



New South Wales

Dust Diseases Tribunal Amendment (Subpoenas) Rule 2005

under the

Dust Diseases Tribunal Act 1989

The Dust Diseases Tribunal Rule Committee made the following rule of court under the *Dust Diseases Tribunal Act 1989* on 4 May 2005.

David Martin
Secretary of the Rule Committee

2005 No 189

Clause 1 Dust Diseases Tribunal Amendment (Subpoenas) Rule 2005

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under the

Dust Diseases Tribunal Act 1989

1 Name of Rule

This Rule is the *Dust Diseases Tribunal Amendment (Subpoenas) Rule 2005*.

2 Amendment of Dust Diseases Tribunal Rules

The *Dust Diseases Tribunal Rules* are amended as set out in Schedule 1.

Schedule 1 Amendment

Rule 15 is omitted. Insert instead:

15 Interpretation and application

(1) In this Part:

access order, in relation to a subpoena requiring production, means an order of the Tribunal granting access to specified documents or things produced pursuant to the subpoena (whether with or without conditions).

person named means, in relation to a subpoena, the person to whom the subpoena is addressed.

privileged document or thing, in relation to a subpoena, means:

- (a) a document or thing of which evidence could not be adduced in an action over the objection of any person, by virtue of the operation of Part 3.10 (other than sections 128 and 130) of the *Evidence Act 1995*, or
- (b) if the party on whom the subpoena is served is a natural person—a document or thing the contents or production of which may tend to prove that the party:
 - (i) has committed an offence against or arising under an Australian law or a law of a foreign country, or
 - (ii) is liable to a civil penalty, within the meaning of the *Evidence Act 1995*, or
- (c) a document that relates to matters of state within the meaning of section 130 of the *Evidence Act 1995*, unless and until the Tribunal directs that it cease to be a privileged document.

requesting party for a subpoena means a person who is requesting, or who has requested, the issue of the subpoena.

return date for a subpoena means the date on which the subpoena is returnable.

- (2) This Part applies to subpoenas issued on or after the commencement of this Part.
- (3) The provisions of this Part apply to the exclusion of the equivalent provisions of the rules.

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16 Conduct money

- (1) A subpoena must not require the person named to attend or produce any document or thing on any day on which the person's attendance is required unless an amount sufficient to meet the reasonable expenses of the person named of complying with the subpoena in relation to that day is paid or tendered to the person at the time of service of the subpoena or not later than a reasonable time before that day.
- (2) The amount mentioned in section 20 (6) of the Act is to be, in respect of a person duly served with a subpoena in any proceedings, the amount which would be payable in respect of that person if the party issuing the subpoena were entitled to claim witness' expenses in respect of that person as costs in the proceedings.

17 Medical expert not called

- (1) Where a subpoena is served on a medical expert who is to give evidence of medical matters and the medical expert is not called as a witness, he or she is, unless he or she was given notice, 14 days or more before the date of his or her attendance, that his or her attendance would not be required on that date or unless the Tribunal otherwise orders, be entitled to be paid \$167.00 in addition to any amount paid under clause *16 (Conduct money).
- (2) The amount payable under subclause (1) is to be paid by the party who requested the issue of the subpoena to the expert within 30 days after the date for his or her attendance.
- (3) Unless the Tribunal otherwise orders the amount paid under subclause (2) is not recoverable from any other party.

18 Production by non-party

- (1) Where the person named in a subpoena for production of any document or thing is not a party to the proceedings, the subpoena must, unless the Tribunal otherwise orders, permit the person to produce the document or thing to the Registrar not later than the day before the first date on which the persons' attendance is required, instead of attending and producing the document or thing as required by the subpoena.
- (2) Where a document or thing is produced to the Registrar pursuant to subclause (1), the Registrar must:
 - (a) give a receipt to the person producing the document or thing, and

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- (b) produce the document or thing as the nature of the case requires or as the Tribunal may direct.
 - (3) Where a document or thing is produced to the Registrar pursuant to subclause (1) and before the document or thing is tendered to the Tribunal the hearing of the proceedings is adjourned, other than to a date then fixed, the subpoena is no longer of any force or effect, and the Registrar is at liberty to return the document or thing to the person who produced it unless the claim is subject to the claims resolution process under Part *4.
 - (4) Subclause (3) does not operate to prevent the issue of a further subpoena requiring the production of a document or thing returned by the Registrar under that subclause.
 - (5) This clause does not apply to so much of a subpoena as requires the person named to attend to testify in any proceedings.

