

Responding to a subpoena

Legal information for community organisations

This fact sheet covers:

- ▶ terms used
- ▶ what is a subpoena?
- ▶ subpoena to produce documents
- ▶ subpoena to attend
- ▶ contacting the court or tribunal



Disclaimer

This fact sheet provides general information about responding to a subpoena. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

There are many different courts and tribunals in Australia and each has its own different rules for dealing with subpoenas. This fact sheet is therefore a general guide only.

Terms used

Some of the terminology used in this fact sheet may be unfamiliar, so we have explained these terms below.

Court or tribunal rules

A court is where judges decide a range of factual and legal issues, while a tribunal focuses on specific areas and is usually less formal and quicker.

Each court or tribunal has its own set of rules regulating and prescribing the practice and procedure to be followed in proceedings in that court or tribunal. They can usually be found online at the relevant court or tribunal website. If you are having trouble locating these rules or regulations you can contact the relevant court or tribunal. Alternatively you can locate all Australian rules or regulations (and legislation) at [Austlii](#).

Court order

A command or direction issued by a court or tribunal requiring a person, business, organisation or corporation to do or not do something. A subpoena is a court order requiring attendance or production by the recipient.



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| Issuer of the subpoena | This is the party to the legal proceeding that filed the subpoena with the court and is seeking to compel the subpoena recipient to attend the court or tribunal to give evidence, produce documents or things, or both. The contact details for the issuer will appear on the subpoena document – often this will be the lawyer for the party. Where there is a lawyer listed, you should speak to them, not to the party themselves. |
| Party or parties | The people, businesses, organisations, corporations or other legal entities directly involved in the court proceedings. Generally, the name of the parties will be used to give a title to the court proceedings (sometimes referred to as the 'Title of proceedings') which you can generally find at the front of the subpoena document. Being served with a subpoena does not make you a party to the proceedings. |
| Proceeding or proceedings | A word used to describe an action taken in a court or tribunal. |
| Produce or produced | Another word for provide or supply. |
| Subpoena recipient | A person, business, organisation, corporation or other legal entity served with a subpoena who is required to attend the court or tribunal to give evidence, produce documents or things, or both. |
| Service or served | Service is a term used to describe the various methods of delivering certain legal documents to a person, business organisation, corporation or other legal entity. When service has been effected, that person has been 'served'. |
| Privilege | A legal right to withhold certain information from being provided because the information is sensitive or confidential This includes client-lawyer and doctor-patient privilege. |



What is a subpoena?

A subpoena is an order issued by a court or tribunal in response to a request by a party to a civil or criminal proceeding requiring the subpoena recipient to attend that court or tribunal to give evidence, or to produce a document or thing within that other person's possession, or both.

The subpoena recipient is not a party to the proceeding.

Parties often issue subpoenas to gather evidence for their case (ie. it's often an information gathering activity).

A subpoena can be issued on third parties or on a party to a proceeding. Being served with a subpoena does not make you a party to the proceedings.

A subpoena is a court order that requires the recipient to:

- attend the court or tribunal as a witness – a 'subpoena to attend'
- produce certain documents or things to the court or tribunal – a 'subpoena to produce'
- both – a 'subpoena to produce and to attend'

**Note**

A 'subpoena' may be known as a different name depending on the court or tribunal it is issued out of such as a 'witness summons' or a 'third party notice for production'.

In this fact sheet, we use the term 'subpoena' as it is the most common name, but these principles still apply to other documents with different names that operate in the same manner as a subpoena.

**Caution**

Failure to comply with a subpoena without a lawful excuse is a contempt of court and the person can be punished, including by being fined or (in rare cases) imprisoned.

**Tip**

A subpoena is different from a search warrant. A search warrant is also a court order, but it lawfully permits authorities to enter and search your property or premises.



For more information, see the [Legal Aid New South Wales webpage Step by step guide – Subpoenas](#), which includes subpoena samples.

Is the subpoena valid?

Check the following subpoena details:

Does the subpoena have a 'filed' stamp showing the date it was filed?

