

Litigation Essentials: Subpoenas

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INTRODUCTION

1. In 2011, the NSW Supreme Court adopted a new practice for return of subpoenas that was modelled on the District Court. This paper sets out an overview of this procedure. While the focus of this paper is on the Supreme Court, relevant cross-references to Federal Court rules and practice notes are provided.
2. This paper is split into two parts. The first part will focus on the procedural issues associated with issuing a subpoena pursuant to the Uniform Civil Procedure Rules (UCPR). The focus of the second part is on the proper drafting of the schedule of subpoena.

PART I – PROCEDURAL ISSUES

Types of subpoenas

3. There are three types of subpoenas: UCPR, r 33.2; FCR, r24.12(1). The first type of subpoena requires a recipient's attendance in court to give evidence. The second type of subpoena requires a recipient to produce documents. The third type of subpoena requires a recipient to both attend court to give evidence as well as the production of documents. The focus of this paper is on the second type of subpoena, ie. subpoenas to produce documents.

Leave to issue subpoena

4. Some jurisdictions require that leave be obtained before subpoenas can be prepared.
5. For example, matters in the Equity division of the Supreme Court are required to comply with PN SC Eq 11 before being entitled to disclosure. That practice note provides that an order for disclosure will not be made before evidence has been served unless there are exceptional circumstances: [5]. Even if the evidence is all on, the practice note requires that there will be no order for disclosure (including by consent) unless it is necessary for the resolution of the real issues in dispute in the proceedings): [6]. To satisfy the Court that this is the case, an affidavit setting out the reasons why the disclosure is necessary, the classes of documents sought and the likely costs is required to be filed. While the Practice Note does not apply to a subpoena to produce 'in terms' (*Re Mempoll Pty Ltd* [2012] NSWSC 1057 at [12]), any attempt to subvert the operation of the Practice Note will render a subpoena liable to be set aside: *New Price Retail Services Pty Ltd v Hanna* [2012] NSWSC 422

at [19] (McDougall J). However, there are circumstances where subpoenas have been drafted sufficiently narrowly such that they were found not to have breached the Practice Note. For instance, in *Re North Coast Transit Pty Ltd* [2013] NSWSC 1912 at [55], his Honour Black J found that a subpoena requiring production of four identified documents did not to contravene the Practice Note.

6. Similarly, r24.1 of the *Federal Court Rules 2011* provides that a subpoena may only be issued with the leave of the Court: Practice Note GPN-SUBP, [2.1]. However, there is a difference to the Supreme Court in that such an application may be made without notice to any other party: Practice Note GPN-SUBP, [3.2]. This is done by making an oral request to the relevant judge at a case management hearing (which will involve disclosure to the other party) or by completing a request for leave to issue subpoena form and submitting online. The form can be downloaded at: www.fedcourt.gov.au/_data/assets/word_doc/0015/40218/Form-NCF7-v2.docx.
7. It is also worth noting that litigants in person and parties in Local Court Small Claims Division also need leave of the Court to issue a subpoena: UCPR, r7.3.

Preparation of the subpoena

8. Standard forms for each type of subpoena are available from the UCPR forms website: <http://www.ucprforms.justice.nsw.gov.au/>.
9. See forms 25, 26A and 27A below:

24	3	Notice to produce to court	PDF	DOC	
25	2	Subpoena to attend to give evidence	PDF	DOC	File online
26A	4	Subpoena to produce with subpoena notice and declaration	PDF	DOC	File online OR Watch demo
27A	3	Subpoena to give evidence and produce with subpoena notice and declaration	PDF	DOC	File online
29	4	Order for production	PDF	DOC	

10. The forms are largely self-explanatory. Some key aspects are:
 - (a) Title of Proceedings & Issuing Details:
 - (i) these sections of the form are self-explanatory and are the same as all other court forms;
 - (b) Order to the Subpoena Recipient:

- (i) this section of the subpoena looks like this:

ORDER TO THE SUBPOENA RECIPIENT
Name
Address
You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule to the court.
Note: The person to whom this subpoena is addressed to is the "addressee" defined in UCPR 33.1(1) and is referred to in this document as the "subpoena recipient".

- (ii) the subpoena must not be addressed to more than one person: UCPR, r33.3(2); FCR r24.13(2);
- (iii) the subpoena must identify the addressee by name or by description of the office or position: UCPR, r33.3(3); FCR r24.13(3);
- (iv) if the addressee is a corporation, the corporation must comply with the subpoena by its appropriate or proper officer: UCPR, r33.3(9); FCR, r24.13(9). In this respect, the convention is to address subpoenas to corporations to the 'The Proper Officer';
- (v) if the addressee is a partnership, the subpoena should be addressed to all partners rather than to one individual partner (notwithstanding the requirement noted above that a subpoena must not be addressed to more than one person): *Rochfort v Trade Practices Commission* (1982) 153 CLR 134.

