

How to Request a Summons to Produce Documents in an NCAT Building Dispute

As a homeowner involved in an NCAT dispute, you may need to request a summons for documents relevant to your case. This guide will provide you with a step-by-step approach to help you obtain the documents you need. The NCAT Act gives the Registrar of the Tribunal discretion to issue Summons to produce documents. However, the Tribunal has the power to determine whether a Summons should be issued, refused, or set aside.

What is a Summons to Produce Documents?

A Summons to Produce Documents is a legal document that requires a party to produce certain documents to another party in a dispute. The document must be issued by the Registrar of the Tribunal or directed by the NCAT itself.

When can you Request a Summons to Produce Documents?

You can request a Summons to Produce Documents at any time during the proceedings. The Registrar of the Tribunal has the discretion to issue a Summons to Produce Documents, but the Tribunal has the power to determine whether the Summons should be refused or set aside in whole or in part.

Scenarios where a Homeowner may need to Request a Summons

Some examples of situations where a homeowner may need to request a Summons to Produce Documents include:

- If the Council or Building Authority has not provided the necessary documents related to the construction, such as Development Approval or Construction Certificate.
- If contractors or suppliers are not providing invoices or supporting documents that prove the genuineness of their claims.
- If the builder is not providing documents that establish the genuineness of their claims, such as emails and diary entries.

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Scenarios where a Homeowner may need to Request a Summons

You can request any document that is relevant to your case and could assist in proving your claim. However, the document must have a legitimate forensic purpose. The documents that you can request may include:

- Emails and diary entries
- Invoices and supporting documents
- Plans, specifications, and approvals for the works
- Any other documents that relate to the construction work

How to Request a Summons to Produce Documents

To request a Summons to Produce Documents, follow these steps:

1. Complete an Application to the Tribunal form and file it with the NCAT Registry.
2. Attach a supporting affidavit that outlines the documents you need and how they are relevant to your case.
3. Serve the Application and Affidavit on the other party.
4. Attend the hearing before the Tribunal to request the Summons.
5. The Tribunal will consider whether the Summons should be issued, and if so, the terms of the Summons.

Tips for Improving your Chances of Success

Here are some tips to improve your chances of having a successful Summons to Produce Documents:

- Ensure that the documents you are requesting have a legitimate forensic purpose.
- Be specific about the documents you need and how they are relevant to your case.
- Ensure that the terms of the Summons are not unduly vague or oppressive.
- Provide evidence that the documents you are requesting exist and are in the possession of the other party.
- Demonstrate that you have cause to believe that the documents you are requesting exist.

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Relevance of Documents

When requesting a summons, the documents you seek must be relevant to your case. According to the NSW Court of Appeal in *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145, a subpoena can be issued for a legitimate forensic purpose if the documents sought are:

1. "apparently relevant";
2. "will materially assist on an identified issue"; or
3. "there is a reasonable basis beyond speculation that it is likely the documents subpoenaed will so assist."

In the *Blacktown City Case*, the Court also noted that if the documents sought are apparently relevant and the terms of the subpoena are not unduly vague or oppressive, the subpoena should not be set aside.

However, if the Tribunal determines that the issuing party filed the summons for some improper, illegitimate, or ulterior purpose foreign to the litigation, the Court may set aside the subpoena as an abuse of process.

Example of Documents to Summons

List of Examples that may be Summoned (subpoena)

1. Summons against the Council or Building Authority (such as the certifier) to provide documents related to construction. This includes the Development Approval, Construction Certificate, Occupation Certificate, and any other documents lodged or made by the council for the works. These documents may be crucial in determining if the builder or owner has complied with the legal requirements and regulations.
2. Summons against contractors and suppliers to supply invoices or supporting documents. This includes invoices, receipts, and other supporting documents related to the works carried out by the contractor and supplied by the supplier. These documents will assist in determining the genuineness of claims from the builder in support of their cost plus contract or provisional sum claim.

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3. Summons against the Builder to establish the genuineness of documents. This includes emails, diary entries (both hard copy and electronic copy), and other documents relied upon by the builder. Electronic documents will have meta data to analyse, and these documents will assist in determining the truthfulness of the documents relied upon by the builder.
4. Summons against expert witnesses to provide their expert reports and other documents relied upon by them, including communication that identifies their instructions. This includes reports from engineers, architects, and other experts that may have been engaged in the construction work. These documents will assist in determining the quality of workmanship, compliance with legal requirements, and defects that may have arisen during or after the construction or to assess the assumptions made by the expert.
5. Summons against the owner to provide documents related to the construction works. This includes any documents that the owner may have in their possession, such as plans, contracts, and invoices. These documents may assist in determining the scope of the works, the value of the works, and any [defects](#) that may have arisen during or after the construction.
6. Summons against any other parties that may have relevant documents or information related to the construction works. This includes neighbours, tenants, and any other parties that may have witnessed or been affected by the construction works.

Legitimate Forensic Purpose

To establish a legitimate forensic purpose for the Summons, the documents sought must:

1. have some evidential value; and
2. be apparently relevant to the issues that have arisen or are likely to arise in the proceedings.

