

Commencing Proceedings												
Limitation periods/time is barred												
<p>Step one: Limitation of actions rationale (expiry of limitation period)</p> <p>Limitation of actions rationale – <i>Regional Health Authority v Taylor</i></p> <ul style="list-style-type: none"> • Delays impact on justice: Where there is delay, the whole quality of justice deteriorates. – <i>Brisbane South</i>. • Upholding society's welfare: The limitation period represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period. • Limitation of actions rationale (Effects of delays): <ol style="list-style-type: none"> 1. Evidence is likely to be lost when matters are delayed. 2. Oppressive to defendants to allow old claims to be lodged. 3. People and organisations, such as insurance companies, should be able to organise themselves on the basis that after a certain point, they cannot be sued. 4. The public interest requires that disputes be settled as quickly as possible. <p>Step two: Overarching obligations</p> <p>Section 25 – Minimise delay: To ensure prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to:</p> <ol style="list-style-type: none"> (a) Act promptly; and (b) Minimise delay. <p>Step three: Time limitation period</p> <p>Equitable relief</p> <table border="1"> <tr> <td>Equitable relief</td></tr> <tr> <td> <p>Limitation statute: The limitations statute does not apply to claims for equitable remedies.</p> <p>Cause of action accrues: Equitable relief</p> <p>Not unjust: The court will refuse to grant relief when the plaintiff's delay makes it unjust to do so. – Doctrine of <i>Laches</i>.</p> </td></tr> </table> <p>Common law claims</p> <table border="1"> <tr> <td>Common law claim: Contracts</td></tr> <tr> <td> <p>Time limit commencement: The time limit begins to run when the breach occurs. – <i>Commonwealth of Australia v Cornwell</i>.</p> <p>Time limitation period: Action cannot be brought after a period of six years from the date of the action for breach of contract. – Section 5(1)(a) Limitation of Actions Act.</p> </td></tr> <tr> <td>Common law claim: Tort (not a personal injury)</td></tr> <tr> <td> <p>Time limit commencement: The time limit begins to run when the actions accrues (date of damage). – <i>Commonwealth of Australia v Cornwell</i>.</p> <p>Time limitation period: Action cannot be brought after a period of six years from the date of the action for a tort, including breach of statutory duty. – Section 5(1)(a) Limitation of Actions Act.</p> </td></tr> <tr> <td>Common law claim: Defamation</td></tr> <tr> <td> <p>Time limitation period: Action for defamation cannot be brought one year after publication. – Section 5(1AAA) Limitation of Actions Act.</p> </td></tr> <tr> <td>Common law claim: Chattels</td></tr> <tr> <td> <p>Time limitation period: No cause of action can be brought after a period of six years. – Section 6(1) Limitation of Actions Act.</p> </td></tr> <tr> <td>Common law claim: Personal injury or death</td></tr> <tr> <td> <p>Step one: Personal injury type</p> <p>Personal injuries: Applies to all damage claims arising from death or personal injury, except dust-related conditions, tobacco injuries and injuries covered by statutory compensation schemes. – Section 27B Limitation of Actions Act.</p> <ul style="list-style-type: none"> • Personal injury types: Personal injury includes any disease and impairment of a person's physical or mental condition. – Section 3(1) Limitation of Actions Act. </td></tr> </table>	Equitable relief	<p>Limitation statute: The limitations statute does not apply to claims for equitable remedies.</p> <p>Cause of action accrues: Equitable relief</p> <p>Not unjust: The court will refuse to grant relief when the plaintiff's delay makes it unjust to do so. – Doctrine of <i>Laches</i>.</p>	Common law claim: Contracts	<p>Time limit commencement: The time limit begins to run when the breach occurs. – <i>Commonwealth of Australia v Cornwell</i>.</p> <p>Time limitation period: Action cannot be brought after a period of six years from the date of the action for breach of contract. – Section 5(1)(a) Limitation of Actions Act.</p>	Common law claim: Tort (not a personal injury)	<p>Time limit commencement: The time limit begins to run when the actions accrues (date of damage). – <i>Commonwealth of Australia v Cornwell</i>.</p> <p>Time limitation period: Action cannot be brought after a period of six years from the date of the action for a tort, including breach of statutory duty. – Section 5(1)(a) Limitation of Actions Act.</p>	Common law claim: Defamation	<p>Time limitation period: Action for defamation cannot be brought one year after publication. – Section 5(1AAA) Limitation of Actions Act.</p>	Common law claim: Chattels	<p>Time limitation period: No cause of action can be brought after a period of six years. – Section 6(1) Limitation of Actions Act.</p>	Common law claim: Personal injury or death	<p>Step one: Personal injury type</p> <p>Personal injuries: Applies to all damage claims arising from death or personal injury, except dust-related conditions, tobacco injuries and injuries covered by statutory compensation schemes. – Section 27B Limitation of Actions Act.</p> <ul style="list-style-type: none"> • Personal injury types: Personal injury includes any disease and impairment of a person's physical or mental condition. – Section 3(1) Limitation of Actions Act.
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Step two: Discoverability

