) [13].

¹⁰⁰ RH Kersley, *Broom’s Legal Maxims* (Sweet & Maxwell, 10th ed, 1939) 162–9.

¹⁰¹ Ibid 166.

tion of the nature of a subpoena and of jurisdiction. In *Arhill*, Rogers CJ Comm D, drawing on US authority, stated:

The majority drew attention to the difference between subpoenas and documents of originating process, such as writs and summonses. A summons may validly be served out of the jurisdiction. A summons gives a party notice of impending legal action. A subpoena is a part of a court's compulsive jurisdiction, as it compels a witness to appear or produce documents under threat of punishment for contempt.¹⁰²

The High Court of Australia as early as 1929 explained the effect of non-compliance with a subpoena as follows:

[T]he order to bring the books into Court as directed by the writ of subpoena was made by a competent Court, and ... a refusal to obey that order was a defiance of the authority of the Court and therefore a contempt of Court.¹⁰³

A subpoena is 'an exercise of sovereign authority'.¹⁰⁴ If an Australian court sought to punish a foreign citizen in a foreign jurisdiction for contempt for not responding to a subpoena, then the court would ultimately need to invoke the enforcement machinery of the Australian state. This is problematic based on two streams of reasoning. The Australian court does not have personal jurisdiction over the recipient of the subpoena to be able to subject a person to contempt proceedings or carry out any punishment.¹⁰⁵ Further, any attempt at enforcement in the foreign jurisdiction would require Australia to seek to exercise its powers in relation to legal proceedings within the territory of the other state.¹⁰⁶ This requires reference to the international law concepts of prescriptive and enforcement jurisdiction. Jurisdiction to prescribe represents a state's authority to make its law applicable to conduct, relations, status or interests of persons or things. Jurisdiction to enforce, in contrast, describes a state's authority to compel compliance or punish noncompliance with its

¹⁰² *Arhill* (n 24) 552. See also *Gloucester* (n 22) [32] (White J).

¹⁰³ *James v Cowan; Re Botten* (1929) 42 CLR 305, 311. See also *Pyoja Pty Ltd v 284 Bronte Road Developments Pty Ltd* (2006) 67 NSWLR 1, 4–5 [14]–[17], 7 [31].

¹⁰⁴ *Mackinnon* (n 44) 494 (Hoffmann J).

¹⁰⁵ See, in the US context, Ryan W Scott, 'Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery' (2004) 88 *Minnesota Law Review* 968, 997; Gary B Born and Peter B Rutledge, *International Civil Litigation in United States Courts* (Wolters Kluwer, 5th ed, 2011) 997. See, in the UK context, Trevor C Hartley, 'Jurisdiction in Conflict of Laws: Disclosure, Third-Party Debt and Freezing Orders' (2010) 126 *Law Quarterly Review* 194, 203.

¹⁰⁶ *Arhill* (n 24) 552 (Rogers CJ Comm D).

laws.¹⁰⁷ The scopes of prescriptive jurisdiction and enforcement jurisdiction are not necessarily identical. Prescriptive jurisdiction raises for consideration whether a state can make laws in relation to conduct in another state. While prescriptive jurisdiction is usually territorial it may extend to things and conduct outside a state's territory that have effects within its territory (the effects doctrine)¹⁰⁸ and to a state's citizens regardless of where they are located (the nationality principle).¹⁰⁹ The *Restatement (Third) of the Foreign Relations Law of the United States* has adopted this as settled practice.¹¹⁰ Other countries, in particular the United Kingdom, have tended to take a narrower view. In *Mackinnon*, Hoffmann J relied on the limits of prescriptive jurisdiction, or what he called subject matter jurisdiction, to find that even where the court had personal jurisdiction over an entity, the court should not require 'obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction'.¹¹¹ However, his Lordship still recognised that 'exceptional circumstances' may apply and the rule is not absolute.¹¹² Enforcement jurisdiction tends to be strictly territorial.¹¹³ As a corollary of state sovereignty, law enforcement officers of one state cannot exercise their functions in the territory of another state without consent.¹¹⁴ In *Stemcor* Allsop J said:

Such a subpoena, if served, even using the methods contemplated by the *Convention*, is not capable of enforcement. Without other steps being taken to enlist German governmental assistance (whether executive or judicial), Australian courts cannot enforce compliance on pain of punishment.¹¹⁵

¹⁰⁷ American Law Institute (n 49) § 401.

