



New South Wales

Uniform Civil Procedure Rules (Amendment No 27) 2009

under the

Civil Procedure Act 2005

The Uniform Rules Committee has made the following rules of court under the *Civil Procedure Act 2005*.

Jennifer Atkinson
Secretary of the Uniform Rules Committee

Explanatory note

The object of these Rules is to amend the *Uniform Civil Procedure Rules 2005*:

- (a) to give effect to uniform rules developed by the Rules Harmonisation Committee of the Council of Chief Justices with respect to service of judicial documents under the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965, and
- (b) to provide that an originating process for proceedings on a claim for possession of land cannot be served in accordance with an agreement, acknowledgment or undertaking between the parties unless the agreement, acknowledgment or undertaking is made after the originating process is filed but before it is served, and
- (c) to enable registrars nominated by the principal registrar of the Supreme Court to exercise functions under Division 9 (Court appointed referral for legal assistance) of Part 7 of the Rules in relation to the Supreme Court.

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1 Name of Rules

These Rules are the *Uniform Civil Procedure Rules (Amendment No 27) 2009*.

2 Commencement

These Rules commence on the day on which they are published on the NSW legislation website.

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[1] Rule 1.10B

Insert after rule 1.10A:

1.10B When Part 11A concerning service under Hague Convention has effect

The provisions of Part 11A have effect on and from the day on which the Hague Convention enters into force for Australia.

[2] Part 7.34 Definitions

Insert “or any registrar of that Court nominated by the principal registrar” after “that Court” in paragraph (a) of the definition of *registrar*.

[3] Rule 10.6 Service in accordance with agreement between parties

Insert after rule 10.6 (1):

- (1A) In relation to the service of an originating process in proceedings on a claim for possession of land, the agreement, acknowledgment or undertaking referred to in subrule (1) must be made after the originating process is filed but before it is served.

[4] Rule 11.2 Cases for service of originating process

Insert at the end of rule 11.2:

- (2) This rule extends to originating process to be served outside Australia in accordance with the Hague Convention.

[5] Rule 11.3 Notice to the defendant served outside Australia

Insert at the end of the rule:

- (2) This rule does not apply to originating process that is intended to be served on a defendant outside Australia in accordance with the Hague Convention.

Note. Division 2 of Part 11A deals with the service of local judicial documents in a country (other than Australia) that is a party to the Hague Convention.

[6] Rule 11.4 Leave for plaintiff to proceed where no appearance by defendant

Insert at the end of the rule:

Note. Rule 11.8 provides for the interaction between this Division and Part 11A (which deals with service of judicial documents under the

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Hague Convention). See Division 3 of Part 11A in relation to default judgment in proceedings in the Supreme Court after service overseas of a local judicial document.

[7] Rule 11.8 Operation of Commonwealth laws and Hague Convention

Insert “, the Hague Convention or Part 11A” after “the Commonwealth”.

[8] Rule 11.8

Insert at the end of rule 11.8:

Note. Part 11A deals with service of judicial documents under the Hague Convention.

[9] Rule 11.8A

Insert before rule 11.9:

11.8A Application of Division

This Division does not apply to any document that is intended to be served on a person outside Australia in accordance with the Hague Convention.

Note. Division 2 of Part 11A deals with the service of local judicial documents in a country (other than Australia) that is a party to the Hague Convention.

[10] Rule 11.13

Omit “This Part”. Insert instead “Subject to subrule (2), this Division”.

[11] Rule 11.13 (2)

Insert at the end of rule 11.13:

- (2) This Division does not apply to the service in this State of any foreign judicial document (within the meaning of Part 11A) in accordance with a request for service made under the Hague Convention.

Note. Division 4 of Part 11A deals with the service in New South Wales of foreign judicial documents originating in countries that are parties to the Hague Convention.

[12] Rule 11.14 Requisite documents

Omit “this Part”. Insert instead “this Division”.

[13] Part 11A

Insert after Part 11:

Part 11A Service under the Hague Convention

Division 1 Preliminary

Note 1. This Part forms part of a scheme to implement Australia's obligations under the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Under the Convention, the Attorney-General's Department of the Commonwealth is designated as the Central Authority (under Article 2 of the Convention) and certain courts and government departments are, for certain purposes, designated as "other" or "additional" authorities (under Article 18 of the Convention).

