

SERVICE

Service

- PRELIMINARY: Before you can serve any originating process –
 - (i) you must have capacity to sue;
 - (ii) the D must have capacity to be sued;
 - (iii) P has standing;
 - (iv) the writ is drafted as above;
 - (v) the writ is filed + filing fee paid.

STEP 1 - INTRODUCTION

Once the [court docs] have been filed and sealed, [X] must then attend to service by way of:

- **Personal service** as required for originating processes (*SCR r 6.03*), 3P notices (*SCR r 11.04(2)*) and subpoenas (*SCR r 42.05*).
 - If it is a Magistrates Court matter, it can also be done by post (*Reg 6412 CPR*).
- **Ordinary service** as used for everything else unless otherwise specified (N/B: you can still personally serve docs that only need ordinary service (*SCR r 6.07*)).

To [Y].

Personal Service

STEP 2A - GENERAL RULES

The default rule is that an **originating process** must be **served personally**, except where otherwise provided (*SCR r 6.02(1)*)

REQUIRES:

Per *SCR r 6.03(1)*, to effect personal service one can –

- (a) Leave a copy of the document with the person to be served; OR
 - Incl. their legal representatives (*Ainsworth*)
- (b) If the person does not accept the copy, putting it down in their presence and telling the person the nature of the document.

N/B: Need not be the original document, it is permissible to serve a copy (*SCR r 6.03(3)*)

- The copy must be sealed w/ courts' stamp and in accordance w *r 5.11 (SCR r 6.03(2))*

ALTERNATIVES TO PERSONAL SERVICE:

If [P] cannot affect personal service, they can still serve proper if —

1. Service being accepted by a solicitor (with instruction);
 - The solicitor may have undertaken to accept service for their client (*SCR r 6.09*).
 - They will note on the document they have accepted service on behalf of the D.
 - Must have the authority or instructions to do so
 - Example: See *Ainsworth*
2. Confirmation of informal service
 - If a document has been improperly served, but D has notice then the documents are taken to have been served on the day D has notice (*SCR r 6.11*)

ANALOGISE / DISTINGUISH

Ainsworth - Server held out the writ and said 'these documents are for you'. The D looked at the documents, refused to take them and his solicitor took the documents. HELD — This was sufficient for valid service under sub-s(a) but not (b) as the nature of the documents left with D were not described — it is presumed that the D will become aware of the document: Kirby ACJ.

STEP 2B - SPECIAL PARTIES / RULES

Corporations

START WITH ASIC SEARCH TO CONFIRM COMPANY DETAILS

A copy can be left with the head officer or treasurer/ manager / co- secretary of the company (*SCR r 6.04(a)*).

OR

Per *s 109X Corporations Act*, service (incl. an originating process) can be effected by:

- Leaving or posting the document to the Co's registered office;
- Delivering the document personally to a resident director;
- If the Co is in liquidation/administration — leave or post a copy to the liquidator or administrator's address

N/B: *s 601CX* — Foreign Corporations — can leave or post to the address of a local agent of a foreign company

Minors

Per *SCR r 6.04(b)*, personal service is effected by serving

- the parent/guardian of the minor OR
- if none, serving the person with whom the minor resides or is in the care of

Handicapped person

Per *SCR r 6.04(c)*, can serve:

- the litigation guardian if there is an eligible person OR
- a person with whom the party resides/ is in the care of

Cth Gov

Per *SCR r 6.04(d)*, the documents can be served on:

- the Secretary to the AG's Department or
- the Australian Gov. Solicitor

State Gov

Can serve the Victorian Government Solicitor (*SCR r 6.04(e)*)

Partnership

Partnerships can be sued in the name of the firm or individual partners (*SCR r 17.01*)

Therefore, an originating process commenced against the firm can be served on any partner or anyone at the principal place of business who appears to have control (*SCR r 17.03(1)*)

STEP 2C - SUBSTITUTED SERVICE

Where it is **impracticable** to effect service as required by the Rules, [P] can make an ex parte application to the court for an order that service be effected in some other manner (**SCR r 6.10(1)**).

THIS REQUIRES:

- The plaintiffs must show per **Amos v Small**, the requirements for this are:
 1. Personal service to be impracticable **AND** P has made **extensive efforts to effect personal service**
 - **Flo Rida** – was unable to on several occasions effect personal service due to security/ posse w/ Flo Rida
 - → **demonstrate that they've tried several times**
 2. The costs or geographical difficulty alone is insufficient (**Amos**)
 3. The proposed substituted method is likely to bring the proceedings to D's attention
 - Methods incl. post, newspapers, serving a closely connected person, social media, texts, public advertisement in area where D is known to reside, service to someone close to him who they are likely to speak to regularly (**Amos**)

ANALOGISE / DISTINGUISH

- **Amos** – serving someone closely connected
 - P proposed SS for a tort action against 19 D's by way of serving a common solicitor acting for them in a separate action. Here, as there was an urgent timeline requiring all parties in court in the next week, it was permitted.
- **Flo Rida** - At first instance, the court allowed service via Facebook and Email (as P could physically not get to Flo Rida due to security). On appeal overturned - there was no evidence FR's FB or personal email was actually checked by him or anyone likely to come to his attention
 - N/B: This may be different for non-celebrities (i.e. if it can be shown they would check their account)
- **MKM Capital v Corbo** – social media service permitted

APPROACH:

- The P can bring an ex parte application, supported by affidavit setting out and justifying the proposed method of substituted service.

