



Supreme Court Rules (Amendment No 389) 2004

under the

Supreme Court Act 1970

The Supreme Court Rule Committee made the following rules of court under the *Supreme Court Act 1970* on 15 March 2004.

Steven Jupp

Secretary of the Rule Committee

Explanatory note

The object of these Rules is to apply, with respect to proceedings before the Supreme Court, the harmonised subpoena rules that have been developed under the auspices of the Council of Chief Justices.

2004 No 127

Clause 1 Supreme Court Rules (Amendment No 389) 2004

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1 Name of Rules

These Rules are the *Supreme Court Rules (Amendment No 389) 2004*.

2 Commencement

These Rules commence on 1 May 2004.

3 Amendment of Supreme Court Rules 1970

The *Supreme Court Rules 1970* are amended as set out in Schedule 1.

Schedule 1 Amendments

(Clause 3)

[1] Part 3, rule 3

Omit “rule 3”. Insert instead “rule 6”.

[2] Part 36, rules 13BA–13BC

Insert after rule 13B:

13BA Fees for medical expert for compliance with subpoena

- (1) If a subpoena is served on a medical expert who is to give evidence of medical matters but is not called as a witness, the expert is, unless the Court otherwise orders, entitled to be paid, in addition to the amount payable under Part 37 rule 11, the amount prescribed in item 6 of Schedule G1.
- (2) The amount payable under subrule (1) must be paid by the issuing party to the expert within 30 days after the date for the expert’s attendance.
- (3) If a party makes a requirement under rule 13B (2) and revokes it, he or she must pay to the issuing party the amount paid under subrule (2), but otherwise an amount paid under subrule (2) by the issuing party is not recoverable from any other party unless the Court so orders.
- (4) This rule applies only to proceedings on a trial at Sydney.

13BB Service of subpoena on medical expert

- (1) If the person named in a subpoena is a medical expert:
 - (a) service of the subpoena on the expert may be effected at a place where the expert’s practice is carried on, by handing it to some person apparently engaged (whether as an employee or otherwise) in the practice and apparently of or above the age of 16 years, and
 - (b) if, on tender of the subpoena to the person mentioned in paragraph (a), the person refuses to accept it, the subpoena may be served by putting it down in the person’s presence after he or she has been told of the nature of the subpoena.

2004 No 127

Supreme Court Rules (Amendment No 389) 2004

Schedule 1 Amendments

- (2) If a subpoena requires a medical expert to attend in Sydney on a specified date for the purpose of giving evidence on medical matters, the subpoena must be served on the expert not later than 21 days before the date so specified unless the court otherwise orders.
- (3) The parties may not by consent abridge the time fixed by or under subrule (2).

13BC Subpoena requiring production of medical records

- (1) A subpoena for production may require a medical expert to produce medical records or clear, sharp photocopies of them.
- (2) A subpoena for production may not require a person named to produce any medical records or copies thereof unless the amount prescribed in item 2 of Schedule G1 is paid or tendered to the person at the time of service of the subpoena or not later than a reasonable time before the date on which production is required.
- (3) Part 37 rule 6 does not apply to a subpoena to which subrule (1) applies.
- (4) Part 37 rule 7 applies to the photocopies in the same way as it applies to the records.
- (5) If a subpoena to which subrule (1) applies has been issued and served but the party who requested the issue of the subpoena requires production of medical records without the option of producing photocopies of them, the party must request the issue of, and serve, another subpoena requiring production of the original medical records.

[3] Part 36, rule 16 (1A)

Omit “rule 2 (2)”. Insert instead “rule 3”.

[4] Part 37

Omit the Part. Insert instead:

Part 37 Subpoenas**1 Definitions**

(1) In this Part:

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.

Registrar, in relation to proceedings in respect of which a subpoena is sought or issued, means the Registrar of the Division in which the proceedings are being taken.

subpoena means 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.
- (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*.

