

Service in the Federal Court and the Federal Circuit Court

Fact Sheet



This fact sheet covers:

- ✔ What is service?
- ✔ Who serves documents in a proceeding?
- ✔ When does service take effect?
- ✔ When is personal service required?
- ✔ How do you serve a document?
- ✔ Proving you have served someone
- ✔ Substituted service
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1. What is service?

Service is a common legal term used throughout the Australian legal system. Service refers to specific ways of providing, or delivering, a legal document to another person so that the court is satisfied that the other person has received and been made aware of that document.

There may be many different ways you can serve a document. The procedural rules that apply to the court in which your matter is being heard will set out how a document is to be served.

Generally speaking, service can be either **personal** or **ordinary**. Personal service is a method of service where you must hand the document to the person you wish to serve, after establishing his or her identity. Ordinary service includes any other methods of service that are not personal service and which are recognised by the court as valid methods of service, such as serving a document by email or post (see sections 4 and 5 of this fact sheet for further detail).

The court will require you to serve certain documents at different stages in a proceeding.

Generally, every document filed with the court must be served on all parties to the proceeding. Particular documents may be required to be served within a specific time period and the relevant court rules will specify this. Nonetheless, once a document is filed with the court, you should aim to serve the relevant parties as soon as possible.¹

2. Who serves documents in a proceeding?

Parties to a proceeding have different obligations (and time frames) to file documents with the court and to serve each other, depending on the type of claim.

Both an applicant and a respondent will be required to serve documents at some stage in a proceeding. For example, in the Federal Court, an applicant is required to serve a copy of the originating application and the statement of claim or accompanying affidavit on each respondent named in the application at least five days before the first return date (which is a date inserted by the court Registry on the front page of the application when the application is filed).² A respondent must then file and serve a defence within 28 days after they were served with the statement of claim.³

When you are reading this fact sheet, please keep in mind that it has been written with a particular focus on an applicant in a proceeding. If you notice that the other party has not complied with their obligations as set out anywhere in this fact sheet, you should raise this with the court.

3. When does service take effect?

The date on which the court will consider your documents to have been served is referred to as the date on which service ‘takes effect’. In relation to ordinary service, the relevant court rules specify when service takes effect depending on what method of ordinary service has been used.

¹ Federal Circuit Court Rules 2001, r 6.03.

² Federal Court Rules 2011, r 8.06.

³ Federal Court Rules 2011, r 16.32.

3.1 Federal Circuit Court

Method of service in the Federal Circuit Court⁴	When service takes effect
Posted to an address in Australia	The day the document would be delivered in the ordinary course of the post
Posted by airmail to an address outside of Australia	28 days after posting
Fax	Next business day after the document was sent
Electronic communication	Next business day after the document was sent

3.2 Federal Court

Method of service in the Federal Court⁵	When service takes effect
Pre-paid post	4 business days after the document was sent
Fax	Next business day after the document was sent
Electronic communication	Next business day after the document was sent

4. When is personal service required?

The relevant court rules specify when a document needs to be served personally. Personal service (known as “service by hand” in the Federal Circuit Court) is usually only required in certain circumstances. However, the court can also order that certain documents be served personally at any stage in a proceeding.

4.1 Personal service and the Federal Circuit Court

Personal service is required in the Federal Circuit Court in certain circumstances, which include the following:

⁴ Federal Circuit Court Rules 2001, r 6.12(a)-(d).

⁵ Federal Court Rules 2011, r 10.32.

- when serving the application starting a proceeding; and
- when serving a subpoena on the person the subpoena is addressed to.⁶

4.2 Personal service and the Federal Court

Personal service is required in the Federal Court in certain circumstances, which include the following:

- when serving the originating process (the document that an applicant is required to file to start a proceeding);
- when serving a subpoena on the person the subpoena is addressed to;⁷ and
- when serving an application addressed to a person (who is not a party to the proceeding) for the production of documents that are relevant to the issues in dispute and which are in their possession.⁸

However, you should note that sections 4.1 and 4.2 above are **not** a complete list of all the circumstances in which personal service will be required in these courts. You should always consult the relevant court rules before attempting to serve a document, or seek legal advice.

5. How do you serve a document?

Service requirements will vary depending on the nature of the document you intend to serve and whether the party you intend to serve is a natural person or a corporation.