Discoverability (time commencement)– Section 27F(1) *Limitation of Actions Act*

- (1) **Objective test (discoverability):** The cause of action is discovered on the first date that the plaintiff knew or ought to have known:
- (a) **Occurred:** Death or personal injury has occurred; and
 - (b) **Caused:** Death or personal injury was caused by the defendant's fault; and
 - (c) **Serious:** The personal injury was sufficiently serious to justify bringing of an action on the cause of action.
 - **Latent injury (discoverable):** The plaintiff is not aware that they have suffered an injury until later.

Discoverable = Short stop.

Not discoverable = Long stop.

Step two: Time limitation period

Time limitation period (expiration)

- **Short stop (discoverable):** Three years from the date on which the cause of action is discoverable by the plaintiff. – **Section 27D(1)(a) *Limitation of Actions Act*.**
- **Disability:** The limitation period is six years if the plaintiff has a disability. – **Section 27E *Limitation of Actions Act*.**
- **Long stop (Not discoverable):** The limitation period is twelve years from the date of act or omission alleged to have resulted in death or personal injury. – **Section 27D(1)(b) *Limitation of Actions Act*.**

Step four: Suspension of operation of limitation period

Suspension of limitation period:

- Fraud, deceit, or concealment. – **Section 27 *Limitation of Actions Act*.**
- Acknowledgment or part-payment by defendant. – **Sections 24-26 *Limitation of Actions Act*.**
- **Plaintiff is under a disability subject to restrictions:**
 - **Capable parent/guardian:** Provides that a minor is only under a disability for the purpose of suspending the limitation period (for personal injury cases) if they do not have a capable parent or guardian. – **Section 27J *Limitation of Actions Act*.**
 - **Injury caused by relative or close associate:** Deemed discoverable when plaintiff turns 25 or when actually discoverable (whichever is later), and the long stop is 12 years from 25 (by 37 at the latest). – **Section 27I *Limitation of Actions Act*.**
 - **Long stop:** The long stop is 12 years from 25 (by 37 at the latest).

Child abuse claims (no limitation period)

Section 27O(1) *Limitation of Actions Act*: No limitation period where an action is founded on the death or personal injury of a person resulting from:

- (1) An act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse.
- (2) Psychological abuse (if any) that arises out of that act or mission.
 - **Unfairness:** Section 27R *Limitation of Actions Act* still provides inherent jurisdiction to dismiss or stay proceedings where there is unfairness to the defendant. – ***GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*.**

Step five: Extension of limitation periods

Test: 'Just and reasonable?': The long stop period extension may be extended if it is 'just and reasonable' to do so. – **Section 27K(2)(b) *Limitation of Actions Act*.**

Considerations for extending limitation period – Section 27L(1) *Limitation of Actions Act*

- (a) The length, reasons for the delay on the part of the plaintiff.
- (b) The extent to which the delay is likely to be prejudicial to the defendant.
- (c) The extent to which the defendant had taken steps to make particular information available to the plaintiff.
- (d) The duration of any disability or legal incapacity of the plaintiff arising on or after the date of discoverability.
- (e) The time within which the cause of action was discoverable.