¹⁰⁸ Brendan Sweeney, 'Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?' (2007) 8 *Melbourne Journal of International Law* 35, 52–67, discusses the views of a number of jurisdictions on the effects doctrine.

¹⁰⁹ *Blackmer v United States*, 284 US 421, 436–8 (1932).

¹¹⁰ American Law Institute (n 49) § 402.

¹¹¹ *Mackinnon* (n 44) 493.

¹¹² See Hartley (n 105) 204–5.

¹¹³ *Federal Trade Commission v Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F 2d 1300, 1316 [10, 11] (DC Cir, 1980); Ivan Felix Blejec, 'Extraterritorial Jurisdiction of US Courts regarding the Use of Subpoenas *Duces Tecum* to Obtain Discovery in Transnational Litigation: The Search for a Limiting Principle' (1984) 16 *New York University Journal of International Law and Politics* 1135, 1155.

¹¹⁴ American Law Institute (n 49) § 432 cmt (b).

¹¹⁵ *Stemcor* (n 24) [12].

Consequently, the question of power to permit the issue and service of a subpoena is one of prescriptive jurisdiction which may operate in an extraterritorial manner. In contrast, orders imposing contempt sanctions for non-compliance with a subpoena invoke the enforcement jurisdiction, rather than prescriptive jurisdiction.¹¹⁶ While the service of the subpoena requires consideration of comity as discussed above, the actual enforcement of the subpoena goes further and would result in an infringement of the sovereignty of the foreign state, unless the state consented.

Even if the threshold question of international comity is overcome in relation to the issue and service of the subpoena, there appear to be few situations, if any, where unenforceability of the subpoena can be overcome. In *Ceramic Fuel Cells*, the agreement of USBNA was initially thought to demonstrate that unenforceability was not a problem. However, the subsequent decision in the proceeding, where it was revealed that USBNA had, in fact, declined to comply with a non-US subpoena, ultimately reinforced the significance of unenforceability.¹¹⁷

While the case law has referred to enforceability as being capable of going to either power or discretion, it seems more likely that an Australian court lacks power to enforce a subpoena overseas. As explained above, the *Hague Service Convention* does not address this difficulty. Consequently, the subpoena, if issued and served, is reduced to a mere request, as observed by Allsop J, which sits awkwardly with the compulsory nature of the subpoena. The agreement of the subpoenaed entity to comply does not change this.¹¹⁸

¹¹⁶ *Compagnie De Saint-Gobain-Pont-A-Mousson* (n 113) 1316 [10, 11].

¹¹⁷ *Ceramic Fuel Cells [No 2]* (n 6) 363 [2], 370 [33].

¹¹⁸ An overseas entity's willingness to agree to comply with a subpoena may mean that the subpoena does not need to be enforced because it is being voluntarily complied with. However, voluntary compliance does not make the subpoena, which is not enforceable, somehow enforceable. The subpoenaed entity is not complying because of the coercive nature of the subpoena, but rather of its own free will. In such a situation no subpoena should be necessary. If an overseas entity requests an Australian subpoena, presumably so that it can say it was required to comply, then the overseas entity misunderstands the effect of the Australian subpoena. In the case of USBNA, it is not clear if USBNA misunderstood the effect of the Australian subpoena, or if the request for a subpoena was in fact a request for a US subpoena which the lawyers for CFC could have obtained through 28 USC § 1782, discussed below. Confusion as to the effect of an Australian subpoena on overseas entities can also be seen in *Ceramic Fuel Cells [No 2]* (n 6) 365–8 [12]–[22] (Wigney J).