- (c) Proposed Access Order:

- (i) this section of the subpoena looks like this:

#PROPOSED ACCESS ORDER
[This section to be completed by the issuing party if the Court issuing the subpoena requires a proposed access order to be specified. The court will make the default access order appropriate for the jurisdiction unless you state the proposed access order for the subpoenaed material and accompanying reasons for that order.]
#[Role of party eg Plaintiff] to have first access for [number of days eg 7] days because [#that party may be entitled to claim privilege #specify other reasons]; thereafter, in the absence of further application, access to all parties.
#Access granted to all parties, because [#no claims for privilege are likely to arise #specify other reasons].
#[Specify proposed alternative access order with reason/s.]

- (ii) the current standard form requires that a proposed access order must be included;

- (iii) if an access order is not specified on the subpoena, the practice note provides that a default access order (being general access to all parties) will apply;
- (d) Date, Time and Place:
 - (i) this section of the subpoena looks like this:

DATE TIME AND PLACE AT WHICH YOU MUST ATTEND TO PRODUCE THE SUBPOENA OR A COPY OF IT AND DOCUMENTS OR THINGS
Date
Time
Place
ADDRESS TO WHICH THE SUBPOENA (OR COPY) AND DOCUMENTS OR THINGS MAY BE DELIVERED OR POSTED
[insert registry address if the Subpoena is to be filed over the counter] or
[insert " https://subpoenaresponse.justice.nsw.gov.au " if the Subpoena is to be filed via the NSW Online Registry website]

- (ii) Date: nominate a date a sufficient time in advance to allow for service;
 - (iii) Time: 9.00am
 - (iv) Place is Supreme Court of New South Wales, 184 Phillips Street
 - (e) Schedule
 - (i) this is the part that sets out the substance of the request and will be dealt with later in this paper.
11. Similar Federal Court forms can be downloaded from:
<http://www.fedcourt.gov.au/forms-and-fees/forms/federal-court-rules>

43A	<u>Subpoena to give evidence (doc - 48 kb)</u> Rule 24.13(1)(a)	1/8/11
43B	<u>Subpoena to produce documents (doc - 53 kb)</u> Rule 24.13(1)(b)	3/9/14
43C	<u>Subpoena to give evidence and produce documents (doc - 55.5)</u> Rule24.13(1)(c)	3/9/14
44	<u>Subpoena – Declaration by addressee. Notice to addressee (doc - 38.5 kb)</u> Rule 24.21	1/8/11

12. Once prepared, the subpoena needs to be filed (also known as sealed) in Court before it is served. When filing a subpoena, take at least 3 copies for stamping by the court – one to be served on the recipient, one for the court file and one for your file. An extra copy is not required for the process server to annex to an affidavit of service because UCPR r35.8 provides that an affidavit of service must not annex a copy of the document being served unless the document has not been filed. It is always a good idea to keep a sealed copy of the subpoena. The Supreme Court filing fee is currently \$104 for an individual and \$208 for a corporation.

Service

Personal Service

13. Subpoenas are required to be served personally: UCPR, r33.5(1); FCR, r24.16(1). While there are a number of ways in which personal service can be effected, it is important to keep in mind the date (and possibly time) of service may need to be proven in the future.
14. For corporations, UCPR r10.22 and FCR r10.02 provide that personal service may be effected by personally serving the document on a principal officer of the corporation or by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation. This typically means service in accordance with s109X of the *Corporations Act 2001* (Cth):

CORPORATIONS ACT 2001 - SECT 109X

Service of documents

- (1) For the purposes of any law, a document may be [served](#) on a company by:
- (a) leaving it at, or posting it to, the company's [registered office](#); or
 - (b) delivering a copy of the document [personally](#) to a [director](#) of the company who resides in Australia or in an external Territory; or
 - (c) if a liquidator of the company has been appointed--leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
 - (d) if an administrator of the company has been appointed--leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.
15. A common way is to post the document to the company's registered office. To avoid later disputes about service, the subpoena should be posted in a way that enables confirmation of delivery to be obtained. For example, using express post where a tracking number can be used to verify delivery on Australia Post's website. Couriers are even better because they are often faster and, upon request, can obtain a signature from whoever accepts delivery. To assist in later preparing an affidavit of service, if required, the person who posts the subpoena should make a file note.
16. Serving on individuals is more difficult. UCPR r10.21 (and FCR, r10.01) provides that personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document. The easiest way to do this is to engage a process server. The benefits of process servers include their experience in serving process, they are often reasonably good at tracking down people avoiding service and they have standard templates for affidavits of service.

Time for service

17. UCPR r33.6(2) and FCR r24.17(2) provide that an addressee need not comply with a subpoena unless it is served on or before the date specified in the subpoena as the last date for service. However, UCPR r33.6(3) and FCR r24.17(3) provide that an addressee must comply with the requirements of a subpoena even if the subpoena has not be served personally on that addressee if the addressee has, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.
18. UCPR r33.3(8) and FCR r24.13(8) requires that a subpoena be served 5 days before the return date unless an earlier date is fixed by the Court. The rules do not specify whether it is business days or calendar days. However, UCPR r1.11(3) and FCR r1.61(3) provide that, for a period of 5 days or less prescribed by the rules, the day or part of a day on which the registry is closed (UCPR) or days that are not business days (FCR) are excluded from the count.

