

Reprint  
as at 18 October 2016



**Evidence (Trans-Tasman Service of, and  
Compliance with, New Zealand Subpoenas and  
Australian Subpoenas Issued in Criminal Proceedings)  
Rules 2013**  
(SR 2013/353)

Jerry Mateparae, Governor-General

**Order in Council**

At Wellington this 2nd day of September 2013

Present:

The Right Hon John Key presiding in Council

His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following rules pursuant to section 199, and for the purposes of subpart 1 (on proceedings in Australia and New Zealand) of Part 4 (on evidence from overseas or to be used overseas), of the Evidence Act 2006 and, insofar as they regulate the practice and procedure of—

- (a) the High Court, pursuant to section 51C of the Judicature Act 1908, and with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee established under section 51B of the Judicature Act 1908 (of whom at least 1 was a Judge of the High Court); and

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**Note**

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.  
Note 4 at the end of this reprint provides a list of the amendments incorporated.

**These rules are administered by the Ministry of Justice.**

- (b) District Courts, pursuant to section 122 of the District Courts Act 1947, and with the concurrence of the Chief District Court Judge and at least 2 members of that Rules Committee (of whom at least 1 was a District Court Judge); and
- (c) Youth Courts, pursuant to section 448 of the Children, Young Persons, and Their Families Act 1989.

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## **Rules**

### **1 Title**

These rules are the Evidence (Trans-Tasman Service of, and Compliance with, New Zealand Subpoenas and Australian Subpoenas Issued in Criminal Proceedings) Rules 2013.

## 2 Commencement

These rules come into force on 11 October 2013.

### *Preliminary provisions*

## 3 Interpretation

- (1) In these rules, unless the context otherwise requires,—
  - (a) the **Act** means the Evidence Act 2006; and
  - (b) terms that are defined in the Act have the meanings given to them by the Act.
- (2) A reference in these rules to a numbered form is a reference to that numbered form as set out in the Schedule.  
Compare: 1908 No 89 Schedule 2 r 9.58

## 4 Rules apply only to New Zealand subpoena, or Australian subpoena, issued in criminal proceeding

- (1) These rules apply only to a New Zealand subpoena, or an Australian subpoena, issued in a criminal proceeding, and references in these rules to a New Zealand subpoena, an Australian subpoena, or the subpoena, must be read accordingly.
- (2) Rules on trans-Tasman service of, and compliance with, New Zealand subpoenas and Australian subpoenas issued in a civil proceeding are in other rules of court (for example, the High Court Rules 2016 and District Courts Rules 2009).  
Rule 4(2): amended, on 18 October 2016, by section 183(c) of the Senior Courts Act 2016 (2016 No 48).

### *Service of, and compliance with, New Zealand subpoenas in Australia*

## 5 Issue of subpoenas by High Court, District Court, or Youth Court for service in Australia

- (1) An order of subpoena of the High Court, a District Court, or a Youth Court for service on a witness in Australia that requires the witness to testify, whether or not it also requires the witness to produce documents or things, must be in form 1.
- (2) An order of subpoena of the High Court, a District Court, or a Youth Court for service on a witness in Australia that requires the witness to produce documents or things, but does not require the witness to testify, must be in form 2.
- (3) An order of subpoena referred to in subclause (1) or (2) may be obtained by any party to a criminal proceeding, at any time after the commencement of the proceeding.
- (4) A party requiring the issue of an order of subpoena must file a written request to obtain it.

- (5) The names of more than 1 witness may be included in an order of subpoena, but it is not necessary to show the names on the written request.
- (6) Upon receiving a written request under this rule the Registrar must forthwith issue the order or orders of subpoena requested.

