



## Been Served? How should a business respond to a subpoena?

*In conducting a business, you have to comply with a myriad of mandatory government and regulatory requirements involving the collection and supply of information to relevant authorities. But how should a business owner deal with a subpoena to give evidence or provide documents in court proceedings involving other parties?*

### What is a Subpoena?

The term “Subpoena” derives from the Latin phrase “sub poena” which means “under penalty”. Its earliest known use was in 1282 when John Waltham, the then Master of Rolls of the English Court of Equity devised a Writ (court order) to compel defendants to attend a trial. The Writ placed the defendants “under penalty” of a term of imprisonment if they did not comply with it.

In contemporary terms a Subpoena is a Court Order requesting an individual, a company, or their representative to appear at a Court hearing to:

- (a) give evidence in a case before the Court;
- (b) produce documents and information in their possession before the Court or;
- (c) do both of these.

Subpoenas are generally issued by a Court at the request of a party to Court proceedings, whose legal team have formed a view that the potential evidence or information that the receiver of the Subpoena may give to the Court will be of benefit to their client in the case.

### When is a business likely to receive a Subpoena?

Business owners can receive a Subpoena to give evidence or to provide documents in a fairly wide range of matters. Some examples are:

- If a customer of the business is involved in a court dispute with another party and that party wants information about your business’s dealings with the customer.
- When a couple your business has provided services to are embroiled in a Family Law property settlement dispute and one of them requires that the records, contracts and other documentation you hold about their business activities is needed to assist them in the dispute.
- When a former employee is involved in a Workers Compensation or Personal Injury case and either the employee or the other party to the proceedings requires that evidence or information be provided about the employee’s wages and activities during their employment in your business.



## What happens if I don't comply?

Failure to comply with a Subpoena, without a lawful excuse, constitutes a contempt of the Court that issued the Subpoena and can expose the party who is served to substantial penalties. For an individual this can mean a term of imprisonment, a fine or both. If a company fails to comply with a Subpoena the Court may punish the company's contempt by impounding the company's assets, imposing a fine or both.

## What to do if served?

If a business owner or an employee of a business is served with a Subpoena to give evidence in a Court matter, they must comply with this request and attend the Court on the date and at the time and place specified in the Subpoena. You are not however required to comply with the Subpoena unless it was served on you at least 5 clear days before you are required to attend the Court, except if the Court orders that the Subpoena may be served in a shorter period of time.

If a business owner is served with a Subpoena to produce documents to a Court there are a number of matters that should be considered before complying with or objecting to it including:

- Whether the request contained in the Subpoena is too broad or vague being what is colloquially known as a "fishing expedition" to gain much more information than is necessary having regard to the nature of the Court proceedings. If the Subpoena doesn't clearly set out the documents that are required to be produced there may be a right to have it set aside.
- Whether the documents requested in the Subpoena are commercially sensitive, such as a request to reveal confidential information you hold, like a customer's client lists or the prices at which they purchase products or services from your business. If so, it may be possible to request undertakings from the party issuing the Subpoena that the documents be produced on the basis that there is a limited access to them.
- The requested documents sought in the Subpoena are privileged for example being subject to legal profession privilege involving confidential communications between a lawyer and a client.

## Can I claim back my expenses?

The NSW Uniform Civil Procedure Rules (2005) provides that if you are subpoenaed to give evidence before a Court the party that requested the issue of the Subpoena must provide you with "Conduct Money", being an amount sufficient to meet your reasonable expenses of travelling to and from the Court. This amount will of course vary depending on the distance the person resides from the Court. If you feel that the "Conduct Money" offered is insufficient to meet your reasonable expenses, you should contact the issuing party's lawyer to seek Conduct Money more commensurate with your anticipated expenses.

The costs incurred by a business owner to comply with a Subpoena to produce documents at Court may also be claimed by the business. These may include the reasonable administrative expenses in the retrieval and production process of the documents and for printing costs. You should also contact the issuing party's lawyer to obtain their consent to reimbursing these "production costs".

If you're unable to reach an agreement on the amount of Conduct Money payable, or no consent is given for the payment of your production costs, you still must comply with the Subpoena but you can at a later date make an application to the Court under the Rules to seek payment of the disputed amount.



## Conclusion

Failing to respond to a Subpoena to attend a Court to give evidence or to produce documents may have serious consequences for both individuals and companies in business. If you are unsure about what to do after your business has been served with a Subpoena it's essential that you obtain legal advice about what rights and obligations you or your business may have in complying with or objecting to the Subpoena.

*If you require advice about how to respond to a Subpoena that's been served on you or your business, or you need assistance with any business dispute contact [Ken Gray](#) on 02 4731 5899 or email us on [commercial@batemanbattersby.com.au](mailto:commercial@batemanbattersby.com.au).*