Interstate Service

19. Serving a subpoena interstate presents particular challenges. Such service is governed by the *Service and Execution of Process Act 1992* (Cth) (**SEP Act**).
20. Section 30(1) of the SEP Act provides that unless a court orders otherwise, the interstate service of a subpoena is only effective if the period between service and the day on which the person to whom the subpoena is addressed is required to comply is not less than 14 days.
21. Further, s31 of the SEP Act requires that service is only effective if the subpoena is served with a copy of any prescribed notices and, where an application has been made to abridge the time for service, a copy of the resulting order. Regulation 6 of the SEP Regulations 2018 prescribe form 2 in Schedule 1 for this purpose. A copy of the form is at **Annexure A**.

Are the other parties entitled to copies of subpoenas issued?

22. Copies of any subpoenas must be served on all other active parties as soon as practicable after the subpoena has been served on the addressee: Practice Note SC Gen 19, [9]; UCPR, r33.5(2); FCR, r24.16(2).

Conduct Money

23. UCPR r33.6(1) and FCR r24.17(1) provide that an addressee need not comply with the requirements of a subpoena to give evidence unless conduct money (being a sum of money or its equivalent, sufficient to meet the reasonable expense of a person required by subpoena or order to attend Court) has been handed or tendered to the addressee a reasonable time before the date on which attendance is required. There is no equivalent provision for the subpoena for the production of documents.
24. Whether or not the conduct money is sufficient depends on the particular circumstances. For instance, if a witness lives locally to where the hearing will take place, their reasonable expenses will be less than if they live interstate.
25. However, s32 of the SEP Act provides that interstate service of a subpoena is only effective if at the time of service or at some other reasonable time before the person to whom the subpoena is addressed is required to comply with it, allowances and travelling expenses sufficient to meet the person's reasonable expenses of complying with the subpoena are paid.

Production

26. There are several ways in which documents may be produced in response to a subpoena.

27. First, the documents may be posted or hand delivered to the registry two clear days before the return date: UCPR, r33.6(4)(b); FCR, r24.17(4)(b).
28. Second, at least in Supreme Court matters, the documents may be emailed to the registry: Practice Note SC Gen 18.
29. Third, the documents may be produced in person to the registrar on the return date: UCPR, r33.6(4)(a); FCR, r24.17(4)(b).
30. Pursuant to rule 33.6(6) and (7) of the UCPR, unless a subpoena specifically requires production of the original, the addressee may produce a copy (photocopy or electronic copy): Practice Note SC Gen 18, [8]-[10].
31. The practice note also suggests that to facilitate electronic production, the issuing party should indicate to the producing party that electronic format is acceptable: Practice Note SC Gen 18, [11]. In this regard, the practice note suggests recommends that PDF files be produced unless the file cannot be conveniently saved in that format: Practice Note SC Gen 18, [12]-[13].
32. As the registry has limited space, unless prior arrangements have been made, the registry will not accept subpoenaed material that is not packed in standard document boxes, exceeds more than 3 standard size or 6 archived boxes in volume (or more than one upright trolley load) or any material that is in any way hazardous: Practice Note SC Gen 18, [17].
33. The proper process is for the producing party to retain those documents until the return date and then orders can be made for accessing those materials at a mutually convenient location. The producing party is to comply with the subpoena by sending the letter to the registry and the issuing party listing the material that they are producing and confirming that they will comply with any directions of the Court in relation to that material: Practice Note SC Gen 18, [18]-[19].

Subpoena List

34. Every weekday morning during the court term, there is a subpoena list in the Supreme Court. It is usually in Court 1A at Queens Square. It is run by a registrar.¹
35. The court list that is published at 3.30pm each day for the next days' matters includes a link to download the subpoena list (http://www.courtlist.justice.nsw.gov.au/courtlists/nswsc_lists.nsf/web+version+courtlist). It looks like this:

¹ Pursuant to s13 of the Civil Procedure Act 2005, registrars have the delegated power to deal with part 33 of the UCPR concerning subpoenas.

RETURN OF SUBPOENA - LAW COURTS BUILDING COURT 11D QUEENS SQUARE SYDNEY 9:00AM
Return of subpoena report incorporating case details and schedule of items produced, if any



[Return of Subpoena List Court Item Report 31.01.2019.pdf](#)