CONSEQUENCE:

- If substituted service is granted, service is deemed to be effected at expiration of a specified period after compliance (and there is no need to prove D had notice)
- [D] may challenge service on the basis that it failed to bring proceedings to his attention, but the court will simply judge whether or not it was reasonable to assume that the method of service made [D] aware. In other words, his/her arguments won't simply be taken on face value.

STEP 2D - PROOF OF SERVICE

Proof of service can be done by Affidavit of Service or by admission (**r 6.17 SCR**).

If service is disputed, [P] must then submit an affidavit of service to the court stating: e.g. process server (who served it); hour, day and date; place served; method of identification used to ID the D (**SCR r 6.17(1)**).

STEP 2E - SERVICE OUTSIDE OF JURISDICTION (SERVICE 'EX JURIS')

Outside Vic, within Aus

The *Service and Execution of Process Act 1992 (Cth)* ('SEPA') provides that an initiating process may be served in any part of Australia (*s 15(1) SEPA*). This requires a SEPA form to be attached to the process.

REQUIRES:

- Service on the individual is effected in the **same way as service in the State** where proceedings are issued (*s 15(2) SEPA*) → i.e. *SCR r 6.03* still applies, although physically locating [X] may be difficult if s/he is in another State
- **Unless — Companies** — Service is effected by leaving the document / sending the doc to the companies registered office (*s 9(1) SEPA*)
 - The Corporations Act provisions do not apply where SEPA can be used (*s 9(9)*)

CONSEQUENCE

- The service has the same effect / gives rise to the same proceedings as if served in the place of issue (*s 12 SEPA*)
- TOPIC LINK — Jurisdictional consequences — SCV has jurisdiction over all Australian residents, as long as that person has been validly served.
- If D objects to the jurisdiction-
 - From the VSC: make a case transfer application under X- vesting scheme;
 - Any other court: Apply for a stay on the basis the court is an inappropriate court to hear the matter (FNC argument).

Outside Aus - NZ

Order 7A applies to service in NZ, which is affected without leave of VSC using the normal rules (*s 9 Trans-Tasman Proceedings Act*)

Outside Aus - Hague Convention

Australia acceded to the Hague Service Convention in March 2010. The Convention covers 62 party states and provides a standard form of service. This doesn't replace the SCR.

- See *Order 80* for the Hague Convention Rules:
 - Treaty provides a standard form of service for members, in which a sealed copy of the writ (with nexus factors) is sent via personal service to the Defendant

Outside Aus - All other

→ Without leave

- Per *SCR r 7.03*, if [X] is outside of Australia, this can be affected by:
 - personal service → i.e. *SCR r 6.03* still applies, although physically locating [X] may be difficult if s/he is in another country **OR**
 - done in accordance with the laws of the country in which you are serving (*SCR r 7.03*)
 - Would require investigation of the laws of service in that particular country

Per *SCR r 7.02*, If [plaintiffs] attempt to serve [D] whilst s/he is overseas, they must contain an indorsement and include in the writ of statement of the nexus that connects [D] to the Victorian jurisdiction per *r 7.01*— see below → **IMPORTANT SELECT A FEW TO DISCUSS IN EXAM**

- (a) the whole subject matter of the proceeding is land situate within Victoria (with or without rents