Note 2. This Part provides (in Division 2) for service in overseas Convention countries of local judicial documents (documents that relate to proceedings in the Court) and (in Division 3) for default judgment in proceedings in the Court after service overseas of such a document. Division 4, on the other hand, deals with service by the Court or arranged by the Court in its role as an other or additional authority, of judicial documents emanating from overseas Convention countries.

Note 3. The Attorney-General's Department of the Commonwealth maintains a copy of the Convention, a list of all Convention countries, details of declarations and objections made under the Convention by each of those countries and the names and addresses of the Central and other authorities of each of those countries. A copy of the Convention can be found at <http://www.hcch.net>.

11A.1 Definitions

In this Part:

additional authority, for a Convention country, means an authority that is:

- (a) for the time being designated by that country, under Article 18 of the Hague Convention, to be an authority (other than the Central Authority) for that country, and
- (b) competent to receive requests for service abroad emanating from Australia.

applicant, for a request for service abroad or a request for service in this jurisdiction, means the person on whose behalf service is requested.

Note. The term **applicant** may have a different meaning in other Parts of these rules.

Central Authority, for a Convention country, means an authority that is for the time being designated by that country, under Article 2 of the Hague Convention, to be the Central Authority for that country.

certificate of service means a certificate of service that has been completed for the purposes of Article 6 of the Hague Convention.

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certifying authority, for a Convention country, means the Central Authority for the country or some other authority that is for the time being designated by the country, under Article 6 of the Hague Convention, to complete certificates of service in the form annexed to the Hague Convention.

civil proceedings means any judicial proceedings in relation to civil or commercial matters.

Convention country means a country, other than Australia, that is a party to the Hague Convention.

defendant, for a request for service abroad of an initiating process, means the person on whom the initiating process is requested to be served.

foreign judicial document means a judicial document that originates in a Convention country and that relates to civil proceedings in a court of that country.

forwarding authority:

- (a) for a request for service of a foreign judicial document in this jurisdiction—the authority or judicial officer of the Convention country in which the document originates that forwards the request (being an authority or judicial officer that is competent under the law of that country to forward a request for service under Article 3 of the Hague Convention), or
- (b) for a request for service of a local judicial document in a Convention country—the Registrar.

Hague Convention means the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965.

initiating process means any document by which proceedings (including proceedings on any cross-claim or third party notice) are commenced.

local judicial document means a judicial document that relates to civil proceedings in the Court.

Registrar means the principal registrar of the Court, and includes any other person who, by delegation or otherwise, is authorised to exercise the functions of that office.

request for service abroad means a request for service in a Convention country of a local judicial document mentioned in rule 11A.4 (1).

request for service in this jurisdiction means a request for service in this jurisdiction of a foreign judicial document mentioned in rule 11A.13 (1).

the Court means the Supreme Court.

this jurisdiction means New South Wales.

11A.2 Provisions of this Part to prevail

The provisions of this Part prevail to the extent of any inconsistency between those provisions and any other provisions of these rules.

Division 2 Service abroad of local judicial documents

11A.3 Application of Division

- (1) Subject to subrule (2), this Division applies to service in a Convention country of a local judicial document.
- (2) This Division does not apply if service of the document is effected, without application of any compulsion, by an Australian diplomatic or consular agent mentioned in Article 8 of the Hague Convention.

11A.4 Application for request for service abroad

- (1) A person may apply to the Registrar, in the Registrar's capacity as a forwarding authority, for a request for service in a Convention country of a local judicial document.
- (2) The application must be accompanied by 3 copies of each of the following documents:
 - (a) a draft request for service abroad, which must be in the approved form,
 - (b) the document to be served,
 - (c) a summary of the document to be served, which must be in the approved form,
 - (d) if, under Article 5 of the Hague Convention, the Central Authority or any additional authority of the country to which the request is addressed requires the document to be served to be written in, or translated into, the official language or one of the official languages of that country, a translation into that language of both the document to be served and the summary of the document to be served.
- (3) The application must contain a written undertaking to the Court, signed by the legal practitioner on the record for the applicant in

