



## NCAT Procedural Direction 2

### SUMMONSES

<b>This Procedural Direction applies to:</b>	All Tribunal proceedings
<b>Effective Date:</b>	29 April 2021
<b>Replaces Procedural Direction:</b>	NCAT Procedural Direction 2 (21 April 2017)
<b>Notes:</b>	You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at <a href="http://www.ncat.nsw.gov.au">www.ncat.nsw.gov.au</a>

#### Introduction

1. A party can ask a person to come and give evidence in the Tribunal or to hand over documents or other things for use in the Tribunal. If the person will not agree to do this or it is otherwise necessary or useful:
  - (a) to have the person attend and give oral evidence; or
  - (b) to have the person hand over the documents or other things to the Tribunal,the Tribunal or a registrar can issue a document, called a summons, which requires the person named in the summons to attend at the Tribunal and give evidence or hand over to the Tribunal the documents or other things listed in the summons or both.
2. This Procedural Direction sets out:
  - (a) how to request the issue of a summons by the Tribunal;
  - (b) what has to be done if a summons is issued;
  - (c) what can be done if the person named in the summons does not wish to attend and give evidence or hand over the documents or things listed;
  - (d) who may have access to material produced in answer to a summons; and
  - (e) what can be done with material produced in answer to a summons.

## Compliance and other matters

3. The Tribunal may excuse a person from complying with this Procedural Direction before or after the time for compliance.
4. Nothing in this Procedural Direction prevents the Tribunal from giving any directions concerning the issue, service or compliance with a summons that the Tribunal considers appropriate in any particular proceedings before the Tribunal.
5. This Procedural Direction is made by the President under s 26 of the *Civil and Administrative Tribunal Act 2013*.

## Definitions

Word	Definition
Act	<i>Civil and Administrative Tribunal Act 2013</i>
Rules	Civil and Administrative Tribunal Rules 2014
conduct money	A sum of money or its equivalent (such as pre-paid travel) sufficient to meet the reasonable travel expenses of a person attending the Tribunal to comply with a summons and returning after attending.
person	Includes an individual, a corporation and a government department.
registrar	The principal registrar or any other person employed as a registrar of the Tribunal.
serve a summons on a person	Deliver or send the summons to the person in a way which complies with the Act, the Rules and NCAT Procedural Direction 1 - Service and Giving Notice.
summons	A document issued by the Tribunal and signed by a registrar requiring the person named in the document to attend at the Tribunal and give evidence, attend at the Tribunal and produce documents or other things or both.

6. Words used in this Procedural Direction have the same meaning as defined in the Act and the Rules.

## Who can apply for the issue of a summons?

7. Any party to proceedings in the Tribunal can apply for the issue of a summons.
8. In addition, the Tribunal itself can direct a registrar to issue a summons but this is likely to be mainly in cases where the parties cannot apply themselves.

## How to apply for a summons to be issued

9. To apply for the issue of a summons, a party must (unless a registrar dispenses with any of these requirements):
  - (a) complete an Application for Summons form (a copy of this form can be downloaded from the Tribunal's website at [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au) or obtained from an NCAT Registry);
  - (b) lodge the completed Application for Summons together with any required documents with the Tribunal; and
  - (c) pay the relevant fee.
10. A registrar will decide whether or not to issue the summons and is to notify the party applying for the summons of that decision.
11. If a registrar decides not to issue the summons, the party applying for the summons can ask to have a Tribunal Member decide whether or not the summons should be issued.

## What has to be done to issue the summons?

12. If a registrar or Member decides to issue the summons:
  - (a) the party who applied for the summons must lodge with the Tribunal the summons completed in accordance with the registrar's or Member's decision; and
  - (b) the registrar or Member is to:
    - (i) specify in the summons the date and time by which the summons is to be served on the person named in the summons;
    - (ii) specify in the summons the date and time by which the person named in the summons is required to comply with the summons;
    - (iii) sign and seal the summons; and
    - (iv) provide the summons to the party who applied for the summons.

## Who should be named in the summons?

13. A summons may not be effective if it does not correctly name the person required to comply with the summons.
14. A summons should not be addressed to more than one person.
15. The person required to comply with the summons should be named as follows in the summons:
  - (a) If an individual, use the individual's full name;

- (b) If a corporation, state the corporation's full name (including for example "Ltd" or "Pty Ltd" as the case may be) followed by the words "by its proper officer";
- (c) If the holder of a governmental office or position, use the official description of the office or post held; and
- (d) If a government department or agency, state the department's or agency's name followed by the words "by its proper officer".

## Service of the summons

- 16. Where a summons is issued on the application of a party that party must serve the sealed summons and any accompanying documents on the person named in the summons by the date and time for service specified in the summons.
- 17. Where a summons is issued at the direction of the Tribunal, the summons is to be served by or on behalf of the registrar.
- 18. The date for service on the person named in the summons is usually 5 days before the date for compliance with the summons. The date of issue, the date of return, Saturdays, Sundays and public holidays are NOT counted as part of the 5 days.
- 19. A sealed copy of the summons is also required to be served on each party, other than the party who applied for the summons or the person named in the summons, before the date for compliance with the summons.
- 20. The ways in which a summons can be served are covered in Rule 13. A copy of the Rules can be found at the Tribunal's website at [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au).
- 21. Under that rule a summons can be served:
  - (a) on a person (including an individual, a corporation or Government Department) by sending the document (addressed to the person) to the address for service of the person;
  - (b) on a person (including an individual, a corporation or Government Department) by sending the document (addressed to the person) by fax, email or other electronic means to the person if the person has consented to receiving documents by these means;
  - (c) on an individual by posting the document (addressed to the person) to, or leaving it at, the person's business or residential address last known to the person serving the document;
  - (d) on a corporation by:
    - (i) leaving the document at or posting it to the registered office of the corporation; or
    - (ii) delivering the document personally to a director of the corporation who resides in Australia;

