

PRACTICE NOTE No. 31A

Issued 15 February 2018, replacing Practice Note 31

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

PRACTICE NOTE No. 31A

Issued pursuant to Section 185A of the Industrial Relations Act 1996 and Section 15 of the Civil Procedure Act 2005

Production of and access to summonsed material and returning exhibits and summonsed material in civil proceedings

Application

1. This Practice Note applies to production of documents in compliance with a summons issued in regard to proceedings in the Commission and the return of summonsed documents and exhibits after proceedings have been determined.
2. This Practice Note does not apply to summonses issued pursuant to s 132, s 165(3)(a) or s 332 of the *Industrial Relations Act* 1996 or as a consequence of Part 5.5 or Part 11 of the Industrial Relations Commission Rules 2009, save as to any Order made by the Commission in that regard.
3. This Practice Note takes effect from the date of re- issue.

Definitions

4. In this Practice Note:

UCPR means Uniform Civil Procedure Rules 2005

Issuing party means the party requesting the issue of a summons for production

Summons recipient means the person to whom a summons for production is addressed.

Introduction

5. The purpose of this Practice Note is:
 - to inform the parties of their ability to nominate, on the summons document before filing, a convenient return date for the summons;
 - to inform the parties of the need to endorse a proposed access order on the summons and the procedure that applies in that regard;

- to inform the parties of the Commission's preferred practice in relation to the format of documents being produced in response to a summons; to inform parties of the Commission's practice in relation to accessing summoned material produced in an electronic format; and
- to inform Summons recipients and parties of the Commission's practice in relation to returning exhibits and summonsed material.

Serving the Summons

6. The forms of summons to produce, and to attend and give evidence and produce, have been amended to include the Summons recipient's declaration (in relation to whether the documents produced are originals and whether they need to be returned): see new forms 41 and 42 (based entirely on UCPR forms 26A and 27A). The issuing party should provide a copy of the summons when it is served so that the Summons recipient can retain the original summons and forward the copy with the completed declaration to the registry.

7. The issuing party can nominate a convenient return date for the summons on the document filed at the registry, provided that sufficient time is allowed to serve the Summons recipient. The Commission has a summons list every Wednesday at 9.15am during the Commission term. If the summons does not include a nominated return date, the registry will allocate a date.

Endorsement of Access Orders

8. The issuing party must endorse the proposed access order on the summons. If the issuing party does not propose an access order on the summons the following access order will apply:

"The issuing party to have first access for 7 days; thereafter, in the absence of any further application, access to all parties".

9. Where a different proposed access order is sought the issuing party must attach his or her reasons to the summons. If there is a dispute over access the parties must appear on the return date.

10. An order for access includes an order that, where necessary, the documents may be physically inspected and photocopied.

11. Parties are advised that if they consent to the proposed access orders the Commission will generally make the proposed access orders. There is no need for the parties to appear on the return date if all parties consent to the orders sought thereby saving the parties the cost of an attendance.

12. The issuing party must attend on the return date if it has not notified all the parties of the issuing of the summons. The Commission may make costs orders against parties who have not complied with the Rules or this Practice Note.

13. Any party, or the producer, may object to the issuing party about the proposed access order. The issuing party must notify all the other parties of the objection. Parties who wish to contest the proposed access order must appear on the return date. The matter may be determined on that date or remitted to a Member of the Commission for determination on a future date.

14. If there is no objection to the proposed access order at the return of summons, the order will automatically take effect from the day following the return of summons.

Production of summonsed material

15. The UCPR was updated in 2011 in relation to how to comply with a summons to produce. Specific attention is drawn to UCPR rule 33.6(6) and (7).

16. UCPR rule 33.6(6) allows the Summons recipient to produce a copy of documents, unless the summons specifically requires the original documents to be produced. The issuing party should only specify that the original document is required in those special circumstances where the original document may need to be tendered.