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the proceedings to which the local judicial document relates or, if there is no legal practitioner on the record for the applicant in those proceedings, by the applicant:

- (a) to be personally liable for all costs that are incurred:
 - (i) by the employment of a person to serve the documents to be served, being a person who is qualified to do so under the law of the Convention country in which the documents are to be served, or
 - (ii) by the use of any particular method of service that has been requested by the applicant for the service of the documents to be served, and
 - (b) to pay the amount of those costs to the Registrar within 28 days after receipt from the Registrar of a notice specifying the amount of those costs under rule 11A.6 (3), and
 - (c) to give such security for those costs as the Registrar may require.
- (4) The draft request for service abroad:
- (a) must be completed (except for signature) by the applicant, and
 - (b) must state whether (if the time fixed for entering an appearance in the proceedings to which the local judicial document relates expires before service is effected) the applicant wants service to be attempted after the expiry of that time, and
 - (c) must be addressed to the Central Authority, or to an additional authority, for the Convention country in which the person is to be served, and
 - (d) may state that the applicant requires a certificate of service that is completed by an additional authority to be countersigned by the Central Authority.
- (5) Any translation required under subrule (2) (d) must bear a certificate (in both English and the language used in the translation) signed by the translator stating:
- (a) that the translation is an accurate translation of the documents to be served, and
 - (b) the translator's full name and address and his or her qualifications for making the translation.

11A.5 How application to be dealt with

- (1) If satisfied that the application and its accompanying documents comply with rule 11A.4, the Registrar:
 - (a) must sign the request for service abroad, and
 - (b) must forward 2 copies of the relevant documents:
 - (i) if the applicant has asked for the request to be forwarded to a nominated additional authority for the Convention country in which service of the document is to be effected—to the nominated additional authority, or
 - (ii) in any other case—to the Central Authority for the Convention country in which service of the document is to be effected.
- (2) The *relevant documents* mentioned in subrule (1) (b) are the following:
 - (a) the request for service abroad (duly signed),
 - (b) the document to be served,
 - (c) the summary of the document to be served,
 - (d) if required under rule 11A.4 (2) (d), a translation into the relevant language of each of the documents mentioned in paragraphs (b) and (c).
- (3) If not satisfied that the application or any of its accompanying documents complies with rule 11A.4, the Registrar must inform the applicant of the respects in which the application or document fails to comply.

11A.6 Procedure on receipt of certificate of service

- (1) Subject to subrule (5), on receipt of a certificate of service in due form in relation to a local judicial document to which a request for service abroad relates, the Registrar:
 - (a) must arrange for the original certificate to be filed in the proceedings to which the document relates, and
 - (b) must send a copy of the certificate to:
 - (i) the legal practitioner on the record for the applicant in those proceedings, or
 - (ii) if there is no legal practitioner on the record for the applicant in those proceedings—the applicant.

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- (2) For the purposes of subrule (1), a certificate of service is in due form if:
 - (a) it is in the approved form, and
 - (b) it has been completed by a certifying authority for the Convention country in which service was requested, and
 - (c) if the applicant requires a certificate of service that is completed by an additional authority to be countersigned by the Central Authority, it has been so countersigned.
- (3) On receipt of a statement of costs in due form in relation to the service of a local judicial document mentioned in subrule (1), the Registrar must send to the legal practitioner or applicant who gave the undertaking mentioned in rule 11A.4 (3) a notice specifying the amount of those costs.
- (4) For the purposes of subrule (3), a statement of costs is in due form if:
 - (a) it relates only to costs of a kind mentioned in rule 11A.4 (3) (a), and
 - (b) it has been completed by a certifying authority for the Convention country in which service was requested.
- (5) Subrule (1) does not apply unless:
 - (a) adequate security to cover the costs mentioned in subrule (3) has been given under rule 11A.4 (3) (c), or
 - (b) to the extent to which the security so given is inadequate to cover those costs, an amount equal to the amount by which those costs exceed the security so given has been paid to the Registrar.