(f) The extent to which the plaintiff acted promptly and reasonable once they had that the relevant act or omission of the defendant might be capable of giving rise to an action for damages.
The steps taken by the plaintiff to obtain medical, legal or other expert advice and the nature of the advice they received.

Step one: Commencing proceedings (submitting writ and claim**)**

Step one: Understand overarching obligations and proper basis

Understood overarching obligations: Each party must personally certify that they have read and understood the overarching obligations and the paramount duty. – **Section 41 CPA.**

Proper basis certification: The lawyer must certify the complaint has a proper basis. – **Section 42 CPA.**

- **Certificates files:** Certificates must be filed with the first substantial document filed by the party, ie Statement of Claim (by plaintiff), Defence, and signed by the client.
- **Client compliance with obligations:** Must be explained that the client must comply with the overarching obligations.

Attached to writ: This must be attached with the writ.

Step two: Writ or originating process

Option one: Writ

Step one: Writ requirement

Writ requirement: Except as provided by Rules 1.12, 4.05 and 4.06 and Order 58, every proceeding shall be commenced by writ. – **Rule 4.04 SCR.**

- **Writ:** Formal order issued by the court which directs a form of action against an identified defendant.

Step two: Indorsement of claim on writ

Indorsement of claim: A writ must contain an indorsement of claim. – **Rule 5.04(2)(a) SCR.**

Indorsement options (mention both**)**

Statement of claim on writ – Rule 5.04(2)(a) SCR.

Statement of claim (the endorsement): Formal document that is attached to the writ, which pleads:

- The causes of action that the Plaintiff seeks to rely on.
- The relief sought.
- Must contain all the facts which the plaintiff will use to establish a cause of action.

Or:

General statement (limited/less detailed) – Rule 5.04(2)(b) SCR.

- A statement that puts defendant on notice of the claim and foreshadows statement of claim. Must specify:
 - Nature of claim.
 - Cause of action relied upon.
 - Relief/remedy sought.
 - **Statement of claim not endorsed on writ:** Where the indorsement of claim on a writ does not constitute a statement of claim in accordance with Rule 5.04 and a defendant files an appearance, the plaintiff shall serve a statement of claim on that defendant within 30 days after the defendant's appearance, unless the Court otherwise orders.

Step three: Writ serving time

Serving time: The writ must be served within 12 months on the defendant or it gets stale. – **Rule 5.12(1) SCR.**

Step four: Writ renewal

Writ renewal (timing extension)

Wide discretion: The court has wide discretion to renew the writ. – **Savcor v CPI ASP**

- Considerations for renewing the writ:
 - It is the duty of the plaintiff to serve the writ promptly.
 - The plaintiff must have a good reason for the extension.
 - If the extension is outside the 12 month period, must be reason of substance.

- There is no defined 'good reason' to renew writ.

Example of writ renewal: The defendant's whereabouts are unknown and the plaintiff has spent 12 months trying to find the defendant.

Option two: Originating motion

Step one: Originating motion

When originating motion required – Rule 4.05 SCR

- (1) A proceeding shall be commenced by originating motion:
- (a) Where there is no defendant to the proceeding;
 - (b) Where by or under any Act an application is authorised to be made to the Court; or
 - (c) Where required by these Rules.

Step two: Commencement of proceedings

Optional commencement by originating motion – Rule 4.06 SCR

A proceeding may be commenced by originating motion where:

- (a) It is unlikely that there will be any substantial dispute of fact; and
- (b) For that reason it is appropriate that there be no pleadings or discovery.

Writing requirement – Indorsement specifications – Rule 5.05 SCR

An originating motion shall specify:

- (a) The relief or remedy sought and the Act, if any, under which the claim is made; and
- (b) Where it includes any question to be answered, the question shall be stated.

Step five: Service (below)

Step two: Service (Sending writ and statement of claim to defendant)

Service: Communicating effective notice of the proceeding (writ and statement of claim) to a party and the case they have to answer.

