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## Commencing Proceedings – Instituting, Service and Appearance

### service of a statement of claim can be made

Statement of claim –the way a dispute between two parties on factual issues is commenced.

### How service is to be effected?

Defendant must be adequately served with documents that inform of the proceedings.

Two broad categories of service

- Personal service – notify the legal action personally
- Ordinary service – nominated address

### personal service

Personal delivery of the writ to the defendant, a notification of the nature of the document served, production of original document for inspection, endorsement of detail of service (if applicable).

### Appropriate legislation:

r 10.20

r 10.21 How personal service effected generally

(cf SCR Part 9, rule 3; DCR Part 8, rules 3 and 14; LCR Part 7, rules 3 and 14)

- (1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.
- (2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person.
- (3) Service in accordance with subrule (2) is taken to constitute personal service.

### cases:

*Thomson V Phenev* (1832) 1 Dowl 441, 443 – The document should be left as near to the possession or control of the person to be served as circumstances will allow.<sup>1</sup>

*Ainsworth v Redd* (1990) 19 NSWLR 78 Court of Appeal (NSW) - The document doesn't need to be physically taken by the defendant to constitute personal service. Example in this case, service was held as valid when it was left with a representative of the person standing right next to him when the person said he will look at the document.

### Good Service

- Put a copy down in the presence and informing him or her of the nature of the document. See Uniform Civil Procedure Rules 2005 (NSW) r 10.21
- leave the document closest to the defendant if the person who is serving the document is prevented by violence or threat. See Uniform Civil Procedure Rules 2005 (NSW) r 10.20

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<sup>1</sup> 8.2.4 of Civil Text Book Pg 332

- Deponent inform the ‘..defendant of nature of process and thrown it down...’. see *Thomson V Phenev* (1832)
- When a process server handed a statement of claim to a recipient’s attorney, who was not told of the nature of the document and was under the belief that it was a different document, in the presence of the recipient. See the case *Ainsworth v Redd* (1990) above.
- When service is completed, the plaintiff or (his/her solicitor) must file an affidavit of service. r 35.8. see Form 41 (Version 1) UCPR.

### Exceptions to personal service

- Defendant’s Solicitors undertakes to accept service on his behalf. r 10.13
- Where Substituted service is ordered. r 10.14.
- Where Service is by mode as agreed by parties in an agreement. r 10.6.
- Where it is for Action for recovery for land within jurisdiction. r10.15.

### Substituted Service

Firstly, state what is good service for a statement of claim.

#### What is substituted service?

Alternative mode of service to personal service. Need to show that the plaintiff did everything they could before applying for substituted service.

*Kendell v Sweeney* [2002] QSC 404 - An order for substituted service will not be made unless there appears to be an impossibility of actual service.<sup>2</sup>

*Porter v Freudenberg* [1915] 1 KB 857 - An order for substituted service will not be made unless it appears that the method of substituted service asked for is one which will in all reasonable probability (if not for certain) be effective to bring knowledge of the writ to the defendant.<sup>3</sup>

#### When it is used?

r 10.14 - Difficult or it is impractical to serve on the defendant in the manner provided by law.

How to go about applying for substituted service?

An application can be made to the court for service to be allowed in a different manner in order to bring the document to the notice of the defendant.

#### conditions to be satisfied?

*Porter v Freudenberg* (1915) 1KB 857

- The defendant cannot, with reasonable diligence, be served with the document;
- The method of substituted service suggested, is likely to enable the service of document on the defendant.
- It is likely to bring the notice of proceeding against the Defendant. But for the practical difficulties, personal service is permissible.

#### Methods of substituted service

Include:

- advertising in the newspaper, registry

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<sup>2</sup> 8.8.3 of Civil Text Book Pg 354

<sup>3</sup> 8.8.3 of Civil Text Book Pg 354

- serving on someone closely connected with defendant, such as spouse, agents, attorney acting under a power of attorney- that the defendant will be contacted by relatives, friend or closely related persons.
- Facebook – two views
  - *MKM Capital Pty Ltd v Corbo & Poyser* (unreported Act Supreme Court, Master Harper, 12 December 2008)–was permitted
  - *Citigroup Ltd v Weerakoon* [2008] QDC 174 – was not permitted.