

Order 7—Service out of Australia

Part 1—Service out of Australia

Order 7 Pt 1
(Heading
and rules
7.01–7.08)
substituted as
Order 7 Pt 1
(Heading
and rules
7.01–7.09) by
S.R. No.
109/2016
rule 5.

7.01 Part does not apply to service in New Zealand of documents for or in certain Trans-Tasman proceedings

Rule 7.01
substituted by
S.R. No.
109/2016
rule 5.

This Part (which contains rules on service out of Australia) does not apply to service in New Zealand of an originating process for, or of any other document to be served in or for, a proceeding an originating process for which may be served in New Zealand under Division 2 of Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth.

7.02 When allowed without leave

Rule 7.02
substituted by
S.R. No.
109/2016 rule
5.

An originating process may be served out of Australia without leave in the following cases—

- (a) when the claim is founded on a tortious act or omission—
 - (i) which was done or which occurred wholly or partly in Australia; or
 - (ii) in respect of which the damage was sustained wholly or partly in Australia;

- (b) when the claim is for the enforcement, rescission, dissolution, annulment, cancellation, rectification, interpretation or other treatment of, or for damages or other relief in respect of a breach of, a contract which—
 - (i) was made or entered into in Australia; or
 - (ii) was made by or through an agent trading or residing within Australia; or
 - (iii) was to be wholly or in part performed in Australia; or
 - (iv) was by its terms or by implication to be governed by Australian law or to be enforceable or cognizable in an Australian court;
 - (c) when the claim is in respect of a breach in Australia of any contract, wherever made, whether or not that breach was preceded or accompanied by a breach out of Australia that rendered impossible the performance of that part of the contract that ought to have been performed in Australia;
 - (d) when the claim—
 - (i) is for an injunction to compel or restrain the performance of any act in Australia; or
 - (ii) is for interim or ancillary relief in respect of any matter or thing in or connected with Australia, where such relief is sought in relation to judicial or arbitral proceedings commenced or to be commenced, or an arbitration agreement made, in or outside Australia (including, without limitation, interim
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or ancillary relief in relation to any proceedings under the International Arbitration Act 1974 of the Commonwealth or the **Commercial Arbitration Act 2011**; or

- (iii) without limiting subparagraph (ii), is an application for a freezing order or ancillary order under Order 37A in respect of any matter or thing in or connected with Australia;
 - (e) when the subject matter of the claim is land or other property situated in Australia, or any act, deed, will, instrument, or thing affecting such land or property, or the proceeding is for the perpetuation of testimony relating to such land or property;
 - (f) when the claim relates to the carrying out or discharge of the trusts of any written instrument of which the person to be served is a trustee and which ought to be carried out or discharged according to Australian law;
 - (g) when any relief is sought against any person domiciled or ordinarily or habitually resident in Australia (whether present in Australia or not);
 - (h) when any person out of Australia is—
 - (i) a necessary or proper party to a proceeding properly brought against another person served or to be served (whether within Australia or outside Australia) under any other provision of these Rules; or
 - (ii) a defendant to a claim for contribution or indemnity in respect of a liability enforceable by a proceeding in the Court;
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- (i) when the claim is for the administration of the estate of any deceased person who at the time of death was domiciled in Australia or is for any relief or remedy which might be obtained in any such proceeding;
 - (j) when the claim arises under an Australian enactment and—
 - (i) any act or omission to which the claim relates was done or occurred in Australia; or
 - (ii) any loss or damage to which the claim relates was sustained in Australia; or
 - (iii) the enactment applies expressly or by implication to an act or omission that was done or occurred outside Australia in the circumstances alleged; or
 - (iv) the enactment expressly or by implication confers jurisdiction on the Court over persons outside Australia (in which case any requirements of the enactment relating to service must be complied with);
 - (k) when the person to be served has submitted to the jurisdiction of the Court;
 - (l) when a claim is made for restitution or for the remedy of constructive trust and the person to be served's alleged liability arises out of an act or omission that was done or occurred wholly or partly in Australia;
 - (m) when it is sought to recognise or enforce any judgment;
 - (n) when the claim is founded on a cause of action arising in Australia;
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- (o) when the claim affects the person to be served in respect of the person's membership of a corporation incorporated in Australia, or of a partnership or an association formed or carrying on any part of its affairs in Australia;
- (p) when the claim concerns the construction, effect or enforcement of an Australian enactment;
- (q) when the claim—
 - (i) relates to an arbitration held in Australia or governed by Australian law; or
 - (ii) is to enforce in Australia an arbitral award wherever made; or
 - (iii) is for orders necessary or convenient for carrying into effect in Australia the whole or any part of an arbitral award wherever made;
- (r) when the claim is for relief relating to the custody, guardianship, protection or welfare of a minor present in Australia or who is domiciled or ordinarily or habitually resident in Australia (whether present in Australia or not);
- (s) when the claim, so far as concerns the person to be served, falls partly within one or more of the above paragraphs and, as to the residue, within one or more of the others of the above paragraphs.