Step one: Writ serving time

Serving time: The writ must be served within 12 months on the defendant or it gets stale. – **Rule 5.12(1) SCR.**

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Example of writ renewal: The defendant's whereabouts are unknown and the plaintiff has spent 12 months trying to find the defendant.

Step two: Service type

Service type: Personal service

Step one: Personal service requirements

Personal service: Requires the giving or the receiving of the document to the recipient.

Personal: The originating process must be served personally, except where otherwise provided. – **Rule 6.02(1) SCR.**

Documents: Documents do not need to be served personally unless specially required. – **Rule 6.01 SCR.**

How is personal service effected? – Rule 6.03 SCR

- (1)
- (a) Leaving a copy of the document with a person to be served.
 - (b) If the person does not accept the copy, putting it down in their presence and telling the person the nature of the document.
 - **Handing directly to lawyer (even if document mistaken):** The process server of handing out the originating process saying 'these documents are for you' to the

recipient's lawyer in the presence of the recipient (and thought they were another document) is accepted. – ***Ainsworth v Redd***.

- (2) In the case of originating process, the copy for service shall be sealed in accordance with Rule 5.11.
(3) **Copy documents:** Original documents are not necessary for personal service, copies are sufficient.

Step two: Alternatives to personal service

1. **Acceptance by solicitor:** The solicitor may undertake to accept service on behalf of client (*instructions are required*). – **Rule 6.09(2) SCR.**
 - **Authority:** The solicitor must have authority to serve the document for the document to be accepted.
2. **Confirmation of informal service:** Where the document is not served in the manner required by the rules, but the document has come to the notice of the person to be served, the document shall be taken to have been served on the day it came to the person's notice. – **Rule 6.11 SCR.**

Step three: Affidavit

Affidavit of service – Rule 6.17 SCR.

- (1) In the case of personal service of a document, an affidavit of service of the document shall state:
 - (a) By whom the document was served;
 - (b) The hour of the day, day of the week and date on which it was served;
 - (c) The place of the service; and
 - (d) The manner of identification of the person served.
- (2) In any other case of service of a document, an affidavit of service of the document shall state with relevant dates the facts constituting service.
- (3) An affidavit of service of originating process shall exhibit a copy of the sealed originating process.

Service type: Substituted service (personal service is impractical**)**

Step one: Substituted service

Substituted service: Where it is impracticable to serve a document in the manner required by the rules, the Court may order that, instead of service, such steps be taken as the Court specifies for the purpose of bringing the document to the notice of the person to be served. – **Rule 6.10 SCR.**

- **Cannot locate:** Service will be impractical when the defendant cannot be located.
- **Requirements for substituted service:**
 - Order by *ex parte* application to court.
 - **Affidavit:** Application supported by affidavit outlining circumstances that justify the application, and that attempts were made, and the proposed method of substituted service.

Impractical factors – *Amos Removal & Storage v Small*

- **Costs:** Cost of service are not an impractical matter.
- **Geography:** Geographical location of recipients by itself is not an impractical matter.
- Timing and geographical spread of recipients is a relevant factor.

Step two: Methods of substituted service

Methods of substituted service:

- Post.
- Newspaper notices.
- Serve someone closely connected with defendant.
- Social media.

Social media – *Flo Rida v Mothership Music*

- The use of social media could not be used as a substituted service as court could not determine the Facebook page was Flo Ridas (could be maintained by other people).
- Must be satisfied to the court that the use of social media will allow the service to be provided to the owner of the social media account.

Service Type: Ordinary service (*After proceedings commence*)

Ordinary service: The delivery of the documents does not require personal delivery.

- More relaxed process.

Personal service not required – Rule 6.07(1) SCR.