17. UCPR rule 33.6(7) allows the issuing party to permit the production of documents in a format that is acceptable to that party. Most Summons recipients who have access to a photocopier will now also have access to a document scanner. Where documents would otherwise be photocopied to respond to a summons it will normally be as convenient, and less costly for the Summons recipient, to scan those documents and save them in an electronic format. If a document already exists in an electronic format it will also be more convenient and less costly to copy that document in an electronic format rather than print it out on paper. It will also normally be more convenient for the issuing party and the other parties to access summonsed documents in an electronic format.

18. To facilitate the production of summonsed documents electronically (rather than paper copies), the Issuing party should indicate to the Summons recipient that production in an electronic format is acceptable. This should particularly be done where a large volume of material is being summonsed. This information for the Summons recipient can be included on the summons in the schedule describing the documents to be produced. It can also be included in a covering letter.

19. If a document has been scanned, is a word processing document or is a photograph or image, a copy of the document should be saved as, or converted to, a PDF file. Generally it will be sufficient for emails to be provided in a PDF file.

20. If the material is in an electronic format which cannot be conveniently saved as a PDF file, such as a database, a sound or a video recording, it is appropriate for a copy of the document to be

provided in the original electronic format. If the original format is not a current or common format then the issuing party should also consider whether a copy in some other electronic format should also be asked for, so that it can be readily accessed by the parties and the Commission.

21. Electronic summonsed documents can be provided on a DVD, a CD or a USB device.

22. Electronic summonsed documents can also be emailed to the registry at irc.registry@courts.nsw.gov.au provided a scanned copy of the summons is also attached to the email. The subject line of the email should state "Producing summonsed documents" and include the case name and number.

Accessing summonsed material produced in an electronic format

23. If an unrestricted order for access is made in relation to summonsed material which has been produced in an electronic format, then, on application by a party entitled to access that material, an electronic copy of the material will be made and provided by the registry.

24. The party applying for access should provide a blank DVD, CD or USB device onto which the copy can be made. In the alternative, upon request, the registry may provide access to the material by sending an email attaching the material to the party applying for access.

25. Access to non-electronic summonsed material will continue to be provided as per the current practice, that is, the material may be copied on the Commission premises unless an order for uplift has been made.

Tendering summonsed material originally produced in an electronic format

26. If directions have not been made to allow the tendering of documents at the hearing in an electronic format, then it is the responsibility of the party intending to tender a document which was originally provided to the registry in an electronic format to provide a printed copy of the document to the Commission at the hearing or to make arrangements for the relevant technology to be available so that the document can be viewed. This requirement may be achieved by including the document in a tender bundle.

Returning exhibits and produced documents

27. Rules 31.16A and 33.10 of the UCPR require the Commission to retain exhibits and summonsed material for specified time frames after the determination of the proceedings, unless the Commission makes a specific order for the return of this material at an earlier date.

28. The Commission's usual practice in relation to exhibits and summonsed material will now be an order when the proceedings are determined that the exhibits and summonsed material be returned forthwith. The Commission will not retain this material unless there is an order by the Member that it remain on the Commission file.

29. When a summons is served, the Summons recipient is asked to complete a declaration stating whether the documents being produced are copies and, if so, acknowledging that they may be destroyed by the Commission when they are no longer required. Summoned documents in an electronic format (produced on a DVD, a CD or a USB device) which have been identified as copies will not be returned to the Summons recipient and will be destroyed (or deleted) by the registry unless the Summons recipient has specifically requested that they be returned.

30. In relation to any exhibits that are returned, those exhibits must be retained intact by the party or person who produced the material until the expiry of the time to file an appeal or until any appeal has been determined. Solicitors should notify their clients of their obligations in relation to this material if it is returned to the clients. If an appeal is filed, the party or persons may be asked to produce the material to the Commission registry for the purposes of the appeal, however, generally, copies held by the appellant can be used for preparing the appeal books.

P M Kite SC, Chief Commissioner
15 February 2018