2 Issuing of subpoena

- (1) The Court may, in any proceeding, by subpoena order the addressee:
 - (a) to attend to give evidence as directed by the subpoena, or
 - (b) to produce the subpoena or a copy of it and any document or thing as directed by the subpoena, or
 - (c) to do both of those things.
- (2) An issuing officer must not issue a subpoena:
 - (a) if the Court has made an order, or there is a rule of the Court, having the effect of requiring that the proposed subpoena:
 - (i) not be issued, or
 - (ii) not be issued without the leave of the Court and that leave has not been given, or
 - (b) requiring the production of a document or thing in the custody of the Court or another court.
- (3) The issuing officer must seal with the seal of the Court, or otherwise authenticate, a sufficient number of copies of the subpoena for service and proof of service.
- (4) A subpoena is taken to have been issued on its being sealed or otherwise authenticated in accordance with subrule (3).

3 Form of subpoena

- (1) A subpoena must be in accordance with Form 46.
- (2) A subpoena must not be addressed to more than one person.
- (3) Unless the Court otherwise orders, a subpoena must identify the addressee by name or by description of office or position.
- (4) A subpoena to produce must:
 - (a) identify the document or thing to be produced, and
 - (b) specify the date, time and place for production.
- (5) A subpoena to attend to give evidence must specify the date, time and place for attendance.
- (6) The date specified in a subpoena must be the date of trial or any other date as permitted by the Court.

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- (7) The place specified for production may be the Court or the address of any person authorised to take evidence in the proceeding as permitted by the Court.
 - (8) A subpoena must specify the last date for service of the subpoena, being a date not earlier than:
 - (a) 5 days, or
 - (b) any shorter or longer period as ordered by the Court and specified in the subpoena,before the date specified in the subpoena for compliance with it.
 - (9) If the addressee is a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

4 Setting aside or other relief

- (1) The Court may, on the application of a party or any person having a sufficient interest, set aside a subpoena in whole or in part, or grant other relief in respect of it.
- (2) An application under subrule (1) must be made on notice to the issuing party.
- (3) The Court may order that the applicant give notice of the application to any other party or to any other person having a sufficient interest.

5 Service

- (1) A subpoena must be served personally on the addressee.
- (2) The issuing party must serve a copy of a subpoena to produce on each other party as soon as practicable after the subpoena has been served on the addressee.

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.

2004 No 127

Supreme Court Rules (Amendment No 389) 2004

Schedule 1 Amendments

- (3) Despite rule 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.

7 Production otherwise than upon attendance

- (1) This rule applies if an addressee produces a document or thing in accordance with rule 6 (4) (b).
- (2) The Registrar must, if requested by the addressee, give a receipt for the document or thing to the addressee.
- (3) If the addressee produces more than one document or thing, the addressee must, if requested by the Registrar, provide a list of the documents or things produced.
- (4) The addressee may, with the consent of the issuing party, produce a copy, instead of the original, of any document required to be produced.
- (5) The addressee may at the time of production inform the Registrar in writing that any document or copy of a document produced need not be returned and may be destroyed.

8 Removal, return, inspection, copying and disposal of documents and things

The Court may give directions in relation to the removal from and return to the Court, and the inspection, copying and disposal, of any document or thing that has been produced to the Court in response to a subpoena.

9 Inspection of, and dealing with, documents and things produced otherwise than on attendance

- (1) This rule applies if an addressee produces a document or thing in accordance with rule 6 (4) (b).
- (2) On the request in writing of a party, the Registrar must inform the party whether production in response to a subpoena has occurred, and, if so, include a description, in general terms, of the documents and things produced.
- (3) Subject to this rule, no person may inspect a document or thing produced unless the Court has granted leave and the inspection is in accordance with that leave.
- (4) Unless the Court otherwise orders, the Registrar may permit the parties to inspect at the office of the Registrar any document or thing produced unless the addressee, a party or any person having sufficient interest objects to the inspection under this rule.
- (5) If the addressee objects to a document or thing being inspected by any party to the proceeding, the addressee must, at the time of production, notify the Registrar in writing of the objection and of the grounds of the objection.
- (6) If a party or person having a sufficient interest objects to a document or thing being inspected by a party to the proceeding, the objector may notify the Registrar in writing of the objection and of the grounds of the objection.
- (7) On receiving notice of an objection under this rule, the Registrar:
 - (a) must not permit any, or any further, inspection of the document or thing the subject of the objection, and
 - (b) must refer the objection to the Court for hearing and determination.

