

Policy

Subpoenas

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Subpoenas

Policy Statement

This policy provides a framework for the effective and timely management when dealing with the receipt of a subpoena served on Council or an employee of Council.

This Policy sets out Council's principles in relation to the recovery of all "reasonable costs" that are incurred by Council in complying with the terms of the subpoena.

Principles

Council is accountable to the public for the management of public funds. It is essential for Council to account for its funds and to recover any lawfully owed funds due for services provided in a timely and transparent manner.

Guidelines

Uniform Civil Procedure Rules 2005 - Reg 33.6

Compliance with subpoena

33.6 Compliance with subpoena

- (1) An addressee need not comply with the requirements of a subpoena to attend to give evidence unless conduct money has been handed or tendered to the addressee a reasonable time before the date on which attendance is required.
- (2) An addressee need not 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.
- (3) Despite rule 33.5 (1), an addressee must comply with the requirements of a subpoena even if it has not been 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.
- (4) The addressee must comply with a subpoena to produce:
 - (a) by attending at the date, time and place specified for production and producing the subpoena or a copy of it and the document or thing to the court or to the person authorised to take evidence in the proceeding as permitted by the court, or
 - (b) by delivering or sending the subpoena or a copy of it and the document or thing to the registrar at the address specified for the purpose in the subpoena, so that they are received not less than 2 clear days before the date specified in the subpoena for attendance and production.
- (5) In the case of a subpoena that is both a subpoena to attend to give evidence and a subpoena to produce, production of the subpoena or a copy of it and of the

document or thing in any of the ways permitted by subrule (4) does not discharge the addressee from the obligation to attend to give evidence.

- (6) Unless a subpoena specifically requires the production of the original, the addressee may produce a copy of any document required to be produced by the subpoena.
- (7) The copy of a document may be:
 - (a) a photocopy, or
 - (b) in any electronic form that the issuing party has indicated will be acceptable.

Costs and expenses of compliance

33.11 Costs and expenses of compliance

- (1) The court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena.
- (2) If an order is made under subrule (1), the court must fix the amount or direct that it be fixed in accordance with the court's usual procedure in relation to costs.
- (3) An amount fixed under this rule is separate from and in addition to:
 - (a) any conduct money paid to the addressee, and
 - (b) any witness expenses payable to the addressee.

Validity of Subpoena

Council will check the validity of a subpoena before processing to ensure that the subpoena was taken out by a solicitor, or if the applicant is unrepresented, that the applicant has obtained leave from the court to take out the subpoena.

Should there be any uncertainty Council must verify the validity of the subpoena with the appropriate court, prior to any documents being marshalled.

The issuing party will be advised within two business days of confirmation of validity that the subpoena will be actioned.

Uniform Civil Procedure Rules 2005 - Reg 7.3

Issue of subpoena in certain circumstances requires leave

7.3 Issue of subpoena in certain circumstances requires leave

- (1) A subpoena may not be issued, except by leave of the court, unless the party at whose request the subpoena is to be issued is represented by a solicitor in the proceedings.
- (2) Leave under subrule (1) may be given either generally or in relation to a particular subpoena or subpoenas.

- (3) Despite subrule (1), a subpoena may not be issued in relation to proceedings in the Small Claims Division of the Local Court, except by leave of the court, in any circumstances.

Conduct Money

Payment for conduct money will be sought in advance from the issuing party. Council will apply its advertised fee and charge for conduct money, based on flights, where applicable, travel, including accommodation and council officer salary. Council will advise the issuing party in writing, including an invoice and notify the nominated court of its estimated reasonable expenses, however it should be noted that the claim can be challenged in the nominated court.

What if the conduct money is inadequate?

If there is a refusal to provide conduct money, or it is considered insufficient, Council will contact the issuing party and negotiate the applicable fees.

If the conduct money is not agreed through negotiation, the subpoena will not be complied with and Council will advise the nominated court (and copied to the issuing party) stating the reason for not complying with the subpoena.

Uniform Civil Procedure Rule 33.11 Costs and expenses of compliance

Loss or Expense of Compliance - Advice to Issuing Party that Council will be seeking payment

The issuing party will be advised by Council within two business days of acceptance of a valid subpoena that it could be seeking payment (in addition to conduct money where applicable) for any loss or expense in compliance with the subpoena, with this advice including information on the adopted hourly processing fee, photocopying charges and actual postage cost where applicable.

Loss or Expense of Compliance - Advice to Issuing Party of estimate of cost of subpoena compliance

Council will advise the issuing party within four business days of acceptance of a valid subpoena, that it will be seeking payment (in addition to conduct money where applicable) with an estimate of the cost of the expense in complying with the subpoena and requesting the issuing party's written agreement within two business days to meet these costs.

