



**Land and Environment
Court**
of New South Wales

PRACTICE NOTE

SUBPOENA PRACTICES

Name and commencement of Practice Note

1. This Practice Note is to be known as Practice Note - Subpoena Practices. It commences on 22 July 2020. It replaces the Practice Note – Subpoena Practices made on 7 May 2015.

Application of Practice Note

2. This Practice Note applies to all subpoenas for the production of documents and all notices to produce returnable in court in all classes of jurisdictions of the Land and Environment Court.

Purpose of Practice Note

3. The purpose of this Practice Note is to inform parties and the producing person of new procedures and practices in the Land and Environment Court in relation to:
 - (i) the ability to nominate a convenient return date on the subpoena before filing the subpoena;
 - (ii) the Court's default access orders;
 - (iii) changes to the operation of the return of subpoena list;
 - (iv) the Court's preferred practice in relation to the format of documents being produced in response to a subpoena;
 - (v) the Court's practice in relation to accessing subpoenaed material produced in an electronic format;
 - (vi) the Court's practice in relation to the production of bulky material; and
 - (vii) the Court's practice in returning exhibits and subpoenaed material.

Context

4. The provisions of Part 33 and Part 34 of the *Uniform Civil Procedure Rules 2005* (UCPR) apply to subpoenas and notices to produce issued in the Land and Environment Court, with the following exceptions in Classes 5, 6 and 7 of the Court's jurisdiction:



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- (i) Rules 33.3(1), 33.3(8), 33.6(1) and 33.7 do not apply;
- (ii) Rules 32.3(3), 33.5 and 33.11 do not apply where the issuing party is the Crown; and
- (iii) Rules 34.2 and 34.3 do not apply.

Definitions

5. In this Practice Note:

Default access order means an order allowing general access to all parties. An order for general access includes permission to copy documents.

Issuing party means the party requesting the issue of a subpoena for production.

Producing person means the person to whom a subpoena for production is addressed.

Produced documents means documents produced in answer to a subpoena.

Proposed access order means an order proposed by the Issuing party as to the terms for access to the documents produced in answer to a subpoena.

Return date means the date stated on the subpoena on which the Producing person is required to produce the relevant documents, or any later date to which the subpoena has been adjourned.

Subpoena means a subpoena to produce, a subpoena to give evidence and produce and a notice to produce returnable in court issued under Part 34 of the *Uniform Civil Procedure Rules 2005*.

UCPR means the *Uniform Civil Procedure Rules 2005*.

Issuing a subpoena

6. The Issuing party can nominate a convenient return date for the subpoena on the document filed at the Registry, provided that the date is no sooner than five days after the date the subpoena is issued, sufficient time is allowed to serve the Producing person and a return date has not already been ordered by the Court. The Court has a subpoena list on Tuesday to Friday during the Court term. If the subpoena does not include a nominated return date, the Registry will allocate a date.

Serving the subpoena

7. A copy of the subpoena must be served on all other active parties to the proceedings.



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8. The form of subpoena includes the Producing person's declaration (in relation to whether the documents produced are originals and whether they need to be returned). The Issuing party should provide a copy of the subpoena when it is served so that the Producing person can retain the original subpoena and forward the copy with the completed declaration to the Registry.

Proposed access order

9. A subpoena must include either:
- (i) a Proposed access order for the documents to be produced and the reasons for that order, or
 - (ii) a Default access order.
10. If the Issuing party does not propose an access order then the Default access order will apply. The person to whom the subpoena to produce is addressed must return the subpoena notice and declaration to the Court with the produced items.
11. If the nature of the documents to be produced under the subpoena means that one or more of the parties may be entitled to claim privilege, or seek orders restricting access in relation to all or some of the documents, then the Issuing party must nominate a Proposed access order that provides first access to the party that may be entitled to claim privilege or apply for restricted access. In proceedings where the applicant may be entitled to claim privilege or apply for orders to restrict access, the usual order is: applicant to have access for 7 days then, in the absence of further application, general access to all parties. The terms of the Proposed access order should be amended as appropriate to suit the particular case.
12. The reasons for the Proposed access order should be included in the subpoena or in a covering letter to the Producing party with a copy of such letter to be provided to all other parties and the Court.

Access orders

13. The Court produces a list of all packets produced under subpoena for proceedings that are listed in the return of subpoena list. This list also includes any documents previously produced in the proceedings. The list shows the Proposed access order, and in relation to documents previously produced and where access has been granted, a summary of the access order. This list is



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available in the Registry and is published on the Court's website (on the Court lists page), the afternoon of the business day prior to the Return date.

14. A party cannot access produced documents until the Court has made an order allowing the party to access the documents. Such orders will be made on the Return date.
15. The Court will make an access order on the Return date in relation to:
 - (i) Produced documents that have been produced to the Registry before the close of the business day before the Return date, and
 - (ii) Produced documents that are produced in court on the Return date where the Producing person has no objection to the Proposed access order and no other party appears to object to the Proposed access order.
16. Unless the Court otherwise orders, it will make an order in accordance with the Proposed access order contained in the subpoena. If a Proposed access order has not been included in the subpoena, the Court will make the Default access order.
17. If all the parties agree to the Proposed access order, then there is no need for the parties to attend on the Return date.
18. Any party or the Producing person may object to the Issuing party about the Proposed access order. The Issuing party must notify all other parties of the objection. The Issuing party and the person objecting to the order should all notify the Court of that objection prior to the Return date. Parties who wish to contest the Proposed access order must appear on the Return date and argue the question before the Registrar.

