

SERVICE

Who serves a document

5.1 (1) If these rules require a document to be served, the party who filed the document is responsible for ensuring the document is served.

[5.1.1] Obligation unaffected by court practice Though notices are usually served by the court, that does not displace the obligations on parties under this rule to serve documents: *Dinh v Samuel* [2010] VUCA 6 at [39]-[40]; CAC 16 of 2009. This obligation is said to extend to informing the other parties of hearing dates when not indorsed on the application papers or heard in court/chambers: *Dinh v Samuel* at [41]-[42]; *VCMB v Dornic* [2010] VUCA 4; at [30]; CAC 2 of 2010.

(2) The party responsible for service may apply to the court for an order that the document be served by an enforcement officer or other person.

(3) The court may order that the document be served by an enforcement officer or other person if the court is satisfied that the circumstances of the proceeding require it.

[5.1.2] Meaning of “enforcement officer” There is no definition of “enforcement officer” in this part or in Part 20. The definition of “enforcement officer” in r.14.1 (being the sheriff or a police officer) is expressed to apply only to Part 14 but was probably also intended to apply here.

Service of claim

E SCRO10r1

5.2 The claim and response form must be served on the defendant personally, unless:

[5.2.1] Service is basis of jurisdiction The foundation of the court’s jurisdiction over a defendant is usually said to be the personal service on him of the court’s process: *Laurie v Carroll* (1958) 98 CLR 310 at 323, 324; 32 ALJR 7 at 10, 11.

(a) rule 5.9 applies (rule 5.9 deals with other ways of service);
or

(b) the court orders that the claim may be served in another way.

[5.2.3] Discretion to order alternative method of service See r.5.9 as to the discretion to order substituted service. The power to order an alternative method of service must be applied in accordance with the overriding objective. In particular, the court must consider the high cost of litigation, the obstacles faced by those with limited means (and in particular those with limited means facing litigants with abundant means) and the need to ensure that cases proceed expeditiously. Applications advancing collateral purposes, for example, to secure a step ahead in a race to commence proceedings in this jurisdiction before they are commenced elsewhere, should not be granted: *Albon v Naza Motor Trading* [2007] EWHC 327 at [37], [44].

Time for serving claim

E CPR r7.5
E SCRO6r8

5.3 (1) The claim and response form must be served on the defendant within 3 months of the date on which the claim was filed.

(2) If a claim is not served within that period, it is no longer of any effect.

[5.3.1] It is difficult to see what this rule adds to r.4.15.

[5.3.2] **Striking out** An order striking out the case under r.9.10 may follow: *Family Vanuapura v Supernativuitano Island Tribunal* [2007] VUSC 110; CC 20 of 2007.

Address for service

E SCR 06r5(2)

5.4 (1) An address for service is the address at which documents in a proceeding (other than a claim) can be served on the party giving the address.

(2) Every document filed must state an address for service for the party filing the document.

(3) An address for service must be:

(a) within Vanuatu; and

[5.4.1] **Post boxes** It has been held in Australia that a post office box does not fulfil the requirements of an address for service: *Sarikaya v Victorian Workcover* (1997) 80 FCR 262 at 263. The lack of street addresses in Vanuatu and the consequent reliance on post office boxes casts doubt over the applicability of this decision.

(b) if the party is represented by a lawyer, the address of the lawyer's office.

[5.4.2] **Changes of lawyer** A frequent difficulty associated with this provision occurs when a lawyer ceases to act and no new lawyer commences to act, leaving the party unrepresented and with no address for service known to the other parties. In this situation it is suggested that the provisions of subr.(4) require the unrepresented party to notify the other parties of a new address for service. See further r.18.8.

(4) If a party's address for service changes, the party must give the Court and the other parties notice in writing of the new address. The notice must include:

(a) the number of the proceedings; and

(b) the names of the parties.

(5) The notice must be filed with the Court and served on each other party.

(6) Service of a document at the address given as the address for service is effective service unless a notice of change of address for service has been given to the party serving the document.

Service of other documents

E CPR r6.2(1)

5.5 A document other than a claim may be served:

(a) on a party personally; or

(b) by leaving it at the party's address for service; or.

