The Future of Private International Law in Australia

Andrew Dickinson¹

Abstract

In a seminar held at the University of Sydney on 16 May 2011, the four speakers were invited to consider “The Future of Private International Law in Australia” from different perspectives – judge, lawyer in government, practitioner and academic. Unsurprisingly, given the breadth of the topic, the subject matter of the presentations varied widely. Justice Paul Le Gay Brereton of the New South Wales Supreme Court addressed the difficulties inherent in the proof of foreign law, and recent developments in New South Wales practice in this area. Thomas John of the Commonwealth Attorney-General’s Department considered Australia’s approach to the regulation of private international law issues at an international level. Dr Andrew Bell SC of the New South Wales Bar looked at recurring themes and likely future trends in Australian case law in the area. In the final presentation, based on this paper, Andrew Dickinson considered two related topics. First, the development and recognition of a unified body of Australian private international law. Secondly, the case for reform of the currently diverse regimes regulating the personal jurisdiction of courts in Australia. Professor Dickinson argues that the subject has now developed and matured to a point where the label “Australian private international law” is justified in two of the three key areas: applicable law and the recognition and enforcement of judgments. He urges reform of Federal and State rules governing personal jurisdiction, by a process of harmonisation, in order to complete the last side of the Australian private international law triangle.

Introduction

A lawyer working at a University or other academic institution may contribute in a number of ways to the development of the law. The most important of these roles is that of legal education, encouraging students (among whom will be the future legal practitioners, legislators and judges) to acquire the knowledge and skills that they will need in their future careers. In this role, and in undertaking research and writing, academic lawyers enjoy greater flexibility and freedom than their counterparts in legal practice. Whereas the latter, at least in terms of

¹ Professor in Private International Law, Faculty of Law, University of Sydney. This paper was first presented at the seminar held, under the same title, at the University of Sydney on 16 May 2011.
legal principle, must focus on the present, the law teacher may (and, indeed, should) trace the historical development of the law and suggest its future direction. He or she may also choose, without fear of reproach from the bench, to divert from the topic at hand and to focus on a particular subject matter which captures their interest.

In that spirit, this short paper will consider three topics. First, the teaching of private international law in Australia. Secondly, the development of a uniform body of “Australian private international law”. Thirdly, the case for harmonisation of the rules of jurisdiction applied by Australian courts in cases with a foreign connection (i.e. a connection to a legal system outside Australia).

The Teaching of Private International Law in Australia

A glance at any reading list for a course on private international law at an Australian University demonstrates that students are required to grapple with a combination of older common law and equitable doctrine, recent judicial innovation and legislative intervention at Federal and State level. In this eclectic mix lies much of the subject’s appeal (at least to the present writer).

There is no doubt that private international in Australia is becoming more and more important over time. As demand for Australia’s resources and the skills of her population grows and as technological innovation facilitates communication and travel between nations, the number of cases brought before Australian courts with an overseas connection has increased significantly in recent years, reflecting an evident global trend. In light of this development, no longer can the study of the ways in which legal systems deal with private law aspects of cross-border transactions and disputes be offered only as a specialist elective in a post-graduate setting. All law students should be exposed to the extra dimension to which an international element in any dispute gives rise – the recognition that a dispute may be resolved in more than one forum, that a court will not necessarily apply rules of local origin and that a judgment may (or may not) have legal effects outside the system in which it originated.

Happily (at least for those who enjoy the challenges of the subject) the University of Sydney, and other Australian Universities, have recognised

---

2 i.e. a connection to a country or legal system outside Australia.
3 In his presentation at the seminar, Dr Andrew Bell SC reported that he had noted 50 Australian cases in the field in the period of a little over a year since the publication of the 8th edition of Nygh's Conflict of Laws in Australia (2010).
this need. Undergraduate students at this University have long been exposed to the subject as an element in the general international law course. From 2013, every 3rd year student on the University’s JD programme will study private international law as a separate, compulsory subject. This will allow those teaching the course to look in greater depth, in particular, at the ways in which Australian courts approach questions of jurisdiction and the law applicable to transnational disputes.

**Australian Private International Law**

When referring to “The Future of Private International Law in Australia” (a title, I must admit, of my own choosing), one cannot but notice the elephant in the room, that is to say the way in which the words “in Australia” appear to be used in a geographical sense only, a tacit admission of a lack of uniformity in the treatment of the subject among the legal systems which make up the Commonwealth of Australia. The same reticence can be seen in the titles of the two most recently published Australian textbooks, the 8th edition of *Nygh’s Conflict of Laws in Australia* (edited by Dr Bell and Justice Brereton, as well as Professor Martin Davies) and Professor Mortensen’s *Private International Law in Australia*, soon to emerge in a new edition, co-authored by Professor Mary Keyes and Professor Richard Garnett.

This observation begs the question whether there is a sufficiently coherent body of law as to admit of the title “Australian private international law” (i.e. the law “of” rather than “in” Australia) and, if so, the further questions as to how that body of law developed and the ways in which it may develop in the future.

Looking to the past, two principal obstacles to the emergence of a unified “Australian private international law” can be seen. First, the historical and constitutional ties which linked Australia to the United Kingdom and, in particular, to the English common law. Secondly, the demands of a federal structure and the need for Australian courts to determine disputes connected to two or more Australian States or Territories much more frequently than those involving a foreign country. These two circumstances, pulling private international law in different directions,

---

4 In addition to 6 States (New South Wales, Queensland, Tasmania, Victoria, South Australia and Western Australia) and 2 Territories (Australian Capital Territory and Northern Territory), the separate jurisdiction and legal structure of the federal courts (including the High Court and Federal Court of Australia) must be acknowledged.

were noted by Professor Nygh in the Preface to the 1st edition of his work in 1968. Noting the continuing influence of English case law, and the need to find solutions to intra-State conflicts issues, Professor Nygh acknowledged that it was, as yet, “incorrect to speak of an Australian law of conflicts”. He suggested that:6

“[T]he main justification for a special Australian text on conflict of laws is that such a text will encourage Australian lawyers to try and find their own solutions to conflictual problems at a time when the traditional dependence on all things British is rapidly disappearing. It is not, it must be stressed, intended to strike a blow for Australian nationalism. Rather, it is intended to encourage a greater freedom in local experimentation in which solutions are adopted for their own intrinsic merit and not because some august overseas tribunal thought of it first.”

By that time, the separation of the umbilical cord linking the Australian and English legal systems was, of course, well underway. In 1963, the Australian High Court had held that it would not consider itself bound by decisions of the House of Lords if they were manifestly wrong7 and, in 1967, the Privy Council upheld the High Court’s rejection of the English common law’s approach to exemplary damages,8 thereby acknowledging the separate existence of the common law in (if not “of”) Australia. Shortly after Professor Nygh wrote his Preface in March 1968, the first of three Australian statutes removing final rights of appeal to the Privy Council, and establishing the supremacy of the High Court in the Australian legal system, received Royal Assent.9

The publication of Nygh should be seen as the first landmark on the road to the creation of a unified body of Australian private international law. Other events have, directly or otherwise, contributed to that process, as follows:

- First, the UK’s accession to the European Economic Community in 1973 and its adoption in 1987 of the Brussels Convention on jurisdiction and the recognition and enforcement of judgments

---

8 Australian Consolidated Press Ltd v Uren (1967) 117 CLR 221.
9 Privy Council (Limitation of Appeals) Act 1968 (Cth). See also Privy Council (Appeals to the High Court) Act 1975 (Cth) and the Australia Acts 1986 (Cth and UK).
between the Member States of that organisation. These developments, as the current authors of Nygh rightly point out, committed the UK to follow a course away from the rest of the common law world and towards the adoption of private international law rules with a heavy civilian and European influence. Among the principal common law jurisdictions, the United States and Canada have also moved in very different directions, partly dictated by their own federal and constitutional structures. Although other Commonwealth jurisdictions (including New Zealand and Singapore) have remained more faithful to a “traditional” common law approach, uniformity no longer provides a strong reason for Australia to hold back from developing its law according to its own policies and interests.

- Secondly, the Service and Execution of Process Act 1992 (Cth) introduced a uniform, exclusive regime for the service of process and the recognition and enforcement of judgments within Australia. This development may be seen as important for two reasons. First, in setting a precedent for harmonisation of rules regulating jurisdiction in cross-border cases. Secondly, in segregating the rules governing intra-State matters from those governing matters connected to a foreign legal system. The latter category of situations would continue to be separately regulated in each Australian system by rules of court, to be considered in the final part of this paper.