Compare: 1908 No 89 Schedule 2 rr 9.52, 9.59

**6 Application for leave to serve New Zealand subpoena on witness in Australia**

- (1) An application for leave (of a Judge of the relevant court, and under section 154 of the Act) to serve a New Zealand subpoena on a witness in Australia must be made—
  - (a) in writing to the Registrar of the relevant court; and
  - (b) without notice to the other parties to the criminal proceeding.
- (2) The application must be accompanied by an affidavit containing the following matters:
  - (a) the name, occupation, and residential address of the witness:
  - (b) proof that the witness has attained the age of 18 years:
  - (c) if the subpoena requires the witness to testify and to attend at the New Zealand court, whether consideration has been given to requiring the witness to testify from Australia by audio link or audiovisual link and the reason it is not considered appropriate that the witness do so:
  - (d) the latest date proposed for service of the subpoena:
  - (e) if the subpoena requires the witness to attend at the New Zealand court or at any other place,—
    - (i) the availability of suitable means of transport to enable the witness to comply with the subpoena:
    - (ii) an estimate of the length of time that the witness will be required to attend at the court or other place:
    - (iii) an estimate of the cost of transport and accommodation likely to be incurred by the witness in complying with the subpoena:
  - (f) the amounts or the amounts represented by vouchers, as the case may be, proposed to be paid or tendered to the witness to enable the witness to comply with the subpoena:
  - (g) if the applicant is aware of any fact or circumstance that may constitute a ground for setting the subpoena aside under section 160 of the Act, the fact or circumstance.
- (3) A Judge of the relevant court may direct that the subpoena be served in Australia on a body corporate by serving the subpoena on a member, officer, or employee of the body corporate in the manner the Judge directs.

Compare: 1908 No 89 Schedule 2 r 9.60(1)–(3)

**7 Service of New Zealand subpoena on witness in Australia**

Every statement that, in accordance with section 156(2)(b) of the Act, is required to accompany a New Zealand subpoena that is served on a witness in Australia must be in form 3.

Compare: 1908 No 89 Schedule 2 r 9.61

**8 Application to set aside New Zealand subpoena**

- (1) An application to set aside a New Zealand subpoena served on a witness in Australia may be filed by the witness, or by a person who is authorised by, or on behalf of, the witness to file the application and who is—
  - (a) a solicitor who is the holder of a current practising certificate as a solicitor or as a barrister and solicitor issued under section 39 of the Lawyers and Conveyancers Act 2006; or
  - (b) a person who is entitled to practise as a solicitor of a Supreme Court of a State or Territory of Australia.
- (2) The application—
  - (a) may state (for the purposes of rule 10(1)) that a hearing is required to determine the application; and
  - (b) may be filed by sending it by fax or email to the registry of the relevant court in which leave to serve the subpoena was given.
- (3) Every application—
  - (a) must state an address in New Zealand or Australia that is the applicant's address for service;
  - (b) may state a fax number in New Zealand or Australia or an email address to which documents relating to the application may be sent to the applicant.
- (4) If the application is filed by fax or email, the Registrar—
  - (a) must send by fax or email to the applicant or the applicant's solicitor, as the case may be, an acknowledgement that the application has been received;
  - (b) may, if the application is not clear or legible, require the applicant or the applicant's solicitor, as the case may be, to transmit the application by fax or email again.

Compare: 1908 No 89 Schedule 2 r 9.62

**9 Service of documents on applicant to set aside New Zealand subpoena**

- (1) A document relating to an application to set aside a New Zealand subpoena may be served on the applicant by—
  - (a) leaving it at, or posting it to, the address for service of the applicant stated in the application; or

- (b) if a fax number or email address is stated in the application, sending it by fax to that number or email to that email address.
- (2) If a document relating to the application is served on the applicant by post in accordance with subclause (1)(a), it is to be treated as having been served on the earlier of—
  - (a) the sixth working day after the day on which it was posted; and
  - (b) the day on which it was received.
- (3) If a document relating to the application is served on the applicant by fax or email in accordance with subclause (1)(b), the document must, subject to subclauses (4) and (5), be treated as having been served on the day on which it was sent.
- (4) If a document is sent by fax to a fax number or by email to an email address in a State or Territory of Australia at a time later than 5 pm in that State or Territory, the document must, subject to subclause (5), be treated as having been served on the first working day after the day on which it was sent.
- (5) A document sent to a fax number or email address in Australia must, unless the contrary is proved, be treated as having been received in a complete and legible condition.