Extension of Time to Comply with the Subpoena

Within five business days of acceptance of the subpoena, should Council require additional time to comply with the subpoena by the return date, the Council Officer managing the subpoena will notify the issuing party that it is unable to produce the requested documents by the return date. The two parties will endeavour to mutually agree on a date for Council to produce the documents to the nominated court. This agreement will also include who will apply to the nominated court for a revised date for production of the subpoena documents.

Uniform Civil Procedure Rules 2005 - Reg 33.9

On what grounds can a subpoena be challenged?

The subpoena is too wide and/or oppressive

A subpoena may be set aside:

- (1) Where its terms are so wide and insufficiently precise that compliance (ie collation and production of documents) would impose an onerous obligation on Council; or
- (2) Where a subpoena is used for the purpose of 'fishing' for information that a party hopes, but does not reasonably expect is in existence. The subpoena may also be oppressive if it is not clear what documents are sought by a subpoena, or if it appears that the documents sought will have little or no relevance to issues in the proceedings.

The scope of a subpoena can be narrowed in two ways:

- (a) By agreement with the issuing party; or
- (b) By successfully challenging the subpoena in court, if the scope of the subpoena is too broad and calls for documents to be produced which are demonstrably not relevant to the proceedings, an option available is to approach the issuing party, with a view to seeking a compromise on the range of documents that are required. If a compromise is reached, written confirmation should be obtained from the issuing party. If the issuing party refuses to negotiate the scope of the subpoena Council will challenge the subpoena on the basis that it is an abuse of process or oppressive.

The subpoena is an abuse of process or lacks a legitimate forensic purpose

A subpoena that has been issued for reasons other than for the purpose of obtaining relevant evidence for the proceedings may be set aside. The issuing party must have an objective basis for demonstrating a real possibility that the subpoenaed material would assist their court action, only documents that have a legitimate forensic purpose need to be produced.

Other Court Ruling References

- Federal Court - Part 24 of the Federal Court Rules 2011
- Supreme Court - Section 42A.07 - Supreme Court (General Civil Procedure) Rules 2005

Public interest immunity

Where the public interest that would be served by withholding certain documents is so strong that it overrides the public interest in the following of due process, a subpoena may be set aside. A challenge on this basis applies only to very limited types of documents and will usually only be available to documents, which may affect national security, the workings of the NSW Cabinet or some other extraordinary public interest.

Production of Subpoena Documents

Council will comply with the subpoena by producing the documents to the nominated court by the return date. Where payment has not been received by Council, prior to the documents being produced to court, Council will advise the nominated court registrar, with a copy to the issuing party, that at the time of sending the documents the issuing party has not paid Council's loss or expense in complying with the subpoena and accordingly request that the nominated court withhold release of the documents until Council's claim has been paid or a cost order issued by the nominated court.

If documents are released to the issuing party by the nominated court prior to the reasonable expenses being paid or a cost order being granted, then Council will lodge a Notice of Motion with the nominated court seeking an Order in respect of its costs.

Definitions

"**addressee**" means the person who is the subject of the order expressed in a subpoena.

"**conduct money**" means a sum of money or its equivalent, such as pre-paid travel, sufficient to meet the reasonable expenses of the addressee of attending court as required by the subpoena and returning after so attending.

"**issuing officer**" means an officer of the court who is empowered to issue a subpoena on behalf of the court.

"**issuing party**" means the party at whose request a subpoena is issued.

"**marshall**" in relation to a subpoena is the act of producing documentary material to be placed before the courts.

"**registrar**", in relation to proceedings in respect of which a subpoena is sought or issued, means:

- (a) in relation to the Supreme Court, the principal registrar, and,
- (a1) in relation to the Industrial Court, the industrial registrar referred to in section 207 of the *Industrial Relations Act 1996* , and
- (b) in relation to the District Court:
 - (i) the principal registrar, or
 - (ii) the registrar of the District Court for the proclaimed place (within the meaning of the *District Court Act 1973*) where the subpoena was issued, or where the subpoena is returnable, whichever is applicable, and
- (c) in relation to the Local Court, the registrar of the Local Court for the venue where the subpoena was issued.

"**subpoena**" means:

- (1) an order in writing requiring the addressee:
 - (a) to attend to give evidence, or
 - (b) to produce the subpoena or a copy of it and a document or thing, or
 - (c) to do both of those things, and includes a summons to that effect under section 165 of the *Industrial Relations Act 1996* .
- (2) To the extent that a subpoena requires the addressee to attend to give evidence, it is called a "subpoena to attend to give evidence".
- (3) To the extent that a subpoena requires the addressee to produce the subpoena or a copy of it and a document or thing, it is called a "subpoena to produce".

"**solicitor**" is a reference to a legal practitioner who practises as a solicitor

Version History

Version #	Summary of changes made	Date changes made
1.0	Policy created.	