- In the 1990s, the High Court of Australia asserted the unity of Australian common law rules – a single common law to be applied, subject to statutory modification, by courts and tribunals in all

---

10 The UK had acceded to the Convention in 1978, but the Civil Jurisdiction and Judgments Act 1982, giving force of law to its provisions, did not enter into force until 1987.
11 Nygh (8th ed., 2010), p. xxiii. See also the comments of Chief Justice Spigelman of the New South Wales Supreme Court at the launch of the 8th edition of Nygh (Sydney, 2010) [2010] 162 CLR 574, in which the High Court had held that the service provisions of the Service and Execution of Process Act 1901 (Cth) did not exclude State rules regulating service out of the jurisdiction.
12 See also the Trans-Tasman Proceedings Act 2010 (Cth), referred to at n 23 below.
The significance of this development for this area could not be underestimated. Private international law remains a subject, increasingly rare these days, in which the common law plays a major part, particularly in identifying the law applicable to the determination of disputes with a cross-border element. The High Court’s decisions in *Lange* (1997) and *Lipohar* (1999) provided, therefore, a constitutional basis for unifying a significant part of the subject across all Australian legal systems.

This importance of the last of these developments was soon borne out by the High Court’s decision in *John Pfeiffer v Rogerson* (2000). *John Pfeiffer* is, I would respectfully submit, the most important landmark in the development of Australian private international law. That observation may seem a little strange, in that the facts of the case had no connection to a legal system outside Australia and the High Court restricted itself to redefining the rules governing the law applicable to torts in intra-State situations. Two aspects of the case, however, are significant. First, the Court put to one side the constitutional arguments that had bedevilled the development of the law in this area in the past and dealt with the problem as one concerning development of the Australian common law, albeit in an intra-State context. Secondly, the High Court distanced itself from the English common law by rejecting the “double actionability” rule, and the dominant role which it attributed to the law of the forum (*lex fori*). It saw that rule as being unfit for purpose in fixing the law to be applied by Australian courts in intra-State tort cases.

These elements of the decision paved the way for the development of the common law in international cases. In *Renault v Zhang* (2002) and *Neilson v Overseas Products Corp* (2005), the High Court seized upon this opportunity and adopted a distinctive, Australian rule of applicable law, combining application of the law of the place of the tort (*lex loci delicti*) with a form of the doctrine of renvoi, referring to the whole of the law of that place, including rules of private international law. If one asks the question whether Australian private international law exists, *Neilson*...
surely provides an affirmative answer, whatever one may think of the merits of the approach taken by the High Court.\textsuperscript{20}

In other areas, and in particular the law applicable to contractual obligations,\textsuperscript{21} the English common law continues to exert a strong influence on Australian law and practice. No doubt, if the legislator does not intervene first, it will not be too many years before the High Court and other appellate courts have the chance to bring the Australian common law in these areas into the 21st Century.

Coupled with statutory and common law rules regulating the reception of foreign judgments in Australia,\textsuperscript{22} the common law rules of applicable law form a significant body of Australian private international law along two sides of the traditional, triangular framework used to analyse the subject. However, the third side, that of jurisdiction, may be seen to be largely incomplete. It is this area which, in my submission, represents the most important field in the future development of private international law in Australia, and to which we now turn.

**Harmonisation of Australian Rules of Jurisdiction**

It is submitted that the need for reform of the rules currently applied by Australian courts is twofold, as follows:

- First, the need for uniformity. The jurisdiction of Australian courts continues to be based on the amenability of the defendant to service of initiating process. Although the rules governing service of process in Australia have been substantially harmonised by the 1992 Act, the service of process outside Australia\textsuperscript{23} continues to be separately regulated by the rules of court of the 9 legal systems.\textsuperscript{24} Although Professor Nygh was able to claim in 1968 that these rules bore a “family likeness”,\textsuperscript{25} the family has long since grown apart\textsuperscript{26}

\textsuperscript{20} That debate must be left for another day.
\textsuperscript{21} If the Australian rules governing the law applicable to tort (Renault and Nielson) may be compared to a modernist building, new but not to everyone’s taste, the common law rules governing the law applicable to contractual obligations seem more in the character of a pre-fabricated bungalow, full of character but ripe for renovation or rebuilding.
\textsuperscript{22} See, in particular, the Foreign Judgments Act 1991 (Cth).
\textsuperscript{23} Service of originating process in New Zealand will, upon the coming into force of the Trans-Tasman Proceedings Act 2010 (Cth), be regulated by the provisions of Part 2 of that Act. Any reform proposal would need to take into account the terms of the Act, and any implementing rules, but this aspect is not considered further here.
\textsuperscript{24} See the extracts from those rules set out in the Annex to this paper.
\textsuperscript{25} Nygh (1st ed., 1968), p 117.
and there exist sharp differences between the current rules, with respect to the following issues:

- The need to obtain the court’s leave to serve originating process outside Australia.\(^{27}\)
- The information that must be provided to defendants.\(^{28}\)
- The need to obtain the court’s leave to proceed if the defendant does not enter an appearance.\(^{29}\)
- Whether it is required that each and every part of the claim falls within one or other of the grounds for serving originating process outside Australia.\(^{30}\)

\(^{26}\) The editors of the current edition of Nygh (8th ed., 2010) express the view (p xxii) that: “The lack of uniformity both as between the State Supreme Courts and the Federal Court in relation to extended jurisdiction and service upon individuals and corporations resident or present abroad continues to be an undesirable feature of practice in this area, and is ripe for co-ordinated reform by the rules committees of the several superior courts of the country”.

\(^{27}\) Compare, for example, Ord 10, r 1A(2) of the Rules of the Supreme Court 1971 (Western Australia) with rule 124 of the Uniform Civil Procedure Rules 1999 (Queensland). Leave to serve is also required under the Federal Court Rules (Ord 8, r 3) and in the Supreme Court of the Northern Territory (Supreme Court Rules (NT), rule 7.02), but in these courts service may be confirmed after the fact in other cases if the failure to obtain leave is sufficiently explained.

For cases falling within the grounds for service outside Australia set out in the rules, leave is not generally required in the other States or in the Australian Capital Territory (but note Supreme Court (General Civil Procedure) Rules (Vic), r 7.06, retaining the requirement in some cases).

In Queensland (UCPR (Qld), r 127) and the ACT (Court Procedures Rules 2006 (ACT), r 6505), leave to serve originating process may be given in cases not otherwise falling within the specified grounds for service out.

\(^{28}\) For example, in Victoria, the originating process must contain an indorsement stating the facts and the particular ground(s) for service out relied on (see SC(GCP)R (Vic), r 7.02(1)) whereas in New South Wales a more general indorsement of the statement of claim suffices (UCPR (NSW), r 11.3).

\(^{29}\) For example, leave to proceed is required in New South Wales (Uniform Civil Procedure Rules 2005 (NSW), r 11.04), Tasmania (Supreme Court Rules 2000 (Tas), r 147B), Victoria (SC(GCP)R (Vic), r 7.04) and the Australian Capital Territory (CPR (ACT), r 6508), but not in Queensland. The position in South Australia is less clear. The authors of Nygh suggest (8th ed., p 34) that leave to proceed is required, but the rule referred to (r 46) is not in point and r 40 does not, in terms, require leave to proceed.

\(^{30}\) Compare, for example, UCPR (NSW), Sch 6, para (w) (requiring that all of the claim be fitted within one or other of the grounds for service out) with UCPR (Qld), r 124(1)(x), SCR (Tas), r 147A(1), CPR (ACT), r 6501(y) and FCR, r 8 (requiring only that part of the claim be fitted within one of those grounds). See also Nygh, 8th ed, pp 61-62, pointing out that this issue is not addressed by a specific provision in the rules for South Australia, Victoria, Western Australia and Northern Territory.
The allocation of the legal and evidential burdens of showing that the claim falls within those grounds, that the claim has sufficient prospects of success and that the forum is a convenient (or “not clearly inappropriate”) place to bring the action.\textsuperscript{31}

The number and content of the grounds for service out,\textsuperscript{32} in particular with respect to claims in tort\textsuperscript{33} and the joinder of foreign parties as “necessary or proper” parties to the action.\textsuperscript{34}

The existing regimes may be seen to operate on a scale of permissiveness, with Western Australia at the conservative end, Queensland at the liberal end and the other Australian legal systems (including New South Wales and the Federal Courts) somewhere in between.

This diversity in approach is deeply unattractive. It creates uncertainty for Australian businesses and those dealing with them,

\textsuperscript{31} For example, (1) under RSC (WA), Ord 10, r 4, a party seeking leave to serve out must support his application with evidence that (a) grounds for service out exist, and (b) he has a good cause of action, and the court may not grant leave unless the case is a “proper one” for service out, (2) under FCR, Ord 8, r 3(2), the Federal Court in giving leave must be satisfied that it has jurisdiction, that there exist grounds for service out and that the person seeking leave has a \textit{prima facie} case for all or any of the relief claimed (in the systems where leave is required, see also Nygh, 8\textsuperscript{th} ed, pp 37-39), (3) under UCPR (NSW), r 11.04, a party seeking leave to proceed need only demonstrate that his claim falls within one or more of the grounds for service out (see \textit{Agar v Hyde} (2000) 201 CLR 552), and (4) in Queensland, leave to proceed is not required. In other cases, the defendant must make an application to set aside service on grounds including the strength of the plaintiff's case and the inappropriateness of the forum, and will bear the legal burden (\textit{Agar}).

