

Table of Contents

<i>Civil Procedure Overview</i>	2
<i>ADR</i>	3
<i>Letter of Advice</i>	5
<i>Case Management</i>	6
<i>Access to Justice and Open Justice</i>	7
<i>Preliminary Orders (Before Litigation)</i>	7
<i>Commencing Proceedings</i>	8
<i>Defence</i>	11
<i>Pleadings</i>	12
<i>Gathering Documentary Evidence</i>	14
<i>Privilege</i>	17
<i>Tribunal Alternatives</i>	21
<i>Interlocutory Hearings</i>	21
<i>Summary Disposition</i>	22
<i>Adjournments and Stays</i>	24
<i>Trial</i>	24
<i>Costs</i>	25
<i>Appeals</i>	26
<i>Enforcement</i>	27
<i>Criminal Procedure Overview</i>	27
<i>The Jury</i>	28
<i>Police Powers</i>	29
<i>Bail</i>	32
<i>Sentencing</i>	36
<i>Case Reference List</i>	38

Civil Procedure Overview

- **Civil procedure:** “[R]ules governing or regulating court proceedings” (*McKain v R W Miller & Co (SA) Pty Ltd* (1991)).

Balancing Themes

1. **Efficiency v Due Process:** ↑speed/↓cost can threaten justice (*Aon v ANU; Queensland v JL Holdings, ERA v Armstrong, UBS v Tyne*).
2. **Certainty v Flexibility:** Rigid rules don't suit all litigants vs too much discretion = uncertainty.
3. **Open Justice v Privacy:** Accountability vs protecting vulnerable parties.
4. **Party Autonomy v Court Control:** Parties run case vs court manages process.

Sources of Civil Procedure Law (NSW)

CPA 2005 | UCPR 2005 | Practice Notes | Court Acts | Fed: FCA Act/FCFCOA Rules

Overriding Purpose

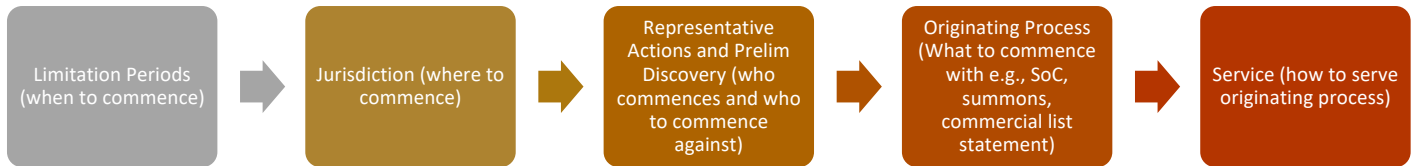
CPA s 56 to "facilitate just, quick & cheap resolution of real issues"

- **S 57:** Objects ((a) just determination, (b) efficient disposal, (c) efficient use of resources, (d) timely disposal).
- **S 58:** Dictates of justice factors: Court to follow dictates of justice in deciding “whether to make any order or direction for the management of proceedings”. Discretionary decision guided by factors in 58(2).
- **S 59:** Eliminate delay: the practice and procedure of the court should be implemented with the object of eliminating delay
- **S 60:** Costs should be proportionate to the dispute.
- **UCPR r 2.1:** Court can make any order for just/quick/cheap disposal.

Typical Civil Litigation Steps

Dispute → ADR attempt → Prelim orders (prelim discovery/freezing/search orders) → Letter of demand (threat of litigation) → SOC filed in court by P and served on D → Appearance by D → Directions → Particulars (D requests and P provides) → Defence → Possible further particulars → Pleadings close → Discovery → Witness evidence → Interlocutory motions re: discovery and privilege → Third party subpoenas → Trial preparation and trial → Judgment → Appeals → Enforcement [+ADR anytime].