- (e) on a Government Department by leaving the document at or posting it to an office of that Department addressed to the Head of the Department; and
  - (f) in any other way that the Tribunal or a registrar directs in a particular case.
22. If difficulties are experienced in serving a summons a party can ask the Tribunal or a registrar to make a direction as to how to serve the summons.
23. A summons can be served outside New South Wales under s 48(5) of the Act but the procedure under the *Service and Execution of Process Act 1992* (Cth) must be followed. This requires leave to be obtained under s 57 of that Act. Leave can only be granted if the person granting leave is satisfied that the giving of the evidence and/or production of documents or things is necessary in the interests of justice and that there will be enough time for the person to comply with the summons or to ask for relief from compliance, without inconvenience. A summons served outside New South Wales must be accompanied by a copy of the form required under the *Service and Execution of Process Act*.

#### Allowances and expenses of complying with the summons

24. If a summons to attend and give evidence is issued on the application of a party, the person named in the summons need not comply with the requirements of the summons unless the party pays the person's reasonable travel expenses of attending at the Tribunal and returning after attending (called conduct money), a reasonable time before attendance is required.
25. A party usually sends the conduct money at the same time as the summons is served.
26. Usually a party who applied for a summons to be issued will be liable to pay witness allowances and expenses to the person (other than a public servant) who is required by the summons to attend and give evidence. In addition, if other loss or expense is incurred in complying with a summons, a reasonable amount for that loss or expense may sometimes also be recovered from the party who applied for the summons to be issued.
27. The general position is that the amount to be paid for allowances, loss or expenses is a reasonable amount either as agreed between the person named in the summons and the party who applied for the summons or, if they cannot agree, as determined by the Tribunal.

#### Compliance with the summons

28. Unless they have a lawful excuse for not complying, the person named in the summons must comply with that summons and in particular:

- (a) in the case of a summons to attend and give evidence, they must come to the Tribunal to give evidence on the date and at the time specified in the summons and remain until excused by the Tribunal;
  - (b) in the case of a summons to attend and produce documents or other things, they must either:
    - (i) attend and produce the documents or other things at the place and by the date and time specified in the summons;or
    - (ii) send the summons or a copy of the summons and the documents or other things to the registrar at the place specified in the summons so that they arrive not less than 2 days before the date specified in the summons.
29. The person named in a summons to produce a document can comply by producing a photocopy or a copy in any electronic form that the party who applied for the summons has indicated would be acceptable, unless the summons expressly requires that an original document is to be produced.
30. Documents or other things produced to the Tribunal in answer to a summons should be in a sealed envelope or a binder or folder (depending on the bulk of the items) with a copy of the summons attached.

### Objecting to a summons

31. If the person named in the summons objects to complying with the summons or if another person affected by the summons objects to the summons being complied with, they should try to resolve the objection with the party who applied for the summons to be issued before the time for compliance.
32. Common objections are:
- (a) the summons is oppressive, for example because it is too wide in scope and imposes too great a burden on the person named in the summons;
  - (b) the summons is too vague so that the person named in the summons cannot clearly identify what documents or other things are required to be produced;
  - (c) the evidence, documents or other things are privileged from disclosure, for example because they are confidential communications between a lawyer and a client;
  - (d) the evidence, documents or other things identified in the summons are not relevant to any issue in dispute in the proceedings.
33. If the objector is unable to resolve the matter informally, the objector should:

- (a) before the time for compliance, inform the registrar and the party who applied for the summons of the basis for the objection. This should be done in writing;
  - (b) attend the Tribunal on the date for compliance and be prepared to explain the basis for objection.
34. Objections that cannot be resolved by discussion and agreement will be referred to a Member for decision.

#### Access to documents or other things

35. In the case of a summons to produce documents or other things, if on the date for compliance no one objects to any party having access to the documents or other things, a registrar will make directions about access.
36. The standard access direction is for all parties to have access to the documents or other things so that all parties can look at and photocopy the documents or look at the other things produced.
37. If any person believes there may be grounds for objecting to one or more parties having access to the documents, that person can object to the parties being given access or can ask for 'first access' to the documents in order to check what the documents contain.
38. Grounds for an objection to access or for a first access order include when the documents contain: legal advice which is privileged; medical records; personal information relating to a child; or information that is confidential to a business.
39. If 'first access' is given to a person, that person will be able to look at the documents and decide whether to object to a party or parties having access to some or all of the documents.
40. If the documents or other things are privileged, confidential or should not be disclosed for some other reason, a person with a relevant interest can object to access being given and the Tribunal can restrict or prohibit access to those documents or other things.

#### Restriction on use of summonsed documents or other things

41. Documents and other things obtained under a summons must only be used for purposes directly connected with the proceedings. Using the documents or other things for any other purpose or publishing their contents for any other purpose, may constitute contempt of the Tribunal and be punishable by fine or other orders.

## Putting summonsed material before the Tribunal

42. The documents or other things produced in answer to a summons will be held in the Registry and placed with the Tribunal file for the proceedings to which they relate.
43. In most cases, the Tribunal will not take into account documents or other things produced in answer to a summons unless they are given to the Tribunal at the hearing as part of the evidence. This is called tendering those documents or things. Usually a party will be required to tell all the other parties prior to the hearing what evidence, including documents or other things produced in answer to a summons, the party is going to rely on at hearing.

**Armstrong J**

President

29 April 2021