19 Retention and return of exhibits

- (1) The Tribunal may:
 - (a) order that exhibits in any proceedings be retained by the Tribunal until the expiry of any period, or the occurrence of any event, specified in the order for the return of the exhibits, or
 - (b) order that exhibits in any proceedings that have been returned to the person who originally produced them to the Tribunal or Registrar be returned to the Tribunal for the purposes of the determination of a cross-claim arising out of the proceedings.
- (2) Exhibits in any proceedings in which judgment is given or a final order is made are to be returned to the persons who produced them to the Tribunal or Registrar:
 - (a) if the Tribunal makes no order that the exhibits be retained and no appeal to the Supreme Court is brought in respect of the proceedings within the period provided for an appeal by or under the *Supreme Court Act 1970*—immediately after the expiry of that period, or
 - (b) if the Tribunal makes no order that the exhibits be retained and leave to appeal to the Supreme Court is refused in respect of the judgment or final order in the proceedings—immediately after the Tribunal or Registrar is notified of the refusal to grant leave, or

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- (c) if the Tribunal makes an order that the exhibits be retained—at the expiry of the period, or on the occurrence of the event, specified in the order for the return of the exhibits.
- (3) A person to whom exhibits are to be returned under subrule (2) is to obtain the return of, and give the Registrar a receipt for, the exhibits as soon as is practicable after the first day on which exhibits are to be returned.
- (4) The Registrar is responsible for the safe custody of any exhibits only for a period of 14 days after the first day on which exhibits are to be returned.
- (5) This rule applies to any exhibits produced in proceedings, whether on subpoena or otherwise.

20 Issue

- (1) On request by a party, the Registrar must issue a subpoena to give evidence or a subpoena for production or a subpoena both to give evidence and for production.
- (2) Subclause (1) does not prevent the issue of a subpoena to give evidence and a subpoena for production to the same person in the same proceedings.
- (3) Subject to subclause (4) a party requesting the issue of a subpoena must produce the subpoena to the Registrar in duplicate.
- (4) Where a party requests in any proceedings the issue of several subpoenas to give evidence in similar terms but addressed to different persons, the party need produce only one original, but that original must contain the name of each person to whom any of the subpoenas is addressed.
- (5) The Registrar is not required to place a copy of the subpoena on the Tribunal's file.
- (6) A subpoena for production may be made returnable on the day fixed for the hearing of the proceedings in which it is issued, or, with the leave of the Tribunal or the Registrar, on any other day.
- (7) While a claim is subject to the claims resolution process under Part *4, a subpoena for production of any document or thing:
 - (a) is to be made returnable on a day that is no later than 5 business days before the commencement of mediation on the claim under that Part, and

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- (b) must permit the person named in the subpoena (whether or not the person is a party) to produce the document or thing to the Registrar.

21 Notice to be given to other parties concerning subpoenas requiring production

- (1) The requesting party for any subpoena requiring production must serve each other party who has an address for service in the proceedings with a copy of the subpoena:
 - (a) if the return date of the subpoena is on a day that is 14 days or more after the subpoena is issued—within the period of 7 days after the subpoena is issued, or
 - (b) if the return date of the subpoena is on a day that is less than 14 days after the subpoena is issued—within 24 hours after the subpoena is issued.
- (2) The requesting party for a subpoena requiring production who fails to comply with subclause (1) must notify the Tribunal of that failure at the next date on which the subpoena is returnable.
- (3) The requesting party for a subpoena requiring production must notify each other party to the proceedings who has an address for service in the proceedings of any new return date for the subpoena fixed after the subpoena is first issued:
 - (a) if the return date of the subpoena is on a day that is 14 days or more after the new date is fixed—within the period of 7 days after the new date is fixed, or
 - (b) if the return date of the subpoena is on a day that is less than 14 days after the new date is fixed—within 24 hours after the new date is fixed.
- (4) The Tribunal or the Registrar may make an order for costs against a requesting party for a subpoena requiring production if that party fails to comply with subclause (2) or (3), but only in respect of costs incurred by reason of that failure.
- (5) A requesting party for a subpoena requiring production need not comply with a requirement under subclause (1), (2) or (3) if the person named is excused from compliance with the subpoena by the requesting party under clause *29 (2) (Alteration to obligations) before the time when the requesting party had to comply with that requirement.
- (6) Nothing in this clause affects the operation of clause *26 (Subpoena to medical expert).

22 Access to subpoenaed material

- (1) The Tribunal may make an access order in relation to a subpoena requiring production at the time the subpoena is issued or at any time after it is issued.
- (2) If an access order has effect in relation to a subpoena for production, a party or the party's barrister or solicitor may (subject to the terms of the order):
 - (a) inspect documents or things produced in compliance with the subpoena, and
 - (b) take copies of any documents so inspected.