Compare: 1908 No 89 Schedule 2 r 9.63

**10 Application to set aside New Zealand subpoena may be determined with or without hearing**

- (1) The relevant court may determine without a hearing an application to set aside a New Zealand subpoena if neither the applicant (in the application) for an order to set aside a New Zealand subpoena, nor the person at whose request the subpoena was issued (in a document filed in response to the application), states that a hearing is required.
- (2) For the purposes of determining an application to set aside a New Zealand subpoena the relevant court may, if it thinks fit, hold a hearing by audio link or audiovisual link under section 168 of the Act (which governs remote appearances related to remote evidence).
- (3) The relevant court must for those purposes hold a hearing by audio link or audiovisual link under the section specified in subclause (2) if—
  - (a) the applicant requests, either in the application or within a reasonable time after the filing of the application, that a hearing be held by video link or telephone conference; and
  - (b) it may do so in accordance with the Act.

Compare: 1908 No 89 Schedule 2 r 9.64

**11 Failure to comply with New Zealand subpoena**

A certificate under section 161 of the Act must be in form 4.

Compare: 1908 No 89 Schedule 2 r 9.65

*Service of, and compliance with, Australian subpoenas in New Zealand*

**12 Transmission of documents or things to Australian court**

- (1) Every person who produces a document or thing at a registry of the High Court in compliance with an Australian subpoena must provide the Registrar with a copy of the subpoena.
- (2) When a document or thing is produced at a registry of the High Court, the Registrar must, on compliance with subclause (1),—
  - (a) issue a receipt for the document or thing that states the date and time of its production; and
  - (b) send to the Registrar of the Australian court that issued the subpoena, by fax or other means of communication (for example, by email), a copy of the receipt and of the subpoena; and
  - (c) send the document or thing together with a copy of the subpoena, without delay, to the Australian court by means enabling it to be received before the date on which it is required to be produced to that court.

Compare: 1908 No 89 Schedule 2 r 9.66

## Schedule Forms

r 3(2)

### Form 1

#### Subpoena to give evidence for service in Australia

r 5(1)

**To** [*name, place of residence, occupation*]

1 You are ordered to attend [*place of court or, if witness is required to attend at a place other than the relevant court, that other place*] on [*date, time*] and on each subsequent day until you are discharged from attendance to give evidence on behalf of the [*party*] in this proceeding.

2 *Omit this paragraph if it does not apply*

You are ordered to bring with you and produce at the same time and place [*details of documents or things to be produced—list below if appropriate*].

3 This order of subpoena is issued by [*full name*], the party/solicitor for the party\*.

\*Select one.

**Note:** Section 156(2) of the Evidence Act 2006 of New Zealand allows this order of subpoena to be served in Australia only if it is accompanied by a copy of the order granting leave to serve it, and a statement in the prescribed form of the rights and obligations of the person served.

#### **\*List of documents or things**

[*List documents or things.*]

\*Omit if inapplicable.

Date:

Signature:

Full name of Registrar/Deputy Registrar\*:

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Schedule

Postal address of registry:

Telephone:

Fax:

\*Select one.

Sealed: [*date*]

Form 2  
Subpoena for production only for service in Australia

r 5(2)

**To** [*name, place of residence, occupation*]

- 1 You are ordered to produce this subpoena and the documents or things set out in the list below at [*relevant court*] at [*place, date, time*].
- 2 You may comply with this subpoena by producing the documents or things at a registry of an Australian court that is authorised by the law of the Commonwealth of Australia to receive those documents or things, no later than 10 days before that date.
- 3 This order of subpoena is issued by [*full name*], the party/solicitor for the party\*.

\*Select one.

**Note:** Section 156(2) of the Evidence Act 2006 of New Zealand allows this order of subpoena to be served in Australia only if it is accompanied by a copy of the order granting leave to serve it, and a statement in the prescribed form of the rights and obligations of the person served.

