

## 5. Commencing Proceedings, Service and Appearance

P commences proceedings by writ or originating motion. The choice depends on whether there are substantial disputes of fact and whether there is a defendant. Once originating documents are completed, P must file with the court and pay the filing fee. Note: once writ filed, P is under OOs and CPA applies. D is not covered by any of this until served.

### RED FLAG -- Watch For These Triggers

- Limitation period: identify all causes of action first, then assess accrual date, which provision applies, any suspension, when time expires, and whether extension is available.
- Stale writ: must be served within 12 months of filing or becomes stale (*r 5.12(1)*). Extension requires compelling reasons -- P has duty to serve promptly (*Savcor*).
- CPA certificates must accompany first substantive document or failure taken into account in costs and procedural orders.
- Doctrine of laches: LAA does NOT apply to equitable remedies (*LAA s 31*) -- courts may refuse relief where P's delay makes it unjust (causes prejudice to D).

### 5.1 Limitation of Actions (LAA 1958)

#### SCRIPT: Limitation Period Assessment -- 3-Step Script

**Step 1: When did the action ACCRUE + what is the limitation period?** Identify ALL of P's causes of action first -- different limitation periods may apply to different claims.

- -> CONTRACT: 6 years from accrual (*LAA s 5*) = date when all facts necessary to bring claim occurred (eg at time of breach).
- -> TORT (excluding personal injury): 6 years from accrual (*LAA s 5*) = date when all facts necessary occurred (eg at time damage/loss suffered).
- -> DEFAMATION: 1 year from publication of defamatory material (*LAA s 5(1AAA)*).
- -> PERSONAL INJURY -- GENERAL (non-dust, non-tobacco, not statutory scheme): SHORTER of (a) 3 years from when CoA is DISCOVERABLE (*s 27D(1)(a)*) OR (b) 12 years from the act or omission resulting in the injury (*s 27D(1)(b)*). CoA is 'discoverable' on first date P knew or ought to have known: (i) PI has occurred (*s 27F(a)*); (ii) PI was caused by fault of D (*s 27F(b)*); (iii) PI is sufficiently serious to justify bringing an action (*s 27F(c)*). 'Ought to know' = if would have been ascertained had P taken all reasonable steps before that date (*s 27F(2)*).
- -> DUST/TOBACCO PI: discoverable when P knows/ought to know P suffered PI AND that PI was caused by act/omission of another. Must not be brought after 3 years from accrual (*LAA ss 5(1A), 5(1AA)*).

- -> EQUITY/EQUITABLE REMEDIES: LAA does NOT apply (*s 31*). Governed by DOCTRINE OF LACHES -- court may refuse relief where P's delay makes it unjust to do so (ie has caused prejudice to D).

**WRITE:** The relevant cause of action is *[contract / tort / personal injury / equitable]* which accrued on *[date]* because *[reason -- eg breach occurred on X / damage was suffered on X / injury was discoverable on X because P knew/ought to have known of PI, causation and seriousness]*. The applicable limitation period is *[X years]* under *[LAA s X]*. Time *[will expire / expired]* on *[date]*.

### Step 2: Was there a SUSPENSION or POSTPONEMENT of time?

- -> COVID: Period between 16 March 2020 to 31 July 2020 NOT included in calculation of limitation period (COVID-19 Omnibus Regulations, Pt 7 Reg 20).
- -> FRAUD/CONCEALMENT (*LAA s 27*): If P's right of action is CONCEALED by fraud of D or D's agent, limitation period does NOT begin to run until P DISCOVERS the fraud or COULD have discovered it with reasonable diligence.
- -> ACKNOWLEDGEMENT or PART-PAYMENT of DEBT (*LAA ss 24-26*): If D acknowledges P's claim or makes any payment re it -- time accrues on date of acknowledgment or last payment. Acknowledgment must be in writing and signed by D or D's agent (*s 25(1)*).
- -> P under a disability (*LAA s 27E(2)*): If P is under disability WHEN act or omission causing PI occurred -- claim must be brought within SHORTER of (a) 6 years from when CoA is discoverable OR (b) 12 years from act/omission.
- -> MINORS not in custody of capable parent/guardian (*LAA s 27J(1)-(2)*): time suspended until P turns 18.
- -> CHILD ABUSE (*LAA ss 27O and 27P*): NO limitation period for actions arising from child abuse (physical/sexual/psychological).
- -> MINOR injured by parent/guardian or close associate (*LAA s 27I(1)*): CoA deemed discoverable when P turns 25 OR when actually discoverable -- whichever is later. Long-stop = 12 years from when P turns 25 (ie when P is 37).

**WRITE:** Time *[is / is not]* suspended because *[ground -- eg OP's fraud prevented P's knowledge until X date / P was under a disability from X to Y / COVID period applies]*.