- or profits) or the perpetuation of testimony relating to land so situate;
- (b) any act, deed, will, contract, obligation or liability affecting land situate within Victoria is sought to be construed, rectified, set aside or enforced in the proceeding;
 - (c) any relief is sought against a person domiciled or **ordinarily resident** within Victoria;
 - (d) the proceeding is-
 - (i) for the administration of the estate of a person who died domiciled within Victoria; or
 - (ii) for any relief or remedy which might be obtained in any such proceeding;
 - (e) the proceeding is for the execution, as to property situate within Victoria, of the trusts of a written instrument of which the person to be served is a trustee and which ought to be executed according to the law of Victoria;
 - (f) the proceeding is one brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract—
 - (i) was made within Victoria;
 - (ii) was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria; or
 - (iii) is governed by the law of Victoria;
 - (g) the proceeding is brought in respect of a breach committed within Victoria of a contract wherever made, even though that breach was preceded or accompanied by a breach out of Victoria that rendered impossible the performance of that part of the contract which ought to have been performed within Victoria;
 - (h) the proceeding is founded on a contract the parties to which have agreed that the Court shall have jurisdiction to entertain a proceeding in respect of the contract;
 - (i) the proceeding is **founded on a tort committed within Victoria;**
 - (j) the proceeding is **brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring;**
 - (k) an **injunction is sought ordering the defendant to do or refrain from doing anything within Victoria**, whether or not damages are also claimed in respect of a failure to do or the doing of that thing;
 - (l) the proceeding is properly brought against a person duly served within or out of Victoria and another person out of Australia is a necessary or proper party to the proceeding;
 - (m) the proceeding is either brought by a mortgagee of property situate within Victoria (other than land) and seeks the sale of the property, the foreclosure of the mortgage or delivery by the mortgagor of possession of the property or brought by a mortgagor of property so situate (other than land) and seeks redemption of the mortgage, reconveyance of the property or delivery by the mortgagee of possession of the property, but does not seek, except so far as permissible under any other paragraph of this Rule, any personal judgment or order for the payment of any moneys due under the mortgage;

→ **With leave**

- If the case does not fit within **r 7.2** categories (**SCR r 7.03**)

REQUIRES:

- Application must be accompanied with affidavit stating facts/reason for having case held in Aus + place/country where person served will likely be found: (4)
- The person being served to be provided with notice of the scope of the court's jurisdiction, P's claims alleging jurisdiction and the right to object to jurisdiction (**SCR r 7.05**)
 - Service to be personally effected **OR** done in accordance with the laws of the country in which you are serving (**SCR r 7.03**)
- Per **SCR r 7.4**, the court has the discretion to assume jurisdiction on application by the person served. The matters it can consider for service contests are —
 - Cause of action arise in Victoria;

- Does the claim have a real and substantial connection with Australia?
- Whether service outside of Australia is not authorised by the rules;
- Court an appropriate forum;
- Claim has insufficient prospects of success to warrant putting the person to the time, expense and trouble of defending the claim.

Disputing service overseas

- **Exam tip:** If providing service outside of the state/overseas, note that the difficulty with the options it will likely be impossible to locate G and personally serve documents on him. If service is improper, it may be open to challenge by the Defendants who can argue that the writ must be set aside and the proceeding stayed because of service irregularities.
- If the D objects to the service
 - The Court can make an order referred to in **r 8.09** on application of the party served with the originating process overseas (**SCR r 7.05(1)**)
 - Enables the court to set aside the originating motion, its service or stay proceedings (**SCR r 8.09**)
- The court can make this order on the grounds that service outside was unauthorised or that Vic is an inappropriate forum to hear the matter (forum non conveniens) (**SCR r 7.05(2)**)

STEP 2F - CONSEQUENCES OF DEFECTIVE PERSONAL SERVICE

For the reasons outlined above, the service is likely to be a defective personal service. In the event that it is found to be a defective personal service, this allows the defendant (usually after a conditional appearance) to apply to set aside the writ; or set aside service of the writ on the grounds of improper service or lack of jurisdiction (**O 7**).

General/Ordinary Service

STEP 3A - GENERAL RULES (LESSER DOCUMENTS)

Interlocutory processes have more relaxed rules (c.f. personal services)

- A document need **not** be served personally unless specifically required (**SCR r 6.01**)
- As there is no need to serve personally, if there is personal service, the costs associated are 'unnecessary' and cannot be claimed

METHOD:

- Per **SCR r 6.07(1)**, if personal service is not required, the document may be served by
 - (a) Leaving the document at a 'proper address' (as appearing in their writ or appearance: **rr 6.06(1); 8.06(2)**)
 - (b) Post doc to person to be served at the proper address;
 - (c) Serving on a Corporation via provisions made under any Act (eg **s 109X Corporations Act**)
 - (d) Leaving w/solicitor in a document exchange;
 - (e) Leave with solicitor by fax
 - (f) emailing the document to the persons' address
 - P must include an email address for service on the originating process (**SCR r 5.07(1)(d)**);
 - D must incl. an email address in their notice of appearance (**SCR r 8.06**)
 - **But note**—the previous practice of informal service (**SCR r 6.11**) still stands.

- N/B: 'Proper address' — If not on the writ or appearance, it is: the last known residence or business place of the person (**SCR r 6.07(2)**)
 - Failure to serve at the proper address may mean costs are incurred to re-serve it.