\textsuperscript{32} The number of separately listed grounds is as follows: Western Australia – 13 (including the additional ground in RSC (WA), Ord 10, r 2); South Australia – 13; Victoria – 14; Northern Territory – 15; Tasmania – 21; Federal Court – 22; New South Wales – 23; Queensland – 24; ACT - 25

For a detailed comparison, see Nygh, 8\textsuperscript{th} ed, pp 40-62. In addition to the two areas mentioned below, the authors draw attention to significant differences between the rules in the areas of (a) statutory claims, (b) claims relating to property within the jurisdiction, (c) trusts, (d) claims relating to corporations, (e) arbitration, and (f) foreign judgments.

\textsuperscript{33} The Western Australian rules (RSC (WA), Ord 10, r 1), unlike those of the other States and Territories and of the Federal Court, do not allow service out in tort cases on the basis of damage sustained within the jurisdiction. See also text to n 36 below.

\textsuperscript{34} Differences exist as to (1) whether the “anchor defendant” must be served in Australia (e.g. New South Wales: UCPR (NSW), Sch 6, para (i)) or may be served outside Australia (e.g. South Australia: SCCR (SA), r 40(1)(c); Victoria: SC(GCP)R (Vic), r 7.01(1)(l)), and (2) whether service out is possible where the defendant seeks to join a third party as a proper party to the action (see Nygh, 8\textsuperscript{th} ed., pp 55-56).
adding to legal risk and costs when a transaction or dispute is connected to two or more Australian legal systems, as well as to a foreign system. Moreover, it has the potential to affect the ability of businesses in different Australian States and Territories to compete with each other on equal terms in view of the differing levels of access to local courts in cross-border situations, and the additional costs and inconvenience involved in litigating disputes abroad when such access is not granted.

- Secondly, the existing rules governing service (at both federal and state level) do not always perform the most basic function of rules of jurisdiction, of ensuring that disputes have a substantial connection to the forum in which they are to be determined. Temporary presence within Australia will suffice to validate service under the 1992 Act, and the modern trend with respect to the grounds for service out is to interpret them more broadly, and in some instances to a point which requires only the most tenuous connection with Australian soil. The case law in New South Wales with respect to the requirement of damage within the jurisdiction in tort cases provides the clearest example of this, invariably giving New South Wales based plaintiffs the right to start proceedings locally.

Of course, and recognising that the grounds of jurisdiction are widely formulated, Australian courts have developed other techniques for controlling “forum shopping”. The recognition in Voth v Manildra (1990) of the power to stay proceedings on “clearly inappropriate forum” grounds and the “whole law” approach in Neilson stand out in this respect. These developments, however, remind one of the familiar cautionary tale of the old lady who swallowed a fly. Here, of course, we know at least the historical

---


36 Uniform Civil Procedure Rules 2005 (NSW), Sch 6, para 1(e). See Flaherty v Girgis (1985) 4 NSWLR 248 (injury sustained abroad but continuing within the jurisdiction); Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (1990) 25 NSWLR 569 (financial liability incurred abroad but funded from and/or accounted for within the jurisdiction).

37 Oceanic Sun Line Special Shipping Co v Fay (1988) 165 CLR 197 (Deane and Gaudron JJ); Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538. Recent case law, and in particular the High Court’s decision in Puttick v Tenon Ltd (2008) 238 CLR 265 suggests that the power to stay may be a blunter weapon for controlling the parties’ freedom to choose a forum than the majority in Voth seemed to think.

38 Neilson v Overseas Projects Co, above.
reasons why the fly was swallowed, but it does not mean that the
best method of tackling the problem is to swallow a spider (i.e. Voth) and then, when the spider causes further indigestion, to
consume a bird (i.e. Neilson) as well. The principal cause of the
mischief, i.e. the rules conferring jurisdiction on the Australian
courts, should be re-examined.

Similar considerations to these have recently informed the European
Commission’s Proposal to harmonise the EU Member States’ rules
governing the assertion of jurisdiction over defendants domiciled in third
countries. If adopted, this Proposal will sweep away the common law
and statutory rules in England regulating jurisdiction based on service (as
well as the doctrine of forum conveniens) and replace them with a
restrictive regime based on the premise that jurisdiction is best located in
the courts of the place where the defendant is based (“domiciled”),
subject to limited and exhaustively stated exceptions and room for the
exercise of judicial discretion only in very few cases.

I would not seek to argue that Australian private international law should
follow this approach. Instead, I would submit that harmonisation of the
existing rules (rather than a radical restatement) should represent the
primary objective of any reform process. That said, the opportunity could
be taken to make some more substantial changes. Three aspects, in
particular, should be addressed, as follows:

1. It would be better for the rules to be formulated in terms of the
circumstances in which Australian courts have, or do not have,
jurisdiction over a party to civil proceedings, rather than in terms of
the power to serve originating process within or outside Australia.
The right to serve outside Australia should exist if, and only if, the
plaintiff is able to certify (in the originating process or otherwise)
that the court has jurisdiction.

2. There should, at least, be a debate and consultation with
stakeholders as to whether to replace the basic requirement of
“presence” with a test requiring a more substantial connection to

---

39 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction
and the recognition and enforcement of judgments in civil and commercial matters
See also pp 19-27 of the accompanying Impact Assessment (SEC (2010) 1547 final -

40 See, for example, r 6.34 of the Civil Procedure Rules 1998 (England and Wales).
Australia, for example residence (in the case of individuals) or principal place of business (in the case of corporations) or the undertaking in Australia of activities linked to the dispute (in the case of businesses generally).\textsuperscript{41}

3. Finally, some of the worst excesses of the current rules, and in particular those concerning service out in tort cases could be highlighted, with a view to some modest pruning.\textsuperscript{42}

Any process of this kind in Australia raises, of course, constitutional issues.\textsuperscript{43} I would submit, however, that it is in the interests not only of the Commonwealth but also of the States and Territories for these matters to be regulated in a uniform manner and for the limits of international jurisdiction of the Australian courts to be clearly set out. If federal legislation is not possible, or is impractical, the problem could be addressed (as the authors of Nygh suggest\textsuperscript{44}) by co-ordinated action among the rule-making bodies.

***

The purpose of the last part of this paper has been to open a debate as to whether harmonised Australian rules of jurisdiction are necessary or desirable. Further discussion of that topic, and of the detail of reform proposals, must await another day. In the meantime, I would offer the following conclusion. Australian private international law does exist, and is growing in significance, both in legal practice and in higher education. Its future is bright.

\textsuperscript{41} See Foreign Judgments Act 1991 (Cth), s 7(3)(iv)-(v), which may provide a drafting model.

\textsuperscript{42} For example, it could be provided that the fact that injuries are treated or payments funded from or accounted for in Australia does not constitute “damage” within the jurisdiction for the purposes of rules corresponding to the current UCPR (NSW), Sch 6, para 1(e).

\textsuperscript{43} In terms of federal legislative power, the most obvious basis for Commonwealth legislation extending to the States and Territories would seem to be the “external affairs” power in s 51(xxix) of the Constitution. Its use, in the absence of an international treaty, may however be controversial. Of the other grounds, neither s 51(xxiv) (service and execution within the Commonwealth) nor s 51(xxv) (recognition of laws, records and judicial proceedings) would appear sufficiently broad.

\textsuperscript{44} n 26 above.
Annex

Extracts – Rules of Court in the States, Territories and Federal Court Governing Service Outside Australia

Uniform Civil Procedure Rules 2005 (New South Wales)

Part 11 Division 1 General

11.2 Cases for service of originating process

(cf SCR Part 10, rule 1A)

(1) Originating process may be served outside Australia in the circumstances referred to in Schedule 6.