36. Clicking through the link obtains a document like this:

Supreme Court of NSW		Return of Subpoena List			
Return of Subpoena Listing Date: 31/01/2019					
Supreme Court - Civil					
Senior Deputy Registrar L Brown					
					9:00 AM Law Courts Building Court 11D Queens Square Sydney
1	201200282770	Aaron Victor Nyciuk by his tutor Anne Buchanan v INSURANCE AUSTRALIA LIMITED TRADING AS NRMA INSURANCE ABN 11 000 016 722			
Packet ID	Description	Category	Producer	Privilege Claim	Access Condition Type
201200282770001-S-4	NSW GOVERNMENT RECORDS-1 PACKET-CREATED FROM SUBPOENA PACKET S2-PRIVILEGE	Other	DEPARTMENT OF AGEING AND DISABILITY	Y	PRIVILEGE CLAIMED BY PLAINTIFF AARON NYCUK
201200282770001-S-8	NSW GOVERNMENT DOCUMENTS-1 PACKET-PRIVILEGE	Other	DEPARTMENT OF FAMILY AND COMMUNITY SERVICES	Y	LEGAL PROFESSIONAL PRIVILEGE CLAIMED BY DEPARTMENT OF FAMILY AND COMMUNITY SERVICES
201200282770001-S-26	as described in the schedule	Other	Dr Moushami S. Kadkol	N	1st access Plaintiff (7days)
201200282770001-S-27	as described in the schedule	Other	Ms Donna Morgan	N	1st access Plaintiff (7days)

37. This document shows:

- (a) the list number of each case;
- (b) the packet ID – the first part of the packet ID is just the proceedings number. The last letters and numbers are the packet number. Usually, this will be an ‘S’ followed by a number. While this can seem confusing, there is a simple reason for packet IDs. Each bundle of documents is given a separate packet number. This makes it easier to deal with logistics relating to access orders etc.
- (c) the producer – this is helpful where multiple subpoenas have been issued;
- (d) privilege claim – this identifies whether a privilege claim has yet been made;
- (e) access condition type – this records the access order that has previously been made or the proposed access order on the subpoena.

38. There is usually a copy of this list left on the bar table for everyone to check. It is always worth checking because it occasionally includes more up to date information than what is published the day before.

Adjournments

39. If there are no packets identified under a matter, it is because the registry has not processed the receipt of any yet. Usually this means that the documents have not

been produced. However, as the registry needs documents to be delivered two clear days before the return date in order to be processed in time, it may be that the documents have been produced but not processed.

40. In that situation, the subpoena will need to be adjourned to another date. If the issuing party and producing party agree on the new date, there is no need to mention the matter before the registrar. The issuing party can simply note the adjournment in the adjournment book. While a lot of people try on a daily basis, there is usually limited utility in mentioning the matter for the sole purpose of asking the registrar to confirm that the printed list is up to date (although this may be required if it is known for a fact that documents were produced more than two days before the return date).
41. The adjournment book is the white folder that is on the bar table. It includes a table that looks like :

RETURN OF SUBPOENA ADJOURNMENTS

Court List #	Court file Number	Plaintiff / parties	Notice to produce to Name subpoenaed party	Issuing party contact number	Date to be adjourned

42. The adjournment book is to be completed by the issuing party. The issuing party is also obliged to notify the subpoena recipient and the other active parties in the proceedings of the new return date: Practice Note SC Gen 19, [22]. It is good idea to have a copy of such correspondence on the next return date as the registrars frequently ask for confirmation that the other parties have been notified and given an opportunity to appear to contest any access orders.
43. If there is agreement between the parties or if it is known that no other parties or the recipient will attend list, the practice note permits the issuing party to email sc.subpoena@justice.nsw.gov.au to seek an adjournment: Practice Note SC Gen 19, [21]. However, it must be remembered that with this approach, there is a risk that one of the parties or the subpoena recipient appears in the list and seeks something different.
44. If the producing party wants to contest the proposed new adjournment date, the parties need to argue the date in front of the registrar.

Appearances

45. When appearing before the subpoena registrar (ie. if something other than a consent adjournment or default access order is sought), legal representatives need to identify the number the matter is in the list, their name, the party they are acting for and whether they are the issuing / producing party.
46. For example: "Registrar, may I mention matter # in your list. My name is Byrne. I appear for the plaintiff, X Pty Ltd, who is the issuing party". Allow the other parties to give their appearances, then give a very brief description of the issue: For example, "There is an issue of access orders in relation to packet S-4, being documents produced by Dr Y".

Access

47. The current subpoena forms require a proposed access order to be identified: Practice Note SC Gen 19, [6]. The general position is that a party cannot access produced documents unless the Court has made an order allowing access: UCPR, r33.9(3); Practice Note SC Gen 19, [12].
48. However, practically speaking, the subpoena registrar will not grant access to a bundle of documents unless it has a packet number in their system. This means that unless it is on the printed sheet left on the bar table (an updated version of the online list), access will not be granted.
49. Assuming documents have been produced in sufficient time prior to the return date, the Court will make access orders on the return date: Practice Note SC Gen 19, [13]. If all the parties agree to the proposed access order, there is no need to attend: Practice Note SC Gen 19, [15]. At the end of the subpoena list, the registrar will make an order that (save for the matters that have otherwise been dealt with) the access orders proposed in the subpoenas be made over the packets that have been produced (or if no order is proposed, the default access order). So, if all that is sought is the default access order, there is no need to mention the matter as access will automatically be granted.
50. Any party may object to the issuing party about the proposed access order in which case they must notify all other parties of the objection and then appear on the return date to argue the question before the registrar: Practice Note SC Gen 19, [16].
51. On occasion, subpoenas are returnable in close proximity to deadlines for pleadings / evidence and even hearings. In extreme cases, on the application of a party, the registrar may grant immediate access to particular packets of documents. What this means is rather than having to wait for all of the access orders to be manually entered into the system, which often takes a few hours, the registrar will provide a slip on the spot which allows immediate access to those documents from the office on level 4 of the court building.