A filed stamp or cover page is proof that the document was issued by the court or tribunal. If there is any doubt, contact the court or tribunal and ask them to confirm that the subpoena was filed and issued.

If they have no record of the subpoena, don't comply with it and contact the party that issued the subpoena to let them know that you will not be complying with the subpoena as the court or tribunal has no record of it. It's preferable that this contact is made in writing (for example, by email) so you have a written record, if needed at a later date.

Did you receive the subpoena before the 'last date for service'?

The last date for service will be stated in the subpoena document.

If you didn't receive the subpoena by this date and you don't think you can comply with the subpoena by the return date, you can ask the issuing party to obtain an extension of the return date (which is the date by which you must comply with the



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| | <p>subpoena) from the court. Alternatively, if there is no issue with you complying by the return date, you should do so.</p> <p>See 'When do I have to comply with the subpoena', below.</p> |
| <p>Was the subpoena served in accordance with the court or tribunal rules?</p> | <p>Each court or tribunal has its own set of rules for service, for example rules on how the subpoena is to be delivered to the person (such as – being handed to the person personally, left at the premises, or posted).</p> <p>If there is an issue with the service of the subpoena, you can raise this with the issuer. Alternatively if there is no issue with you complying by the return date, you should do so.</p> |
| <p>Were you provided with 'conduct money' (payment to cover your costs of complying with the subpoena)?</p> | <p>The standard is usually to cover 'reasonable expenses' and is generally between \$30 and \$50, but this varies. For example, conduct money may reimburse expenses like travel costs or lost wages incurred while complying with the subpoena.</p> <p>Conduct money is generally provided at the time the subpoena is served on the recipient.</p> <p>In some circumstances a subpoena recipient is not excused from complying just because conduct money has not paid, so if there is any issue with the conduct money, including if it is not provided, you should raise this with the issuer of the subpoena before the return date.</p> |

If any of these points are an issue, seek legal advice.

Subpoena to produce documents

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| <p>When do I have to comply with the subpoena?</p> | <p>The date that the documents need to be produced is referred to in the subpoena as a 'return date'. The documents need to be produced to the court or tribunal for its records at the address specified in the subpoena, not to the party that issued the subpoena.</p> <p>If you need more time to produce the documents (for example, if there are a large number of them, or they are stored off-site), contact the issuer of the subpoena so that a joint request can be made to the court or tribunal for a new return date. Alternatively you or a lawyer can appear at the court or tribunal on the return date and ask for a new return date. You may need to provide an explanation.</p> <p>If you have missed the return date or a deadline you can contact the issuer of the subpoena to obtain a new return date in the same way.</p> |
| <p>The subpoena schedule</p> | <p>A subpoena to produce will have a 'schedule' listing the documents to produce. You only need to produce documents that are in your (or your organisation's) possession or control (ie. you don't have to ask other people for documents that you don't have).</p> <p>Before producing the documents you should consider whether you need to inform anyone that you are disclosing the documents. For example, you may have a contract with someone which states that you will obtain their consent before producing documents or you may have privacy obligations under the law.</p> <p>You are entitled to consult with people in your organisation about the subpoena or those whose rights or privacy may be affected by the production of the documents. You can object to providing certain information for confidentiality reasons if the information is not relevant to the subpoena.</p> |



Most legal proceedings are open to the public so unless the proceedings are subject to a non-publication order or are closed, which the subpoena issuer should be able to tell you, you are permitted to discuss the subpoena with others.

If you are able to produce the requested documents by the return date at a reasonable cost and have no objections then you should do so.

If you have conducted all reasonable searches and have not located any documents in your possession or control falling within the subpoena schedule, you should still produce a copy of the subpoena and complete any subpoena declarations. You can include a covering letter to the court stating that you do not have any of the relevant documents in your possession or control.