Commencing Proceedings



Limitation Periods (*Limitation Act 1969 (NSW)*)

Action	Time	Act
Contract/Tort property	6 years	S 14A
Personal injury	3 years	S 18A
Defamation	1 year	S 14B
Deed	12 years	S 16
Child abuse	NONE	S 6A

- Act: *Limitation Act 1969 (NSW)*.
- **The time period within which to bring a claim;** governed by the law that governs the cause of action (*John Pfeiffer Pty Ltd v Rogerson*).
- Rationale: balances efficiency with due consideration – justice delayed is justice denied (*Brisbane South Regional HW v Taylor*).
- **Extensions/Exceptions:** *Lim Acts 56A* defamation (extension up to 3 yrs where ‘just and reasonable’ having regard to all the circumstances of the case including length and reason for delay, delay in P’s knowledge, promptness of P action, effect of delay e.g., *Barret v TCN Channel Nine Pty Ltd; Joukhador v Network Ten Pty Ltd, GLJ v RC Church, Wilmot v QLD, RC v The Salvation Army (WA) Property Trust* (child abuse actions – s 6A *Lim Act* means no limit); *Cth v Smith* (allowed extension of time in the interests of justice)).

Jurisdiction

- **Checklist:** 1) Nature of dispute; 2) Amount claimed; 3) Location (parties/events); 4) Governing law; 5) Assets location.
- Key cases: *Citta Hobart* (tribunals must determine own jurisdiction), *Re Wakim* (Fed can't exercise state), *McKain v RW Miller & Company (SA), AZC20 v Minister for Immigration, Parry v Secretary, Dep of Health*.

Court	\$ Limit and Jurisdiction
LC	≤\$100,000 or \$120,000 by agreement (s 29 LCA) Personal Injury: ≤\$60,000 Small claims division ≤\$20,000
DC	\$100,001-\$1,250,000 Unlimited in some areas e.g., motor accidents (s 44 DCA).
SC	Unlimited – ‘all jurisdiction which may be necessary for the administration of justice in NSW’ (s 23 SCA). Inherent jurisdiction – means something under Cth legislation can be brought as a matter (<i>Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)</i>). The only court that can grant equitable relief (except for where DC can cover certain matters under s 134 DCA).
Specialist tribunals and courts	E.g., LEC, Industrial Relations Commission and Industrial Court, Coroner’s Court.
NCAT	Various – 4 divisions (replaced 23 tribunals).
FC	Conferral of jurisdiction by statute (not Cth) – s19 FCAA. Federal Circuit and Family Court: <i>Family Law Act 1975 s 31</i> and <i>Federal Circuit and Family Court of Australia Act 2021</i> . Procedural laws of State court will apply (<i>lex fori</i>) but FC cannot exercise state jurisdiction (<i>Re Wakim; ex parte McNally, ASIC v Edensor</i>).
HC	Original jurisdiction in certain matters; single unifying authority as Cth court and highest CA from state courts.

Who to Sue

Class Actions (Uncertain Ps)

- Purpose: help individuals with similar small claims come together and pool resources, usually through litigation funders or law firms acting as funders.
- Opt out approach for determining application joinders (automatically in unless you opt out): s159 CPA. Court must set "opt out" date: s162 CPA.
- Limitation period is suspended from commencement until opt out.
- **Requires:** 7 or more individuals with "same, similar or related circumstances," "substantial common question of law or fact.": s157 CPA.
- *Johnston v Endeavour Energy*: shows the complexity of "opt out" with multiple representative actions involving insurers.
- Issues: Closed classes, the Common Fund Doctrine and subsequent individual defences: *Multiplex Funds Management Ltd v Dawson Nominees Pty Ltd*, *Money Max Int. Pty Ltd (Trustee) v QBE Insurance Group Ltd*, *Timbercorp Finance Pty Ltd (in liq) v Collins*.
- Other key cases: *Scenic Tours Pty Ltd v Moore*, *Gill v Ethicon Sarl (No 5)*, *BMW Australia Ltd v Brewster*; *Westpac Banking Corporation v Lenthall*, *Wigmans v AMP Limited*, *Racing NSW v Lewin*.

Preliminary Discovery

- Unknown D (UCPR r 5.2); where to serve claim (D location unknown UCPR r 5.2); whether it is worth commencing proceedings (value of claim uncertain or D may be impecunious and not worth suing UCPR r 5.3): these are uncommon but they happen.
- Key cases: *Dallas Buyers Club LLC v iiNet Ltd*, *AstraZeneca AB v Alphapharm Pty Ltd*, *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd*.

Originating Process

- The process by which proceedings are commenced, and includes the process by which a cross-claim is made. S 3 CPA
- Two types: Statement of claim (UCPR r 6.3), e.g., for tort, contract, debt, property; Summons (UCPR r 6.4), e.g., for preliminary discovery, ex parte proceedings such as Anton Piller orders and commercial list, technology and construction list, non-monetary relief.