52. On some occasions, it may be appropriate for the issuing party or one of the other parties to have first access for a particular period. Usually this is sought if there is a risk that some documents may be subject to privilege. If such a claim is likely, the practice note provides that the usual access order is for that party to have first access for 7 days then, in the absence of further application, general access: Practice Note SC Gen 19 at [8].
53. Practice Note SC Gen 19 provides that contested applications that cannot be dealt with conveniently in the return of subpoena list will be listed before a registrar in the list in which the case is being managed: [18]. This will typically include all fights over privilege. The question then becomes whether the party claiming privilege has to bring a motion to support its claim or the other party has to bring a motion seeking access. The practice notes are vague on this issue. However, the suggested default order for these circumstances in [8] of the practice note suggests that it is incumbent on the party claiming privilege to make the application. The merits of a privilege claim are discussed in the final part of this paper. x
54. If legal representatives have electronic access to the court file, any electronically produced documents should be able to be downloaded once the access order has been made: Practice Note SC Gen 18, [21]. On request, the registry may also provide access by email: Practice Note SC Gen 18, [22].
55. If hard copies are produced, it is a little more difficult to get access. Parties are required to comply with practice note SC Gen 3: Practice Note SC Gen 18, [23]. In those circumstances, an application to inspect documents produced under subpoena needs to be completed and submitted to sc.subpoena@justice.nsw.gov.au. A copy of the form can be downloaded at http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_formsfees/SCO2_forms/SCO2_forms_subject/subpoena_forms.aspx.
56. This form requires:
- (a) a letter of authorisation from the solicitor on record authorising you to access the documents (photo ID is required at all times); and
 - (b) the form has to be sent in by noon the day before you want to inspect the documents.
57. It is usually far more efficient to get one of the approved legal copier firms to copy the documents. They have preapproved authorisation to uplift the documents and copy them in their own offices. A list of the approved copiers is available at: http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/approved_legal_copier_firms.aspx.

Costs of compliance

58. Pursuant to UCPR r33.11 and FCR 24.22, the Court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena. Similarly, s35(1) of the SEP Act entitle a subpoena recipient to payment of an amount equal to the reasonable expenses incurred in complying with the subpoena.
59. UCPR r42.33 requires the Court to be satisfied that the parties have attempted but failed to agree on the amount of costs to be paid in relation to compliance with a subpoena or notice to produce before an order is made.
60. If this cannot be agreed with the issuing party, a motion and supporting affidavit is required. It is nevertheless important to remember that (besides for service of interstate subpoenas and subpoenas to give evidence), non-payment of any conduct money requested does not excuse non-compliance.
61. Practice Note SC Gen 18 provides that any application by a producing person for costs of production should be made on the return date with contested applications that cannot be conveniently dealt within the list be listed before a registrar: [17]-[18]. Again, these are rarely (if ever) dealt with in the list. Usually, orders are made for a motion and affidavit to be filed – but in reality, the parties negotiate a sensible solution.

Non-Compliance

62. Contrary to client's and many legal representatives' expectations, documents are rarely produced to the Court in response to a subpoena on the first return date. In the majority of cases, the subpoena is required to be adjourned multiple times before full compliance is achieved.
63. Pursuant to UCPR r33.12(1) and FCR r24.23, failure to comply with a subpoena without lawful excuse constitutes contempt of court (even if addressee was not properly served in time but nevertheless had actual knowledge of the subpoena and its requirements).
64. Nevertheless, it is very difficult to satisfy the evidentiary burden in proving such a claim. In addition to proving the non-production of documents, it must be proven that the subpoena recipient had documents that fell within the scope of the subpoena at the relevant time and that they deliberately disobeyed the request. Each element must be proved beyond a reasonable doubt. In most cases, this will likely be very difficult to prove.
65. Further, although it is discretionary, non-compliance with a subpoena enlivens the arrest powers under the s97 of the *Civil Procedure Act 2005* (NSW) and s194 of the *Evidence Act 1995* (NSW).

Making an application to set aside a subpoena (or part thereof)

66. Pursuant to UCPR r33.4(1) and FCR 24.15, on the application of a party or any person having a sufficient interest, the Court may set aside a subpoena in whole or in part, or grant other relief in respect of it. This must be done by way of a motion and supporting affidavit.

PART II – THE SCHEDULE

Introduction

67. A subpoena to produce is a written order issued by a court at the request of a party involved in court proceedings to a third party seeking production of documents for use in proceedings.

