

A Guide to Summonses in the Industrial Relations Commission

What is a summons?

A summons is an order from the Commission that requires a person to provide you with documents and/or to attend and give evidence in your case.

A party might consider requesting that the Commission issue a summons where it believes that a person has documents or could provide testimony that would assist its case, but where it has not been able to obtain the agreement of that person to provide it with access to the documents in their control or to attend and give evidence before the Commission.

There are three types of summonses in the Commission. The relevant forms for issuing a summons can be found on the [IRC website](#).

- Summons to attend to give evidence ([Form 40](#)). This summons is used if you want to compel a person to attend and give evidence at a hearing/arbitration before the Commission
- Summons to produce ([Form 41](#)). This summons requires a person to give you access to documents that you believe will assist your case.
- Summons to attend to give evidence and to produce ([Form 42](#)). As its name suggests, this type of summons requires a person both to give you access to documents and attend to give evidence before the Commission.

In other jurisdictions, the term 'subpoena' is used instead of 'summons': see the [Uniform Civil Procedure Rules \('UCPR'\), Part 33](#) and in particular r 33.1(1). A summons has the same effect as a subpoena under the UCPR and the same consequences for non-compliance.

Procedural requirements

The requirements for the issuing of summonses by the Commission are contained in the *Industrial Relations Act 1996* ('IR Act') and the UCPR.

Before applying to have a summons issued, you should speak with the person who holds the documents you wish to access, or who you wish to give evidence to the Commission. If they agree to provide you with the documents or to attend to give evidence, a summons may not be required. (A summons to attend and give evidence may still be considered prudent if there is a risk of the person not attending, despite any assurances that they have given to you.)

It is for the Commission to decide whether to issue a summons, and a summons will generally only be issued if it is reasonable. For example, a summons to produce seeking a very large number of documents, or which contains vague categories of documents to be produced, may not be issued (or, if issued, may be challenged by the person to whom it is issued). Summonses to attend and give evidence addressed to very senior public and political figures are unlikely to be issued, without strong grounds for doing so.

There are limitations on the use of summonses in respect of applications under s 181E of the *Police Act 1990* ('Police Act'). [Section 181H of the Police Act](#) provides that neither the Commissioner of Police nor any member of a Commissioner's Advisory Panel is compellable to give evidence in relation to the exercise of the Commissioner's functions under s 181D unless the Commission gives leave, and that such leave may only be given if the Commission "considers that extraordinary grounds exist".

The following steps must be taken to have a summons issued and served on the summons recipient:

Step 1 – Seeking Leave of the Commission (Unrepresented Litigants)

A party who is not represented by a lawyer must obtain the leave of the Commission to issue a summons: [UCPR Part 7 rule 7.3](#).

While a summons is issued by the Commission, the party seeking to have the summons issued is responsible for drafting it and for making and supporting the request that it be issued.

A request to issue a summons can be made by filing the completed summons form, together with a written statement of reasons, with the Registry. The forms are available on the [IRC website](#) or at the Registry. Documents can be filed in person or by post.

The written statement of reasons should set out the reasons why the summons is sought. Specifically, the statement should explain how the evidence sought is relevant to the proceedings.

A summons must be addressed to a person. A summons seeking documents from an organisation must be addressed to the 'Proper Officer' in that organisation: UCPR [Part 33 rule 33.3](#).

The request for a summons will be dealt with by the Commission as soon as practicable, and generally within 48 hours. In some cases, parties may be required to appear before a Commissioner to decide whether the summons should be issued. If the request is granted, the fee for the issuing of the summons must be paid. The fees for issuing a summons can be found on the [IRC website](#).

Once leave is granted the Registrar will include on the summons details of the date, time and place for the production of documents, or attendance to give evidence ('the return date'): [Part 33 rule 33.3](#).

When a summons has been issued the applicant becomes the 'issuing party'. The person to whom the summons is issued is the 'summons recipient'.

In respect of a summons to produce, documents must be produced on the return date. Alternatively, the summons recipient may appear before the Registrar on the return date to argue that the documents ought not be produced. The parties will be heard and a decision will be made as to whether all, some or none of the requested documents are to be produced.