23 Proposed access orders

- (1) Unless the Tribunal orders otherwise, the requesting party for a subpoena requiring production must endorse a proposed access order on the subpoena.
- (2) Without limiting clause *22 (Access to subpoenaed material), the Tribunal may:
 - (a) endorse a proposed access order on a subpoena requiring production if the requesting party has not endorsed such a proposed order, or
 - (b) endorse a proposed access order on a subpoena requiring production in different terms to a proposed order endorsed by the requesting party.
- (3) Unless the Tribunal orders otherwise, any such proposed access order has effect as an access order immediately after the next return date for the subpoena if:
 - (a) documents or things are produced in compliance with the subpoena on or before that date, and
 - (b) no person appears before the Registrar or Tribunal on the return date in opposition to the proposed order.
- (4) Without limiting subclause (3), the Tribunal may take into account a failure to comply with subclause (5) or (6) or clause *21 (1), (2) or (3) in determining whether a proposed access order should have effect according to its tenor or whether an order is to be made to modify or revoke the proposed access order.
- (5) A party or a person named in a subpoena requiring production who proposes to object to the proposed access order on the return date for the subpoena must notify the requesting party of the objection:

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- (a) if the party or person is served with a copy of the subpoena on a day that is 14 days or more before the return date—within the period of 3 days after the party or person is served, or
 - (b) if the party or person is served with a copy of the subpoena on a day that is less than 14 days before the return date—within the period of 24 hours after the party or person is served.
- (6) A requesting party who has received notice of an objection to a proposed access order must notify all of the other parties who have an address for service in the proceedings of the objection within 24 hours after receiving that notice.

24 Exercise of functions by Registrar

- (1) The functions of the Tribunal under clauses *22 and *23 may, unless the Tribunal otherwise orders, be exercised by the Registrar.

25 Time for service

- (1) A subpoena must be served on the person named within a reasonable time.
- (2) Without affecting the generality of subclause (1), where a subpoena requires attendance or production or both on a specified date, the subpoena may not be served on the person named later than 5 days before the date so specified unless the Tribunal or Registrar otherwise orders.
- (3) Subject to subclause (4), service of a subpoena for production which requires production on a specified date, being a date not later than 21 days before the hearing of the proceedings in which the subpoena is issued, may be effected by sending a copy of the subpoena by pre-paid post addressed to the person named at that persons' usual or last known residence or place of business.
- (4) Service pursuant to subclause (3) is not effective unless and until the subpoena is actually received by the person named.

26 Subpoena to medical expert

- (1) Where a subpoena requires a medical expert to attend in Sydney on a specified date for the purposes of giving evidence on medical matters, the subpoena may not be served on the expert later than 21 days before the date so specified unless the Tribunal otherwise orders.

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- (2) The parties may not by consent abridge the time fixed by or under subclause (1).
- (3) A party may request the issue of a subpoena for production in the approved form requiring a medical expert to attend and produce medical records or clear sharp photocopies of them.
- (4) A subpoena requested under subclause (3) must not require the person named to attend or produce any document on any date specified unless the amount of \$28 is paid or tendered to the person at the time of service of the subpoena or not later than a reasonable time before that specified date.
- (5) Clause *16 (Conduct money) does not apply to a subpoena requested under subclause (3).
- (6) Clause *18 (Production by non-party) applies to the photocopies as it applies to the records.

27 Setting aside

The Tribunal may, of its own motion or on the motion of any person having a sufficient interest, set aside a subpoena wholly or in part.

28 Expense and loss

Where a person named is not a party and, in consequence of service of the subpoena, reasonably incurs expense or loss substantially exceeding any sum paid under clause *16 (Conduct money), the Tribunal may order that the party who requested the issue of the subpoena pay to the person named an amount in respect of the expense or loss.

29 Alteration to obligations

- (1) A party who has requested the issue of a subpoena to give evidence may, by written or oral notice to the person named, alter the day specified in the subpoena for attendance to a day which is:
 - (a) later than the day specified in the subpoena and the day, if any, as last altered pursuant to this subclause, and
 - (b) the day of the hearing of the action.
- (2) Where the person named in any subpoena has not been called to give evidence, or produce documents, before the Tribunal in compliance with the subpoena, the party who requested the issue of the subpoena may, by written or oral notice to the person named, excuse that person from compliance with the subpoena.

30 Application of Part 3.10 of Evidence Act 1995

Nothing in this Part compels a person on whom a subpoena is served to produce a privileged document or thing.