5.1 How do you serve an originating process?

An 'originating process' refers to the document that an applicant must prepare and file with the court to start a proceeding. In the Federal Court the rules for service refer to these documents as an '**originating application**'. In the Federal Circuit Court rules it is called an '**application starting a proceeding**'. An originating process must always be served personally. The requirements for personal service are set out directly below.

If you wish to start a proceeding in the Federal Court, you must file and serve a sealed copy of the originating application and the statement of claim or accompanying affidavit personally on each respondent at least five days before the first return date which will be inserted by the Registry on the

⁶ Federal Circuit Court Rules 2001, r 6.06(1).

⁷ Federal Court Rules 2011, r 24.16.

⁸ Federal Court Rules 2011, r 20.23.

first page of the originating process.⁹ A sealed copy is a copy of a document which has an original court seal stamped on it (or one electronically applied by the Registry).

If you wish to start a proceeding in the Federal Circuit Court, your application and any document filed with it must be personally served on each party in the proceeding.¹⁰

Documents cannot be served less than three days before the date of the hearing of an application in a case or less than seven days before the day fixed for the hearing of any other application.¹¹

NOTE

An Application in a Case is made in a case that has already commenced and is used by a party seeking further interim or procedural orders, sometimes on an urgent basis.

5.2 Service on a natural person

5.2.1 Personal service

If you need to personally serve documents on a natural person, you can serve them by:

- leaving the document with the individual;¹²
- if the person refuses to accept the document, putting it down in the person's presence and telling the person what the document is;¹³ or
- leaving the documents with the respondent's lawyers if they are authorised to accept service of an originating process.¹⁴

5.2.2 Service on a natural person under a 'legal incapacity'

If you are personally serving documents on a person under a legal incapacity (for example, on a person who has a mental disability or is under 18 years old) and that person has a '**litigation representative**', the document must be served on the litigation representative.¹⁵ Note that in the Federal Circuit Court this person is referred to as a '**litigation guardian**'.¹⁶

CAUTION

Different requirements for service apply where you are serving someone overseas. Please consult with the Registry staff and obtain legal advice about these requirements.

A litigation representative or litigation guardian is a person who has been appointed to represent a person in a proceeding under a legal incapacity.¹⁷ This may include a parent or guardian, the Public

⁹ Federal Court Rules 2011, r 8.06.

¹⁰ Federal Circuit Court Rules 2001, r 6.03(2), 6.06, 6.19.

¹¹ Federal Circuit Court Rules 2001, r 6.03(2), 6.06, 6.19.

¹² Federal Court Rules 2011, r 10.01 and Federal Circuit Court Rules 2001, r 6.07(1).

¹³ Federal Court Rules 2011, r 10.12 (1)(a),(b) and Federal Circuit Court Rules 2001, r 6.07.

¹⁴ Federal Court Rules 2011, r 10.22.

¹⁵ Federal Court Rules 2011, r 10.09.

¹⁶ Federal Circuit Court Rules 2001, r 11.08.

¹⁷ Federal Court Rules 2011, Sch 1.

Trustee for each respective state and territory in Australia (for example, the NSW Public Trustee and Guardian) or a trustee company.¹⁸

Even if a person under a legal incapacity has a litigation representative or litigation guardian, you are still required to personally serve the following documents on the person under a legal incapacity:

- a subpoena requiring the person under a legal incapacity to attend court; and
- where the person under a legal incapacity is the respondent and an order has been made by the court which requires that person to do, or not do, an act or thing, the application or order.¹⁹

If the person does not have a litigation representative or litigation guardian, the document can be served on the person's guardian, a person with whom the person lives (if they do not have a guardian) or the person's carer.²⁰ In the case of a minor who is at least 16 years old and not a mentally disabled person, you must serve both the minor **and** the parent or guardian.²¹ If you cannot serve a person's litigation representative or litigation guardian, you can apply to the court for an order that the document be served in some other way or on some other person.²²

5.2.3 Ordinary service

If you are serving documents on a natural person and they do not need to be personally served, you can serve them by:²³

- delivering or sending the documents, in a sealed envelope via pre-paid post, to the person's address for service or last-known business or residential address;
- where that person has agreed that they may be served by fax, sending the documents to the fax number provided by that person;
- where that person has filed a notice authorising service by email, emailing the person;
- where the person's address for service includes the number of a document exchange box for a lawyer, by placing a pre-paid envelope, containing the documents, in that box; or
- where the person is legally represented and their address for service includes their lawyer's email address, emailing the documents to that person's lawyer.

