



New South Wales

Uniform Civil Procedure (Amendment No 83) Rule 2016

under the

Civil Procedure Act 2005

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

Rebel Kenna
Secretary of the Uniform Rules Committee

Explanatory note

The object of this Rule is to amend the *Uniform Civil Procedure Rules 2005* to give effect to harmonised rules approved by the Council of Chief Justices with respect to service of an originating process and other documents outside of Australia.

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1 Name of Rule

This Rule is the *Uniform Civil Procedure (Amendment No 83) Rule 2016*.

2 Commencement

This Rule commences on the day on which it is published on the NSW legislation website.

Schedule 1 Amendment of Uniform Civil Procedure Rules 2005

[1] Rules 11.1–11.8

Omit the rules. Insert instead:

11.1 Application of Part

- (1) This Part applies to proceedings in the Supreme Court.
- (2) For the purposes of this Part, a reference to Australia includes a reference to the external Territories.

11.2 Operation of Commonwealth laws and Hague Convention

This Part does not require the leave of the Supreme Court for any service or other thing that may be effected or done under any law of the Commonwealth, the Hague Convention or Part 11A.

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

[2] Part 11, Division 1A

Insert after Division 1:

Division 1A Service outside of Australia in accordance with harmonised rules

11.3 Division does not apply to service in New Zealand of documents for or in certain trans-Tasman proceedings

This Division (which contains rules on service outside 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.

11.4 Cases for service of originating process

- (1) Originating process may be served outside of Australia without leave in the circumstances referred to in Schedule 6.
- (2) This rule extends to originating process to be served outside Australia in accordance with the Hague Convention.

11.5 When allowed with leave

- (1) In any proceeding when service is not allowed under Schedule 6, an originating process may be served outside of Australia with the leave of the court.
- (2) An application for leave under this rule must 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 must be served with the document to which it relates.
- (4) An application for leave under this rule must 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, and
 - (c) in all the circumstances the court should assume jurisdiction.

11.6 Court's discretion whether to assume jurisdiction

- (1) On application by a person on whom an originating process has been served outside of Australia, the court may dismiss or stay the proceeding or set aside service of the originating process.
- (2) Without limiting subrule (1), the court may make an order under this rule if satisfied:
 - (a) that service 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 outside Australia to the time, expense and trouble of defending the claim.

11.7 Notice to person served outside Australia

If a person is to be served outside of Australia with an originating process, the person must also be served with a notice in the approved form informing the person of:

- (a) the scope of the jurisdiction of the court in respect of claims against persons who are served outside Australia, and
- (b) the grounds alleged by the plaintiff to found jurisdiction, and
- (c) the person's right to challenge service of the originating process or the jurisdiction of the court or to file a conditional appearance.

11.8 Time for filing appearance

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

11.8AA Leave to proceed where no appearance by person

- (1) If an originating process is served on a person outside Australia and the person does not enter 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 subrule (1) may be made without serving notice of the application on the person served with the originating process.

11.8AB Service of other documents outside Australia

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

11.8AC Mode of service

A document to be served outside 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.

[3] Schedule 6

Omit the Schedule. Insert instead:

Schedule 6 Service outside of Australia without leave

(Rule 11.4)

An originating process may be served outside 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 outside 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 or ancillary relief in relation to any proceedings under the *International Arbitration Act 1974* of the Commonwealth or the *Commercial Arbitration Act 2010*), or
 - (iii) without limiting subparagraph (ii), is an application for a freezing order or ancillary order under Division 2 of Part 25 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 outside 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,
- (i) when the claim is for the administration of the estate of any deceased person who at the time of his or her 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 alleged liability of the person to be served 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,
- (o) when the claim affects the person to be served in respect of his or her 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 it 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.

Note 1. Originating process includes a document that initiates a civil proceeding as well as a cross claim or third party claim.

Note 2. If a proceeding is instituted in the court and originating process is served outside of Australia under this Schedule 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 *Jurisdiction of Courts (Cross-vesting) Act 1987* and may make an order for costs against the party who instituted the proceeding in the court rather than in the transferee court.