[Schedule 6 Proceedings in respect of which originating process may be served outside Australia]

(cf SCR Part 10, rule 1A)

Originating process may be served outside Australia in relation to the following circumstances:

(a) if the proceedings are founded on a cause of action arising in New South Wales,

(b) if the proceedings are founded on a breach in New South Wales of a contract (wherever made), whether or not the breach is preceded or accompanied by a breach (wherever occurring) that renders impossible the performance of any part of the contract which ought to be performed in New South Wales,

(c) if the subject-matter of the proceedings is a contract and the contract:
   (i) is made in New South Wales, or
   (ii) is made on behalf of the person to be served by or through an agent carrying on business or residing in New South Wales, or
   (iii) is governed by the law of New South Wales, or

(iv) is one a breach of which was committed in New South Wales,

(d) if the proceedings are founded on a tort committed in New South Wales,

(e) if the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in New South Wales caused by a tortious act or omission wherever occurring,

(f) if the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the court,

(g) if the person to be served is domiciled or ordinarily resident in New South Wales,

(h) if the proceedings are proceedings in respect of which the person to be served has submitted or agreed to submit to the jurisdiction of the court,

(i) if the proceedings are properly commenced against a person served or to be served in New South Wales and the person to be served outside New South Wales is properly joined as a party to the proceedings,

(j) if the subject-matter of the proceedings, so far as concerns the person to be served, is property in New South Wales,

(k) if the proceedings are for the perpetuation of testimony relating to property in New South Wales,
(l) if the proceedings concern the construction, effect or enforcement of an Imperial Act or Commonwealth Act, or a regulation or other instrument having or purporting to have effect under such an Act, affecting property in New South Wales,

(m) if the proceedings are for the construction, rectification, setting aside or enforcement of a deed, will or other instrument or of a contract, obligation or liability, affecting property in New South Wales,

(n) if the proceedings are for an injunction as to anything to be done in New South Wales or against the doing of any act in New South Wales, whether damages are also sought or not,

(o) if the proceedings are for the administration of the estate of a person who dies domiciled in New South Wales, or are for relief which might be granted in proceedings for administration of such an estate,

(p) if the proceedings are for the execution of trusts which are governed by the law of New South Wales, or are for relief which might be granted in proceedings for the execution of such trusts,

(q) if the proceedings affect the person to be served in respect of his or her membership of a corporation incorporated in New South Wales, or of an association formed or carrying on any part of its affairs in New South Wales,

(r) if the proceedings concern the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act,

(s) if the proceedings concern the effect or enforcement of an executive, ministerial or administrative act done or purporting to be done under an Act or regulation or other instrument having or purporting to have effect under an Act,

(t) if the proceedings:
   (i) relate to an arbitration held in, or governed by the law of, New South Wales, or
   (ii) are commenced to enforce in New South Wales an arbitral award wherever made, or
   (iii) are for orders necessary or convenient for carrying into effect in New South Wales the whole or any part of an arbitral award wherever made,

(u) if the proceedings are commenced to enforce in New South Wales a judgment wherever given,

(v) if the proceedings are for relief relating to the custody, guardianship, protection or welfare of a minor, whether or not the minor is in New South Wales, which relief the court has, apart from service, jurisdiction to grant,

(w) if the proceedings, so far as concerns the person to be served, fall partly within one or more of the foregoing paragraphs and, as to the residue, within one or more of the others of the foregoing paragraphs.

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

11.4 Leave for plaintiff to proceed where no appearance by defendant

(cf SCR Part 10, rule 2)

(1) If originating process is served on a defendant outside Australia, and the defendant does not enter an appearance, the plaintiff may not proceed against the defendant except by leave of the Supreme Court.

(2) A motion for leave under subrule (1) may be made without serving notice of motion on the defendant.
11.7 Setting aside originating process served outside Australia

(cf SCR Part 10, rule 6A)

(1) The Supreme Court may make an order of a kind referred to in rule 12.11 (Setting aside originating process etc) on application by a defendant on whom originating process is served outside Australia.

(2) Without limiting subrule (1), the Supreme Court may make an order under this rule:
(a) on the ground that the service of the originating process is not authorised by these rules, or
(b) on the ground that the court is an inappropriate forum for the trial of the proceedings.
Federal Court Rules

Order 8

2 When originating process may be served outside Australia

Subject to rule 3, an originating process may be served on a person in a foreign country in a proceeding which consists of, or includes, any 1 or more of the kinds of proceeding mentioned in the following table:

<table>
<thead>
<tr>
<th>Item</th>
<th>Kind of proceeding in which originating process may be served on a person outside Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Proceeding based on a cause of action arising in Australia</td>
</tr>
<tr>
<td>2</td>
<td>Proceeding based on a breach of a contract in Australia</td>
</tr>
<tr>
<td>3</td>
<td>Proceeding in relation to a contract that:</td>
</tr>
<tr>
<td></td>
<td>(a) is made in Australia; or</td>
</tr>
<tr>
<td></td>
<td>(b) is made on behalf of the person to be served by or through an agent who carries on business, or is resident, in Australia; or</td>
</tr>
<tr>
<td></td>
<td>(c) is governed by the law of the Commonwealth or of a State or Territory;</td>
</tr>
<tr>
<td></td>
<td>in which the applicant seeks:</td>
</tr>
<tr>
<td></td>
<td>(d) an order for the enforcement, rescission, dissolution, rectification or annulment of the contract; or</td>
</tr>
<tr>
<td></td>
<td>(e) an order otherwise affecting the contract; or</td>
</tr>
<tr>
<td></td>
<td>(f) an order for damages or other relief in relation to a breach of the contract</td>
</tr>
<tr>
<td>4</td>
<td>Proceeding based on a tort committed in Australia</td>
</tr>
<tr>
<td>5</td>
<td>Proceeding based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring)</td>
</tr>
<tr>
<td>Item</td>
<td>Kind of proceeding in which originating process may be served on a person outside Australia</td>
</tr>
<tr>
<td>------</td>
<td>------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>6</td>
<td>Proceeding seeking the construction, rectification, setting aside or enforcement of:</td>
</tr>
<tr>
<td>7</td>
<td>Proceeding seeking the execution of a trust governed by a law of the Commonwealth, or of a State or Territory, or any associated relief</td>
</tr>
<tr>
<td>8</td>
<td>Proceeding that affects the person to be served in relation to the person’s membership of a corporation that carries on business in Australia or is registered in a State or Territory as a foreign company</td>
</tr>
<tr>
<td>9</td>
<td>Proceeding in relation to an arbitration carried out in Australia</td>
</tr>
<tr>
<td>10</td>
<td>Proceeding in which the Court has jurisdiction, seeking relief in relation to the guardianship, protection, or care, welfare and development of a person under 18 years (whether or not the person is in Australia)</td>
</tr>
<tr>
<td>11</td>
<td>Proceeding based on a breach of a provision of an Act that is committed in Australia</td>
</tr>
<tr>
<td>12</td>
<td>Proceeding based on a breach of a provision of an Act (wherever occurring) seeking relief in relation to damage suffered wholly or partly in Australia</td>
</tr>
<tr>
<td>13</td>
<td>Proceeding in relation to the construction, effect or enforcement of an Act, regulations or any other instrument having, or purporting to have, effect under an Act</td>
</tr>
<tr>
<td>14</td>
<td>Proceeding in relation to the effect or enforcement of an executive, ministerial or administrative act done, or purporting to be done, under an Act, regulations or any other instrument having, or purporting to have, effect under an Act</td>
</tr>
<tr>
<td>15</td>
<td>Proceeding seeking contribution or indemnity in relation to a liability enforceable by a proceeding in the Court</td>
</tr>
<tr>
<td>Item</td>
<td>Kind of proceeding in which originating process may be served on a person outside Australia</td>
</tr>
<tr>
<td>------</td>
<td>-------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| 16   | Proceeding in which:  
|      | (a) the person to be served is domiciled or ordinarily resident in Australia; or  
|      | (b) if the person is a corporation, the corporation is incorporated in Australia, carries on business in Australia or is registered in a State or Territory as a foreign company |
| 17   | Proceeding in which the person to be served has submitted to the jurisdiction of the Court |
| 18   | Proceeding properly brought against a person who is served, or is to be served, in Australia, if the person to be served has been properly joined as a party |
| 19   | Proceeding in which the subject matter, so far as it concerns the person to be served, is property in Australia |
| 20   | Proceeding seeking the perpetuation of testimony in relation to property in Australia |
| 21   | Proceeding seeking an injunction ordering a person to do, or to refrain from doing, anything in Australia (whether or not damages are also sought) |
| 22   | Proceeding affecting the person to be served in relation to:  
|      | (a) the person’s membership of, or office in, a corporation incorporated, or carrying on business, in Australia; or  
|      | (b) the person’s membership of, or office in, an association or organisation formed, or carrying on business, in Australia; or  
|      | (c) the person’s conduct as a member or officer of such a corporation, association or organisation |

3  Application for leave to serve originating process outside Australia

(1) Service of an originating process on a person in a foreign country is effective for the purpose of a proceeding only if:  

(a) the Court has given leave under subrule (2) before the application is served; or  

(b) the Court confirms the service under subrule (5); or
(c) the person served waives any objection to the service by entering an appearance in the proceeding.

(2) The Court may give leave to a party to serve an originating process on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country, on such terms and conditions as it considers appropriate, if the Court is satisfied that:

(a) the Court has jurisdiction in the proceeding; and

(b) the proceeding is of a kind mentioned in rule 2; and

(c) the person seeking leave has a prima facie case for all or any of the relief claimed by the person in the proceeding.

(3) The evidence on an application for leave under subrule (2) must include the following:

(a) the name of the foreign country where the person to be served is or is likely to be;

(b) the proposed method of service;

(c) a statement that the proposed method of service is permitted by:

   (i) if a convention applies — the convention; or

   (ii) if the Hague Convention applies — the Hague Convention; or

   (iii) in any other case — the law of the foreign country.