11A.7 Payment of costs

- (1) On receipt of a notice under rule 11A.6 (3) in relation to the costs of service, the legal practitioner or applicant, as the case may be, must pay to the Registrar the amount specified in the notice as the amount of those costs.
- (2) If the legal practitioner or applicant fails to pay that amount within 28 days after receiving the notice:
 - (a) except by leave of the Court, the applicant may not take any further step in the proceedings to which the local judicial document relates until those costs are paid to the Registrar, and
 - (b) the Registrar may take such steps as are appropriate to enforce the undertaking for payment of those costs.

11A.8 Evidence of service

A certificate of service in relation to a local judicial document (being a certificate in due form within the meaning of rule 11A.6 (2)) that certifies that service of the document was effected on a specified date is, in the absence of any evidence to the contrary, sufficient proof that:

- (a) service of the document was effected by the method specified in the certificate on that date, and
- (b) if that method of service was requested by the applicant, that method is compatible with the law in force in the Convention country in which service was effected.

Division 3 Default judgment following service abroad of initiating process

11A.9 Application of Division

This Division applies to civil proceedings for which an initiating process has been forwarded following a request for service abroad to the Central Authority (or to an additional authority) for a Convention country.

11A.10 Restriction on power to enter default judgment if certificate of service filed

- (1) This rule applies if:
 - (a) a certificate of service of initiating process has been filed in the proceedings (being a certificate in due form within the meaning of rule 11A.6 (2)) that states that service has been duly effected, and
 - (b) the defendant has not appeared or filed a notice of address for service.
- (2) In circumstances to which this rule applies, default judgment may not be given against the defendant unless the Court is satisfied that:
 - (a) the initiating process was served on the defendant:
 - (i) by a method of service prescribed by the internal law of the Convention country for the service of documents in domestic proceedings on persons who are within its territory, or
 - (ii) if the applicant requested a particular method of service (being a method under which the document was actually delivered to the defendant or to his or

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- her residence) and that method is compatible with the law in force in that country, by that method, or
- (iii) if the applicant did not request a particular method of service, in circumstances where the defendant accepted the document voluntarily, and
 - (b) the initiating process was served in sufficient time to enable the defendant to enter an appearance in the proceedings.

(3) In subrule (2) (b), *sufficient time* means:

- (a) 42 days from the date specified in the certificate of service in relation to the initiating process as the date on which service of the process was effected, or
- (b) such lesser time as the Court considers, in the circumstances, to be a sufficient time to enable the defendant to enter an appearance in the proceedings.

11A.11 Restriction on power to enter default judgment if certificate of service not filed

(1) This rule applies if:

- (a) a certificate of service of initiating process has not been filed in the proceedings, or
- (b) a certificate of service of initiating process has been filed in the proceedings (being a certificate in due form within the meaning of rule 11A.6 (2)) that states that service has not been effected,

and the defendant has not appeared or filed a notice of address for service.

(2) If this rule applies, default judgment may not be given against the defendant unless the Court is satisfied that:

- (a) the initiating process was forwarded to the Central Authority, or to an additional authority, for the Convention country in which service of the initiating process was requested, and
- (b) a period that is adequate in the circumstances (being a period of not less than 6 months) has elapsed since the date on which initiating process was so forwarded, and

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- (c) every reasonable effort has been made:
 - (i) to obtain a certificate of service from the relevant certifying authority, or
 - (ii) to effect service of the initiating process, as the case requires.

11A.12 Setting aside judgment in default of appearance

- (1) This rule applies if default judgment has been entered against the defendant in proceedings to which this Division applies.
- (2) If this rule applies, the Court may set aside the judgment on the application of the defendant if it is satisfied that the defendant:
 - (a) without any fault on the defendant's part, did not have knowledge of the initiating process in sufficient time to defend the proceedings, and
 - (b) has a prima facie defence to the proceedings on the merits.
- (3) An application to have a judgment set aside under this rule may be filed:
 - (a) at any time within 12 months after the date on which the judgment was given, or
 - (b) after the expiry of that 12-month period, within such time after the defendant acquires knowledge of the judgment as the Court considers reasonable in the circumstances.
- (4) Nothing in this rule affects any other power of the Court to set aside or vary a judgment.