2004 No 127

Supreme Court Rules (Amendment No 389) 2004

Schedule 1 Amendments

- (8) The Registrar must notify the issuing party of the objection and of the date, time and place at which the objection will be heard, and the issuing party must notify the addressee, the objector and each other party accordingly.
- (9) The Registrar must not permit any document or thing produced to be removed from the office of the Registrar except on application in writing signed by the solicitor for a party.
- (10) A solicitor who signs an application under subrule (9) and removes a document or thing from the office of the Registrar, undertakes to the Court by force of this rule that:
 - (a) the document or thing will be kept in the personal custody of the solicitor or a barrister briefed by the solicitor in the proceeding, and
 - (b) the document or thing will be returned to the Registry in the same condition, order and packaging in which it was removed, as and when directed by the Registrar.
- (11) The Registrar may, in the Registrar's discretion, grant an application under subrule (9) subject to conditions or refuse to grant the application.

10 Disposal of documents and things produced

- (1) Unless the Court otherwise orders, the Registrar may, in the Registrar's discretion, return to the addressee any document or thing produced in response to the subpoena.
- (2) Unless the Court otherwise orders, the Registrar must not return any document or thing under subrule (1) unless the Registrar has given to the issuing party at least 14 days' notice of the intention to do so and that period has expired.
- (3) If the addressee has informed the Court that a document or a copy of a document produced need not be returned and may be destroyed, the Registrar may, unless the Court otherwise orders, destroy the document or copy instead of returning it.
- (4) The Registrar must not destroy a document or a copy of a document unless the Registrar has first given to the issuing party and to the addressee at least 14 days' notice of the intention to destroy the document or copy.

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.

12 Failure to comply with subpoena—contempt of court

- (1) Failure to comply with a subpoena without lawful excuse is a contempt of court and the addressee may be dealt with accordingly.
- (2) Despite rule 5 (1), if a subpoena has not been served personally on the addressee, the addressee may be dealt with for contempt of court as if the addressee had been so served if it is proved that the addressee had, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.
- (3) Subrules (1) and (2) are without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

13 Documents and things in the custody of a court

- (1) A party who seeks production of a document or thing in the custody of the Court or of another court may inform the Registrar in writing accordingly, identifying the document or thing.
- (2) If the document or thing is in the custody of the Court, the Registrar must produce the document or thing:
 - (a) in Court or to any person authorised to take evidence in the proceeding, as required by the party, or
 - (b) as the Court directs.

2004 No 127

Supreme Court Rules (Amendment No 389) 2004

Schedule 1 Amendments

- (3) If the document or thing is in the custody of another court, the Registrar must, unless the Court has otherwise ordered:
- (a) request the other court to send the document or thing to the Registrar, and
 - (b) after receiving it, produce the document or thing:
 - (i) in Court or to any person authorised to take evidence in the proceeding as required by the party, or
 - (ii) as the Court directs.

[5] Part 66, rule 1A

Insert after rule 1:

1A Unrepresented litigants

- (1) An issuing officer may not issue a subpoena, without the leave of the Court, unless the issuing party is represented by a solicitor in the proceedings concerned.
- (2) The Court or a Judge may give leave to issue a subpoena:
 - (a) generally or in relation to a particular subpoena or subpoenas, and
 - (b) unconditionally or subject to conditions.

[6] Schedule F

Omit Forms 46–48. Insert instead:

Form 46 Subpoena

(Part 37, rule 3 (1))

IN THE *[name of court]*

File number:

APPLICANT/PLAINTIFF:

RESPONDENT/DEFENDANT:

SUBPOENA

To: *[name]*

[address]

YOU ARE ORDERED:

- *to attend to give evidence—see section A of this form, or
- *to produce this subpoena or a copy of it and the documents or things specified in the Schedule—see section B of this form, or
- *to attend to give evidence and to produce this subpoena or a copy of it and the documents or things specified in the Schedule—see section C of this form

**Select one only of these three options*

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

The last date for service of this subpoena is:.....