(4) Nothing in this rule prevents the Court from giving leave to a person to give notice, in a foreign country, of a proceeding in the Court on the basis that giving the notice takes the place of serving the originating process in the proceeding.

(5) If an originating process was served on a person in a foreign country without the leave of the Court, the Court may, by order, confirm the service if the Court is satisfied that:

(a) paragraphs (2) (a), (b) and (c) apply to the proceeding; and

(b) the service was permitted by:

   (i) if a convention applies — the convention; or

   (ii) if the Hague Convention applies — the Hague Convention; or

   (iii) in any other case — the law of the foreign country; and

(c) the failure to apply for leave is sufficiently explained.
Uniform Civil Procedure Rules 1999 (Queensland)

Part 7 Service outside Australia

Division 1 Ordinary service outside Australia

124 When service outside Australia permitted

(1) An originating process for any of the following may be served on a person outside Australia without the court’s leave—

(a) a proceeding based on a cause of action arising in Queensland;

(b) a proceeding about—
   (i) property situated in Queensland; or
   (ii) obtaining evidence for a future claim relating to property in Queensland;

(c) a proceeding in which an Act, deed, will, contract, obligation or liability affecting property in Queensland is sought to be interpreted, rectified, set aside or enforced;

(d) a proceeding for relief against a person domiciled or ordinarily resident in Queensland;

(e) a proceeding for—
   (i) the administration of the estate of a person who died domiciled in Queensland; or
   (ii) relief that might be obtained in a proceeding for the administration of the estate of a person who died domiciled in Queensland;

(f) a proceeding for the execution of a trust if—
   (i) the trust is created or declared by an instrument; and
   (ii) the person is a trustee; and
   (iii) the execution relates to trust property in Queensland; and
   (iv) the trust ought to be executed under the law of Queensland;

(g) a proceeding relating to a contract—
   (i) made in Queensland; or
   (ii) made by 1 or more parties carrying on business or residing in Queensland; or
   (iii) made by or through an agent carrying on business or residing in Queensland on behalf of a principal carrying on business or residing outside Queensland; or
   (iv) governed by the law of Queensland;

(h) a proceeding based on a breach of contract committed in Queensland, regardless of where the contract was made and whether or not the breach was preceded or accompanied by a breach (wherever occurring), rendering impossible the performance of a part of the contract that ought to be performed in Queensland;

(i) a proceeding based on a contract containing a condition by which the parties agree to submit to the jurisdiction of the court;

(j) a proceeding for the recovery of an amount payable under an Act to an entity in Queensland;
(k) a proceeding based on a tort committed in Queensland;

(l) a proceeding for damage—
   (i) all or part of which was suffered in Queensland; and
   (ii) caused by a tortious act or omission (wherever happening);

(m) a proceeding affecting a person in relation to the person’s membership of—
   (i) a corporation incorporated in Queensland; or
   (ii) a partnership, association or other entity formed, or carrying on any part of its
       affairs, in Queensland;

(n) a proceeding for a contribution or indemnity for a liability enforceable in the court;

(o) a proceeding for an injunction ordering a defendant or respondent to do, or refrain
   from doing, anything in Queensland (whether or not damages are also claimed);

(p) a proceeding properly brought in Queensland against a person in which another person
   outside Queensland is a necessary or proper party to the proceeding;

(q) a proceeding brought under the Civil Aviation (Carriers’ Liability) Act 1959
   (Cwlth)—
   (i) by a resident of Queensland; or
   (ii) in relation to damage that happened in Queensland;

(r) a proceeding in which a person has submitted to the jurisdiction of the court;

(s) a proceeding in which the subject matter of the proceeding, so far as it concerns the
   person, is property in Queensland;

(t) a proceeding concerning the interpretation, effect or enforcement of—
   (i) an Act; or
   (ii) an Imperial or Commonwealth Act affecting property in Queensland;

(u) a proceeding concerning the effect or enforcement of an executive, ministerial or
   administrative act done, or purported to have been done, under an Act;

(v) a proceeding relating to an arbitration held in Queensland;

(w) a proceeding about a person under a legal incapacity who is domiciled or present in,
   or a resident of, Queensland;

(x) a proceeding, so far as it concerns the person, falling partly within 1 or more of
    paragraphs (a) to (w).

(2) Each paragraph of subrule (1) is a separate ground for deciding whether an originating
    process may be served outside Australia under this rule.

(3) Also, this rule does not limit or extend the jurisdiction a court has apart from this rule.

125 Service of counterclaim or third party notice

(1) This rule applies—

   (a) to a counterclaim against a plaintiff and another person if the person against whom the
       counterclaim is made is not already a party to the proceeding; and
(b) to a third party notice.

(2) A counterclaim or third party notice may be served outside Australia without the court’s leave if the claim made by the defendant in the counterclaim or third party notice is of a kind that, if the claim were made by claim or other originating process, the originating process could be served outside Australia under rule 124.

(3) If subrule (2) does not apply, the court may, by leave, allow service outside Australia of a counterclaim or third party notice.

126 Setting aside service

The court must, on application by a defendant or respondent, set aside service of an originating process under this part if service of it is not authorised under rule 124.

127 Service of other process by leave

The court may, by leave, allow service outside Australia of the following—

(a) an originating process for a proceeding under an Act if service is not authorised under rule 124;

(b) an application, order, notice or document in a pending proceeding.
(1) Originating process may be served outside Australia without the Court's permission if—

(a) the claim relates to—

(i) real or personal property in the State; or

(ii) the interpretation of an instrument or the terms of a transaction affecting real or personal property in the State; or

(iii) the enforcement of rights or liabilities affecting real or personal property in the State; or

(b) a remedy is sought against a person domiciled or resident in the State or the estate of a person who died domiciled or resident in the State; or

(c) the action is brought against a person duly served within or outside the State and a person outside the State is a necessary or proper party to the action; or

(d) the action is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain any other remedy in respect of a breach of contract, where the contract is—

(i) made within the State; or

(ii) made by or through an agent trading or residing in the State on behalf of a principal trading or residing out of the State; or

(iii) governed by the law of the State; or

(iv) contains a clause to the effect that the Court is to have jurisdiction in claims relating to the contract; or

(e) the action is brought in respect of a breach committed in the State of a contract made in or outside the State; or

(f) the action is founded on a tort and—

(i) the tort was committed in the State; or

(ii) damage was sustained in the State as a result of the tort; or

(g) the action is brought to enforce a trust that is governed by the law of the State; or
(h) the action is brought for the administration of the estate of a person who died domiciled in the State; or

(i) the action is brought in a probate action relating to the will or testamentary intentions of a person who died domiciled in the State or who made a will or expressed testamentary intentions in circumstances governed by the law of the State; or

(j) the action is brought to enforce a judgment of a foreign court or an arbitral award; or

(k) the action is brought under a statute of the Commonwealth or the State; or

(l) the action is brought against a person who has submitted or agreed to submit to the jurisdiction of the Court, or

[Subrule 40(1)(m) inserted by Supreme Court Civil Rules 2006 (Amendment No. 2)]

(m) the action is for an injunction as to anything to be done in the State or against the doing of anything in the State, whether damages are sought or not.

(2) Originating process for an action of any other kind may only be served outside Australia with the Court's permission.

(3) Originating process that is to be served outside Australia must be in the appropriate form for such originating process.
Supreme Court Rules 2000 (Tasmania)

Division 10 - Service of originating process outside Australia

147A. Service outside Australia

(1) Subject to rules 147B and 147C, originating process may be served outside Australia without an order of the Court where the proceedings fall either wholly or partly into one or more of the following cases:

(a) if the person to be served is domiciled, or ordinarily resident, in the State;

(b) if the proceedings are based on a cause of action arising in the State;

(c) if the proceedings are based on a tort committed in the State;

(d) if the proceedings, wholly or partly, are based on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act, or tortious omission, wherever occurring;

(e) if the subject matter of the proceedings, in so far as it concerns the person to be served, is property in the State;

(f) if the person to be served has submitted, or has agreed to submit, to the jurisdiction of the Court for the proceedings;

(g) if the person to be served outside the State is joined as a party to proceedings that are brought against another person served, or to be served, in the State;

(h) if a contract is the basis of proceedings and the contract –
   (i) is made in the State; or
   (ii) is made, on behalf of the person to be served, by or through an agent carrying on business, or residing, in the State; or
   (iii) is governed by the law of the State; or
   (iv) has been breached in the State;

(i) if the proceedings are for contribution, or indemnity, for a liability enforceable by proceedings in the Court;

(j) if the proceedings are for the perpetuation of testimony relating to property in the State;

(k) if the proceedings concern the construction, effect or enforcement of –
   (i) an Act; or
   (ii) a regulation or other instrument of legislative character that has, or purports to have, effect under an Act;