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“In the absence of any question of public interest immunity, no more is required to support the issue of a subpoena there is a reasonable basis for supposing that the material called for will likely add, in the end, in some way or another, to the relevant evidence in the case for production than that there is a reasonable basis for supposing that the material called for will likely add, in the end, in some way or another, to the relevant evidence in the case” (Blacktown City Council Case at [89]).

Whether the documents relate to the subject of the proceedings or could possibly throw light on the issues in the case, they will add "in some way" to the relevant evidence if they are capable of assisting in cross-examination, or go to credit, and notwithstanding that they are inadmissible according to the rules of evidence.

Applying for a Summons

To improve your chances of obtaining a summons, be prepared to provide the Tribunal with information that supports the relevance of the documents you seek. For example, you may need to demonstrate that the documents are apparently relevant and have evidential value. Additionally, you may need to show that the terms of the subpoena are not unduly vague or oppressive.

If the Tribunal lists a hearing to determine the summons application, you should be as organised and prepared as possible. The NCAT Member may ask you one or many questions. You need to be clear on what you need and the reasons why you need the information requested. It would be ideal that all the reasons why you require the documents have been put to your opponent clearly in writing so that the Tribunal Member can see that you have made every effort to resolve the issues informally amongst the parties.

Oppose Summons

To improve their chances of having a successful summons made, homeowners should ensure they have a clear understanding of the documents they require and how they will be relevant to their case. They should also be prepared to provide specific information to NCAT, such as the names and addresses of the parties they are seeking documents from and a detailed explanation of how the documents will be relevant to their case.

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If a summons is challenged or opposed by the respondent (for example: builder, contractor, council, or Certifier), homeowners should be prepared to argue their case and provide evidence of the relevance of the documents they are seeking. They may also refer to relevant case precedents, such as *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145, which established that a subpoena can be deemed to have a legitimate forensic purpose if the documents sought are "apparently relevant" or will "materially assist" on an identified issue.

Additionally, homeowners should be mindful of the costs involved in obtaining documents through a summons, as they may be required to pay the reasonable costs of compliance by the person summoned.

Case Analysis

In the case of *Colombini v De Berigny* [2009] NSWSC 718, Ward CJ in Eq stated at [129] that "Where there is no legitimate forensic purpose, in that sense, for the issue of a subpoena or notice to produce, then it may readily be seen to be a fishing expedition." The Court noted that a subpoena to produce documents will lack legitimate forensic purpose if it is oppressively wide, vague or uncertain, calls for the creation of documents, or imposes upon a third party the task of forming a judgement whether a document relates to issues between the litigants (*Universal Press Pty Limited v Provest Lim* at [10]).

The Court also held that whether a party has cause to believe that particular documents exist is a relevant factor in determining whether the subpoena constitutes a "fishing expedition" (*Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* at 254).

In the context of NCAT proceedings, there is no opportunity to seek discovery or interrogatories, as there is in a court to which the provisions of the Uniform Civil Procedure Rules 2005 (NSW) apply. Therefore, the focus of the enquiry needs to be on whether the summons to produce is necessary and relevant to the dispute at hand.

To establish the necessary and relevant documents, homeowners may need to request the NCAT for a summons against various parties, including:

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1. Summons against the council or building authority, such as the certifier, to provide documents made for construction, including the Development Approval, Construction Certificate, and other documents lodged or made by the council for the works.
2. Summons against contractors and suppliers to supply invoices or supporting documents. The invoices will evidence the genuineness of claims from the builder in support of their cost-plus contract or provisional sum claim.
3. Summons against the builder to establish the genuineness of documents. Emails and diary entries (both hard copy and electronic copy) will assist in identifying the truthfulness of the documents relied upon by the builder. Electronic documents will have metadata to analyse.

It is important to note that the NCAT has the discretion to issue a summons to produce documents and may be directed to do so by the Tribunal. A party does not have the right that a summons to produce documents issued, and the Tribunal has the power to determine whether leave to issue a summons should be refused or, if the summons is issued, to set it aside in whole or in part.

To improve the prospect of their summons being made by the registrar, homeowners should be prepared to provide the Tribunal with information establishing that the documents sought are apparently relevant and that there is a legitimate forensic purpose for the summons. Homeowners should also ensure that the terms of the summons are not unduly vague or that the ambit of the summons is not such that it would be oppressive to comply with it.

Conclusion

If you are involved in a building dispute and need specific documents to prove your claim, you can request a Summons to Produce Documents from the NCAT. Remember to follow the steps outlined in this guide and provide evidence to support your request. With the right approach, you can improve your chances of success and obtain the documents you need to resolve your dispute.

Overall, obtaining documents through a summons can be a useful tool in building disputes, but it is important for homeowners to understand the requirements for issuing a summons and to prepare their case carefully to improve their chances of success.

Our firm regularly represents homeowners in building disputes across Australia through Courts and Tribunals. If you require assistance with obtaining documents, then phone our office for a free 15-minute consultation to speak with one of our expert building and construction lawyers.

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