**List of documents or things**

[*List documents or things.*]

Date:

Signature:

Full name of Registrar/Deputy Registrar\*:

Postal address of registry:

Telephone:

Fax:

\*Select one.

Sealed: [*date*]

Form 3

Statement of rights and obligations of person served in Australia (under  
Evidence Act 2006 of New Zealand) with New Zealand subpoena issued in  
criminal proceeding

r 7

*Section 156(2)(b), Evidence Act 2006 (NZ)*

**Important:** This statement is important. Please read the statement and the attached document carefully. If you are in any doubt about this statement or the attached document, you should get legal advice immediately.

Attached to this statement is a subpoena issued in a criminal proceeding by a New Zealand court, namely the [*relevant court*]. A subpoena is a summons (or order, notice, or other process) to a witness to give evidence or produce documents. The subpoena attached to this statement requires you to [*specify whether witness is required to attend the relevant court or some other place to give evidence, give evidence and produce documents or things, or only produce documents or things*].

The subpoena may be served in Australia under section 156 of the Evidence Act 2006 of New Zealand.

This statement sets out your rights and obligations relating to the subpoena.

**Your rights**

- 1 At the time you are served with this subpoena, or at some other reasonable time before the hearing, you are entitled to be paid allowances and travelling expenses, or given vouchers in respect of those allowances and expenses, that cover your reasonable expenses in complying with this subpoena.
- 2 You are not required to comply with this subpoena unless those allowances and travelling expenses or vouchers are tendered to you.
- 3 You are also entitled to be paid for your reasonable expenses in complying with the subpoena in addition to any payment or vouchers tendered to you. You may apply to the New Zealand court for an order specifying that amount.
- 4 You may apply to the New Zealand court to have the subpoena set aside. If you want to have the subpoena set aside, you should get legal advice as soon as possible.
- 5 An application to set the subpoena aside can be made and determined without your having to go to New Zealand. You are entitled to have Australian solicitors act for you.
- 6 The New Zealand court may determine the application without a hearing if neither you nor the party who requested the issue of the subpoena requires a hearing. The court may hold a hearing by audio link or audiovisual link if the court thinks fit. If a party applies to the court for a direction to hear the application by audio link or audiovisual link, the court is required to hear it by audio link or audiovisual link.

**Note:** See “**Setting subpoena aside**” for details of the grounds on which a subpoena may be set aside and the procedure that must be followed.

### **Your obligations**

- 7 If the subpoena is not set aside, you must comply with it if—
- (a) when you were served with the subpoena, or at some reasonable time before the time specified for you to comply, you have been paid or tendered allowances and travelling expenses, or offered vouchers in respect of those allowances and expenses, that are sufficient to cover reasonable expenses incurred in complying with this subpoena; and
  - (b) a copy of the order of the Judge of the New Zealand court granting leave to serve the subpoena was served on you with the subpoena; and
  - (c) you were served with the subpoena not later than the date specified by the Judge of the New Zealand court who granted leave to serve the subpoena; and
  - (d) any other conditions relating to the service of the subpoena have been complied with; and
  - (e) you have attained the age of 18 years.
- 8 If the subpoena only requires you to produce documents or things, you may comply with the subpoena by producing the documents or things at any registry of an Australian court that is authorised by the law of the Commonwealth of Australia to receive them, not later than 10 days before the date specified in the subpoena for producing them in the New Zealand court. If you produce the documents or things at a registry of an Australian court, you will be required to produce the subpoena and to pay the cost of sending the documents or things to the New Zealand court. You are entitled to have the costs of producing the documents or things, and of sending them to the New Zealand court, paid or tendered to you before you are required to comply with the subpoena.

### **Failure to comply with subpoena**

- 9 Failure to comply with the subpoena constitutes contempt of the Federal Court of Australia and is punishable unless you establish that the failure to comply should be excused.