Statement of Claim

- Most common form of originating process (also a pleading).
- UCPR 6.3: SoC required for: Debt or other liquidated claim, Tort, Fraud, Breach of duty and the damages re death, personal injury, property damage, claims for possession of land, defamation claim.
- **Reasonable grounds test** (*Lemoto v Able Technical Pty Ltd & 2 Ors*): "a claim will have 'reasonable prospects of success' if the legal practitioner reasonably believes there are 'provable facts' and a 'reasonably arguable view of the law' to establish that 'there are reasonable prospects of damages being recovered on [a] claim...[or]... there are reasonable prospects of [a] defence defeating the claim or leading to a reduction in the damages recovered on the claim'."
- **Drafting:** Introductory statements (Who the parties are and how they are connected to the dispute), the body (In numbered paras, substantive allegations sufficient to establish each element of each cause of action. Usually, chronological order is best, or by claim (if multiple) and then chronological), claim for relief.
- **Contents:** court details (court, division, list, registry, case number), title of proceedings (Ps and Ds), filing details (filed for, legal representative, contact details), hearing details ('this summons is listed at [time, date, and place], type of claim (eg Torts – Negligence – Public Liability), relief claimed (list claims eg, Damages, Interest, Costs), pleadings and particulars (list them), signature of legal representative, notice to D (If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the plaintiff's costs of bringing these proceedings. Before you can appear before the court you must file at the court an appearance in the approved form.), instructions on how to respond, party details (P and D), further details about P (including legal representatives and contact details), further details about D (including name and address).

- **Mandatory Legal Practitioners Declaration (lawyer's professional obligation):** "I certify under [clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success. I have advised the plaintiff[s] that court fees may be payable during these proceedings. These fees may include a hearing allocation fee."
- **Notice to D:** "If you do not file a defence within 28 days of being served with this statement of claim:
 - You will be in default in these proceedings.
 - The court may enter judgment against you without any further notice to you.
 The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you."

Summons

- **Also an originating process but does not plead P's case (not a pleading).**
- Exception to SoC in some cases: expedited lists (eg commercial list SC Eq) but require that summons to be accompanied by a pleading equivalent (eg commercial list statement).
- **UCPR6.1:** Summons must specifically state the relief claimed by P, including the costs.
- **Contents:** similar/same as SoC: court details (court, division, list, registry, case number), title of proceedings (Ps and Ds), filing details (filed for, legal representative, contact details), hearing details ('this summons is listed at [time, date, and place], type of claim [selected from list available on website], relief claimed (list claims), signature of legal representative, notice to D (If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the plaintiff's costs of bringing these proceedings. Before you can appear before the court you must file at the court an appearance in the approved form.), instructions on how to respond, party details (P and D), further details about P (including legal representatives and contact details), further details about D (including name and address).

Service

- The foundation of jurisdiction and natural justice (*Audi alteram partem – hear the other side*); opportunity to be served (*Agar v Hyde* [2000]).
- Purpose of service = notice (*United Group Resources Pty Ltd ABN 17 114 888 201 v Calabro* (No 4)).
- **Methods of service:** Personal ([UCPR r10.20](#) and [r10.21](#)); Various ([10.5 UCPR](#)); Agreement ([10.6 UCPR](#)); Acceptance by solicitor ([10.13 UCPR](#)); Substituted; Outside jurisdiction (outside NSW or Australia).
- **Timing of service:** As soon as practicable ([UCPR r 10.1\(1\)](#)); within 6 months (SC/LS/DC outside NSW) ([UCPR r 6.2\(4\)](#)); within 1 month (DC local) ([UCPR r 6.2\(4\)](#)); Can extend by court order or judgment either before or after time expires ([UCPR r 1.12](#)).