(l) if the proceedings concern the effect or enforcement of an executive, Ministerial or administrative action done, or purported to have been done, under –
   (i) an Act; or
(ii) a regulation or other instrument of legislative character having, or purporting to have, effect under an Act;

(m) if the proceedings concern the construction, effect or enforcement of –
   (i) an Imperial Act or Commonwealth Act affecting property in the State; or
   (ii) a regulation or other instrument of legislative character affecting property in the State that has, or purports to have, effect under such an Act;

(n) if the proceedings are for the construction, rectification, setting aside or enforcement of any of the following that affects property in the State:
   (i) a deed;
   (ii) a will;
   (iii) a contract;
   (iv) another instrument;
   (v) an obligation;
   (vi) a liability;

(o) if the proceedings are for an injunction for anything to be done in the State or against the doing of any act in the State, whether damages are sought or not;

(p) if the proceedings are for –
   (i) the administration of the estate of a person who dies domiciled in the State; or
   (ii) relief which might be granted in proceedings for administration of such an estate;

(q) if the proceedings are for –
   (i) the execution of a trust which is governed by the law of the State; or
   (ii) relief which might be granted in proceedings for the execution of such a trust;

(r) if the proceedings affect the person to be served in respect of his or her membership of –
   (i) a corporation in the State; or
   (ii) an association formed, or carrying on any part of its affairs, in the State;

(s) if the proceedings –
   (i) relate to an arbitration held in the State or governed by the law of the State; or
   (ii) are brought to enforce in the State an arbitral award, wherever made; or
   (iii) are for orders that are necessary or convenient for carrying into effect in the State the whole, or any part, of an arbitral award, wherever made;

(t) if the proceedings are brought to enforce a judgment in the State, regardless of where the judgment was made;

(u) if the proceedings are for relief –
   (i) that relates to the custody, guardianship, protection or welfare of a minor, whether or not the minor is in the State; and
   (ii) that the Court has jurisdiction to grant.
(2) In subrule (1), if the originating process to be served under subrule (1) is a cross-claim, the expression "proceedings" means the proceedings on the cross-claim.

**147B. Leave to proceed if no appearance entered**

(1) If an originating process is served on a defendant outside Australia and the defendant does not enter an appearance within the time limited for appearance, the plaintiff is not entitled to proceed against that defendant except with leave of the Court.

(2) An application for leave under subrule (1) may be made without serving notice of the application on the defendant.
ORDER 7

SERVICE OUT OF AUSTRALIA

PART 1—WHEN SERVICE OUT IS ALLOWED

7.01 For what claims

(1) Originating process may be served out of Australia without order of the Court where—

(a) the whole subject matter of the proceeding is land situate within Victoria (with or without rents or profits) or the perpetuation of testimony relating to land so situate;

(b) any act, deed, will, contract, obligation or liability affecting land situate within Victoria is sought to be construed, rectified, set aside or enforced in the proceeding;

(c) any relief is sought against a person domiciled or ordinarily resident within Victoria;

(d) the proceeding is for the administration of the estate of a person who died domiciled within Victoria or is for any relief or remedy which might be obtained in any such proceeding;

(e) the proceeding is for the execution, as to property situate within Victoria, of the trusts of a written instrument of which the person to be served is a trustee and which ought to be executed according to the law of Victoria;

(f) the proceeding is one brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract—

(i) was made within Victoria;

(ii) was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria; or

(iii) is governed by the law of Victoria;

(g) the proceeding is brought in respect of a breach committed within Victoria of a contract wherever made, even though that breach was preceded or accompanied by a breach out of Victoria that rendered impossible the performance of that part of the contract which ought to have been performed within Victoria;

(h) the proceeding is founded on a contract the parties to which have agreed that the Court shall have jurisdiction to entertain a proceeding in respect of the contract;

(i) the proceeding is founded on a tort committed within Victoria;

(j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring;
(k) an injunction is sought ordering the defendant to do or refrain from doing anything within Victoria, whether or not damages are also claimed in respect of a failure to do or the doing of that thing;

(l) the proceeding is properly brought against a person duly served within or out of Victoria and another person out of Australia is a necessary or proper party to the proceeding;

(m) the proceeding is either brought by a mortgagee of property situate within Victoria (other than land) and seeks the sale of the property, the foreclosure of the mortgage or delivery by the mortgagor of possession of the property or brought by a mortgagor of property so situate (other than land) and seeks redemption of the mortgage, reconveyance of the property or delivery by the mortgagee of possession of the property, but does not seek, except so far as permissible under any other paragraph of this Rule, any personal judgment or order for the payment of any moneys due under the mortgage;

(n) the proceeding is brought under the Civil Aviation (Carriers' Liability) Act 1959 of the Commonwealth.

(2) In paragraph (1)—

mortgage includes a charge or lien;

mortgagee means a person entitled to, or interested in, a mortgage;

mortgagor means a person entitled to, or interested in, property subject to a mortgage.

7.02 Indorsement on originating process

(1) Originating process served on any defendant out of Australia in accordance with this Order shall, at the time of service on that defendant, contain an indorsement stating the facts and the particular paragraph of Rule 7.01 relied upon in support of such service.

(1.1) The indorsement under paragraph (1) shall be distinct from the indorsement of claim on the originating process, but any fact in support of service out of Australia which is a fact alleged by the indorsement of claim may be incorporated by specific reference in the indorsement under paragraph (1).

(2) If the originating process does not contain the indorsement referred to in paragraph (1) at the time it is filed, the plaintiff, in accordance with paragraph (3), may amend the originating process to include the indorsement.

(3) The originating process shall be taken to be amended upon the filing by the plaintiff of a copy of the originating process with the indorsement included.

(4) Upon the filing of an amended copy of originating process under paragraph (3) or at any later time, the Prothonotary, on the request of the plaintiff, shall seal a sufficient number of copies of the originating process as amended for service and proof of service.
7.04 Leave to proceed where no appearance

(1) Where no appearance is filed by a party served with originating process out of Australia, the Court may order that the plaintiff shall be at liberty to proceed if satisfied—

(a) that the subject matter of the proceeding so far as it concerns that party is within Rule 7.01; and

(b) that the originating process was duly served on that party.

(2) An application for an order under paragraph (1) shall be supported by affidavit or other evidence showing the grounds on which the application is made.

7.05 Stay, setting aside service etc.

(1) The Court may make an order of a kind referred to in Rule 8.09 on application by a party served with originating process out of Australia.

(2) Without limiting paragraph (1), the Court may make an order under this Rule on the ground—

(a) that service out of Australia is not authorised by these Rules; or

(b) that Victoria is not a convenient forum for the trial of the proceeding.

(3) The Court may make an order under this Rule—

(a) before an application is made under Rule 7.04; or

(b) before an order of the Court is made on such an application.

7.06 Service of other process by leave

The Court, by order, may allow service out of Australia of the following—

(a) originating process in a proceeding in relation to—

(i) the wardship, custody, management or welfare of a minor; or

(ii) the custody, management or welfare of a person who is incapable of managing his or her affairs;

(b) an originating motion in a proceeding brought under any Act;

(c) any summons, order or notice in any proceeding.

7.07 Service of counterclaim or third party notice

(1) This Rule applies to—

(a) a counterclaim against the plaintiff and another person joined as defendant under Rule 10.03 where the person joined is not already a party to the proceeding; and

(b) a third party notice filed in accordance with Order 11.

(2) A counterclaim or third party notice may be served out of Australia without leave where the claim made by the defendant in the counterclaim or third party notice is of such a kind that, if the claim were made by writ or other originating process, the originating process could be served out of Australia without order of the Court under Rule 7.01.
(3) Where paragraph (2) does not apply, the Court may, by order, allow service out of Australia of a counterclaim or third party notice.

7.08 Application for leave

(1) An application for leave under Rule 7.06 or 7.07 shall be supported by affidavit or other evidence showing the grounds upon which the application is made.

(2) The Court may grant such leave if the case is a proper one for service out of Australia.

(3) Upon making an order under Rule 7.06 or 7.07, the Court may give directions with respect to service and the time for filing an appearance or for attendance before the Court or otherwise.

(4) Where any document is served out of Australia by order of the Court made under Rule 7.06 or 7.07—

(a) a copy of the order, a copy of any affidavit made in support of the application for the order; and

(b) unless the Court otherwise orders, a copy of any exhibit referred to in the affidavit— shall be served with the document.
Order 10 — Service out of the jurisdiction

1A. When leave to serve is required

... 

(2) A writ or notice of a writ served on a person outside the Commonwealth of Australia has no effect unless —
   (a) the Court, under this Order, granted leave to serve the person; and
   (b) the person was served —
       (i) under rules 9 to 11; or
       (ii) under Order 11A and the convention referred to in that Order.