68. As noted above, given that a subpoena is a court order, there can be significant consequences for non-compliance. As such, it can be an intimidating document for a non-sophisticated third party to receive. The standard notes to a subpoena include the following:

‘15 Failure to comply with subpoena- arrest

Failure to comply with a subpoena without lawful excuse:

- (a) is contempt of court and may be dealt with accordingly.*
- (b) may lead to your arrest under section 97 Civil Procedure Act or under rules of the court to enforce compliance with a subpoena.’*

69. As a subpoena is an order of the court, care must be taken by legal practitioners to ensure it is prepared in accordance with the rules of the court in which it is issued. All practitioners should be mindful of the limitations that apply to drafting schedules to a subpoena.

70. This part of the paper considers the following matters:

- (a) the requirement to properly identify the documents the subject of the subpoena;
- (b) the proper scope of a subpoena;
- (c) the obligation to avoid oppression;
- (d) abuse of process; and
- (e) privilege and public interest immunity.

Proper Identification of Subpoenaed Material

71. UCPR r33.3(4) is as follows:

“(4) A subpoena to produce must:

(a) identify the document or thing to be produced, and

(b) specify the date, time and place for production.”

72. The drafter of the schedule must ‘*identify*’ the document to be produced with sufficient particularity so that the subpoenaed party is aware of what is to be produced in answer to the subpoena.

73. In *Patonga Beach Holdings Pty Limited v Lyons* [2009] NSWSC 869, his Honour Barrett J said at [13]-[14]:

“13 The requirement under rule 33 is that a subpoena to produce documents “identify” the document to be produced (see rule 33.3(4)(a)), that is, cut the document out from the universe of documents by some description and specification.

14 It is permissible for a subpoena to call for, for example, all documents recording oral communications between A and B within a stated period and referring to a particular company: see Lane v Registrar of the Supreme Court [1981] HCA 35... Such a subpoena satisfies the requirement that there be “specified with reasonable particularity the documents that are required to be produced”. These are the words of Jordan CJ in Commissioner for Railways v Small (1938) 38 SR (NSW) 564 at 573. What is permissible, again using the words of Jordan CJ, is that a person be required to search for or produce all such documents as he or she may have in his or her possession relating to a particular subject matter. Jordan CJ continued:

“It is not legitimate to use a subpoena for the purpose of endeavouring to obtain what would be in effect discovery of documents”.’

74. Accordingly, a subpoena is not a substitute for discovery. The schedule must provide sufficient particulars to identify what is sought to be produced.

75. By way of illustration, in *Smith v Jones* [2017] NSWSC 980, her Honour McCallum J set aside a subpoena containing the following schedule:

‘all documents (whether stored electronically or not) concerning or relating to the child, the plaintiff or the mother, including but not limited to all notes, memoranda, witness statements, statutory declarations, medical records, medical reports, publications, articles, stories and correspondence’

76. Her Honour found that the schedule to the existing subpoena failed to sufficiently identify the documents to be produced. Her Honour stated:

'It does not carve out from the universe of documents likely to be held by Bravehearts any particular documents. It would, it seems to me, be necessary for someone, in order to comply with the subpoena, to trawl through a very large number of documents to see whether there was any reference or relation to any of the three named person'

77. If a schedule fails to identify the documents sought to be produced with reasonable particularity, the subpoena is likely to be set aside on the basis of 'fishing'. In essence, only discovery can require a person to assess whether unspecified documents are relevant to issues in proceedings: *Southern Pacific Hotel Services Inc v Southern Pacific Hotel Corp Ltd* [1984] 1 NSWLR 710 at 718A. If the subpoena is drafted so as to invite the recipient to consider whether it is relevant to issues in the proceedings, it is impermissibly broad.

The proper scope of a subpoena

78. Not only must the schedule identify the documents that must be produced with sufficient particularity, the documents identified in that schedule must serve 'a legitimate forensic purpose'. A subpoena must only identify documents that are 'relevant' to issues in the proceedings in which the documents are sought.
79. To be clear, that does not mean that the documents identified in a subpoena must be limited to documents that satisfy section 55 of the *Evidence Act 1995* (NSW). However, the documents must nevertheless have sufficient 'adjectival relevance' to issues in the proceedings.
80. In *Trade Practices Commission v Arnotts Limited & Ors* (1989) 88 ALR 90, his Honour Beaumont J said that:

'The test of adjectival relevance is satisfied if the material has apparent relevance. In my opinion, the documentation called for here could possibly throw light on issues in the main case. In my opinion, adjectival relevance is established'

81. The test has alternatively found to have been satisfied if it appears to be "on the cards" that the documents sought will materially assist the determination of the issues in dispute: *Allister v R* (1984) 154 CLR 404 at 414.
82. The starting point for determining whether documents 'could possibly throw light' on issues in the proceedings must be the pleadings, affidavits exchanged and the legal principles which govern the claims for relief: per his Honour Brereton J in *Portal Software International Pty Limited v Bodsworth* [2005] NSWSC 1115 at [25]. In addition to facts in issue, a subpoena may also be 'adjectivally relevant' if it seeks documents relevant to credit: *A v Z* [2007] NSWSC 899, per his Honour Brereton J.

