

NOTICE OF FILING

Details of Filing

Document Lodged:	Subpoena Request - GPN-SUBP
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	28/04/2025 1:20:00 PM AEST
Date Accepted for Filing:	28/04/2025 1:22:17 PM AEST
File Number:	NSD689/2023
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

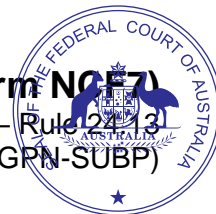


Federal Court of Australia

Request for Leave to Issue Subpoena (Form NCE7)

Federal Court Rules 2011 – Rule 24.13

Subpoenas and Notices to Produce Practice Note (GPN-SUBP)



- Cross boxes where applicable
- Clearly print or type all answers
- Please prepare one Request for Leave to Issue Subpoena for each addressee
- Attach an extra page if you need more space for any of the details requested

1. Details of the proceeding

1.1 Title of proceeding: Ben Roberts-Smith v Fairfax Media Publications Pty Ltd & Ors

1.2 Proceeding number: NSD689 of 2023

2. Details of person making the Request

2.1 I am: ☐ a party to the above proceeding:

☒ the Lawyer for:

The Appellant

2.2 Contact details of person making the Request:

(a) Name & Position
[if applicable] Monica Allen

(b) Organisation/Firm: BlackBay Lawyers

(c) Telephone: 61 2 8005 3077 Mobile :

(d) Email: monica.allen@blackbaylawyers.com

(e) Address: Level 17, 20 Martin Place, Sydney, NSW 2000

(f) Signature:
[an electronic signature can be used, provided this is done by or at the direction of the person completing this Request]

Date: 27 April 2025

3. Request for leave ("Request")

3.1 (a) Is the Request urgent? ☐ No ☒ Yes

OR (b) Is an abridged period of service sought on the addressee (short service)? ☒ No ☐ Yes

If "yes" to either 3.1 (a) or (b), briefly explain the urgency and/or basis for short service being requested:

Hearing commences on 1 May 2025.

3.2 Are the other parties to the proceeding aware of this Request? ☒ No ☐ Yes

3.3 Has the Request (or a similar request) previously been raised with or addressed by the Court? ☒ No ☐ Yes

If "yes" to 3.3 , provide details:

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3.4 Is it intended that the subpoena will be issued for service outside Australia [ie. Outside of the jurisdiction]? ☒ No ☐ Yes

If "yes" to 3.2, set out where, outside Australia the subpoena is to be served:

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3.5 Name of person to be subpoenaed ("Addressee"):

Person 17

3.6 I request leave of the Court to issue a subpoena requiring the Addressees to:

- ☒ Attend at Court to give evidence (Form 43A, r 24.13(1)(a) of the *Federal Court Rules*); or
☐ Produce a document or thing (Form 43B, r 24.13(1)(b) of the *Federal Court Rules*); or
☐ Attend at Court to give evidence and produce a document or thing (Form 43C, r 24.13(1)(c) of the *Federal Court Rules*),

I request leave for the following **reasons**:

The Appellant seeks leave to issue a subpoena to give evidence to the individual known in these proceedings as Person 17 in connection with matters arising from the affidavit of Mr McKenzie affirmed on 14 April 2025.

On 24 April 2025, the Court upheld an interlocutory application filed by the Respondents to set aside in its entirety a subpoena to produce documents to Person 17.

Mr McKenzie states in his affidavit, inter alia:

- at [10]: *“The Audio Recording is only part of the conversation as it does not capture the start or end of the call. My conversations with Person 17 were frequently lengthy, usually ranging from 15 to 45 minutes. I do not recall what Person 17 or I said on the rest of the call”*;
- at [11]: *“I do not recall precisely when the conversation recorded in the Audio Recording occurred, but, based on the nature of what is being discussed, I think it was around March or April 2021”*;
and
- at [37]: *“I do not now have a detailed recollection of the conversation recorded in the Audio Recording. Nevertheless, I have a sufficient recollection of the events at around the time the Audio Recording was made to be relatively confident about what I was referring to in parts of the recording, and why I was talking to Person 17 in the manner captured in the Audio Recording.*

On 24 March 2025, MinterEllison sent a letter to Mark O’Brien Legal (the then solicitors for the Appellant) stating the date of the recording was on or about 24 April 2021. It is not clear on whose instructions that letter was sent, as Mr McKenzie does not recall the date (as noted above).