(See Note 1)

Please read Notes 1 to 15 at the end of this subpoena.

[Seal or Stamp of the Court]

Date:

Issued at the request of [*name of party*], whose address for service is:

A Details of subpoena to attend to give evidence only

Date, time and place at which you must attend to give evidence:

Date:

Time:

Place:

You must continue to attend from day to day unless excused by the Court or the person authorised to take evidence in this proceeding or until the hearing of the matter is completed.

B Details of subpoena to produce only

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule below at the date, time and place specified for attendance and production, or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule below to the address below so that they are received not less than 2 clear days before the date specified for attendance and production. *(See Notes 5–11)*

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things:

Date:

Time:

Place:

2004 No 127

Supreme Court Rules (Amendment No 389) 2004

Schedule 1 Amendments

Address to which the subpoena (or copy) and documents or things may be delivered or posted:

The Exhibits Office
Level 5, Supreme Court of NSW
GPO Box 3, Sydney 2001

Schedule

The documents and things you must produce are as follows:

[If insufficient space attach list]

C Details of subpoena both to attend to give evidence and to produce

In so far as you are required by this subpoena to attend to give evidence, you must attend as follows:

Date:

Time:

Place:

You must continue to attend from day to day unless excused by the Court or the person authorised to take evidence in this proceeding or until the hearing of the matter is completed.

In so far as you are required by this subpoena to produce the subpoena or a copy of it and documents or things, you must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule below at the date, time and place specified for attendance and production, or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule below to the address below so that they are received not less than 2 clear days before the date specified for attendance and production. *(See Notes 5–11)*

Date, time and place at which you must attend to produce the subpoena or a copy of it and the documents or things:

Date:

Time:

Place:

Address to which the subpoena or a copy of it and documents or things may be delivered or posted:

The Exhibits Office
Level 5, Supreme Court of NSW
GPO Box 3, Sydney 2001

Schedule

The documents and things you must produce are as follows:

[If insufficient space attach list]

Notes

Last day for service

- 1 You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

- 2 Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

- 3 If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

- 4 You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date on which your attendance is required.

2004 No 127

Supreme Court Rules (Amendment No 389) 2004

Schedule 1 Amendments

Production of subpoena or copy of it and documents or things by delivery or post

- 5 In so far as this subpoena requires production of the subpoena or a copy of it and a document or thing, instead of attending to produce the subpoena or a copy of it and the document or thing, you may comply with the subpoena by delivering or sending the subpoena or a copy of it and the document or thing to the address specified in the subpoena for the purpose so that they are received not less than 2 clear days before the date specified in the subpoena for attendance and production.
- 6 If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
- 7 Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

Production of a number of documents or things

- 8 If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

- 9 You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

Return or destruction of documents or copies

- 10 You may, at the time of production, inform the Court that any document or copy of a document produced need not be returned and may be destroyed.

- 11 If you have so informed the Court, the Registrar may destroy the document or copy instead of returning it to you.

Applications in relation to subpoena

- 12 You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena, and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

- 13 If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court—arrest

- 14 Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
- 15 Instruction 14 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

[7] Schedule F, Index of Forms

Omit the matter relating to Forms 46, 46A, 46B, 47 and 48.

Insert instead:

46. Subpoena (P 37, r 3).

2004 No 127

Supreme Court Rules (Amendment No 389) 2004

Schedule 1 Amendments

[8] Schedule G1, item 2

Omit “Part 37 rule 7A (4)”. Insert instead “Part 36 rule 13BC (2)”.

[9] Schedule G1, item 6

Omit “Part 37 rule 3A (1) (b)”. Insert instead “Part 36 rule 13BA (1)”.

BY AUTHORITY