### Step 3: Is an EXTENSION of time available? P may apply for extension (*LAA s 27K(1)*). Court may order an extension if JUST AND REASONABLE to do so (*LAA s 27K(2)*; Caven).

- -> s 27L(1) factors: (a) length of and reasons for delay; (b) extent to which delay is likely to be prejudicial to D; (c) extent to which D took steps to make available to P means of ascertaining facts; (d) duration of any disability or legal incapacity of P; (e) time within which action was discoverable; (f) extent to which P acted promptly and reasonably once P knew D's act/omission might give rise to action; (g) steps taken by P to obtain medical, legal or expert advice.
- -> s 27L(2) factors: (a) whether passage of time has prejudiced a fair trial; (b) nature and extent of P's loss; (c) nature of D's conduct.

- -> COUNTER-ARGUMENT: D will argue P had ample opportunity to discover claim earlier; delay is prejudicial to fair trial (evidence lost, witnesses unavailable); P did not act promptly and reasonably once CoA was discoverable.

**WRITE:** An extension [*is / is not*] likely to be granted because, applying s 27L factors, [*key factors -- eg P's delay was caused by D's concealment / P acted promptly once injury was discoverable / D is not prejudiced as all evidence is documentary / D's conduct contributed to P's late discovery of the claim*].

LAA Provision	Limitation Period and Trigger
s 5(1)(a)	6 years: simple contract cases; non-PI tort cases ( <i>does not apply to equitable claims: LAA s 31</i> ).
s 5(1AAA)	1 year from publication: defamation.
s 5(1A)	Dust and tobacco PI: discoverable when P knows/ought to know they suffered PI caused by another. Max 3 years from accrual.
s 27D	PI (not dust/tobacco, not statutory schemes): shorter of 3 years from discoverable ( <i>s 27D(1)(a)</i> ) OR 12 years from act/omission ( <i>s 27D(1)(b)</i> ).
s 27E(2)	PI + P under disability at time of act/omission: shorter of 6 years from discoverable OR 12 years from act/omission.
s 27I(1)	Minor injured by parent/guardian or close associate: CoA discoverable at 25 or actually discoverable -- whichever later. Long-stop: 12 years from when P turns 25.
ss 27O, 27P	Child abuse: NO limitation period.
s 21	Fraudulent breach of trust: no limitation period (to recover trust property in trustee's possession). All other trust breaches: 6 years.
s 22	Claims to personal estate of deceased person: 15 years from date when right to receive the share/interest accrued.

## 5.2 Originating Process

Type	Rules and Requirements
WRIT (Form 5A) ( <i>r 4.04, r 5.02</i> )	Every proceeding must be commenced by writ (subject to exceptions) ( <i>r 4.04</i> ). Must contain an INDORSEMENT OF CLAIM ( <i>r 5.04(1)</i> ) which must be either: (a) a statement of claim (special indorsement); or (b) a statement sufficient to give with reasonable particularity notice of the nature of the claim, cause of action and the relief or remedy sought (general

	<p>indorsement) (<i>Ruzen v Ciccirelli</i>). If general indorsement, full SOC must be filed and served within 30 days of D's appearance (<i>r 14.02</i>). Must be served on D within 12 MONTHS of filing otherwise becomes STALE (<i>r 5.12(1)</i>).</p> <p>Extension: P can apply for extension of up to one year -- court has wide discretion but looks at WHY no service; P has duty to serve promptly and must have good reason (<i>Savcor</i>). Writ shall include statement that if D does not file appearance within time stated, P may obtain judgment without further notice (<i>r 5.03</i>).</p>
<p>ORIGINATING MOTION (rr 4.05-4.06, Forms 5B-5F)</p>	<p>Must use where NO D to the proceeding (eg seeking probate of a will) (<i>r 4.05</i>). MAY use where pleadings or discovery unnecessary because unlikely to be any substantial dispute of fact (<i>r 4.06</i>). Indorsement must specify: relief or remedy sought; Act (if any) under which claim made; any question to be answered (<i>r 5.05</i>). No pleadings required.</p>

### 5.3 Service

PERSONAL SERVICE required for: originating processes (*r 6.02(1)*); 3P notices (*r 11.04(2)*); subpoenas (*r 42.05*).

HOW: (a) Leave copy with person to be served (*r 6.03(1)(a)*) -- NB: satisfied if copy left with person accompanying D (Ainsworth); or (b) if person does NOT accept copy = PUT copy down in person's presence and TELL them the nature of the doc (*r 6.03(1)(b)*). Document need not be original (*r 6.03(3)*). For originating processes, copy must be SEALED (*r 6.03(2)*).

PROOF: affidavit of service stating (*r 6.17(1)*): (a) who served doc; (b) hour, day of week, and date served; (c) place of service; (d) how person served was identified. Good practice: file affidavit regardless of D's response to pre-empt challenges.