C *Alternative Procedures*

The above discussion has raised the *Hague Evidence Convention* as a potential mechanism for employing Letters of Request to obtain documents from third parties overseas, subject to the operation of any art 23 reservation. However, Australian legislation and case law provide further restrictions. The evidence sought must be material to an issue to be tried in the proceeding and not to obtain information for the preparation for trial,¹¹⁹ regardless of the foreign jurisdiction's position in relation to art 23. Further, the documents must be ancillary to oral evidence¹²⁰ even though that *Convention* does not require that this and other jurisdictions permit Letters of Request for documents alone.¹²¹ These restrictions curtail the use of the *Convention*. Indeed Wigney J observed that both restrictions stood in the way of the first category of documents sought by subpoena, unless the applicant sought oral testimony from USBNA and the documents were ancillary to that testimony.¹²²

The problem of subpoenas being unenforceable outside of Australia weighs in favour of revisiting the above restrictions through amending the *Foreign Evidence Act 1994* (Cth) and state equivalents. This article has already pointed to the growth in cross-border disputes giving rise to the need for access to documents held by third parties. To be added to this is the fact that transactions and many, if not most, communications are reduced to documentary form due to information technology and electronic communications. Consequently, Australia's domestic legislation should seek to make the most of international processes such as those embodied in the *Hague Evidence Convention* if disputes are to be resolved on the merits. Of course, Australia may need to reconsider its own position in relation to art 23.

¹¹⁹ *Foreign Evidence Act 1994* (Cth) ss 4, 7(1)(c), 7(2)(b); *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* [No 18] (1995) 133 ALR 667, 675 (Lindgren J); *British American Tobacco Australia Services* (n 84) 495 [22], 501 [45] (Spigelman CJ).

¹²⁰ *Foreign Evidence Act 1994* (Cth) s 7(1)(c); *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd* (1987) 14 FCR 461, 465 (Gummow J); *Novotny v Todd* [2002] WASCA 79, [52] (McLure J). But see *Westpac Banking Corporation v Halabi* (Supreme Court of New South Wales, Rogers J, 22 December 1987) 28; *Biota Holdings Ltd v Glaxo Group Ltd* [2006] VSC 71, [5], [10].

¹²¹ It is implicit in the wording of arts 3 and 23 of the *Hague Evidence Convention* that documentary evidence can be obtained alone through a Letter of Request. The *Evidence (Proceedings in Other Jurisdictions) Act 1975* (UK) s 2(2) provides for documents and oral examinations as separate subjects of a Letter of Request. The *Evidence Act 1977* (Qld) s 26(1) provides that a letter of request may seek the production of documents abroad, with or without witness examination.

¹²² *Ceramic Fuel Cells* (n 2) 360–1 [97]–[98].

In the meantime, a litigant seeking documents from a third party in the United States should consider 28 USC § 1782 (2012). The United States Congress, responding to the refusal of many other countries to assist US civil litigation involving foreign defendants, adopted 28 USC § 1782 (2012) to induce greater cooperation.¹²³ Section 1782(a) relevantly provides that a US Federal Court may order a person residing or found in that court's district

to give testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal ... pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person.

Before granting an application pursuant to 28 USC § 1782 (2012), a court must find that

(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery be for use in a proceeding before a foreign tribunal, and (3) the application be made by a foreign or international tribunal or any interested person.¹²⁴

If those requirements are met, § 1782 'authorizes, but does not require', a US court to grant the application.¹²⁵ In determining whether to exercise that discretion, a district court will consider: whether the person from whom discovery is sought is participating in the foreign proceeding, because if they are not 'their evidence, available in the United States, may be unobtainable absent § 1782(a)'; the nature of the foreign tribunal and its receptiveness to US judicial assistance; whether the 'request conceals an attempt to circumvent foreign proof-gathering restrictions'; and whether the request is 'unduly intrusive or burdensome'.¹²⁶

US courts have specifically allowed for the issue of a subpoena pursuant to US law in response to an application pursuant to 28 USC § 1782 (2012),¹²⁷

¹²³ *Re Malev Hungarian Airlines*, 964 F 2d 97, 99–100 (2nd Cir, 1992).