Notes

- 1 Originating process includes a document that commences a proceeding as well as a counter-claim or third party claim.

- 2 If a proceeding is commenced in the Court and originating process is served out of Australia under this Rule but the Court later decides that it is more appropriate that the proceeding be determined by a court of another Australian jurisdiction, the Court may transfer the proceeding to that other court under the applicable Jurisdiction of Courts (Cross-vesting) Act and may make an order for costs against the party who commenced the proceeding in the Court rather than in the transferee court.

Rule 7.03
substituted by
S.R. No.
109/2016
rule 5.

7.03 When allowed with leave

- (1) In any proceeding when service is not allowed under Rule 7.02, an originating process may be served out of Australia with the leave of the Court.
- (2) An application for leave under this Rule shall be made on notice to every party other than the person intended to be served.
- (3) A sealed copy of every order made under this Rule shall be served with the document to which it relates.
- (4) An application for leave under this Rule shall be supported by an affidavit stating any facts or matters related to the desirability of the Court assuming jurisdiction, including the place or country in which the person to be served is or possibly may be found, and whether or not the person to be served is an Australian citizen.
- (5) The Court may grant an application for leave if satisfied that—
 - (a) the claim has a real and substantial connection with Australia; and
 - (b) Australia is an appropriate forum for the trial of the proceeding; and
 - (c) in all the circumstances the Court should assume jurisdiction.

7.04 Court's discretion whether to assume jurisdiction

- (1) On application by a person on whom an originating process has been served out of Australia, the Court may by order set aside the originating process or its service on the person or dismiss or stay the proceeding.
- (2) Without limiting paragraph (1), the Court may make an order under this Rule if satisfied—
 - (a) that service out of Australia of the originating process is not authorised by these Rules; or
 - (b) that the Court is an inappropriate forum for the trial of the proceeding; or
 - (c) that the claim has insufficient prospects of success to warrant putting the person served out of Australia to the time, expense and trouble of defending the claim.

Rule 7.04
substituted by
S.R. No.
109/2016
rule 5.

7.05 Notice to person served out of Australia

If a person is to be served out of Australia with an originating process, the person shall also be served with a notice in Form 7AAA informing the person of—

- (a) the scope of the jurisdiction of the Court in respect of claims against persons who are served out of Australia; and
- (b) the grounds alleged by the plaintiff to found jurisdiction; and
- (c) the person's right to apply for an order setting aside the originating process or its service on the person or dismissing or staying the proceeding.

Rule 7.05
substituted by
S.R. No.
109/2016
rule 5.

Rule 7.06
substituted by
S.R. No.
109/2016
rule 5.

7.06 Time for filing appearance

Except when the Court otherwise orders, a defendant who has been served out of Australia shall file an appearance within 42 days from the date of service.