- (1) Where personal service is not required, the document can be served by:
- (a) **Leaving at address:** Leaving the document at the proper address of person to be served.
 - (b) **Post:** Posting document to person to be served at the proper address.
 - (c) Where provision made by/under any Act for service of a document on a corporation serving in accordance with that provision.
 - (d) If solicitor has facilities for the reception of documents in a document exchange, leaving the document in the document exchange.
 - (e) **Fax:** Sending by fax if solicitor has fax facilities.
 - (f) **Email:** Emailing the document to the person's email address.
 - Plaintiff must include an email address for service on originating process. – **Rule 5.07(1)(d) SCR.**
 - Defendant must include email address in their notice of appearance. – **Rule 8.06 SCR.**

After proceedings: Ordinary service applies to documents after proceedings have commenced.

Step three: Is there a special party?

Party	Law/requirement
Companies	<p>Companies (Corporations Act): Leaving or posting the document to the company's registered office amounts to good service. – Section 109X Corporations Act.</p> <ul style="list-style-type: none">• Leaving/posting document to registered office.• Delivering document personally to director of company who lives in Australia.• If company is in liquidation or administration, leaving/posting to liquidator's/administrator's address. <p>Companies – Rule 6.04(a) SCR:</p> <ul style="list-style-type: none">• Good service will be provided by giving document to:<ul style="list-style-type: none">(i) Major, chairman, president or other head of the corporation; or(ii) On the town clerk, clerk, treasurer, manager, secretary or other similar officer of the corporation.
Minors	<p>Minor: Person service on the minor is effected by: – Rule 6.04(b) SCR.</p> <ul style="list-style-type: none">• Serving a parent or guardian of the minor.• Serving the person whom the minor resides or whose care they are in.
Handicapped persons	<p>Handicapped persons: Personal service on person who would be entitled to be litigation guardian if there is an eligible person: – Rule 6.04(c) SCR.</p> <ul style="list-style-type: none">• If not, the person whom the party resides or whose care they are in.
Commonwealth government	<p>Commonwealth government: Secretary to the Attorney-General's Department or Australian Government Solicitor: – Rule 6.04(d) SCR.</p>
State of Victoria	<p>State of Victoria: On the Victorian Government Solicitor: – Rule 6.04(e) SCR.</p>

Step four: Service outside the jurisdiction?

Service to another state

Outside Victoria, but within Australia. – *Service and Execution of Process Act 1992*

- **Serving initiating process in another state:** An initiating process issued in a state may be served in another state without leave of the court. – **Section 15(1) Service and Execution of Process Act 1992.**
- **Same effect:** The service will have the same effect (had it been issued in home state) and may give rise to the same proceedings as if it had been served in place of issue. – **Section 12 Service and Execution of Process Act 1992.**
 - Service on individual is effected in the same way as service in State where proceedings are issued. – **Section 15(2) Service and Execution of Process Act 1992.**

Outside Australia. – **Rules of Court**

Defendant objects to the jurisdiction (within Australia)

- **Rejected from VSC:** If defendant objects to the jurisdiction from VSC, make a case transfer application under cross-vesting regime.
- **Rejected from other court:** If the defendant objects from any other court, apply for a stay of proceedings on the basis that the court is inappropriate to hear the matter *forum non conveniens*.

Service outside Australia

New Zealand: Served without leave of VSC, in the same way as Victoria. – **Section 9 *Trans-Tasman Proceedings Act***.

Australia is a signatory to *Hague Service Convention*.

Elsewhere (*Hague Convention countries*): Can be served without leave of Court where in a category of proceedings closely linked with Australia. – **Rule 7.02 SCR**.

- **Leave requirement:** Leave will only be required if proceedings do not fall within 7.02 categories. – **Rule 7.03 SCR**.
- **Notice:** Notice must be provided with notice of scope of court's jurisdiction, plaintiff's claims alleging jurisdiction and person's right to object to jurisdiction. – **Rule 7.05 SCR**.
- **Court discretion:** The court has discretion whether to assume jurisdiction on application by person served, including: – **Rule 7.04(1)(2) SCR**.
 - Whether service out of Australia is not authorised by rules.
 - Whether the court is an inappropriate forum for the trial of proceeding.
 - Whether the claim has insufficient prospects of success to warrant putting the person served to the time, expense and trouble of defending the claim.