Service Method	Rules and Requirements
Personal service (default for originating process)	As above. Documents need not be personally served unless specifically required, however any doc may be served personally ( <i>r 6.01</i> ).
Ordinary service (after appearances filed)	May be served by: (a) leaving at proper address; (b) posting to proper address; (c) Corporations Act method for corporations; (d) leaving at exchange box (DX) for solicitors; (e) sending fax to solicitor; (f) emailing to recipient's email address -- email must state name, address, phone and email of sender; name of person to be served; title and court file number; name and number of pages of each document served; and that email is by way of service under <i>r 6.07(1)(f)</i> .

Service on solicitor ( <i>r 6.09</i> )	If solicitor makes note on copy of doc that service accepted on D's behalf = doc taken to have been served on D on the day solicitor made the note (unless solicitor acted without authority).
Confirmation of informal service ( <i>r 6.11</i> )	If doc NOT served in required manner BUT has come to notice of D = doc taken to have been served on the day it came to D's notice.
Service under contract ( <i>r 6.14</i> )	If parties agreed to service in a manner or at a place specified in agreement = service in accordance with agreement is sufficient.
Substituted service ( <i>r 6.10(1)</i> )	If IMPRACTICABLE to serve in required manner = Court may order that steps be taken as specified to bring doc to notice of person. Method must, in all reasonable possibility (if not certainty), bring knowledge of writ to D's attention ( <i>Amos Removals; Flo Rida</i> ). Apply ex parte, supported by affidavit showing circumstances justifying application, attempts of service, and proposed method.
Service outside Vic but inside Aus ( <i>SEPA s 15</i> )	Initiating process CAN be served in another State without leave of Court ( <i>SEPA s 15(1)</i> ). Must attach SEPA Form 1 to writ. Service on individuals in same manner as in state of issue. Service on companies: leave at or post to registered office, or deliver to a director in Australia.
Service outside Australia ( <i>SCR rr 7.02-7.05</i> )	Without leave: r 7.02 lists cases ( <i>eg relief against person ordinarily resident in Vic; breach of contract made in Vic; tort committed in Vic; damage suffered in Vic</i> ). With leave: r 7.03 if outside r 7.02. NZ: Order 7A -- no leave required.

#### 5.4 Appearance by D

Before D can take any step in the proceeding D must generally FILE AN APPEARANCE (*SCR r 8.02*). HOWEVER, D can apply for an order setting aside the writ or its service, or staying the proceeding, before filing an appearance (*r 8.09*).

Type	Effect and Procedure
TIME LIMITS ( <i>r 8.04</i> )	Served in Vic = 10 days. Interstate = 21 days. Papua New Guinea = 28 days. New Zealand = 30 working days. Elsewhere overseas = 42 days. NB: time excludes beginning day and includes ending day ( <i>r 3.01(2)-(3)</i> ). D may file appearance late without leave as long as do so before default judgment ( <i>r 8.07(1)</i> ).
UNCONDITIONAL APPEARANCE ( <i>Form 8A, r 8.05(1)</i> )	Most common. By filing, D: submits to the Court's jurisdiction; informs P action will be defended; and WAIVES their right to object to any irregularities in service or in the originating process.
CONDITIONAL APPEARANCE ( <i>Form 8B, r 8.08(1)</i> )	Filed where D wishes to RETAIN the right to object to court's jurisdiction and/or any irregularities in service or the originating process while preventing a default

	<p>judgment. D MUST make application by summons within 14 days after day of filing the notice -- otherwise conditional appearance has effect of an unconditional appearance (rr 8.08(3)-(4)). Appropriate where: service interstate and P did not comply with SEPA requirement; D is foreign head of state claiming immunity; D objects to jurisdiction; challenge to service. Note: fact D has filed appearance = indicates proceedings have come to attention = confirmation of informal service (<i>r 6.11</i>).</p>
FAILURE TO ENTER APPEARANCE	<p>P may apply for DEFAULT JUDGMENT against D (<i>SCR r 21.01(2)</i>). Pre-req: P must have filed affidavit proving service of writ on D, a notice to the Prothonotary requesting search of an appearance by D, and a statement of claim.</p>

**Overturing Default Judgment (SCR r 21.07; Kostokanellis)**

D may apply for court to SET ASIDE or vary a default judgment. Court has unfettered discretion but will consider:

- (1) Whether there is a satisfactory explanation for the failure to appear or serve defence;
- (2) Whether there was unreasonable delay in making the application to set aside (*NAB v Singh*);
- (3) Whether D has a prima facie defence on the merits (*Mearns v Willoughby*);
- (4) What setting aside means for the other party -- and if costs can compensate for any change in position.