Applications

19. An application by a Producing person for an order for the costs of production may be made on the Return date or, where the costs are not fully known until after the Return date, by notice of motion filed after the Return date. Where the application is made in Class 1, 2, 3, 4 or 8, unless the Court otherwise orders, an order as to costs is not to be made unless the Court is satisfied that the parties concerned have attempted, but failed, to agree on the amount of costs to be paid (UCPR r 42.33).



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20. Contested applications, including applications to set aside subpoenas, that cannot be conveniently dealt with in the return of subpoena list will be listed before a Registrar at a date and time suitable to both the parties and the Court.
21. Any such applications (other than applications referred to in paragraph (19) are to be made by filing a notice of motion with the return date of that motion being the same as the Return date.

Adjournments

22. If some or all of the documents have not been produced by the Return date, or the Producing person and the parties to the proceedings cannot agree as to the terms of an access order or there is a pending application in relation to the subpoena, then the subpoena can be stood-over. Such application can be made with the consent of all parties and the Producing person in Classes 1, 2 (excluding tree disputes), 3, 4 and 8 of the Court's jurisdiction through Online Court or by email in Class 2 tree disputes and Classes 5, 6 and 7 of the Court's jurisdiction to lecourt@justice.nsw.gov.au.
23. In the absence of consent an adjournment is to be sought in the return of subpoena list.
24. Any application via Online Court or email to lecourt@justice.nsw.gov.au should include the following details:
 - (i) case number and name of parties
 - (ii) name of Producing person and Return date, and
 - (iii) Proposed access order.
25. The Issuing party must notify the Producing person and all other active parties to the proceedings of any adjourned Return date.

Production of subpoenaed material

26. A Producing person should produce a copy of documents, unless the subpoena specifically requires the original documents to be produced. The Issuing party should only specify that the original document is required in those special circumstances where the original document may need to be tendered.
27. The Court encourages a Producing person to produce documents to the Court electronically using the eSubpoena platform. Details and information on using



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eSubpoena to produce documents can be found at:
<https://subpoenaresponse.justice.nsw.gov.au/#/> .

Production of bulky or hazardous material

28. The Issuing party should limit the scope of each subpoena to material relevant to the proceedings. There will nevertheless be circumstances where a party legitimately issues a subpoena that will require the production of a large volume of material that cannot conveniently or inexpensively be produced through eSubpoena.
29. Except in circumstances where the Court has made specific directions and prior arrangements have been made with the Registry through lecourt@justice.nsw.gov.au, the Registry will decline to accept subpoenaed material that is:
 - (i) not packed in standard document boxes;
 - (ii) exceeds more than three standard size (Type 3) or six archive sized (Type 1) boxes in volume (or more than one upright trolley load); or
 - (iii) is in any way hazardous.
30. If a Producing person (or their agent) attends the Registry to produce bulky or hazardous material without prior arrangement, that person will be directed to retain the material in their possession until orders are made on the Return date. Specific directions as to the custody of and access to the material will be made at the Return date. In general, access will be given at the Producing person's place of business or wherever the material is normally stored. If the Issuing party requires the Producing person not to retain custody of the material or that the material should be stored at some alternative location this should be specified in the Proposed access order in the subpoena or in any draft access order submitted for consideration.
31. A Producing person producing bulky or hazardous material may comply with a subpoena by sending a letter to the Registry and providing a copy to the Issuing party listing the material that they are producing and confirming that the Producing person will comply with any directions of the Court in relation to that material.
32. If an Issuing party knows or expects that the material being subpoenaed will be bulky or hazardous they must bring the provisions of this Practice Note to the attention of the Producing person.



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Accessing subpoenaed material produced by eSubpoena

33. Parties granted access to documents produced through the eSubpoena portal will be sent an email with a link to those documents.

Accessing subpoenaed documents produced in hard copy format (including by electronic storage device)

34. Access to hard copy documents produced under subpoena will continue to be provided in the current manner.
35. If an unrestricted order for access is made in relation to subpoenaed material that has been produced using an electronic storage device, then the party applying for access should provide a USB or other storage device onto which a copy can be made by the party accessing the document.

Tendering subpoenaed material originally produced in an electronic format

36. If directions have not been made to allow the tendering of documents at the hearing in an electronic format, then it is the responsibility of the party intending to tender a document that was originally provided to the Registry in an electronic format to provide a printed copy of the document to the Court at the hearing, or to make arrangements for the relevant technology to be available so that the document can be viewed. This requirement may be achieved by including the document in a tender bundle.

Returning exhibits and produced documents

37. The UCPR (rr 31.16A and 33.10) require the Court to retain exhibits and subpoenaed material for specified time frames after the determination of the proceedings, unless the Court makes a specific order for the return of this material at an earlier date.
38. The Court's usual practice in relation to exhibits and subpoenaed material will be an order when the proceedings are determined that the exhibits and subpoenaed material be returned forthwith. The Court will not retain this material, unless there is an order by the judge or commissioner that it is to remain on the Court file.
39. Subpoenaed documents on an electronic storage device will not be returned to



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the Producing person and the device will be destroyed by the Registry unless the Producing person has specifically requested that the device be returned to them.

40. In relation to any exhibits that are returned, those exhibits must be retained intact by the party, or person, that produced the material until the expiry of the time to file an appeal, or until any appeal has been determined. Solicitors should notify their clients of their obligations in relation to this material if it is returned to the clients. If an appeal is filed, the party or persons may be asked to produce the material to the relevant court for the purposes of the appeal, however, generally copies held by the appellant can be used for preparing the appeal books.

***The Honourable Justice Brian J Preston
Chief Judge
Date: 21 July 2020***