Division 4 Local service of foreign judicial documents

11A.13 Application of Division

- (1) This Division applies to service in this jurisdiction of a foreign judicial document in relation to which a due form of request for service has been forwarded to the Court:
 - (a) by the Attorney-General's Department of the Commonwealth, whether in the first instance or following a referral under rule 11A.14, or
 - (b) by a forwarding authority.
- (2) Subject to subrule (3), a request for service in this jurisdiction is in due form if it is in the approved form and is accompanied by the following documents:
 - (a) the document to be served,

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- (b) a summary of the document to be served, which must be in the approved form,
 - (c) a copy of the request and of each of the documents mentioned in paragraphs (a) and (b),
 - (d) if either of the documents mentioned in paragraphs (a) and (b) is not in the English language, an English translation of the document.
- (3) Any translation required under subrule (2) (d) must bear a certificate (in English) signed by the translator stating:
- (a) that the translation is an accurate translation of the document, and
 - (b) the translator's full name and address and his or her qualifications for making the translation.

11A.14 Certain documents to be referred back to the Attorney-General's Department of the Commonwealth

If, after receiving a request for service in this jurisdiction, the Registrar is of the opinion:

- (a) that the request does not comply with rule 11A.13, or
- (b) that the document to which the request relates is not a foreign judicial document, or
- (c) that compliance with the request may infringe Australia's sovereignty or security, or
- (d) that the request seeks service of a document in some other State or Territory of the Commonwealth,

the Registrar must refer the request to the Attorney-General's Department of the Commonwealth together with a statement of his or her opinion.

Note. The Attorney General's Department of the Commonwealth will deal with misdirected and non-compliant requests, make arrangements for the service of extrajudicial documents and assess and decide questions concerning Australia's sovereignty and security.

11A.15 Service

- (1) Subject to rule 11A.14, on receipt of a request for service in this jurisdiction, the Court must arrange for the service of the relevant documents in accordance with the request.
- (2) The relevant documents mentioned in subrule (1) are the following:
 - (a) the document to be served,
 - (b) a summary of the document to be served,

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- (c) a copy of the request for service in this jurisdiction,
 - (d) if either of the documents mentioned in paragraphs (a) and (b) is not in the English language, an English translation of the document.
- (3) Service of the relevant documents may be effected by any of the following methods of service:
- (a) by a method of service prescribed by the law in force in this jurisdiction:
 - (i) for the service of a document of a kind corresponding to the document to be served, or
 - (ii) if there is no such corresponding kind of document, for the service of initiating process in proceedings in the Court,
 - (b) if the applicant has requested a particular method of service and that method is compatible with the law in force in this jurisdiction, by that method,
 - (c) if the applicant has not requested a particular method of service and the person requested to be served accepts the document voluntarily, by delivery of the document to the person requested to be served.

11A.16 Affidavit as to service

- (1) If service of a document has been effected pursuant to a request for service in this jurisdiction, the person by whom service has been effected must lodge with the Court an affidavit specifying:
 - (a) the time, day of the week and date on which the document was served, and
 - (b) the place where the document was served, and
 - (c) the method of service, and
 - (d) the person on whom the document was served, and
 - (e) the way in which that person was identified.
- (2) If attempts to serve a document pursuant to a request for service in this jurisdiction have failed, the person by whom service has been attempted must lodge with the Court an affidavit specifying:
 - (a) details of the attempts made to serve the document, and
 - (b) the reasons that have prevented service.

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- (3) When an affidavit as to service of a document has been lodged in accordance with this rule, the Registrar:
 - (a) must complete a certificate of service, sealed with the seal of the Court, on the reverse side of, or attached to, the request for service in this jurisdiction, and
 - (b) must forward the certificate of service, together with a statement as to the costs incurred in relation to the service or attempted service of the document, directly to the forwarding authority from which the request was received.
- (4) A certificate of service must be:
 - (a) in the approved form, or
 - (b) if a form of certificate of service that substantially corresponds to the approved form accompanies the request for service, in that accompanying form.

[14] Dictionary

Insert in alphabetical order:

Hague Convention—see rule 11A.1.