(c) by sending it to the party's address for service:

(i) by prepaid post; or

[5.5.1] Sworn statement as to service by post To prove service, as for example in relation to default judgment, it is usual that the sworn statement depose that the post was prepaid: *Walthamstow Council v Henwood* [1897] 1 Ch 41 at 44.

(ii) by fax.

[5.5.2] As to service by fax see generally J G Starke "Practice Note: Service by fax conditions for valid service" 63 ALJ 500.

Time for serving other documents

5.6 (1) This rule does not apply to the service of a claim.

[5.6.1] Time limit for claims Claims must be served within three months: see rr.4.15, 5.3.

(2) All other documents must be served within the times required by rule 4.13.

[5.6.2] Time limit for sworn statements For sworn statements see also r.11.6.

Late service of documents

5.7 (1) A party may serve a document after the time fixed by rule 4.13.

(2) The court may decide whether or not the document is effective for the proceeding.

[5.7.1] See further rr.4.14, 18.10.

(3) In deciding whether a late served document is effective, the court may have regard to:

(a) the reasons why the document was served late; and

(b) whether the party is likely to be able to serve the document in the extra time; and

[5.7.2] As the party will already have been served by the time the court's discretion is invoked, it is difficult to understand para (b).

(c) any additional expense or inconvenience incurred by the other parties to the proceeding, and the disadvantage to the first party if the late service is not allowed.

[5.7.3] Relevant considerations It is suggested that wherever a document can be validated without unfairness to all concerned, it will be appropriate to do so: see for example *Outboard Marine v Byrnes* [1974] 1 NSWLR 27 at 30. Lengthy documents will usually strengthen the objection to their late service: See for example *R v Smith* (1875) LR 10 QB 604 at 608.

(4) If the court decides the service of the document is not effective, the court may:

- (a) make any order that is appropriate for the proceeding; and**
- (b) make an order about the costs incurred by a party because of the late service.**

What is personal service

5.8 (1) A document is served personally on an individual:

(a) by giving a copy of it to the individual; or

[5.8.1] What amounts to personal service As to personal service the common law was traditionally very strict – it required the process server to touch the person to be served with the document, describe the nature of the document, and offer the person served the opportunity to compare the service copy to the original, which the server would carry. Despite the relaxation of the common law effected by the rules, it is suggested that the courts will continue to apply a degree of strictness in matters of personal service, especially as to originating process.

[5.8.2] Day or night Service may be effected at any time of the day or night and on any day of the year: s.34, *Interpretation* [Cap 132].

[5.8.3] Other situations In Australia, under a provision that allowed a document to be “left with” the person served, it has been held that personal service will be effected when the person asks the server to leave the document somewhere or hand it to some other person who is with them at the time: *Ainsworth v Redd* (1990) 19 NSWLR 78 at 88.

(b) if the individual does not accept the document, by putting it down in the person’s presence and telling the person what it is.

[5.8.4] Meaning of “putting down” It is not necessarily required that the document be put down on the floor and it is probably acceptable that the document be placed on any surface (including the person’s lap) provided that it is left before or near the person to be served so that the person had immediate and unimpeded access to it: *Re Diftort* (1988) 19 FCR 347 at 360; 83 ALR 265 at 277; *Re Elkateb* (2001) 187 ALR 479; [2001] FCA 1527 at [12].

[5.8.5] Door locked against server Personal service has also been held to be effected when the person to be served is seen in a room which is then locked against the server and the server pushes the document under the door, calling out its nature (*Graczyk v Graczyk* (1955) ALR (CN) 1077) or where the document is attached to the door and its nature is explained (*Re Hudson* (1990) 25 FCR 318 at 320).

[5.8.6] What server is required to tell The requirement that the server tell the person to be served “what the document is” is probably not very onerous. Where the document is not in a sealed envelope and is quite clear on its face, a very brief statement should suffice: *Re Elkateb* (2001) 187 ALR 479; [2001] FCA 1527 at [13]. Whenever documents are served in a sealed envelope, it is essential that the server announce the nature of the document: *Banque Russe v Clark* (1894) WN 203; *Re a Debtor (No 441 of 1938)* [1939] 1 Ch 251 at 257, 259; [1938] 4 All ER 92 at 96-7; *Ainsworth v Redd* (1990) 19 NSWLR 78 at 82.