Personal service ([UCPR r 10.20](#)):

- Required for originating process, subpoenas ([UCPR r 33.5](#)) garnishee orders, orders for examination ([UCPR r 10.20](#)).
- Does not always mean giving the document to a person.
- **Methods:** leave copy with person OR (if they do not accept the copy) put down the document in the person's presence and tell nature of the document ([r 10.21\(1\)](#)).
- Violence exception: if risk of violence, may deliver to the other person by leaving it as near as practicable to that other person. ([r 10.21\(2\)](#)).
- Corporations: personally serving principal officer of corporation ([r 10.22](#)); or company's registered office (best way) (*Corp Acts 109X(1)(a)*).
- Other circumstances: Usually on solicitors, by post, document exchange, email (if details for service specify electronic means), other means contractually agreed by the parties ([UCPR r 10.6](#)).
- **Proving service:** affidavit of service [UCPR r35.8](#) – critical to obtain default judgment as the court must be confident D(s) have notice of the proceedings before finding against them in their absence.

Substituted Service ([r10.14](#)): If can't practicably serve

- **Requirements: cannot practicably be served** on the person (a) or in the manner provided by law (b) (UCPR r 10.14(1)); other party must have seen the notice (and proof must be brought to court); party must specify exactly what the substitution is (what is being done instead of usual service)).
- Judicial discretion to determine what constitutes reasonable attempts to serve personally.
- One must try hard, and very hard first, to do personal service before seeking substituted service (*Syndicate v El-Sayed*).
- Successful cases (where substituted service has been ordered): *Bulldogs Rugby League Club v Williams*, *Capital Ltd v DNV AS*, *Commissioner of the Australian Federal Police v Xin & Ors (No 2)*, *Lamont v Malishus Ltd*.
- Unsuccessful cases: *Flo Rida v Mothership Music Pty Ltd*; *Syndicate Mortgage Solutions Pty Ltd v Khaled El-Sayed & ors*, *United Group Resources Pty Ltd ABN 17 114 888 201 v Calabro (No 4)*.
- OS needs Sch 6 nexus (*Flo Rida* fail | *Capra* success)

Service Outside Jurisdiction:

- Interstate: UCPR s 15(1) – ‘An initiating process issued in a State may be served in another State.’
- Overseas: UCPR Sch 6 outlines certain circumstances that automatically grant the ability to serve overseas where there is a sufficient nexus with issuing jurisdiction including (a) tort arising in NSW, (b)/(c) contract with NSW nexus (d) injunction connected to NSW, (e) land/property in NSW (g) D NSW resident etc. down to (s). OS Service must be as prescribed by Sch 6 (UCPR r 11.4). D must have notice on originating process explaining grounds for jurisdiction (UCPR r 11.7). Substituted service overseas must be sought through SC, DC cannot do it (*Flo Rida*).

Defence

Defence Appearance

- Must file notice of appearance on P within 28 days in approved form (UCPR r 6.10) (do not file defence immediately as that is an appearance); UCPR requires appearance (UCPR r 6.1; *Ghosh v Ninemsn Pty Ltd*).

Types of Appearance:

- **Conditional:** only appears to contest right of court or party, basically objects (could be to jurisdiction, summary dismissal cases, etc) – must use notice of motion without entering proper appearance (UCPR r 12.11).
- **Unconditional:** most matters – D accepts court’s jurisdiction but contests P’s claim.
- **Submitting:** D submits to court’s decision with no active role in litigation (uncommon) (*Evergreen Tours P/L v McLaren*).

Defence

- D’s pleading but not as active as P’s pleading – traverses what P says.
- D must traverse all material facts: 1) Admit (agree with P); 2) not admit (put P to proof on); 3) deny (disputes – these become the real issues).
- Failure to traverse = admission (r 14.26); exception – D makes a joinder of issues under r 14.27 operating as denial of the allegation (r 14.26(1)(b)).
- Some defences also require positive pleadings e.g., fraud.
- Joinder of issue: operates as a denial of every allegation of fact made in the pleading, may be express or implied (r 14.27(5)-(6)), cannot exist following SoC (r 14.27(4)), is automatically implied from the last unanswered pleading (so long as it is not the SoC) (r 14.27(2)-(3)).

Pleadings

- Delivered between parties to litigation and set out the material facts supporting claims or defences.
- Purpose: Give other party notice of case and a fair opportunity to meet it; limit ambit of pre-trial procedures like discovery; limit relevant and admissible evidence (party can only present case based on pleadings).
- *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd*: The function of pleadings is to state with sufficient clarity the case that must be met and to define the issues for decision.
- Also see: *Jeffreys v Sheer*.

