



**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 7 May 2015. It replaces the Practice Note – Subpoena Practices made on 18 December 2014.

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.

The new procedures are similar to the procedure used in the Supreme Court of New South Wales.

Context

4. The provisions of Part 33 and Part 34 of the *Uniform Civil Procedure Rules 2005* apply to subpoenas and notices to produce issued in the Land and



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

Environment Court, with the following exceptions in Classes 5, 6 and 7 of the Court's jurisdiction:

- (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.

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 at 9.00am during the Court term. If the subpoena does not include a nominated return date, the Registry will allocate a date.



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

Serving the subpoena

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



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

Access Orders

13. The Court produces a list of all documents 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 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 of the subpoena.
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 in relation to the subpoenaed material.
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.



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

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).
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 party by eCourt or by email to lecourt@agd.nsw.gov.au or, in the absence of consent, in the return of subpoena list.
23. Any application via eCourt or email to lecourt@agd.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.
24. The Issuing party must notify the Producing person and all other active parties to the proceedings of any adjourned return date.



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

Production of subpoenaed material

25. 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.
26. The Court encourages a Producing person to produce documents to the Court in electronic format particularly where to do so is more convenient and less costly for the Producing person.
27. To facilitate the production of subpoenaed documents electronically (rather than paper copies), the Issuing party should indicate to the Producing person that production in an electronic format is acceptable. This should particularly be done where a large volume of material is being subpoenaed. This information for the Producing person can be included in the subpoena in the schedule describing the documents to be produced. It can also be included in a covering letter.
28. If a document has been scanned, or is a word processing document, a photograph or an image, a copy of the document should be saved as, or converted to, a PDF file. Generally it will be sufficient for emails to be provided in a PDF file.
29. If the material is in an electronic format that cannot be conveniently saved as a PDF file, such as a database, or a sound or video recording, it is appropriate for a copy of the document to be provided in the original electronic format. If the original format is not a current or common format then the Issuing party should also consider whether a copy in some other electronic format should also be asked for, so that it can be readily accessed by the parties and the Court.
30. Documents produced electronically can be provided on a DVD, a CD or a USB device.
31. The Court's preferred option is for documents that are to be produced electronically to be emailed to the Registry at Lecsubpoenas@agd.nsw.gov.au provided that a scanned copy of the subpoena is also attached to the email.



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

The subject line of the email should state “Producing subpoenaed documents” and include the case name and number.

Production of bulky or hazardous material

32. The party issuing subpoenas 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 in an electronic format.
33. Except in circumstances where the Court has made specific directions and prior arrangements have been made through lecsubpoenas@agd.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.
34. If a Producing person or their agent attends the Registry to produce bulky or hazardous material without prior arrangements, that person will be directed to retain the material in their possession until orders are made on the Return date of the subpoena. Specific directions as to the custody of and access to the material will be made at the Return date of the subpoena. 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 that the Producing person does not 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 appearing on the issued subpoena or in any draft access order submitted for consideration.
35. 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.



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

36. 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.

Accessing subpoenaed material produced in an electronic format

37. If an unrestricted order for access is made in relation to subpoenaed material that has been produced in an electronic format, then on application by a party entitled to access that material, an electronic copy of the material will be made and provided by the Registry.
38. The party applying for access should provide a blank DVD, CD or USB device onto which the copy can be made by the party accessing the document. In the alternative, upon request, the Registry may provide access to the material by sending an email attaching the material to the party applying for access.

Accessing subpoenaed documents produced in hard copy format

39. Access to documents produced under subpoena in a non-electronic format will continue to be provided in the current manner.

Tendering subpoenaed material originally produced in an electronic format

40. 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

41. The UCPR (rules 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.
42. The Court's usual practice in relation to exhibits and subpoenaed material will now be an order when the proceedings are determined that the exhibits and



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

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.

43. Subpoenaed documents in an electronic format (produced on a DVD, a CD or a USB device, or emailed to the Court) that have been identified as copies, will not be returned to the Producing person and will be destroyed (or deleted) by the Registry unless the Producing person has specifically requested that they be returned to them.
44. 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: 7 May 2015***