Western Australia

Supreme Court Act 1935

Supreme Court Amendment Rules 2024

SL 2024/38 Official Version
Published 26 Mar 2024 on www.legislation.wa.gov.au

Western Australia

Supreme Court Amendment Rules 2024

Contents

1. Citation 1
2. Commencement 1
3. Rules amended 1
4. Order 1 rule 4 amended 1
5. Order 5 rule 11 amended 2
6. Order 9 rule 1 amended 2
7. Order 9 rule 3 amended 2
8. Order 10 replaced 3

Order 10 — Service outside jurisdiction

Division 1 — Preliminary

1. Term used: originating process 3
2. Application of this Order 3

Division 2 — Service outside jurisdiction but in Australia

3. Service outside State but in Australia 3

Division 3 — Service outside Australia

4. Service in New Zealand of documents in relation to Trans-Tasman proceedings 4
5. When allowed without leave under Division 4
6. When allowed with leave 9
7. Court's discretion whether to assume jurisdiction 9
8. Notice to person served outside Australia 10
9. Time for entering appearance 10
10. Leave to proceed where no appearance by person 11
11. Service of other documents outside Australia 11
12. Mode of service 11

Published 26 Mar 2024 on www.legislation.wa.gov.au

Division 4 — Service through foreign or diplomatic officials outside Australia in non-Convention countries

13. Application of Division 11
14. Method of service of originating process and Form 5AB 12
15. Request for service of originating process 12
16. Serving documents under Division 13
17. Certification of service taken to be proof of service 14
18. Paying expenses 14
19. Other methods of service outside Australia not excluded by Division 15

9. Order 11 rule 2A amended 16
10. Order 11A rule 1 amended 16
11. Order 11A rule 4 amended 16
12. Order 11A rule 7 amended 17
13. Order 12 rule 11 inserted 17
11. Defendant who wishes to abide by decision of court to file notice of intention to abide 17
14. Order 37 rule 2 amended 18
15. Order 52A rule 7 amended 18
16. Order 73 rule 10 amended 18
17. Schedule 2 Form 5AB inserted 19
5AB. Notice to defendant served outside Australia (O. 10 r. 8) 19
18. Schedule 2 Form 8 inserted 20
8. Notice of intention to abide (O. 12 r. 11) 20

Supreme Court Act 1935

Supreme Court Amendment Rules 2024

Made by the judges of the Supreme Court.

1. Citation

These rules are the *Supreme Court Amendment Rules 2024*.

2. Commencement

These rules come into operation as follows —

(a) rules 1 and 2 — on the day on which these rules are published on the WA legislation website;

(b) the rest of the rules — on the 14th day after that day.

3. Rules amended

These rules amend the *Rules of the Supreme Court 1971*.

4. Order 1 rule 4 amended

In Order 1 rule 4(1) insert in alphabetical order:

> ***Convention country*** means a country, other than Australia, that is a party to the Hague Convention;
>
> ***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;

Published 26 Mar 2024 on www.legislation.wa.gov.au

5. Order 5 rule 11 amended

In Order 5 rule 11(3) delete "the time must be fixed by the Court in accordance with Order 10 rule 5." and insert:

the time is 42 days from the date of service unless the Court otherwise orders under Order 10 rule 9.

6. Order 9 rule 1 amended

In Order 9 rule 1(4) delete "subrule (2) or (3), then subject to Order 10 rule 9(9)," and insert:

subrule (2) or (3) or Order 10 Division 4,

Note: The heading to amended Order 9 rule 1 is to read:

Service of writ: general provisions

7. Order 9 rule 3 amended

In Order 9 delete rule 3(2).

Note: The heading to amended Order 9 rule 3 is to read:

Effect of serving writ in accordance with contract

8. Order 10 replaced

Delete Order 10 and insert:

Order 10 — Service outside jurisdiction

Division 1 — Preliminary

1. Term used: originating process

In this Order —

originating process means a document by which a proceeding is commenced or a counterclaim or third party claim is made.

2. Application of this Order

This Order applies to service —

(a) outside the State but in Australia; or

(b) outside Australia, including in Convention countries.

Note for this rule:

See also Order 11A in relation to service in a Convention country and Order 11A rule 2 in relation to the interaction between this Order and that Order.

Division 2 — Service outside jurisdiction but in Australia

3. Service outside State but in Australia

An originating process served on a person outside the State but in Australia must be served in accordance with the *Service and Execution of Process Act 1992* (Commonwealth).

Division 3 — Service outside Australia

4. Service in New Zealand of documents in relation to Trans-Tasman proceedings

(1) An originating process or other document that may be served on a person in New Zealand under the *Trans-Tasman Proceedings Act 2010* (Commonwealth) Part 2 Division 2 must be served in accordance with that Act.

Note for this subsection:

See Order 39A for rules in relation to proceedings and NZ judgments to which the *Trans-Tasman Proceedings Act 2010* (Commonwealth) applies.

(2) Rules 5 to 12 (which contain rules on service outside Australia) do 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 the *Trans-Tasman Proceedings Act 2010* (Commonwealth) Part 2 Division 2.

