

## Article Information

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## Subpoenas - what you need to know

**Florian Ammer, Partner and Brendan May, Associate, provide an overview of the key things you need to know about subpoenas in NSW and how they work.**

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Have you been served with a subpoena? Are you considering serving one yourself?

**Florian Ammer, Partner and Brendan May, Associate,** provide an overview of the key things you need to know about subpoenas in NSW and how they work.

### What is a subpoena?

A subpoena is a written order issued by a court, on the request of a party involved in court proceedings, to a *third party* (i.e. a party not involved in the proceedings) as a way of obtaining evidence for use in those proceedings. A subpoena can take one of three forms:

- a subpoena to produce a document or thing; or
- a subpoena to attend court to give evidence; or
- a subpoena to both produce a document or thing *and* attend court to give evidence.

The party who issues the subpoena is known as the *issuing party*. The person who receives the subpoena is known as the *addressee* or *recipient*. To be valid, a subpoena must be personally served on the addressee (or, in the case of a company, on its registered office)[\[1\]](#) and within prescribed timeframe (no later than the date falling 5 business days before the earliest date on which compliance is required). If the subpoena is served outside the jurisdiction of the place of issue, it must also include a notice (Form 2) under the *Service and Execution of Process Act 1992* (Cth) and must be served no less than 14 days before the date on which compliance is required.

### Who can issue a subpoena?

Only a party to proceedings can issue a subpoena. If the party is not represented by a solicitor in the proceedings, or if the proceedings are in the Federal Court or the small claims division of the Local Court, leave of the court is required.[\[2\]](#) Depending on what jurisdiction you are in, different States and different courts may have slightly different rules, and these should be considered by any party to court proceedings when issuing a subpoena.

### Do you have to comply with a subpoena?

Failure to comply with a subpoena without lawful excuse constitutes contempt of court.[\[3\]](#) Deliberate disobedience can even result in a person's arrest. A person who fails to comply with a subpoena may also be liable in costs and damages to the issuing party.

However there are many lawful reasons why a subpoena recipient would not comply with a subpoena. For example, a subpoena recipient does not need to comply with the requirements of a subpoena unless it is served on or before the date specified in the subpoena as the last date for service of the subpoena (as noted above). Or, if the subpoena requires attendance by the recipient at court but no 'conduct money' for their attendance has been provided to the recipient within a reasonable time before the date on which attendance is required, the recipient need not comply.[\[4\]](#) Alternatively, where the subpoena requires the recipient to produce documents or things, there may be grounds to have the subpoena set aside, as discussed below.

## **How can a subpoena be set aside?**

A court will always endeavour to ensure that only relevant evidence that has a role to play in resolving the proceedings is made available to the parties engaged in the litigation and to the court. Accordingly, a court has power to set aside a subpoena (in whole or in part) on a number of grounds. If it is set aside, compliance will not be necessary and the issuing party can be liable to pay the costs of the recipient.

For a subpoena to produce documents, the subpoena must firstly be issued for a legitimate and proper purpose, being for the purposes of current litigation, and not for some collateral or private purpose.[\[5\]](#)

Next, the material sought under the subpoena must be relevant to the proceedings – if the material sought bears no apparent relevance to the proceedings then it is liable to be set aside as an abuse of the court’s process.[\[6\]](#) Importantly, the material sought must be relevant to the party’s case *as that case is pleaded*.

The test for determining relevance is commonly cited as whether it is “on the cards” that the information sought will assist the party’s case,[\[7\]](#) or that it will “materially assist on an identified issue”.[\[8\]](#) This is the case even if the document sought is ultimately not admissible.[\[9\]](#) If the subpoena calls for a large amount of documents, not all of which are relevant to the party’s case in the proceedings, it may be set aside (in whole or in part) as an abuse of process.[\[10\]](#)

The subpoena should also specify the documents or things it seeks with ‘reasonable particularity’.[\[11\]](#) It cannot seek broad categories of documents generally, or require the recipient to decide for themselves what documents are relevant and what documents are not. Such a broad subpoena has often been described as a ‘fishing expedition’, in that the subpoena is being used by a party not to ascertain information relevant to the case, but to discover whether that party has a case *at all*. Such a subpoena is impermissible and liable to be set aside.