(2) A document is served personally on a corporation:

(a) by giving a copy of the document to an officer of the corporation; or

- [5.8.7] Meaning of “officer” An “officer” of a corporation includes a director, manager or secretary: s.1, *Companies* [Cap 191].

(b) by leaving a copy of the document at the registered office of the corporation; or

- [5.8.8] Only registered office Service at any other office will be bad: *Wood v Anderston* (1888) 36 WR 918; 4 TLR 708; *Vignes v Smith* (1909) 53 SJ 716.

(c) if the corporation does not have a registered office in Vanuatu, by leaving a copy of the document at the principal place of business, or principal office, of the corporation in Vanuatu.

- [5.8.9] Meaning of “principal place of business” The principal place of business does not include a mere agency: *Baillie v Goodwin* (1886) 33 Ch D 604 at 607; *Grant v Anderson* [1892] 1 QB 108 at 117-8; *Badcock v Cumberland Gap Park* [1893] 1 Ch 362 at 369-70; *Worcester Banking v Firbank* [1894] 1 QB 784 at 791; *Marks v Richards* (1913) 32 NZLR 1019 at 1030.

(3) A document is served personally on the State of Vanuatu or the Government of Vanuatu by leaving a copy of the document at the State Law Office during the business hours of that Office.

- [5.8.10] Location of State Law Office The State Law Office is located on Rue Emmanuel Brunet in Port Vila, near the Prime Minister’s Office, and its office hours are 7:30-11:30am and 1:30 to 4:30pm Monday-Friday. The practice of serving the Attorney-General or Solicitor-General after hours at their residences does not constitute good service, is discourteous and should be discouraged.

Substituted service

5.9 (1) If a party is unable to serve a document personally, the party may apply to the court for an order that the document be served in another way (called “substituted service”).

- [5.9.1] Substituted service only an alternative to personal service Substituted service is a substitute for personal service only. Accordingly, it is only available in situations in which personal service is available: *Sloman v New Zealand* (1875) 1 CPD 567; *Mighell v Sultan of Johore* [1894] 1 QB 149 at 159-60, 161, 164; *Porter v Freudenberg* [1915] 1 KB 857 at 889-90; [1914-15] All ER Rep 918 at 933-4; *Sheahan v Joye* (1995) 57 FCR 389 at 397-8.
- [5.9.2] Meaning of “unable” Substituted service may be ordered only where personal service has been “unable” to be effected and this inability is a threshold consideration to the exercise of the discretion to make an order under subr.(2): *Afro-Continental Nigeria v Meridian Shipping* [1982] 2 Lloyd’s Rep 241 at 248; *Paragon v Burnell* [1991] Ch 498 at 507; [1991] 2 All ER 388 at 390; [1991] 2 WLR 854 at 862. The sworn statement in support of the application must describe the efforts which have been made to effect service. Alternatively, if it is obvious that attempting service would be futile, the reasons for such futility: *Ricegrowers Co-op v ABC Containerline* (1996) 138 ALR 480 at 482; *Unilever v PB Foods* [2000] FCA 798 at [13].
- [5.9.3] Evasion Substituted service may be ordered where a defendant, knowing of the claim, leaves the jurisdiction to evade service (*Re Urquhart* (1890) 24 QBD 723 at 725; *Laurie v Carroll* (1958) 98 CLR 310 at 328; 32 ALJR 7 at 13) but not otherwise, unless the document is likely to reach the party to be served: see further [5.9.5].

(2) The court may order that the document be served:

- [5.9.4] Application and relevant considerations The sworn statement in support of the application for substituted service should explain which method of service is

intended and why this method is likely to bring the document to the attention of the person to be served. The primary consideration is how the document can best be brought to the personal attention of the person to be served: *Re McLaughlin* [1905] AC 343 at 347. See further [5.9.5].

