

Appearance

(A) Introduction

R 8.02 After [D] is served with writ, D may enter appearance before taking other procedural steps or do nothing

- Enter an unconditional appearance
 - o Submits to jurisdiction, indicates action will be defended, gives address for service of all future docs
- Enter a conditional appearance
 - o Object to court's jurisdiction/irregularities in service, seek case transfer, prevents default judgment

This informs P that action will be defended, gives name of D's sols, proper address where service can be effected on D

R 21.01 prevents P obtaining default judgement (if D did nothing)

(1) Time limits

R 8.04 time limits apply for appearances

R 8.04(a) for writ served in Vic, it is 10 days after service. After this date, [P] may apply for default judgement

- Interstate → 21 days
- PNG → 28 days
- NZ → 30 working days unless ordered
- Any other case → 42 days

(2) Who can appear

R 8.03 normally, only [D] or sol enter an appearance. Special rules apply for:

- R 15.02 minors/handicapped
- Rr 17.04-06 partnerships
- R 11.08 third parties

(B) Procedure for Entering an Appearance

R 8.06 state name, address and contact details of person entering appearance (D or solicitor)

R 8.05(1), 8.08(2) use required form (8A or 8B, depending on conditional or unconditional)

R 8.05(2)-(3) file notice of appearance and serve (ordinarily) on every P on same day

(C) 2 Types of Appearance

(1) Unconditional Appearance - standard

[D] waives any objections to service irregularities, submits to jurisdiction and informs [P] that action will be defended

R 8.05(1) usual form of appearance filed in Form 8A

(2) Conditional Appearance

R 8.08 protects [D] from default judgement, and preserves rights, to object to procedural/service irregularities, challenge jurisdiction, seek case transfer, immunity In Form 8B

Why enter CA:

- Objections to jurisdiction
- Immunity from suit
- Service irregularities (eg writ served on D's sol who had no instructions to accept service on D's behalf)
- Challenge jurisdiction or seek transfer
- *Forum non conveniens*
- Protects you from default judgement

Examples when CA useful: Service interstate and P didn't comply with SEPA, writ served on sol who had no instructions to accept service on D's behalf

(D) Failure to enter an Appearance

R 21.01 if appearance is not filed within time limit, [P] may apply for default judgement

R 21.07 court may set aside or vary any default judgement

[D] should establish: (*Cook v DA Manufacturing*)

- (1) satisfactory explanation for failure to appear
- (2) no unreasonable delay in making application (*NAB v Singh*)
- (3) prima facie defence on merits (*Mearns v Willoughby*)

(E) Possible Outcomes

1. Court determines it **has jurisdiction** - D bound by that decision
2. Court determines it **lacks jurisdiction** or **irregularity** or **defect** in process/service, court can **stay** or **set aside proceedings**

(F) Alternatives to Conditional Appearance

R 8.09 court may exercise discretion to **set aside writ/service/stay proceeding** on application by [D] before filing appearance

R 7.05 on ground **service not undertaken properly** or **Vic clearly inappropriate forum**

****Forum non conveniens → See above**

- Test in Aus: stay will be granted if the Australian court is a **clearly inappropriate forum**.
 - o *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197;
 - o *Voth v Manildra Flour Mills* (1990) 171 CLR 538
 - o *Rowe v Grünenthal GMBH* (2011)
- Test in most other common law jurisdictions: stay will be granted if another forum is more appropriate
 - o *Spiliada Maritime Corporation v Cansulex* [1987] AC 460
- Other countries: appropriate forum may be determined by treaty, eg European Union

Defence

R 14.04 SCR [D] shall serve defence within 30 days after filing appearance (where writ constitutes a statement of claim) or within 30 days after service of statement of claim or win time limit court directs

- (a) Where indorsement is statement of claim → within 30 days after filing appearance or

- (b) Where P serves a statement of claim → within 30 days after service of statement of claim or
- (c) Within such time as Court directs

R 14.05 if required, P must **serve reply within 30 days** after service of defence

R 14.06 need court order for any pleading after reply

R 14.07 if D serves a **defence and counterclaim**, P and any other party joined must **serve a Defence to Counterclaim** within 30 days after service

R 14.08 pleadings are closed 30 days after service of defence (or last pleading served)