Objections to producing documents

Valid objections to producing documents include:

- producing all the requested documents would be very onerous and time consuming for you (if that is the case, you can apply to the court to have the subpoena set aside or negotiate an amended schedule or return date, or additional compliance costs)
- the scope of the subpoena is too broad or may require you to decide for yourself what kind of documents would be relevant or not, and
- privilege, public interest immunity or confidentiality

Examples of production requests that might be successfully contested include if the subpoena schedule asks you to produce:

- *all correspondence or documents regarding the person A for the past 10 years*
- *all ledgers, journals, invoices, statements, or other financial records of the corporation*
- *all agreements and contracts between party A and party B, or*
- *all communication between party A and their solicitor*

That is because a subpoena must clearly specify the documents required and the relevant period. Broad requests can be likened to a fishing expedition calling for everything in sight without regard to actual or potential relevance. It would also be very time-consuming and difficult to gather everything. In that case, the judge will need to decide what, if anything, you must produce.

Examples of production requests that might **not** be successfully contested include if the schedule asks you to produce:

- *a copy of internal policies related to conflict of interest as they were in effect from 1 January 2023 to 1 January 2024*
- *the membership record, including membership status and type, for member A from 1 June 2022 to 1 June 2023, or*
- *all correspondence sent by party A and received by party B from 1 January 2023 to date related to the contract between party A and party B dated 1 April 2023*

That is because these requests are specific and relevant to a particular issue. If you have to think about whether a document falls within the request and there is some ambiguity, the subpoena might be too broad or not-well defined.

Claims for 'privilege' can potentially be made over documents containing communications with lawyers or content relating to past or present legal proceedings. Speak with the lawyers referred to in the communications. If you think there may be public interest or confidentiality issues, you may also have grounds for objection.

These issues can involve complex technical legal issues, so consider seeking legal advice if you think you should object to production. See below for information on what to do with documents that you object to producing.



Producing the documents

If you have gathered the documents or things to be produced you can:

- attend the court or tribunal on the return date and hand them over to the court, or
- send them to the court or tribunal within the timeframe indicated on the subpoena.

If you prefer to send the documents or things to the court or tribunal, place them in an envelope labelled with the proceedings number, party details, subpoena recipient details and words such as 'Documents produced under subpoena by [INSERT]'. Include your contact details on the envelope. You should send them by registered post, or another method providing tracking information and signature on delivery. This cost could form part of any costs you seek for compliance (see below).

Some courts or tribunals offer the option for documents to be produced electronically, which can be helpful if you have to produce electronic records, such as emails. Contact the court or tribunal for further information.

If there are documents that you object to producing such as privileged documents, they still need to be produced to the court but you should put them in a separate envelope to any documents you do not object to producing.

So that it's clear that there is an objection to the production of those documents, the envelope should be marked with:

- the proceedings number
- party details
- subpoena recipient details
- that the documents are privileged, by writing something such as 'PRIVILEGED AND CONFIDENTIAL', and
- your contact details

You should also prepare a list of the documents that you object to producing and the reasons why, because the parties are entitled to know what the documents are generally and the basis of your objections (for example, grounds of privilege). They may ask you for further information, or they may consent to or oppose your objections.

Check if the subpoena is asking for original documents and if not, keep the originals and produce copies. However – if you send original documents, keep a copy. If you want the documents to be returned to you after the proceedings are concluded, most subpoenas have an option for you to ask for this to happen.

Make sure you complete any declarations contained in the subpoena.

Costs of compliance

In some circumstances a subpoena recipient may have their reasonable costs of compliance paid in addition to the conduct money. Keep a copy of any expenses incurred in attending court for reimbursement. You can raise this with the issuer of the subpoena and should do so as early as possible.

Most courts and tribunals also give you the option of making an application to the court for your costs to be reimbursed if you cannot resolve your compliance costs with the issuer.