¹²⁴ *Certain Funds, Accounts and/or Investment Vehicles v KPMG LLP*, 798 F 3d 113, 117 (2nd Cir, 2015), quoting *Brandi-Dohrn v IKB Deutsche Industriebank AG*, 673 F 3d 76, 80 (2nd Cir, 2012).

¹²⁵ *Intel Corp v Advanced Micro Devices Inc*, 542 US 241, 247, 264 (2004).

¹²⁶ *Ibid* 264–5.

¹²⁷ See, eg, *Texas Keystone Inc v Prime Natural Resources Inc*, 694 F 3d 548, 553 (5th Cir, 2012), where it was considered that 'once an interested party makes the requisite showing that it has met the statutory factors, the district court judge has the discretion to grant the application seeking the authority to issue subpoenas'. See also *Re Republic of Kazakhstan*, 110 F Supp 3d 512 (SD NY, 2015); *Re Application of Bloomfield Investment Resources Corp*, 315 FRD 165 (SD

including in relation to litigation pending in Australia.¹²⁸ However, Australian litigants seeking to make use of § 1782 need to be cognisant of the need to consult the Australian court where proceedings are pending to avoid any suggestion that such an application is an attempt to circumvent the case management and supervision of the litigation, especially in relation to discovery.¹²⁹ The Full Court of the Federal Court of Australia has stated that '[t]here may be conditions where this Court would, in effect, endorse the making by a party of an application under 28 USC § 1782', but it 'would expect them to be exceptional'.¹³⁰ Requiring exceptional conditions would seem to place the bar unnecessarily high in relation to seeking documents from overseas third parties as there are very few, perhaps no, alternatives.¹³¹

VI CONCLUSION

Ceramic Fuel Cells demonstrates the difficulty for litigants seeking to obtain access to documents from an overseas third party by subpoena. Even if considerations of comity result in a court being prepared to grant leave to issue and serve the subpoena overseas, the court lacks power to enforce the subpoena and its threat of compulsion. Consequently, a subpoena should not be issued as it is unable to function as a true subpoena, or it must be accepted that the nature of the subpoena is transformed when issued on a foreign-based third party so as to act as a mere request. Neither outcome is particularly satisfactory. The Australian legislature and courts need to address limitations on litigants in Australian courts that hamper use of international processes such as those embodied in the *Hague Evidence Convention* and procedures permitted under foreign law, such as the US provision for assistance to foreign tribunals and litigants, 28 USC § 1782 (2012).

NY, 2016); *Re Ex parte Application of ANZ Commodity Trading Pty Ltd* (ND Cal, No 17-MC-80070-DMR, 4 August 2017).

¹²⁸ See, eg, *Re the Application of Ching Chung Taoist Association of Hong Kong Ltd* (ND Cal, No 3:16-mc-80157-LB, 23 September 2016).

¹²⁹ *Pathway Investments Pty Ltd v National Australia Bank Ltd [No 2]* [2012] VSC 495, [12]; *Jones v Treasury Wine Estates Ltd* (2016) 241 FCR 111, 118–19 [47]–[49], where in both cases the courts granted injunctions restraining the obtaining of depositions in the US pursuant to 28 USC § 1782 (2012).

¹³⁰ *Jones* (n 129) 118–9 [47]–[48].

¹³¹ But see *Lavecky v Visa Inc* [2017] FCA 454. Cf *Cargill Australia Ltd v Viterra Malt Pty Ltd [No 2]* [2017] VSC 283.