A subpoena can also be set aside if it is *oppressive*, where compliance with it would mean the subpoena recipient is forced to engage in an unduly burdensome or expensive exercise.[\[12\]](#) For this to be found, a court will consider all the relevant circumstances, including the scope of the subpoena, the number and nature of the documents sought and the expense and effort that would be incurred by the subpoena recipient if they were to comply.

## **What if the documents sought are confidential?**

The fact that documents or information sought under subpoena are confidential, commercially sensitive or comprise personal information does not mean that the subpoena may be set aside. However, it does mean that a court should more closely scrutinise the subpoena to ensure that the material sought by it is relevant to the case and not oppressive in any way.[\[13\]](#) This is particularly so if the confidentiality in issue is that of a third party.[\[14\]](#) If a party seeking to have the subpoena set aside fails to have the subpoena set aside but still wishes to preserve the confidential nature of the material, it is best to seek confidentiality/ restricted access orders from the court, or leave from the court to mask or redact irrelevant and/or confidential information.[\[15\]](#)

However, if the documents attract legal professional privilege then this will make them exempt from disclosure (but will still need to be produced to the Court). Legal professional privilege applies to documents created for the dominant purpose of seeking or being provided with legal advice by a lawyer, or for the purpose of current or anticipated litigation.

## **What if you are not the recipient, but still want to have the subpoena set aside?**

Even if you are not the recipient of the subpoena, you can still apply to the court to have the subpoena set aside if you have a *sufficient interest* in the material sought by the subpoena. The subpoena can be set aside on the same grounds as discussed above.[\[16\]](#) For example, if you are a company, and a subpoena is issued to one of your suppliers for their contracts with you, you would have a sufficient interest in the material sought by the subpoena. The categories of people who have a sufficient interest are not closed, and courts have held that any person whose legal rights will be interfered with by the execution of the subpoena is deemed to have a sufficient interest.[\[17\]](#)

## **What about the costs of compliance?**

A court has the power to order the issuing party to pay the amount of any reasonable loss or expense incurred by the recipient in complying with the subpoena.[\[18\]](#) The reasonable expenses of the recipient can include the cost of legal advice relating to the validity of the subpoena and whether the documents sought are subject to legal professional privilege.[\[19\]](#) The usual rule is that the issue of the recipient’s costs of compliance is dealt with *after* the subpoena has been complied with. If an application is made to set aside a subpoena and the application is successful, the applicant is also usually entitled to an order that the issuing party pay its costs of the application (but the converse also applies).

## **Conclusion**

A subpoena is a powerful and essential tool used by parties engaged in court proceedings. It allows for evidence to be gathered and put before the court to assist in the proper and timely determination of the proceedings. A party complying with a subpoena will want to ensure they have complied correctly with court processes, while a party wishing to have a subpoena set aside will need to be careful not to expose themselves to adverse costs orders if they are unsuccessful. Whether you have been issued with a subpoena, want to issue a subpoena or want to have a subpoena set aside, it is important to obtain legal advice.

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[1] See *Uniform Civil Procedure Rules 2005* (NSW)(**UCPR**) rule 33.5; also section 109X(1)(a) of the *Corporations Act 2001* (Cth).

[2] See UCPR regulation 7.3 and rule 24.01(1) of the *Federal Court Rules 2011* (Cth).

[3] UCPR regulation 33.12.

[4] UCPR regulation 33.6.

[5] *National Employers Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372.

[6] *Trade Practices Commission v Arnotts Ltd (No 2)* (1989) 88 ALR 90.

[7] *Alister v R* (1983) 154 CLR 404.

[8] *Icap Australia Pty Ltd v Bfc Partners (Australia) Pty Ltd* [2009] NSWCA 307.

[9] *Drivetime Radio Australia Pty Ltd v Pivotal Creative Solutions Pty Ltd Trading As Broadcast Gp* [2010] NSWSC 763 (**Drivetime**)

[10] *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564.

[11] *Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 921 at 926.

[12] *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564.

[13] *In the Matter of North Coast Transit Pty Ltd* [2013] NSWSC 1912.

[14] See *Drivetime*, supra at 7.

[15] *Grace v Grace (No 8)* [2014] NSWSC 419.

[16] UCPR regulation 33.4.

[17] *Hunt v Russell; Schultz v Russell* (1995) 63 SASR 402.

[18] UCPR regulation 33.11.

[19] *Ann Street Mezzanine Pty Ltd (in liq) v Beck* [2013] FCA 960.