Pleading Sequences

SOC (P) → Defence appearance (28 days UCPR r 14.3) → Defence → Reply (P) → Crossclaim (D/cross-claimant) → Defence to XC (cross-D, can be P or third party) → Reply to XC

All Pleadings – Fundamental Rules

- Material facts NOT evidence (r 14.7).
- Brief as possible (r 14.8).
- No surprises (r 14.14): includes matters which must be pleaded (positive pleadings), including fraud, performance, release, statute of limitation, extinction of right or title, voluntary assumption of risk, causation of accident by unknown and undiscoverable mechanical defect and facts showing illegality (r 14.14(3)). E.g., *Forrest v ASIC* (fraud and illegality). Obligation for legal representatives (*Glover v Australian Ultra Concre Floors Pty Ltd, Boulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd*).
- Traverse or admit (r 14.26)
- Verify (r 14.22-23)

Drafting

- Form – numbered paragraphs: r 14.6
- As brief as possible: r 14.8
- Material facts not evidence: r 14.7
- References in pleadings to documents and spoken words: r 14.9
- Pleadings to be consistent as to allegations of fact – r 14.18
- Pleadings may raise a point of law – r 14.19
- Verification – r 14.22 and r 14.23 (with some exceptions parties must verify that their claims are true by way of supporting affidavit).

Particulars

- **Details of material facts**; required in SoC, Defence, or at least separately usually to a request to provide all particulars (request if insufficient r15.10 – obtain a court order).
- Distinguished from evidence (*Alexanderson Earthmover Pty Ltd v Civil Mining and Construction*).
- Obligation: provide all necessary particulars necessary to enable opposite party to identify case that pleading requires them to meet (UCPR r 15.1).
- Particulars also required of any fraud, misrepresentation, breach of trust, wilful default, or undue influence (r 15.3); and facts and circumstances constituting negligence and breach of statutory duty (UCPR r 15.5).
- Examples: in relation to an event pleaded – when the alleged event occurred, where, who was present, etc; in relation to a statement pleaded – who allegedly made the statement, when was it made, where was it made, who was it made to, who else (if anyone) was present at the time of the statement.

Example of putting it all together:

Material fact: "On or about 8 May 2022 the D entered a contract with the P".

Particulars: "The contract was entered orally at Macquarie University. The contract concerned the provision of documents in exchange for beverages" etc.

Evidence: "On or about 12:00pm, I said to the plaintiff words to the effect of: "I promise to buy you a beer at Ubar if you lend me your uni notes" At about 12:30pm I purchased a Cascade Light at Macquarie University UBar which I handed to the defendant..." etc

Amendments

- Court can direct mode/timeframe (UCPR r 19.6) at any stage.
- Power to amend: s 64 CPA at court's broad discretion subject to overriding purpose of efficiency (CPA s 56), prejudice (*Aon v Anu*), costs/adjournment (UCPR r 42.6).
- Leave not required if P amends within 28 days.
- Amendment after expiry of limitation period is okay (CPA s 65).
- No leave required P amends <28 days there is no defence; if defence is filled, P may still amend but D has 14 days to amend defence.
- Mode of amendment (UCPR rr 19.5-19.6): file a fresh document (complex commercial matters can name pleadings the '2nd amended defence', '8th SoC' etc.) and indicate amendments (e.g., underline amendments or strikethrough deletions in documents).
- Key cases: *JL Holdings*, *Aon v ANU*.

Defective Pleadings

- Examples: Not in correct form [UCPR r 14.5]; Plead evidence [UCPR r 14.7]; Not specific or brief [UCPR r 14.14/14.8]; Inconsistent allegations of fact [UCPR r 14.18]; No reasonable cause of action [UCPR r 14.28]; Prejudice, embarrassment or delay [UCPR r 14.28]
- **Consequences:** pleadings (whole or part) struck out at any time (r 14.28); summary judgment or dismissal ordered (rr 13.1 and 13.4); lose litigation (unable to obtain relief); for minor problems, amend (r 19).
- Court can order dismissal if proceedings appear frivolous or vexatious, no reasonable cause of action, or abuse of process (r 13.4).
- Key cases: *Director Of The Fair Work Building Industry Inspectorate v Construction, Forestry, Mining And Energy Union & Ors (No.2)* [2016].
- Abuse of process (common law concept followed by UCPR): *UBS AG v Tyne*, *Rozenblit v Vainer*, *Vic International Container Terminal Ltd v Lunt*, *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liquidation)*.
- Hopeless Pleadings: *Donaldson v Cth of Australia*, *Markisic v Cth of Aust* (2010), *Markisic v v State of New South Wales & Ors (No 2)*, *Attorney General in and for the State of NSW v Markisic*.