APPEARANCE

Appearance

FIRST STEP OF THE D IN THE LITIGATION PROCESS → The D does not issue an OP unless counterclaim or 3P claims

- The purpose of entering an appearance as a procedural step is —
 - Informs the P the action will be defended;
 - Gives the name of D's solicitors;
 - Provides address where service can be effected (incl. email);
 - **An unconditional appearance** — notifies the court that the D submits to the jurisdiction
 - **A conditional appearance** — notifies the court that D disputes the jurisdiction or service
- N/B: The failure to enter an appearance may mean that P can proceed with the case + obtain **default judgment**

STEP 1 - INTRODUCTION

After [D] is served with a writ, they must enter an appearance before taking other procedural steps (**SCR r 8.02**).

- They have three options after being served
 1. Do nothing (exposing themselves to default judgment);
 - May seek to overturn this judgment in default of appearance
 2. Enter an **unconditional appearance** (**Form 8A** – D submits to the jurisdiction);
 3. Enter a **conditional appearance** (**Form 8B** – objects to **either the jurisdiction of the court or irregularities in service** and perhaps seeks transfer. This protects against default judgment (**Rowe**))

STEP 2 - WHO CAN ENTER

The **D** can enter an appearance in person **OR** through solicitor **OR** authorised person (for corporations) (**SCR r 8.03**)

- **Disabled or Minors:** LG may enter (**SCR r 15.02**);
- **Partnerships:** Each partner must appear individually if sued in firm's name (**SCR r 17.04–06**)
- **Third Parties:** Must enter appearances or risk default judgment (**SCR r 11.08**)

STEP 3 - TIME LIMITS

Per **SCR r 8.04**, the time limits to enter the appearance depend on where the originating process was served

- Served in Vic = 10 days
- Served interstate = 21 days
- Served in NZ = 30 working days
- Served in PNG = 28 days
- Any other case = 42 days

N/B: The failure to enter in the time limit is not fatal → so long as default judgment has not been obtained in the meantime, D can enter late appearance (**SCR r 8.07**)

STEP 4 - PROCEDURE TO ENTER

- Must state the **name, address and contact details** of the person entering an appearance (individual or solicitor) (**SCR r 8.06**)
- Be on the required form either:
 - 8A (unconditional) (**SCR r 8.05(1)**) or
 - 8B (conditional) (**SCR r 8.05(2)**);
- Files a notice of appearance with the Registry and takes steps to serve a sealed copy to every P on the same day (**SCR r 6.07(1)**)
 - Only requires **ordinary** not personal service (**SCR r 8.05(2)–(3)**)

Type of appearance

STEP 5 - UNCONDITIONAL APPEARANCE

Unconditional appearance is most common and is filed under **Form 8A (SCR r 8.05(1))**.

- This waives:
 - The court's jurisdiction;
 - Irregularities in the originating process or commencement of proceedings; AND
 - Irregularities in service
- D will also be submitting to the jurisdiction of the court

STEP 6 - CONDITIONAL APPEARANCE

Conditional appearances are filed where [X] wishes to **retain the right to object to the court's jurisdiction and any irregularities in service or pleadings (SCR r 8.08(1))**. This is filed under **Form 8B (SCR r 8.08(2))**.

This is appropriate where:

- Service interstate and P failed to comply with SEPA or the Hague Convention;
- D is a foreign head of state who claims immunity;
- Writ is served on D's solicitor who has no instructions to accept service;
- *Forum non conveniens* (inconvenient forum)

CONDITIONAL APPEARANCE WHERE D INTERSTATE

21 days (**SEPA s 17, s 8.04(b)**)

- Preserved the D's right to take issue with service irregularities
 - Although the fact that D has filed notice of appearance indicates that the proceedings have come to their attention.
- Allows D to apply for a transfer under the Cross Vesting legislation

CONSEQUENCES OF CONDITIONAL APPEARANCES

[D] must then make an application within 14 days of the appearance regarding: issue with jurisdiction, service or pleadings (**SCR r 8.08(3)-(4)**); for disputing service outside Aus see **SCR r 7.04**)

- On application by D, the court may:
 1. Find it has jurisdiction
 2. Find it doesn't have jurisdiction and order transfer of proceedings
 3. Set aside originating process (**SCR r 8.09(a)**)
 4. Stay a proceeding (**SCR r 8.09(c)**)

5. Make any other order in **r 46.08 (SCR r 8.09(b))**

→ **TOPIC LINK: X-VESTING / JURISDICTION (s 5.2(b))**

N/B: Overturning a default judgement

- The failure to enter an appearance opens D up to default judgment (**SCR r 21.01**). However, the court may overturn judgment in default of appearance under **r 21.07**.
- Per **Cook v DA Manufacturing**, this requires —
 - Satisfactory explanation for the failure to appear (e.g. no English, did not know a lawyer so made an appointment);
 - There was no unreasonable delay in seeking the advice (**NAB v Singh**);
 - There is a prima facie defence on the merits: **Mearn**