5. When allowed without leave under Division

An originating process may be served outside 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 in 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 cognisable 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 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, if that 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* (Commonwealth) or the *Commercial Arbitration Act 2012*); or

(iii) without limiting subparagraph (ii), is an application for a freezing order or ancillary order under Order 52A 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 the land or property, or the proceeding is for the perpetuation of testimony relating to the 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 Australia is —

(i) a necessary or proper party to a proceeding properly brought against another person served or to be served (whether in 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 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;

(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 1 or more of the above paragraphs and, as to the residue, within 1 or more of the others of the above paragraphs.

Note for this rule:

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

6. When allowed with leave

(1) In any proceeding when service is not allowed under rule 5, an originating process may be served outside 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 of the proceeding; and

(c) in all the circumstances the Court should assume jurisdiction.

7. Court's discretion whether to assume jurisdiction

(1) On application by a person on whom an originating process has been served outside 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 outside 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 outside Australia to the time, expense and trouble of defending the claim.

8. Notice to person served outside Australia

If a person is to be served outside Australia with an originating process, the person must also be served with a notice in Form 5AB 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 apply for an order setting aside the originating process or its service on the person or dismissing or staying the proceeding.

9. Time for entering appearance

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

10. 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. 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.

12. 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.

Division 4 — Service through foreign or diplomatic officials outside Australia in non-Convention countries

13. Application of Division

This Division applies to service outside Australia in a non-Convention country.

14. Method of service of originating process and Form 5AB

A person may serve an originating process and notice in Form 5AB in a non-Convention country through —

(a) if a Convention about foreign service applies to the country and to Australia or the State —

(i) the judicial authorities of that country; or

(ii) an Australian diplomatic or consular agent in that country, subject to a provision of the Convention as to the nationality of persons who may be so served;

or

(b) in any other case —

(i) if the government of that country is willing to effect service — the government; or

(ii) an Australian diplomatic or consular agent in that country, unless service through such an authority is contrary to the law of that country.

15. Request for service of originating process

(1) A person who wishes to serve an originating process under this Division must file —

(a) a letter of request for service under this Division of the originating process; and

(b) a copy of the originating process and the Form 5AB to be served under rule 8; and

(c) if the request and the copy of the originating process are not filed electronically — an additional copy of the originating process, and

each other document to be served, for each person to be served; and

(d) an undertaking by the person making the request to be personally responsible for all expenses incurred in respect of the service requested.

(2) If leave is not required to serve the originating process under rule 5, the letter of request for service filed under subrule (1)(a) must state the paragraph in rule 5 under which leave is not required.

(3) If English is not an official language of the country where the originating process will be served under this Division, a person who wishes to serve the originating process must also file —

(a) a translation of the originating process and Form 5AB in an official language of the country; and

(b) a certificate (both in English and the official language) by the person (the ***translator***) who translated the originating process that —

(i) states the translator's name and address; and

(ii) states the translator's qualifications to translate the originating process and Form 5AB; and

(iii) certifies that the translation of the originating process and Form 5AB is a correct translation.

16. Serving documents under Division

The documents filed under rule 15 that are to be served on a person outside Australia must be —

(a) sealed with the seal of the Supreme Court; and

(b) forwarded by the Principal Registrar to the Attorney General of Western Australia for transmission through the diplomatic channel to the country where the documents are to be served.

17. Certification of service taken to be proof of service

(1) This rule applies if an official certificate establishing that documents have been served, and when they have been served, under this Division is transmitted to the Court —

(a) through the diplomatic channel by an Australian diplomatic or consular agent; or

(b) by a foreign government or judicial authority responsible for serving the documents.

(2) The official certificate —

(a) must be placed on the file; and

(b) is taken to be an affidavit of service for the purposes of these rules.

(3) A document purporting to be an official certificate is taken to be a certificate unless the contrary is proved.

18. Paying expenses

(1) The Principal Registrar may give the person who gave an undertaking as to expenses under rule 15(1)(d) a written notice stating —

(a) the expenses incurred in respect of the service of the documents outside Australia; and

(b) if the Principal Registrar directs the manner in which the payment is to be made under subrule (2) —

(i) that the person must pay those expenses consistently with the person's

undertaking in accordance with the direction; and

(ii) the person must provide evidence, such as a receipt, to the Principal Registrar showing that the payment was made in accordance with the direction;

and

(c) if paragraph (b) does not apply — that the person must pay those expenses consistently with the person's undertaking within the period of 14 days after the day on which the person receives the written notice to the Central Office; and

(d) that, if the person fails to pay those expenses in accordance with the notice, the Court may make an order for the payment of the expenses or to stay proceedings under this rule.

(2) The Principal Registrar may direct that the payment of expenses referred to in rule 15(1)(d) must be paid to a particular person, or in a particular manner.

(3) If the person does not pay the expenses in accordance with the notice, the Court may —

(a) stay proceedings until the expenses are paid to the Central Office; or

(b) make an order requiring the person to pay the expenses.