83. A legal practitioner must have in mind the '*legitimate forensic purpose*' for which the documents are sought when drafting a schedule to a subpoena. It is good practice for the practitioner to ask when preparing a schedule to a subpoena, how could these documents inform a fact in issue, or assist resolve a matter of credit? It is the party seeking production that bears the forensic onus in establishing the documents are sought for a legitimate forensic purpose: *Santos Ltd v Pipelines Authority of Australia* (1996) 66 SASR 388.

84. Indeed, in *Principal Registrar of the Supreme Court v Ai Tastan* (1994) 75 A Crim R 498, his Honour Barr AJ (as he then was) said:

'It is the duty of the Court, where the issue is raised, to require the party calling on a subpoena to product documents to identify expressly and precisely the legitimate forensic purpose for which access to documents is sought and to refuse unless such an identification is made.'

85. It helps to have an answer to that question before seeking that the subpoena be issued.

Oppression

86. Even if a schedule to a subpoena is drafted with reasonably particularity and seeks documents with adjectival relevance, it may still be set aside if it is oppressive.

87. A subpoena may be set aside as oppressive if it imposes an unduly onerous burden upon a person to collate and produce documents: *Commissioner for Railways v Small* (1983) 38 SR(NSW) 564.

88. One of the issues relevant to determining whether a subpoena is oppressive is whether the schedule calls for voluminous documents stored in multiple locations. Even if those documents are '*relevant*', their production may not be justified.

89. In *Commissioner of Police v Tuxford & Ors* [2002] NSWCA 139, a subpoena was issued for originals and copies of '*briefing papers*' and other materials held by numerous individual police officers as well as various operational headquarters. The Court set aside the subpoena on many grounds, but relevantly noted:

'No attempt was made, either in the District Court or in this Court, to justify the demand for production of all of the copies of these documents, and on this ground alone, given the numbers of documents involved and the fact that they are or may be located in so many places, means that the subpoena was oppressive.'

90. In considering whether a subpoena is oppressive, the Court will also have regard to the dictates of justice and other matters set out in the ss56-60 of the *Civil Procedure Act 2005* (NSW).

Abuse of Process

91. Seeking to have a subpoena issued with a schedule that lacks sufficient particularity, that does not seek documents that are adjectively relevant or is otherwise oppressive amounts to an abuse of process.
92. A subpoena must not be issued for some other reason than obtaining relevant evidence in the proceedings in which they have been issued: *Botany Bay Instrumentation & Control Pty Limited v Stewart* [1984] 3 NSWLR 98.
93. In addition to the above, it is important that practitioners be aware of the general disclosure restriction that applies to litigants to proceedings. That is, information that is obtained by discovery or subpoena cannot be used for a collateral or ulterior purpose unrelated to the proceedings in which the information is obtained: *Harman v Secretary of State for the Home Department* [1983] 1 AC 280. This is known as the *Harman* undertaking. A breach of the *Harman* undertaking can result in a finding of contempt of court.
94. In general, the undertaking remains in place pending an order releasing the undertaking by the court or the documents are received into evidence in open court. In *Hearne v Street* (2008) 235 CLR 125, Hayne, Heydon and Crennan JJ at [96] said:

'Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specified order of the court, or otherwise, to disclose documents or information, the party obtaining disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.'

95. In *Lemery Holdings Pty Limited v Reliance Financial Services Pty Limited; School Holdings Pty Limited v Dayroll Pty Limited* [2008] NSWSC 1100, a subpoena was issued on a third party, known as 'Bathurst Street Pty Limited', for material that it had received in answer to a subpoena in separate proceedings. In that case, his Honour Barrett J said:

'...It is an abuse to seek, through one process of the court, to compel a person to behave in a way that is inconsistent with an obligation already binding on the person because of another process of the court – at least where the attempt to create a compulsion superior to the existing obligation is made in a way that allows the court to make an assessment of the competing interests and the requirements of justice generally and an informed decision as to which should predominate...'

'The vice in the subpoenas is that they are a process of the court that compels a course of action by Bathurst and Mr Moodie which is contrary to an obligation to which they are already subject by reason of the court's process; and that this conflict has been created without even a request that the court determine that the new compulsion should override the pre-existing

obligation, let alone any considered determination that that should be so. This is an important element of the abuse of process which I have referred. It is not to the point to say that the abuse of process might, in the long run, lead to the same destination as due process under rule 33.13.'

96. It is important that legal practitioners are mindful that a subpoena does not seek production of documents which would undermine some other court or statutory process.
97. Court files should not be subpoenaed. The proper process is to write to the Registrar of the Court holding the file and request access, with an explanation as to why access is required.

Privilege and Public Interest Immunity

98. There are three steps that arise in answering a subpoena. These steps have been conveniently set out in *Waine and Hill v The National Employers Mutual General Assn* [1978] 1 NSWLR 372 as follows:

'Indeed on a correct view there are three steps: the first is obeying the subpoena by the witness bringing the documents to the court and handing them to the judge. This step involves the determination of any objections by the witness to the subpoena. The second step is the decision of the judge concerning preliminary use of the documents, which includes whether or not permissions should be given to a party or parties to inspect the documents. The third step is the admission of evidence being put before the Court by cross-examination or otherwise.'