- (a) by serving it on a chief or a minister of the church who lives in the area where it is believed the person named in the document is living; or**
- (b) by putting a notice in a newspaper circulating in the area where the person lives; or**
- (c) by arranging for an announcement about the document to be broadcast on the local radio; or**
- (d) in any other way that the court is satisfied will ensure that the person to be served knows about the document and its contents.**

[5.9.5] **Relevance of probability** The proviso in this paragraph arguably conditions subr. (2) more generally – substitute service should not be ordered unless there is a probability of the document coming to the attention of the party to be served: *Macfarlane v Kidd* (1886) NZLR 4 SC 445 at 448; *Porter v Freudenberg* [1915] 1 KB 857 at 889-90; [1914-15] All ER Rep 918 at 933-4; *Sheahan v Joye* (1995) 57 FCR 389 at 397-8; *Haymarket v Smith* (1923) 40 WN (NSW) 87; *Chappell v Coyle* (1985) 2 NSWLR 73 at 85.

[5.9.6] **Examples** The court has a very wide discretion as to the method of substituted service. Substituted service has, for example, been ordered on a person's wife (*Bank of Whitehaven v Thompson* [1877] WN 45; *Kohn v Henderson* (1885) 3 NZLR 364 at 364), by attaching documents to a conspicuous place on land (*McKenzie v McKenzie* (1907) 26 NZLR 841 at 844) and on lawyers who have acted for the person to be served in the same subject matter (*Jay v Budd* [1898] 1 QB 12 at 16, 19).

Service on person under a legal incapacity

E CPR r6.6(1)

5.10 (1) A document to be served on a child must be served:

- (a) if the child is a party to the proceeding and has a litigation guardian, on the litigation guardian; and**
- (b) if the child is not a party to the proceeding, on the child's parent or guardian, or on a person who appears to be acting in the position of the child's parent or guardian.**

[5.10.1] **Schools** It may be that the head of a school or college at which the child is residing could be regarded as "acting in the position of" parent or guardian: see for example *Christie v Cameron* (1856) 2 Jur (NS) 635; 25 LJ Ch 488; 27 LTOS 166; 4 WR 589.

(2) If the child is a party to the proceeding but does not have a litigation guardian, the person wishing to serve the child must:

- (a) apply to the court to appoint a litigation guardian for the child; and**
- (b) serve the document on the litigation guardian.**

E CPR r6.6(1)

(3) A document to be served on a person with impaired capacity must be served:

- (a) if the person is a party to the proceeding and has a litigation guardian, on the litigation guardian; and**
- (b) if the person is not a party to the proceeding, on the person's guardian, or on a person who appears to be acting in the position of the person's guardian.**

[5.10.2] Hospitals, etc It may be that the head of a hospital or a medical officer could be regarded as "acting in the position of" guardian: see for example *Than v Smith* (1879) 27 WR 617; *Fore Street Warehouse v Durrant* (1883) 10 QB 471 at 473.

(3) If the person with impaired capacity is a party to the proceeding but does not have a litigation guardian, the person wishing to serve the person must:

- (a) apply to the court to appoint a litigation guardian for the person; and**
- (b) serve the document on the litigation guardian.**

Service relating to deceased estate

5.11 In a proceeding in which the estate of a deceased person is a party, all documents must be served on one of the legal representatives of the estate.

Service on partnership**5.12 (1) A claim against a partnership must be served:**

[5.12.1] See r. 3.11 as to claims against partnerships.

- (a) on a partner; or**
- (b) at the principal place of business of the partnership.**

[5.12.2] Meaning of "principal place of business" The principal place of business does not include a mere agency: *Baillie v Goodwin* (1886) 33 Ch D 604 at 607; *Grant v Anderson* [1892] 1 QB 108 at 117-8; *Badcock v Cumberland Gap Park* [1893] 1 Ch 362 at 369-70; *Worcester Banking v Firbank* [1894] 1 QB 784 at 791; *Marks v Richards* (1913) 32 NZLR 1019 at 1030.

(2) If a claim is served as required by subrule (1), each partner who was a partner when the claim was issued is taken to have been served.

[5.12.3] Examples See *Ellis v Wadeson* [1899] 1 QB 714 at 718-9 as to deceased partners and *Lovell & Christmas v Beauchamp* [1894] AC 607 at 613-4; [1891-4] All ER 1184 at 1186-7 as to partners under a disability.