### **Setting subpoena aside**

- 10 You may apply to the New Zealand court to have this subpoena set aside under section 160 of the Evidence Act 2006 of New Zealand. Section 160 provides that the New Zealand court must set the subpoena aside if—
- (a) the subpoena requires the witness to attend at a sitting of a court and the court is satisfied that—

- (i) the witness does not have, and cannot by the exercise of reasonable diligence within the time required for compliance obtain, the necessary travel documents; or
    - (ii) the witness is liable to be detained in New Zealand for the purpose of serving a sentence; or
    - (iii) the witness is liable to prosecution for an offence, or is being prosecuted for an offence, in New Zealand; or
    - (iv) the witness is liable to the imposition of a civil penalty in civil proceedings in New Zealand, not being proceedings for a pecuniary penalty under the Commerce Act 1986; or
  - (b) the witness is subject to a restriction on his or her movements, imposed by law or by order of a court, that would prevent the witness complying with the subpoena.
- 11 Section 160 further provides that the New Zealand court may set a subpoena aside if it is satisfied that—
- (a) the evidence of the witness could be obtained satisfactorily without significantly greater expense by other means; or
  - (b) compliance with the subpoena would cause hardship or serious inconvenience to the witness; or
  - (c) in the case of a subpoena that requires a witness to produce documents or things, whether or not it also requires the witness to give oral evidence,—
    - (i) the documents or things should not be taken out of Australia; and
    - (ii) satisfactory evidence of the contents of the documents or evidence of the things can be given by other means.
- 12 An application to set the subpoena aside must be filed in the registry of the New Zealand court in which leave to serve the subpoena was given, together with any affidavit setting out the facts on which you rely.
- 13 The application and the affidavit may be sent by fax or email. The fax number and email address of the registry of the court are [*fax number and email address*].
- 14 The application must contain an address for service in New Zealand or Australia and may also state a fax number or email address in New Zealand or Australia to which documents relating to the application may be sent.
- 15 The Registrar of the New Zealand court will arrange for service of the application and any affidavit.
- 16 The New Zealand court can decide the application without a hearing if neither you (in the application) nor the party who requested the issue of the subpoena (in a document filed in response to the application) states that a hearing is required. If there is to be a hearing, the hearing may, if the court thinks fit, be by

audio link or audiovisual link. You may, however, either in your application to set the subpoena aside or within a reasonable time after filing the application, request that the court direct that the hearing be by audio link or audiovisual link. If you make such a request, the court will direct that the hearing be by audio link or audiovisual link.

Form 4  
Certificate of non-compliance with New  
Zealand subpoena for service in Australia

r 11

*Section 161, Evidence Act 2006 (NZ)*

To the Federal Court of Australia at *[place]*

A New Zealand court, namely the *[specify court that issued the subpoena]*, certifies that—

- (a) on *[date]*, a Judge of that court, namely *[name]*, gave leave to serve a subpoena, being a subpoena issued by the court in a criminal proceeding and a subpoena to which Part 4 of the Evidence Act 2006 of New Zealand applies, on *[name of person subpoenaed]*; and
- (b) *[name of person subpoenaed]* has failed to comply with the subpoena in that *[particulars of failure to comply]*.

Date:

Signature:

(Registrar/Deputy Registrar\*)

Postal address of registry:

Telephone:

Fax:

\*Select one.

Sealed: *[date]*

Rebecca Kitteridge,  
Clerk of the Executive Council.

## **Reprints notes**

### **1    *General***

This is a reprint of the Evidence (Trans-Tasman Service of, and Compliance with, New Zealand Subpoenas and Australian Subpoenas Issued in Criminal Proceedings) Rules 2013 that incorporates all the amendments to those rules as at the date of the last amendment to them.

### **2    *Legal status***

Reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by any amendments to that enactment. Section 18 of the Legislation Act 2012 provides that this reprint, published in electronic form, has the status of an official version under section 17 of that Act. A printed version of the reprint produced directly from this official electronic version also has official status.

### **3    *Editorial and format changes***

Editorial and format changes to reprints are made using the powers under sections 24 to 26 of the Legislation Act 2012. See also <http://www.pco.parliament.govt.nz/editorial-conventions/>.

### **4    *Amendments incorporated in this reprint***

Senior Courts Act 2016 (2016 No 48): section 183(c)