Step 2 – Access Orders

A summons to produce must contain a proposed access order, setting out access by parties to the documents produced. Access orders are inserted by the issuing party.

The usual access order is: “The issuing party to have first access for 7 days; thereafter, in the absence of any further application, access to all parties”. If a different order is sought, written reasons for seeking such an order must be provided.

A party may object to proposed access orders and seek different access orders. If there is no objection to the proposed access order on the return date, the proposed order will automatically take effect from the day following the return date.

The issuing party must write the proposed access order on the summons to produce and must serve a copy of the summons on all other parties who have an address for service.

This is only a summary of the rules about access orders to assist parties. [Practice Note 31A – Production of and access to summonsed material](#) sets out in greater detail the Commission's practices about access orders. Paragraphs 7 to 13 of the Practice Note relate to access orders.

Step 3 – Service

A summons must be personally served on the person to whom it is directed: UCPR [Part 33 rule 33.5](#). The requirements for personal service on an individual are set out in UCPR [Part 10 rule 10.21](#).

A copy of the summons must be sent to all other parties to the proceedings, even if they are not the summons recipient: [Part 33 rule 33.5](#).

A party need not comply with a summons to attend to give evidence unless conduct money has been handed or tendered to the recipient of the summons a reasonable time before the date on which attendance is required: UCPR Part 33 rule 33.6(1).

Conduct money is:

A sum of money or its equivalent, such as pre-paid travel, sufficient to meet the reasonable expenses of the addressee of attending court as required by the summons and returning after so attending.

If the summons recipient is a council or other government organisation, they will advise the amount of conduct money that is required. Further, the Commission may order the payment of other amounts for reasonable loss or expense incurred in complying with either a summons to produce documents or a summons to give evidence: UCPR [Part 33 rule 33.11](#).

A party need not comply with the requirements of a summons unless it is served on or before the date specified in the summons as the last date for service of the summons, or the addressee has actual knowledge of the summons and its requirements by that date, which is generally 5 days before the earliest date on which the addressee is required to comply: UCPR Part 33, rules 33.3(8), 33.6(2) and 33.6(3) (although longer periods may apply for summonses issued to addressees outside NSW).

Objections to summonses

The summons recipient may object to the summons and can apply to have it set aside. An application to set aside a summons is done by way of a Notice of Motion with an affidavit in support: see [Practice Note 10](#). The motion will be determined by the Registrar or a Commissioner.

The most common objections to a summons to produce are that the summons is 'oppressive' (so many documents are sought that it is not reasonable to require a party to comply with the summons), or that the documents sought are not relevant to the proceedings or do not have a legitimate forensic purpose. Issuing parties should bear these matters in mind when drafting summonses.

Access to documents

If the summons requires the production of documents, the documents will be produced to the Commission on the return date. If there has been no objection to the proposed access order, the parties do not need to attend. The documents may be accessed in accordance with the access orders the following working day.

If there is an objection, a decision as to whether access will be granted will be made by the Registrar or by Commissioner: UCPR [Part 33 rule 33.9](#).

If access to documents produced under summons is granted, it will usually be in the form of "general access". This includes the right to inspect the documents, and to photocopy them (subject to a fee for copying). Access is subject to agreeing to the following undertaking:

I undertake to use the information obtained from this inspection only for the purpose of these proceedings and to destroy any copies at the conclusion of the proceedings.

If a party is represented by a lawyer, the Registrar may permit 'uplift access': UCPR [Part 33](#). This is dependent on the particular circumstances of the matter. With the Commission's move to encourage the production of electronic copies of documents this should rarely be necessary.

Summonsed documents are not evidence

Documents produced under summons do not automatically become part of the evidence in the proceedings.

The documents must be tendered at the hearing. This is usually done either as an annexure to a witness statement in which the witness will identify the document or after showing it to a witness in cross-examination for the purpose of the witness identifying the document. Parties may also agree that particular documents should be tendered without being identified by a witness.

The Commissioner hearing the matter will decide whether any particular document is admitted into evidence regardless of any agreement between parties.

Important note for unrepresented litigants

Registry staff are available to assist parties with technical aspects of the issuing of summonses, but cannot give parties legal advice or advice about how to conduct their case.

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