Evidence of service

- 5.13 (1) If a defendant files a response or a defence to a claim, the claimant need not file a sworn statement giving proof of service.**
- (2) If a party on whom another document is served does not subsequently file a document required by this rule to be filed, the party serving the first document cannot take any further action in the proceeding unless he or she files a sworn statement setting out details of the time and manner in which the first document was served.**
- (3) If a document is served under rule 5.9 (dealing with substituted service), the sworn statement must:**
- (a) for service on a chief, give details of how and when the claim was served on the chief; and**
 - (b) for service through a newspaper or by radio, give details of the service, including a copy of the notice or the announcement; and**
 - (c) for service in any other way, give details of how the document was served.**

- [5.13.1] What sworn statement should contain The sworn statement should contain full particulars of service, including the date, time, place and manner of service. If the document was served by post the type or class of postage should be stated. If served by facsimile, a transmission report should be attached. See also [5.5.2].
- [5.13.2] Minor defects in documents Defects in photocopying, etc will probably not invalidate service in view of r.1.2: *Hanmer v Clifton* [1894] 1 QB 238 at 239-40; *Smalley v Robey* [1962] QB 577 at 582; [1962] 1 All ER 133 at 135; [1962] 2 WLR 245 at 249.

Service outside Vanuatu

E CPR r6.20
E SCR O11r1

- 5.14 (1) A party may apply to the Supreme Court for an order that a claim in the Supreme Court be served outside Vanuatu.**

- [5.14.1] What application should contain The application must be accompanied by a sworn statement in which full and frank disclosure must be made by the applicant (*GAF v Amchem* [1975] 1 Lloyd's Rep 601 at 608; *Sheldon v New Zealand Forest Products* [1975] 1 NSWLR 141 at 148) addressing the criteria described in subr. (2) (*Hyde v Agar* ; (1998) 45 NSWLR 487 at 502) and identifying a serious issue to be tried (*Seaconsar v Bank Markazi* [1994] AC 438 at 446, 457-8; [1993] 4 All ER 456 at 458, 467-8; [1993] 3 WLR 756 at 768; [1994] 1 Lloyd's Rep 1 at 10).
- [5.14.2] Discretion exercised cautiously English authorities have said that this power ought to be exercised with great care and any doubt resolved in favour of the overseas party: *Vitkovice Horni v Korner* [1951] AC 869 at 883, 889; [1951] 2 All ER 334 at 340, 344; *The Hagen* [1908] P 189 at 201; [1908-10] All ER 21 at 26. The approach in the Australian authorities is, at least recently, less cautious, having regard to the greater reliability of modern communications and transport: *Agar v Hyde* (2000) 201 CLR 552; 173 ALR 665; 74 ALJR 1219; [2000] HCA 41 at [42]. For the approach in Vanuatu see *Solaise Hotel v Pacific Consultants* [1988] VUSC 17; [1980-1994] Van LR 385 which reflected the tone of the English authorities. As this case was decided in 1988 it is respectfully suggested the matter may benefit from fresh consideration in the light of technological developments since then.

(2) The court may order that the claim be served outside Vanuatu if:

E CPR r6.20(10)

(a) the claim concerns land in Vanuatu; or**(b) an Act of Parliament, deed, will, contract, obligation or liability affecting land in Vanuatu is sought to be interpreted, rectified, set aside or enforced; or**

E CPR r6.20(1)

(c) the claim is against a person who is domiciled or ordinarily resident in Vanuatu; or

[5.14.3] Irrelevance of location cause of action arose To this paragraph it is irrelevant where the cause of action arose: *Williams v United States & Australasia Steamship Co* (1908) 25 WN (NSW) 43 at 45. Dealings in Vanuatu unconnected with the subject matter of the proceedings do not provide the requisite nexus: *Patunvanu v Government of Vanuatu* [2005] VUCA 18; CAC 10 of 2005.

[5.14.4] Meaning of "domiciled" A person is said to be domiciled where their habitation is fixed without any intention of moving from it: *Re Craignish* [1892] 3 Ch D 180 at 192. As to the distinction between "resident" and "ordinarily resident" see *Levene v Commissioners of Inland Revenue* [1928] AC 217 at 225, 232; [1928] All ER 746 at 750, 754. A corporation may be "ordinarily resident" in more than one place at the same time: *BHP Petroleum v Oil Basins* [1985] VR 725 at 739.