Person 17, as the person who Mr McKenzie alleges (at [6] of his affidavit) made the recording, is likely to be able to confirm the date on which the Audio Recording was made. The date of the recording is important to understand the communications Mr McKenzie has exhibited to his affidavit and to understand the context in which the conversation with Person 17 occurred, particularly in light of the communications and meetings taking place with Ms Scott and Ms Roberts, at or around that time.

Person 17 is likely to be able to give crucial context to the conversation, what occurred prior to the conversation and what prompted the conversation as well as the content of any communications with Mr McKenzie, or anyone on his behalf, at around that time.

On 25 April 2025, I wrote to Rebekah Giles, Person 17’s current solicitor, to ask whether Person 17 would speak with us about the matters deposed to by Mr McKenzie in his affidavit. **Attached** is a copy of my letter.

On 27 April 2025 at 7.02pm, I received a response from Ms Giles stating, inter alia: *“Our client rejects the evidence he has given in a number of respects and is prepared to provide an affidavit in response subject to being served with a subpoena to give evidence”*. **Attached** is a copy of that letter.

In the circumstances, there is a clear and legitimate forensic purpose for seeking to compel the attendance of this witness to give evidence, and the application satisfies the requirements for leave under *GPN-SUBP*.

3.7 I request that the subpoena be made returnable:

☐

Before the hearing - preferred return date:

☒

At the hearing of the matter *[if known]* on:

1 May 2025

3.8 ☒ **Attached** is the draft subpoena (*Form 43A, Form 43B or Form 43C, r 24.13 of the Federal Court Rules 2011*)

For Court Use only

Considered/Issued by:

.....
(Judge)

.....
(Signature)

Comments:

☐

Accept

☐

Reject

☐

Other:

.....

.....

.....

.....

.....

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Subpoena to Give Evidence

No. NSD 689 of 2023

Federal Court of Australia
District Registry: New South Wales
Division: General

Ben Roberts-Smith VC MG

Appellant

Fairfax Media Publications Pty Limited and others named in the schedule

Respondents

To: Person 17
c/- Giles / George Lawyers
Level 7, 135 King Street
SYDNEY NSW 2000

You are ordered to attend to give evidence. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 8 at the end of this subpoena.

The last date for service of this subpoena is [date]. (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Appellant		
Prepared by (name of person/lawyer)	Monica Allen		
Law firm (if applicable)	BlackBay Lawyers		
Tel	+ 61 2 8005 3077	Fax	-
Email	monica.allen@blackbaylawyers.com		
Address for service (include state and postcode)	Level 17, 20 Martin Place, Sydney, New South Wales, 2000		

Issued at the request of the Appellant, whose address for service is:

Place: Level 17, 20 Martin Place, Sydney, NSW 2000

Email: monica.allen@blackbaylawyers.com

Details of subpoena

Date, time and place at which you must attend to give evidence, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date: 1 May 2025

Time: 10.15 am

Place: Law Courts Building, 184 Phillip St, Queens Square, Sydney NSW 2000

You must continue to attend from day to day unless excused by the Court or the person authorised to take evidence in this proceeding or until the hearing of the matter is completed.

Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Applications in relation to subpoena

5. 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

6. 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's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

7. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
8. Note 7 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

No. NSD 689 of 2023

Federal Court of Australia
District Registry: New South Wales
Division: General

Second Respondent:	Nick McKenzie
Third Respondent	Chris Masters
Fourth Respondent	David Wroe