Subpoena to attend

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| When do I have to comply with the subpoena? | <p>For this kind of subpoena the 'return date' is when the person named in the subpoena is required to attend the court or tribunal to give evidence as a witness under oath or affirmation (a legally binding promise to tell the truth). The witness will be required to answer questions asked by the parties' lawyers about issues relevant to the proceeding.</p> <p>On average a witness will not be required for longer than a day or two, but it can take longer depending on the case. The return date is usually the first day of the hearing and the witness may not be required on that day, but they will need to be available to attend court for the duration of the hearing or until they are excused by the court.</p> <p>You can contact the party that requested the subpoena to see if you can get an estimate of how long you will need to attend court and which days you will need to attend.</p> |
| What should I do when attending court? | <p>A witness attending a hearing should ensure that they are punctual and dress appropriately. When giving evidence, make sure you listen carefully to the questions you are asked. If you don't understand a question or a word, say so. Evidence given in a court or tribunal is recorded and provided to the parties. You can be subject to a penalty if you lie under oath or affirmation. The lawyer for the issuing party can provide you with any further information you need.</p> |
| What if I can't attend court on the date specified in the subpoena? | <p>If there are circumstances preventing your attendance (for example, if you are going to be overseas or you are unwell), contact the issuing party promptly as a first step. You can contact the court or tribunal for further information but you should not ignore the subpoena.</p> |
| Costs of compliance | <p>The witness may be entitled to have their reasonable costs of compliance paid (for example transport and accommodation expenses) in addition to the conduct money. Keep a copy of any expenses incurred in attending court for reimbursement. Raise this with the issuer of the subpoena as early as possible.</p> |

Contacting the court or tribunal

Contact details for courts and tribunals are provided in the table below.

| Jurisdiction | Court or tribunal |
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| Federal | <ul style="list-style-type: none"> High Court of Australia Federal Court of Australia Federal Circuit and Family Court of Australia Administrative Review Tribunal |
| New South Wales | <ul style="list-style-type: none"> Children's Court of New South Wales District Court of New South Wales Drug Court of New South Wales Dust Diseases Tribunal Independent Commission Against Corruption NSW Land and Environment Court of New South Wales |



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| | Local Court of New South Wales New South Wales Coroners Court NSW Civil and Administrative Tribunal (NCAT) Industrial Relations Commission of New South Wales Supreme Court of New South Wales Personal Injury Commission |
| Victoria | Children's Court of Victoria Coroners Court of Victoria County Court of Victoria Magistrates' Court of Victoria Supreme Court of Victoria Victorian Civil and Administrative Tribunal (VCAT) Victims of Crime Assistance Tribunal (VOCAT) |
| Queensland | Queensland Human Rights Commission Children's Court of Queensland Queensland Civil and Administrative Tribunal (QCAT) Coroners Court of Queensland Crime & Corruption Commission Queensland Industrial Relations Commission Mental Health Court Murri Court Planning and Environment Court Queensland Drug and Alcohol Court Residential Tenancies Authority |
| Western Australia | Children's Court of Western Australia Coroner's Court of Western Australia District Court of Western Australia Industrial Magistrates Court Magistrates Court of Western Australia Supreme Court of Western Australia The Western Australian Industrial Relations Commission State Administrative Tribunal of Western Australia |
| Northern Territory | Northern Territory Local Court Supreme Court of the Northern Territory Northern Territory Civil and Administrative Tribunal (NTCAT) |
| Australian Capital Territory | ACT Civil and Administrative Tribunal (ACAT) ACT Magistrates Court ACT Supreme Court |



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| Tasmania | <u>The Supreme Court of Tasmania</u> <u>Magistrates Court of Tasmania</u> <u>Tribunals</u> <u>Tasmanian Civil & Administrative Tribunal (TASCAT)</u> |
| South Australia | <u>Supreme Court of South Australia</u> <u>District Court of South Australia</u> <u>Adelaide Magistrates Court</u> <u>Environment, Resources and Development Court</u> <u>Youth Court of South Australia</u> <u>Warden's Court</u> <u>Coroners Court</u> <u>South Australia Civil and Administrative Tribunal (SACAT)</u> <u>South Australian Employment Tribunal</u> <u>Independent Commissioner against Corruption South Australia</u> |



More information

- [New South Wales Subpoena Survival Guide, developed by Women's Legal Service NSW and Legal Aid NSW](#)
The guide has a focus on the Sexual Assault Communications Privilege but it also covers other protections relevant to subpoenas such as challenging the validity of subpoenas and tips on using the confidential professional relationship privilege.
- [County Court of Victoria Information on Subpoenas](#)
For FAQs, checklists and template subpoena documents. This information only relates to the County Court of Victoria.