E CPR r6.20(12)

(d) the claim is for administration of an estate of a person who was domiciled in Vanuatu at the date of the person's death; or**(e) the claim is for the execution of a trust, the person to be served is the trustee, and the trust concerns property in Vanuatu; or**

E CPR r6.20(5)

(f) the claim concerns a contract made in Vanuatu or governed by the law of Vanuatu; or

[5.14.5] Ascertainment of place of contract See *Commissioners of Inland Revenue v Muller* [1901] AC 217 at 223; *Brinkibon v Stahag Stahl* [1983] 2 AC 34 at 42; [1982] 1 All ER 293 at 296; [1982] 1 WLR 264 at 267.

[5.14.6] Ascertainment of proper law The expression "governed by" suggests that proper law of the contract must be Vanuatu law: *Amin Rasheed Shipping v Kuwait Insurance* [1984] AC 50 at 61; [1983] 2 All ER 884 at 888; [1983] 3 WLR 241 at 246; [1983] 2 Lloyd's Rep 365 at 367. As to ascertainment of the proper law see generally *R v International Trustee for Bond Holders* [1937] AC 500 at 529; [1937] 2 All ER 164 at 166; *Bonython v Commonwealth* [1951] AC 201 at 219; *Compagnie d'Armement Maritime v Compagnie Tunisienne de Navigation* [1971] AC 572 at 609; [1970] 3 All ER 71 at 96.

(g) the claim is based on a breach of contract committed in Vanuatu whether or not the contract was made in Vanuatu; or

[5.14.7] Not necessary for contract to have been performed in Vanuatu It is not necessary that the whole of the contract was to be performed in Vanuatu: *The Eider* [1893] P 119 at 131.

E CPR r6.20(8)(b)

(h) the claim is based on a tort committed in Vanuatu; or

[5.14.8] Ascertainment of place of tort As to the ascertainment of the place of commission of a tort see *Distillers Co (Biochemicals) v Thompson* [1971] AC 458 at

469; [1971] 1 All ER 694 at 700; [1971] 2 WLR 441 at 449; *George Munro v American Cyanamid* [1944] 1 KB 432 at 441; [1944] 1 All ER 386 at 390 (negligence).

E CPR r6.20(8)(a)

- (i) the claim is for damage suffered in Vanuatu, whether or not the tort causing the damage happened in Vanuatu; or
- (j) the claim is for an amount payable under an Act of Parliament to a government body in Vanuatu; or
- (k) the proceeding is brought against a person in Vanuatu and the other person outside Vanuatu is a necessary party to the proceeding; or

[5.14.9] Meaning of “necessary party” A foreign defendant will be a necessary party if they could have been a proper defendant had they lived in Vanuatu: *Witted v Galbraith* [1893] 1 QB 577 at 579; *MacLaine, Watson & Co v Bing Chen* [1983] 1 NSWLR 163 at 167; *Patunvanu v Government of Vanuatu* [2005] VUCA 18; CAC 10 of 2005.

E CPR r6.20(2)

- (l) the proceeding is for an injunction ordering the person to do or not do anything in Vanuatu (whether or not damages are also claimed); or

[5.14.9] Reasonable possibility of injunction required The addition of a prayer for an injunction will not necessarily bring the matter within the rule – there must be a reasonable possibility that the injunction will be granted: *Watson & Sons v Daily Record* [1907] 1 KB 853 at 859.

- (m) for any other reason the court is satisfied that it is necessary for the claim to be served on person outside Vanuatu.

[5.14.10] See generally *Patunvanu v Government of Vanuatu* [2005] VUCA 18; CAC 10 of 2005.

- (3) This rule also applies to service of a counterclaim and a third party notice.
- (4) The court may give directions extending the time for serving the claim, and filing a response and defence to the claim.
- (5) The claimant must also serve on the person a copy of the order and each sworn statement made in support of the order.
- (6) The claimant must file a sworn statement giving proof of the service.

Sealed copy

5.15 If these rules require a copy of a filed document to be served, the copy must be a sealed copy.

[5.15.1] General observations See r.18.5(2). Due to delays associated with the checking and sealing of filed documents it is not uncommon for parties to serve unsealed copies on the other side at the same time as they are filed if there is some urgency. Sealed copies should be served when eventually returned by the court.