19. Other methods of service outside Australia not excluded by Division

Despite another provision of this Division, a document may be served outside Australia if —

(a) the document is served in a non-Convention country where a convention about foreign

service applies to the country and to Australia or the State; and

(b) the manner in which the document is served is —

(i) not expressly excluded by the convention; and

(ii) otherwise valid or sufficient according to the procedure of the Supreme Court.

9. Order 11 rule 2A amended

In Order 11 rule 2A(1) delete "Convention country (as defined in Order 11A rule 1)," and insert:

Convention country,

10. Order 11A rule 1 amended

In Order 11A rule 1 delete the definitions of:

Convention country

Hague Convention

11. Order 11A rule 4 amended

In Order 11A rule 4(3)(b) delete "rule 6(3); and" and insert:

rule 6(3), or another period as directed; and

12. Order 11A rule 7 amended

In Order 11A rule 7(1) delete "Office" and insert:

Office, or pay otherwise as directed,

13. Order 12 rule 11 inserted

After Order 12 rule 10 insert:

11. Defendant who wishes to abide by decision of court to file notice of intention to abide

(1) This rule applies if a defendant to an action —

(a) does not intend to take part in the action; and

(b) either —

(i) intends to accept all orders of the Court made in the action; or

(ii) intends to accept all orders of the Court made in the action, other than an order made as to costs.

(2) The defendant must file and serve 2 copies of a Form 8 that are signed by —

(a) the legal practitioner who acts for the defendant; or

(b) if the non-participating party is self-represented, the defendant.

Published 26 Mar 2024 on www.legislation.wa.gov.au

14. Order 37 rule 2 amended

In Order 37 delete rule 2(11) and insert:

(11) An affidavit and its attachments may be filed electronically if the size of each electronic file to be filed is less than 200 megabytes.

15. Order 52A rule 7 amended

In Order 52A rule 7 delete "if any of the assets to which the order relates are within the jurisdiction of the Court." and insert:

under Order 10 and, if the country is a Convention country, under Order 11A.

16. Order 73 rule 10 amended

(1) In Order 73 rule 10(3):

(a) delete "rule 4" and insert:

rule 6

(b) delete "rules 1 or 2 of that Order." and insert:

Order 10 Division 3.

(2) Delete Order 73 rule 10(5) and insert:

(5) Order 10 Division 4 applies to a citation issued under rule 8 as it applies to an originating process.

Note: The heading to amended Order 73 rule 10 is to read:

Service of citations

17. Schedule 2 Form 5AB inserted

After Schedule 2 Form 5A insert:

5AB. Notice to defendant served outside Australia (O. 10 r. 8)

To the Defendant:

1. You have been served with an originating process outside Australia under Order 10 Division 3 of the *Rules of the Supreme Court 1971* (WA). A copy of the applicable Division is enclosed for your information. The Division shows the scope of the jurisdiction of the Court in respect of claims against persons who are served outside Australia.

2. The grounds alleged by the plaintiff to support its claim to be entitled to serve you outside Australia are:

   [*specify grounds*]

3. The Court may, on application made by you in accordance with the rules of court, dismiss or stay the proceeding or set aside the service on you of this originating process. Without limiting the Court's powers in this regard, the Court may dismiss or stay the proceeding or set aside the service on you if satisfied that —

   (a) the service was not authorised by the rules of court; or

(b) this Court is an inappropriate forum for the trial of the proceedings; or

(c) the claim has insufficient prospects of success to warrant putting you to the time, expense and trouble of defending the claim.

4. Alternatively you may enter an unconditional appearance (in the form prescribed by the rules of court) within the time required under the rules of court.

5. If you enter an unconditional appearance, additional procedural obligations (such as an obligation to file a defence or an affidavit) may apply to you in accordance with the rules of court.

6. If you do not make an application to set aside service referred to in paragraph 3 or enter an unconditional appearance, the Court may give leave to the plaintiff to proceed against you without further notice.

18. Schedule 2 Form 8 inserted

In Schedule 2 after Form 7 insert:

8. Notice of intention to abide (O. 12 r. 11)

Supreme Court of Western Australia	No:
	Notice of intention to abide
Parties	Plaintiff/Applicant [1] Defendant/Respondent [1]
Notice *[Tick one box]*	❒ The defendant/respondent does not intend to take part in the proceedings and will accept any order made by the Court. ❒ The defendant/respondent does not intend to take part in the proceedings and will accept any order made by the Court other than as to costs.

Name of defendant/ respondent [2]		
Signature of party or lawyer	Party/Party's Lawyer	Date:

Notes to Form 8 —

1. Add full party details.
2. Please state full name if there is more than one respondent/defendant.

Date: 19 March 2024

The Hon. Chief Justice Peter Quinlan
Chief Justice of Western Australia
Supreme Court of Western Australia

© State of Western Australia 2024.
This work is licensed under a Creative Commons Attribution 4.0 International Licence (CC BY 4.0).
To view relevant information and for a link to a copy of the licence, visit www.legislation.wa.gov.au.
Attribute work as: © State of Western Australia 2024.
By Authority: GEOFF O. LAWN, Government Printer