Rule 7.07
substituted by
S.R. No.
109/2016
rule 5.

7.07 Leave to proceed where no appearance by person

- (1) If an originating process is served on a person out of Australia and the person does not file an appearance, the party serving the document may not proceed against the person served except by leave of the Court.
- (2) An application for leave under paragraph (1) may be made without serving notice of the application on the person served with the originating process.

Rule 7.08
substituted by
S.R. No.
109/2016
rule 5.

7.08 Service of other documents out of Australia

Any document other than an originating process may be served out of Australia with the leave of the Court, which may be given with any directions that the Court thinks fit.

New rule 7.09
inserted by
S.R. No.
109/2016
rule 5.

7.09 Mode of service

A document to be served out of Australia need not be personally served on a person so long as it is served on the person in accordance with the law of the country in which service is effected.

Part 2—Service in foreign country

Rule 7.09
substituted as
rule 7.09.1 by
S.R. No.
109/2016
rule 6.

7.09.1 Application

This Part applies to the service of any document for the purpose of a proceeding in the Court—

- (a) in a country that is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; or

- (b) in such other country as the Attorney-General, by instrument filed in the proceeding, specifies.

Note

Order 80 applies to countries to which the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters applies.

7.10 Documents required

A person (in this Part called *the applicant*) requiring a document to be served in another country under this Part shall—

- (a) lodge with the Prothonotary—
- (i) the document to be served;
 - (ii) unless English is an official language in the country concerned, a translation of the document in accordance with Rule 7.11;
 - (iii) a copy of the document and of any translation;
 - (iv) such further copies of the document and of the translation as the Prothonotary directs; and
 - (v) if any special manner of service is required, a request for service in that manner and, unless English is an official language of the country concerned, a translation of the request; and
- (b) file—
- (i) a copy of each of the documents mentioned in paragraph (a); and
 - (ii) a request and undertaking in accordance with Rule 7.12.
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7.11 Translation

A translation of a document lodged under Rule 7.10 shall—

- (a) be a translation into an official language of the country in which service is required; and
- (b) bear a certificate of the translator, in that language, stating that it is an accurate translation of the document.

7.12 Request and undertaking

(1) A request and undertaking filed under Rule 7.10 shall contain—

- (a) a request by the applicant to the Prothonotary that a sealed copy of the document to be served be transmitted to the country concerned for service on a specified person; and
- (b) an undertaking by the solicitor for the applicant or, where there is no solicitor, by the applicant, to pay to the Prothonotary an amount equal to the expenses incurred in consequence of the request for service.

(2) The Prothonotary may require the applicant or the applicant's solicitor to give security to the Prothonotary's satisfaction for the expenses referred to in paragraph (1)(b).

7.13 Procedure on lodgment and filing

(1) Where documents are lodged and filed in accordance with Rule 7.10, the Prothonotary shall—

- (a) seal the documents lodged with the seal of the Court; and

(b) send them to the Attorney-General for transmission for service, together with such letter of request, if any, as may be necessary.

(2) A letter of request shall be in Form 7A.

7.14 Evidence of service

Where the Prothonotary has sent documents to the Attorney-General in accordance with Rule 7.13, and afterwards a certificate purporting to be a certificate of a judicial authority or other responsible person in the country concerned or of a British or Australian consular authority in that country as to service or attempted service or non-service is filed, the certificate shall be evidence of the matters stated in the certificate.

7.15 Order for payment of expenses

Where a person has given an undertaking in accordance with Rules 7.10 and 7.12, and does not, within 14 days after service on that person of an account of expenses incurred in consequence of the request for service, pay to the Prothonotary the amount of the expenses, the Court, on application by the Prothonotary, may—

- (a) order the applicant or the applicant's solicitor (where the undertaking was given by the solicitor) or both of them to pay the amount of the expenses to the Prothonotary; and
- (b) stay the proceeding until payment so far as concerns the whole or any part of any claim for relief by the applicant.