99. To this point in the paper, it has primarily been concerned with grounds that may be raised as an objection to the first step in the subpoena process, production to the court.
100. In most cases, where a claim for privilege may exist, this will result in an application made during the second stage to restrict access to the material. That is, the party must produce the documents to the court, but then seek orders denying access to all or part of the documents produced.
101. However, practitioners should keep in mind that sometimes a Court will agree to set aside a subpoena on the basis that it violates a public interest immunity.
102. Section 126B of the *Evidence Act 1995 (EA)* is in the following terms:
 - (1) The 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 identify information.

103. Whilst the EA is directed to the admissibility of evidence at a hearing, it is well established that it also guides the scope of permissible compulsory production of documents at an earlier stage.

104. Practitioners should be aware that a subpoena may be liable to being set aside if it seeks production of a protected confidence. In *Goldy v Goldy* (No 2) [2011] FamCA 418, a father sought production of records from Kids' Helpline. IN that case, his Honour Dawe J stated:

'The Court needs to consider carefully both the usefulness of any information that might be obtained from Kids Helpline and the question of the public interest immunity. There is no specific legislation... which would deal with these particular circumstances, but the common law is significant in that the Court should be very wary about issuing subpoenas to an organisation which relies upon its confidentiality for its very existence. The benefit of the services provided by Kids Helpline to the children and young people who use that service is significant.'

105. Public interest immunity is for the benefit of the public and as such, cannot be waived by parties to litigation. A subpoena will be set aside if it is contrary to the maintenance of that immunity.

13 February 2019

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Annexure A: SEPA Form

Form 2 -- Notice when serving subpoena

Note: This form is to be used when serving a subpoena issued by a court or an authority that is addressed to a person who is not in prison, or who is in prison but who does not need to attend or give oral evidence: see paragraph 31(a) of the Act.

[Service and Execution of Process Act 1992](#)

Notice to witness

This notice is very important

Please read it and the attached document or documents very carefully

If you have any trouble understanding them you should get legal advice as soon as possible

Attached to this notice is a subpoena ¹ ("the attached subpoena") that is a subpoena for the purposes of Part 3 of the [Service and Execution of Process Act 1992](#) issued by the [*issuing court or authority*].

Service of the attached subpoena outside [*State or Territory of issue*] is authorised by that Act.

Your rights

You may be able to apply to a court or authority to set aside or obtain other relief in respect of the attached subpoena. If you would like to make an application you should get legal advice as soon as possible.

Your obligations

You must obey the attached subpoena if:

- (a) at the time of service or at some reasonable time before [*date for compliance*] you were offered or given:
 - (i) enough money to meet your reasonable expenses in obeying it, including any travel and accommodation costs; or
 - (ii) a combination of money, travel tickets and vouchers to meet those expenses; and
- (b) either:
 - (i) you received the attached subpoena at least 14 ² days before [*date for compliance*]; or

- (ii) you received the attached subpoena less than 14² days before [*date for compliance*] and you received with the attached subpoena a copy of an order made by [*issuing court or authority*] permitting the attached subpoena to be served at that time.

If the attached subpoena only requires production of documents or things, you may comply with the attached subpoena by delivering the documents or things at least 24 hours before [*date for compliance*] to the Registrar³ of [*issuing court or the court to which the issuing authority belongs*].

This is most important

If you are subject to a restriction on your movements that you might breach if you comply with the attached subpoena, there are some additional actions you must take for your own protection.

The restriction on you could be imposed as:

- (a) conditions of bail; or
- (b) conditional release from prison; or
- (c) conditions of probation; or
- (d) home or periodic detention; or
- (e) a community service order, community based order, attendance order, intensive correction order or work and development order; or
- (f) some other restriction on your movements imposed by law or by order of a court.

If you are under a restriction of that kind, you must, as soon as practicable after you receive the attached subpoena, inform your supervisor of the service of the attached subpoena. If you are on bail, and your bail is subject to a condition that you report periodically to the police, your supervisor is any police officer at the police station at which you are required to report. If you are on bail, and your bail is subject to a condition that you report periodically to a correction service officer, that officer is your supervisor. In any other case, your supervisor is the person who supervises your compliance with the restriction.

Also, you must, as soon as practicable, inform the [*issuing court or authority*] [⁴ and [*person at whose request the subpoena was issued*]] of the restriction to which you are subject.

You must take all reasonable steps to have the restriction varied so that you can comply with the attached subpoena.

If the restriction is not varied, you must inform the [*issuing court or authority*] [⁴ and [*person at whose request the subpoena was issued*]] either:

- (a) of the steps you took to have the restriction varied, and that the restriction has not been varied; or
- (b) that the law does not permit that variation;

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whichever is the case.

¹ If the process to be served is not called a subpoena, substitute the name of the process.

² If the law of the State or Territory requires a longer period than 14 days from the service of a subpoena until the return date, substitute that period.

³ Or "Clerk", as appropriate.

⁴ Include if the subpoena was issued at the request of a person.