Gathering Documentary Evidence

Ways to Gather Documentary Evidence

Method	Target	Enforce	Key Point
Discovery (FCR Div 20.2)	Party (and non-parties)	Order	Relevant classes
Notice to Admit (r17.3-4)	Party	Deemed if no response	Facts or authenticity
Notice to Produce (r21.9/34.1)	Party	Court order	Two types: inspection/court
Interrogatories (r22)	Party	Answer on oath	Rare - need necessity
Subpoena (r33)	Non-parties (anyone)	Contempt	Personal service required
Freedom of Information (FOI)/Gov Info (Public Access) Act 2009 (GIPA)	Non-parties (unless Gov is party)	GIPA	Can be done online

Discovery

- Process by which P finds all documents relevant to a dispute, D does the same, then list of those documents exchanged.
- Process: Motion → Order → List → Affidavit/Certificate → Inspection
- Key cases: *ERA v Armstrong*.

Process

- Party A files and serves notice of motion seeking discovery (UCPR r 21.2) – sometimes not required where court timetable has discovery on it. UCPR r 21.2: Party B may be ordered to give discovery to Party A of (a) documents with a specified class or classes, or (b) sample/s of documents within a class. UCPR 21.2(2) A class of documents must not be specified in more general terms than court considers justified in the circumstances.
- Hearing of notice of motion and court orders discovery (UCPR r 21.2).
- Party B makes list (UCPR r 21.3).
- B provides affidavit (verifying list) and solicitor makes certificate (r 21.4).
- Inspection by Party A.

Relevant Classes/Categories of Documents

- **Test: "relevant to fact in issue"** - could rationally affect probability (UCPR r 21.1(2)) – “...if it could, or contains material that could, rationally affect the assessment of the probability of the existence of that fact regardless of whether the document or matter would be admissible in evidence.”
- Classes specified by UCPR 21.2(3) (a) by relevance to one or more facts in issue, or (b) by description of their nature and time period within which they were brought into existence, or (c) in such other manner as the court considers appropriate in the circumstances BUT subject to r 21.2(2) A class of documents must not be specified in more general terms than the court considers to be justified in the circumstances.
- Key cases: *Ashton v Pratt, Clifton (Liquidator) v Kerry J Investment*.

Discovery Obligations

- List all relevant docs (r 21.3) currently in possession or were in possession within 6 months prior (r 21.3(2)(a)(ii)) and include brief description (nature and date) (r 21.3(2)(b)).
- Specify person believed to be in possession (r 21.3(2)(c)).
- Identify privileged documents and circumstances giving rise (r 21.3(2)(d)).
- Excluded documents no need to be included (r 21.3(1)): (a) filed, (b) served (c) post-commencement, (d) irrelevant copies of discovered docs, (e) og docs certain to third parties where copy discovered.
- Continuing obligation to give discovery including privileged documents which have ceased to be privileged (UCPR r 21.6)
- **Confidentiality** (UCPR r 21.7): document obtained from discovery cannot be disclosed or used otherwise than for proceedings except by leave of the court or it has been received into evidence in open court.
- List must be supported by affidavit and solicitor’s certificate of advice (if party B has a solicitor) (UCPR 21.4(1)): verifies discovery (*Con Ange v Fairfax Media Publications Pty Ltd & Ors*). Client must sign doc (r 21.4(2)).

- Documents must be made accessible to Party A (UCPR r 21.5).
- **Practice Note No. SC Gen 7** encourages the use of technology for the purposes of information exchange and at trial itself.
- Discovery abuse – document destruction in anticipation of litigation: *BAT v Cowell* (estate of Rolah McCabe), *BAT v Laurie*, *ERA v Armstrong*.