(3) Rules 9 to 11 do not apply to or in relation to the service of a writ or notice of a writ on a person outside the Commonwealth of Australia under the convention referred to in Order 11A.

[Rule 1A inserted in Gazette 3 Jul 2009 p. 2683-4.]

1. When service out of jurisdiction is permissible

(1) The Court may, subject to rule 3, grant leave to serve a person outside the Commonwealth of Australia with a writ, or notice of a writ, that begins an action if —
   (a) the subject matter of the action, so far as it concerns the party to be served, is —
       (i) land (with or without rents or profits) or other property situate within the State, or the perpetuation of testimony relating to land within the State; or
       (ii) any shares or stock of a corporation or joint stock company having its principal place of business within the State;
   (b) any Act, deed, will, contract, obligation or liability affecting land or hereditaments situate within the State is sought to be construed, rectified, set aside or enforced in the action;
   (c) in the action relief is sought against a person domiciled or ordinarily resident within the jurisdiction;
   (d) the action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Western Australia or if the action is for any relief or remedy which might be obtained in any such action as aforesaid;
   (e) the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being in either case a contract —
       (i) made within the jurisdiction; or
(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or

(iii) which by its terms or implications is governed by the law of Western Australia;

(f) the action is brought in respect of a breach committed within the jurisdiction of a contract wherever made and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(g) in the action an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed whether damages are or are not also sought in respect thereof;

(h) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction;

(i) the action is for the recovery of taxes or duty (with or without interest or fines for default in payment thereof) which have been imposed or become due on or in respect of property situate within the jurisdiction;

(j) the action is by a mortgagee or mortgagor in relation to a mortgage of personal property situate within the jurisdiction and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee, but does not seek (unless and except so far as permissible under subparagraph (e)) any personal judgment or order for payment of any moneys due under the mortgage;

(k) the action is founded on a tort committed within the jurisdiction;

(l) the action is properly brought under the Civil Aviation (Carriers’ Liability) Act 1959 of the Commonwealth.

(2) In paragraph (1)(j) the expression personal property situate within the jurisdiction means personal property, which on the death of an owner thereof intestate, would form subject matter for the grant of letters of administration to his estate in Western Australia; the expression mortgage means a mortgage charge or lien of any description; the expression mortgagee means a party for the time being entitled to or interested in a mortgage; and the expression mortgagor means a party for the time being entitled to or interested in property subject to a mortgage.

[Rule 1 amended in Gazette 3 Jul 2009 p. 2684.]

2. Service out of the jurisdiction in certain actions in contract

Where it appears to the Court that a contract contains a term to the effect that the Supreme Court shall have jurisdiction to hear and determine any action in respect of the contract, the Court may, subject to Rule 3, grant leave to serve a person outside the Commonwealth of Australia with a writ, or notice of a writ, that begins such an action.

[Rule 2 amended in Gazette 3 Jul 2009 p. 2684.]
4. **Application for leave**

   (1) An application for the grant of leave under Rule 1 or 2 shall be supported by an affidavit stating the grounds on which the application is made and that, in the deponent’s belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably may be found.

   (2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

   [Rule 4 amended in Gazette 15 Jun 1973 p. 2247.]
6501 Service outside Australia—service of originating process without leave

(SCR o 12 r 2; FCR o 8 r 1; NSW r 11.2 and sch 6; Qld r 124)

(1) An originating process for any of the following may be served on a person outside Australia without the court’s leave:

(a) a proceeding based on a cause of action arising in the ACT;

(b) a proceeding in relation to—
   (i) property in the ACT; or
   (ii) obtaining evidence for a future claim about property in the ACT;

(c) a proceeding for the interpretation, rectification, setting aside or enforcement of a law, deed, will, contract, obligation or liability affecting property in the ACT;

(d) a proceeding for relief against—
   (i) a person domiciled or ordinarily resident in the ACT; or
   (ii) a corporation incorporated in the ACT or under a territory law; or
   (iii) a company taken to be registered in the ACT; or
   (iv) a company or other corporation carrying on business in the ACT;

(e) a proceeding for—
   (i) the administration of the estate of a person who died domiciled in the ACT; or
   (ii) relief that might be obtained in a proceeding for the administration of the estate of a person who died domiciled in the ACT;

(f) a proceeding for the execution of a trust if—
   (i) the trust is created or declared by an instrument; and
   (ii) the person is a trustee or beneficiary; and
   (iii) the execution relates to trust property in the ACT; and
   (iv) the trust ought to be executed under ACT law;

(g) a proceeding in relation to a contract—
   (i) made in the ACT; or
   (ii) made by 1 or more parties carrying on business or living in the ACT; or
   (iii) made by or through an agent carrying on business or living in the ACT on behalf of a principal carrying on business or living outside the ACT; or
   (iv) governed by ACT law;

(h) a proceeding based on a breach in the ACT of a contract (wherever made), whether or not the breach was preceded or accompanied by a breach (wherever happening), that makes impossible the performance of a part of the contract that ought to be performed in the ACT;
(i) a proceeding based on a contract containing a condition by which the parties agree to submit to the jurisdiction of the court;
(j) a proceeding for the recovery of an amount payable under a law to an entity in the ACT;
(k) a proceeding based on a tort committed in the ACT;
(l) a proceeding for damage—
   (i) all or part of which was suffered in the ACT; and
   (ii) caused by a tortious act or omission (wherever happening);
(m) a proceeding affecting a person in relation to—
   (i) membership of, or office holding in, a corporation incorporated in the ACT or under a territory law; or
   (ii) membership of, or office holding in, a company taken to be registered in the ACT; or
   (iii) membership of, or office holding in, a company or other corporation carrying on business in the ACT; or
   (iv) membership of, or office holding in, an unincorporated partnership, association or other entity formed, or carrying on any part of its affairs, in the ACT; or
   (v) the person’s conduct as a member or officer of such a company, other corporation, or unincorporated partnership, association or other entity;
(n) a proceeding for a contribution or indemnity for a liability enforceable in the court;
(o) a proceeding in which a division 2.9.4 order in relation to anything to be done, or not done, in the ACT is the principal relief claimed (whether or not damages are also claimed);
(p) a proceeding properly brought in the ACT against a person in which someone else outside the ACT is a necessary or proper party to the proceeding;
(q) a proceeding brought under the *Civil Aviation (Carrier’s Liability) Act 1959* (Cwlth)—
   (i) by a resident of the ACT; or
   (ii) in relation to damage that happened in the ACT;
(r) a proceeding in which a person has submitted or agreed to submit to the jurisdiction of the court;
(s) a proceeding in which the subject matter of the proceeding, as far as it concerns the person, is property in the ACT;
(t) a proceeding about the interpretation, effect or enforcement of—
   (i) an ACT law; or
   (ii) a law of the Commonwealth (including an Imperial Act applying as a law of the Commonwealth) affecting property in the ACT;
(u) a proceeding in relation to the effect or enforcement of an executive, ministerial or administrative act done, or purported to have been done, under a law;
(v) a proceeding—
   (i) in relation to an arbitration held in the ACT or governed by ACT law; or
   (ii) to enforce in the ACT an arbitral award wherever made; or
   (iii) for orders to carry into effect in the ACT all or part of an arbitral award wherever made;

(w) a proceeding to enforce in the ACT a judgment wherever given;

(x) a proceeding in relation to a person with a legal disability who is domiciled or present in, or a resident of, the ACT;

(y) a proceeding, as far as it relates to the person to be served, falling partly within 1 or more of paragraphs (a) to (x).

Note  Rule 6505 (Service outside Australia—leave for service) provides for the giving of leave for service of an originating process that is not allowed under r (1).

(2) Any other originating process must not be served outside Australia without the court’s leave.

Note  Rule 6505 (Service outside Australia—leave for service) provides for the giving of leave for service of an originating process that is not mentioned in r (1).

(3) Each paragraph of subrule (1) is a separate ground for deciding whether an originating process may be served outside Australia under that subrule.

(4) This rule does not limit or extend the jurisdiction the court has apart from this rule.

6502  **Service outside Australia—counterclaim or third-party notice**

(Qld r 125)

(1) This rule applies to—
   (a) a counterclaim against a plaintiff and someone else if the other person is not already a party to the proceeding; or
   (b) a third-party notice.

(2) If the claim made by the defendant in the counterclaim or third-party notice is of a kind that, if the claim were made by originating process, the process could be served outside Australia under rule 6501 (Service outside Australia—service of originating process without leave), the counterclaim or third-party notice may be served outside Australia without the court’s leave.

(3) If subrule (2) does not apply to the counterclaim or third-party notice, the counterclaim or third-party notice must not be served outside Australia without the court’s leave.

Note  Rule 6505 (Service outside Australia—leave for service) provides for the giving of leave for service of a counterclaim or third-party notice that is not mentioned in r (1).