Limiting Scope of Discovery

- **Practice Note SC EQ 11** – "No order for disclosure of documents before evidence and only when necessary". Commercial technology and construction lists in equity and extended to real property list in 2013. Test: "[T]o be exceptional the circumstance need not be unique or unprecedented or very rare. What is needed is an appraisal of all the circumstances and the context in which the expression must be satisfied. Are there circumstances necessitating disclosure before evidence in the sense that the party's case cannot be put without the disclosure? Are those circumstances exceptional?" (*Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue*).
- Cases where discovery granted as necessary under SC Eq 11: *Skyscanner Ltd v Hotels Combined Pty Ltd*, *In the matter of Metal Storm Ltd (subject to a deed of company arrangement) ACN 064 270 006*, *Micro Machinery Manufacturing Pty Ltd and Micron Group Pty Ltd*.
- Subpoenas cannot circumvent SC Eq 11 (*Broadway Plaza Investments Pty Ltd v Broadway Plaza Pty Ltd*).
- Other cases: *The Owners - Strata Plan No 89791 v FKP Constructions Pty Ltd*, *Guildford Montessori Kindergarten Pty Ltd v Wehbe*.
- Also note: No order for discovery in personal injury claims unless "special reasons" exist (UCPR 21.8).

Notice to Admit

- **Notice served by one party to the proceedings on another party**, requiring the party: to admit specified facts for the purposes of the proceedings only (r 17.3), or to admit the authenticity of specified documents (r 17.4).
- A party may withdraw an admission with leave of the court (r 17.3(3)).
- **Presumed admission:** If, as to any fact specified in the requesting party's notice, the admitting party does not, within 14 days after service on the admitting party of the requesting party's notice, serve on the requesting party a notice disputing that fact (UCPR r 17.3(2)).
- Key cases: *Folau v Minister for Immigration and Border Protection*, *EMS18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, *Star Training Academy Pty Ltd v Commissioner of Police (NSW)*.

Notice to Produce

- Two types: 1) Notice to produce documents to another party for inspection (r 21.9-21.12) (must be referred to in originating process or relevant to fact in issue); 2) Notice to produce docs to the court at a hearing (r 34.1-34.2).
- Can only be served on a party to the proceedings, does not need filing.
- Unless the court orders otherwise party B must comply with a notice to produce (UCPR 21.11 and 34.2).
- Key cases: *Jeray v Blue Mountains City Council*, *Suzlon Energy Ltd v Bangad*.

Interrogatories

- **Series of questions delivered by one party to the other which the party under interrogation is required to answer, usually on oath.**
- Increasingly rare in litigation e.g., **PN SC Eq 3 Commercial & Technology & Construction list interrogatories only upon proof of necessity.**
- The court may order any party to answer specified interrogatories at any stage of the proceedings. (Rule 22.1). Party may object if irrelevant, vexatious, oppressive or a privilege claim. (Rule 22.2). Parties may tender one or more answers to interrogatories as evidence (Rule 22.6).
- Judiciary generally does not like them but they are not ruled out entirely.

Subpoenas

- **A document of the Court compelling a person (often non-party) to give evidence** (must attend trial as a witness UCPR r 33.1) or **produce evidence** (must produce documents to the court UCPR r 33.2).

- **Note:** Special Practice notes eg in SC ([Practice Note SC Gen 18 and 19](#)) and DC ([Practice Note 8](#)) apply to subpoenas.
- **Subpoena to give evidence:** *Cth v Helicopter Resources Pty Ltd* [2020].
- **Subpoena to produce:** Must be served personally as third party often unaware of proceedings and failure to comply is a contempt of court.

Issuing and serving:

- Issued through court registry ([r 33.2](#)) (**note:** means other party alerted).
- Must be personally served on addressee and on each other party ([r 33.5](#)).

Contents:

- Documents or attendance required.
- Proposed access orders [Practice Note SC Gen 19 \(Dec 2011\)](#).
- Formal components informing subpoenaed party of rights and obligations.
- Specific terms and requests (*Christer Nominees Pty Ltd trading as Willis Property Group v Calabria Community Club Ltd* [2022]).
- Court details: court, #division, #list, registry, case number.
- Title of proceedings: Ps and Ds.
- Issuing details: issued at request of, legal representative, contact name and telephone, contact email, address for service.
- Order to the subpoena recipient: name, address, 'you are ordered to attend and give evidence and to produce this subpoena or a copy of it and the documents or things specified in this schedule'.
- Proposed access order: #[Role of party eg Plaintiff] to have first access for [number of days eg 7] days because [#that party may be entitled to claim privilege #specify other reasons]; thereafter, in the absence of further application, access to all parties. #Access granted to all parties, because [#no claims for privilege are likely to arise #specify other reasons]. #[Specify proposed alternative access order with reason/s.]
- Notice to the subpoena recipient: 1) Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest. 2) The last day for service of this subpoena is [date] (must be 5 days before earliest date on which addressee is required to comply with subpoena or an earlier or later date fixed by the court UCPR r 33.3). 3) Please read notes 1 to 18 at the end of this subpoena. 4) You must complete the Declaration appearing on the last page of this document and attach it to the subpoena or copy of the subpoena that accompanies the documents or things produced to the Court under the subpoena. 'Any enquiries concerning compliance with the subpoena should be directed to the Contact person named above.'
- How to respond: In so far as you are required by this subpoena to attend to give evidence, you must attend as follows: date, time, place. Date time and place also need for which you must attend to produce the subpoena or a copy of it and documents or things. Address to which they can be delivered.
- Schedule: list of documents or things that must be produced. It must be specified whether or what electronic form of document production is acceptable.
- Applications in relation to subpoena: 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: 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' expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.
- Failure to comply with subpoena—arrest Failure to comply with a subpoena without lawful excuse: (a) is a contempt of court and may be dealt with accordingly, (b) may lead to your arrest under section 97 Civil Procedure Act or under rules of the court to enforce compliance with a subpoena.

Compliance with subpoena:

- Addressee must adhere to subpoena requests.
- For a subpoena to produce, the addressee can deliver a copy of the subpoena and the documents or things to the court registrar ([UCPR 33.6](#)).

- Court may order payment of reasonable costs of compliance (in addition to conduct money) (UCPR 33.11(1)).
- **Exceptions to compliance:** no conduct money paid by party issuing, subpoena not served on time (r 33.6; but if you had actual knowledge even if it was not personally served you must comply (r 33.6(3)).
- Failure to comply = contempt of court (UCPR r 33.12).
- Note use of subpoenaed material: SC GEN 23 Use of Generative Artificial Intelligence (Gen AI) general prohibition 9A – “...material produced on subpoena, ...must not be entered into any Gen AI program unless the legal practitioner or person responsible for the conduct of the proceeding is satisfied that the information: (a) will remain within the controlled environment of the technological platform being used and that the platform is the subject of confidentiality restrictions on the supplier of the relevant technology or functionality to ensure that the data is not made publicly available and is not used to train any large language models; (b) is to be used only in connection with that proceeding (unless otherwise required or permitted by law to be disclosed or required to be reviewed by a law enforcement agency for policy purposes); (c) is not used to train the Gen AI program and/or any large language model.”

Set aside if (party with sufficient interest can seek order setting aside UCPR r 33.4):

- No legitimate forensic purpose (*Rinehart v Rinehart* (2018); *Secretary of the Dep of Planning, Industry and Environment v Blacktown City Council*).
- Fishing expedition.
- Too wide/oppressive.
- Unnecessary (*NSW v Meredith*).

Discovery from Non-Parties

- Allowed in NSW (UCPR r 5.4-5.5). But allowable circumstances limited and usually for pre-litigation discovery.

FOI/GIPA

- Government is quite a common non-party because it has a lot of information, or government bodies.
- Subpoenas sometimes better because GIPAs can be dragged out.

Privilege

Relevant Provisions

Law determining privilege: Evidence Act 1995 (NSW) or (Cth); CPA; UCPR.

S 118	EA	<ul style="list-style-type: none"> • Client legal privilege – legal advice privilege. • (1) Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of: (a) a confidential communication made between the client and a lawyer; or (b) a confidential communication made between 2 or more lawyers acting for the client; or (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer or another person; for the dominant purpose of the lawyer, or one or more of the lawyer, providing legal advice to the client.’
S 119	EA	<ul style="list-style-type: none"> • Client legal privilege – litigation privilege. • (1) Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of: (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or (b) the contents of a confidential document (whether delivered or not) that was prepared; for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.’
S 130	EA	<ul style="list-style-type: none"> • Public interest immunity: Protects disclosure of information when it is in the public interest for the information not to be disclosed. • (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in