6503  **Service outside Australia—setting aside service of originating process etc**

(SCR o 13 r 17 (2); NSW r 11.7; Qld r 126)

(1) This rule applies to an originating process, counterclaim or third-party notice that has been served on a defendant outside Australia without the court’s leave.
(2) On application by the defendant, the court may make an order of the kind mentioned in rule 40 (Setting aside originating process etc).

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

(3) Without limiting subrule (2), the court may make an order under this rule on the ground that—

(a) for an originating process—service of the originating process was not allowed under rule 6501 (Service outside Australia—service of originating process without leave); or

(b) for a counterclaim or third-party notice—service of the counterclaim or third-party notice was not allowed under rule 6502 (Service outside Australia—counterclaim or third-party notice); or

(c) the court is an inappropriate forum for the proceeding.

6505 Service outside Australia—leave for service

(SCR o 12 r 4 and r 9; NSW r 11.5; Qld r 127)

(1) The court may give leave for service outside Australia of—

(a) an originating process if service outside Australia is not allowed under rule 6501 (Service outside Australia—service of originating process without leave); or

(b) a counterclaim or third-party notice if service outside Australia is not allowed under rule 6502 (Service outside Australia—counterclaim or third-party notice); or

(c) a document in a proceeding other than an originating process, counterclaim or third-party notice.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.

(2) An application for leave under this rule must be supported by affidavit or other evidence—

(a) for an originating process mentioned in subrule (1) (a)—establishing the plaintiff’s belief that the plaintiff has a good cause of action; and

(b) showing in what place or country the person on whom the document is to be served is, or probably may be found; and

(c) stating the grounds on which the application is made.

6508 Service outside Australia—leave to proceed against defendant

(NSW r 11.4)

(1) A plaintiff in a proceeding may, with the court’s leave, proceed against a defendant if—

(a) the originating process, counterclaim or third-party notice in the proceeding was served on a defendant outside Australia; and

(b) for a proceeding started by originating claim—

(i) the defendant does not file a notice of intention to respond or defence within the time required by rule 102 (Notice of intention to respond or defence—filing and service) or any further period agreed between the relevant parties or allowed by the court; or
the defendant files a notice of intention to respond within the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court; or

(iii) the defendant files a conditional notice of intention to respond that becomes an unconditional notice of intention to respond but does not file a defence within the time required by rule 111 (Conditional notice of intention to respond) or any further period agreed between the relevant parties or allowed by the court; or

(iv) the defendant files a defence but the court orders the defence to be struck out; and

Note  In this rule, ‘defendant’ includes a person not a party to the original proceeding who is included as a party by a counterclaim (see r 462 (4) (c)).

(c) for a counterclaim—

(i) the defendant to the counterclaim does not file an answer to the counterclaim within the time required by rule 466 (3) (Counterclaim—answer to) or any further period agreed between the relevant parties or allowed by the court; or

(ii) the defendant to the counterclaim files an answer to the counterclaim but the court orders the answer to be struck out; and

(d) for a third-party notice—

(i) the third party does not file a notice of intention to respond or defence within the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court; or

(ii) the third party files a notice of intention to respond within the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court, but does not file a defence within the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court; or

(iii) the third party files a conditional notice of intention to respond that becomes an unconditional notice of intention to respond but does not file a defence within the time required by rule 111 or any further period agreed between the relevant parties or allowed by the court; or

(iv) the third party files a defence but the court orders the defence to be struck out.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.

Note 2 Pt 2.3 (Notice of intention to respond and defence) applies to a third-party notice (see r 311 (Third-party notice—notice of intention to respond and defence)).

Note 3 Rule 425 (Pleadings—striking out) deals with striking out of defences and answers.

Note 4 Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

(2) However, the plaintiff may not proceed against a defendant under subrule (1) if—

(a) for a proceeding started by originating claim—

(i) the proceeding is stayed under rule 1102 (Stay of debt etc proceeding on payment of amount sought); or
(ii) the defendant files a statement under rule 1104 (Judgment on acknowledgment of debt or liquidated demand); or

(iii) the defendant files a defence after the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the defendant; or

(b) for a counterclaim—the defendant to the counterclaim files an answer to the counterclaim after the time required by rule 466 (3) or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the defendant to the counterclaim; or

(c) for a third-party notice—the third party files a defence after the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the third party.
Supreme Court Rules (Northern Territory)

Order 7  Service outside Australia

Part 1  General

7.01  Originating process that may be served outside Australia

(1) Subject to rule 7.02, an originating process may be served on a person in a foreign country in a proceeding if:

(a) the whole subject matter of the proceeding is land (with or without rents or profits) situated in the Territory or the perpetuation of testimony relating to land situated in the Territory; or

(b) an act, deed, will, contract, obligation or liability affecting land situated in the Territory is sought to be construed, rectified, set aside or enforced in the proceeding; or

(c) relief is sought against a person domiciled or ordinarily resident in the Territory; or

(d) the proceeding is for the administration of the estate of a person who died domiciled in the Territory or a relief or remedy which might be obtained in such a proceeding; or

(e) the proceeding is for the execution, as to property situated in the Territory, of the trusts of a written instrument of which the person to be served is a trustee and which ought to be executed according to the law of the Territory; or

(f) the proceeding is brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract:

(i) was made in the Territory; or

(ii) was made by or through an agent carrying on business or residing in the Territory on behalf of a principal carrying on business or residing out of the Territory; or

(iii) is governed by the law of the Territory; or

(g) the proceeding is brought in respect of a breach committed in the Territory of a contract, wherever made, even though the breach was preceded or accompanied by a breach out of the Territory that rendered impossible the performance of that part of the contract which ought to have been performed in the Territory; or

(h) the proceeding is founded on a contract the parties to which have agreed that the Court will have jurisdiction to entertain a proceeding in respect of the contract; or
(i) the proceeding is founded on a tort committed in the Territory; or

(j) the proceeding is brought in respect of damage suffered wholly or partly in the Territory and caused by a tortious act or omission, wherever occurring; or

(k) an injunction is sought ordering the defendant to do or refrain from doing anything in the Territory, whether or not damages are also claimed in respect of a failure to do, or the doing of, the thing; or

(l) the proceeding is properly brought against a person duly served in or out of the Territory and another person in a foreign country is a necessary or proper party to the proceeding; or

(m) the proceeding:

(i) is brought by a mortgagee of property (other than land) situated in the Territory; and

(ii) seeks the sale of the property, foreclosure of the mortgage or delivery by the mortgagor of possession of the property; and

(iii) unless permitted by another paragraph of this subrule, does not seek a personal judgment or order for the payment of moneys due under the mortgage; or

(n) the proceeding:

(i) is brought by a mortgagor of property (other than land) situated in the Territory; and

(ii) seeks redemption of the mortgage, reconveyance of the property or delivery by the mortgagee of possession of the property; and

(iii) unless permitted by another paragraph of this subrule, does not seek a personal judgment or order for the payment of moneys due under the mortgage; or

(o) the proceeding is brought under the Civil Aviation (Carriers' Liability) Act 1959 (Cth).

(2) In this rule:

mortgage includes a charge or lien.

mortgagee means a person entitled to, or with an interest in, a mortgage.

mortgagor means a person entitled to, or with an interest in, property subject to a mortgage.
7.02 Application for leave to serve originating process outside Australia

(1) Service of an originating process on a person in a foreign country is effective for the purpose of a proceeding only if:
   (a) the Court has given leave under subrule (2) before the originating process is served; or
   (b) the Court confirms the service under subrule (5); or
   (c) the person served waives any objection to the service by filing an appearance in the proceeding.

(2) The Court may give leave to a person to serve an originating process on a person in a foreign country under a Convention, the Hague Convention, or the law of the foreign country, on the terms and conditions it considers appropriate, if the Court is satisfied:
   (a) the Court has jurisdiction in the proceeding; and
   (b) the proceeding is of a kind mentioned in rule 7.01; and
   (c) the person seeking leave has a prima facie case for the relief claimed by the person in the proceeding.

(3) The evidence on an application for leave under subrule (2) must include the following:
   (a) the name of the foreign country where the person to be served is or is likely to be;
   (b) the proposed method of service;
   (c) a statement that the proposed method of service is permitted by:
      (i) if a Convention applies – the Convention; or
      (ii) if the Hague Convention applies – the Hague Convention; or
      (iii) in any other case – the law of the foreign country.

(4) Nothing in this rule prevents the Court from giving leave to a person to give notice, in a foreign country, of a proceeding in the Court on the basis that giving the notice takes the place of serving the originating process in the proceeding.

(5) If an originating process was served on a person in a foreign country without the leave of the Court, the Court may, by order, confirm the service if satisfied:
   (a) subrule (2)(a), (b) and (c) apply in relation to the proceeding; and
   (b) the service was permitted by:
      (i) if a Convention applies – the Convention; or
(ii) if the Hague Convention applies – the Hague Convention; or

(iii) in any other case – the law of the foreign country; and

(c) the failure to apply for leave is sufficiently explained.