¹⁸ Federal Court Rules 2011, r 9.62.

¹⁹ Federal Court Rules 2011, r 10.10.

²⁰ Federal Court Rules 2011, r 10.09 and Federal Circuit Court Rules 2001, r 11.15.

²¹ Federal Court Rules 2011, r 10.09(2).

²² Federal Court Rules 2011, r 10.09(4).

²³ Federal Circuit Court Rules 6.11, Federal Court Rules r 10.31.

RELATED RESOURCES

Both the [Federal Court](#) and the [Federal Circuit Court](#) require a respondent to complete a notice of address for service form after a proceeding has commenced (see Annexure A). You can generally find an applicant's address for service on the originating process.



5.3 Service on a corporation

If you are required to personally serve documents on a corporation, you can serve them by:²⁴

- leaving the documents at, or posting them to, the company's registered office (which you can find out through an ASIC search) or if there is no registered office, at the principal place of business of the corporation;²⁵
- personally delivering the documents to a director of the company who resides in Australia or in an external territory; or
- where a company has become insolvent and a liquidator or administrator has been appointed, leaving the documents at, or posting them to, the address of the liquidator's or administrator's office, as most recently lodged with ASIC.

TIP

An ASIC search can be completed here:

<http://www.asic.gov.au/online-services/search-asics-registers/>

ASIC stands for the Australian Securities and Investment Commission. Corporations need to notify ASIC of any changes to the address of their registered office or directors.

NOTE

Slightly different requirements apply where the party to be personally served is an unincorporated association, organisation or partnership.²⁶ You can serve these bodies by serving a document at their principal place of business and leaving the document with a person who is an adult and appears to be engaged in the operations of the association, organisation or partnership.²⁷

6. Proving you have served someone

Once you (or someone on your behalf) have served documents on the other party, you should keep a written record of how that person was served, in case anyone disputes that you did not serve them properly.

²⁴ Federal Court Rules 2011, r 10.02 citing Corporations Act 2001, s109X (1) and Federal Circuit Court Rules 2001, r 6.08(2)(a) citing Corporations Act 2001, s109X(1).

²⁵ Federal Circuit Court Rules 2001, r 6.08(1).

²⁶ Federal Court Rules 2011, r 10.03, 10.04, 10.05 and Federal Circuit Court Rules 2001, r 6.08(1)(b), (c), 6.10.

²⁷ Federal Court Rules 2011, r 10.03-10.05.

After a document is personally served, you should consider having the person who served the document prepare an affidavit of service as soon as possible. This will constitute evidence of service and help you in responding to any dispute about whether service has occurred, particularly if the other party does not attend court for the first directions hearing.²⁸

An affidavit of service will need to include the time, date and place of service, manner of service, how the person served was identified and how the document being served was identified. An **'authorised person'** must witness an affidavit of service. An authorised person can include a lawyer, notary public or Justice of the Peace. Our fact sheet entitled **'Preparing Documents for Court'** contains further useful information on preparing an affidavit.

In the Federal Circuit Court, there is a specific form (with instructions) you complete for the affidavit of service. In the Federal Court, there is no specific form and you can use the general affidavit form for the affidavit of service. See **Annexure A** for links to the relevant affidavit form for each court.

Once complete, you must file the affidavit with the relevant court Registry. In the Federal Court you may electronically file affidavits (and a number of other court documents) online through its e-Lodgment service (www.elodgment.fedcourt.gov.au). You can also lodge documents for the Federal Circuit Court online at the Commonwealth Courts Portal (www.comcourts.gov.au). Alternatively, you can physically take the original affidavit (as well as several copies) to the court Registry for filing.

If the document does not have to be personally served, it is still a good idea to obtain an affidavit of service or at least keep any relevant records which show that the document was served (for example, copies of correspondence, making a note of the day you put a letter in the post and /or records about delivery tracking).

7. Substituted service

Substituted service requires the court's permission and is an alternative method of service to the typical service requirements.

You may apply to the court seeking substituted service orders where it is has not been possible to serve a document in a way required by the court rules or where you have been unsuccessful in your attempts to serve documents by the applicable methods set out in the relevant court rules. These orders are typically made when the other party has been evading service.

The Federal Circuit Court may take into account the following factors when determining whether to approve your application:²⁹

²⁸ Federal Circuit Court Rules 2001, r 6.05.

²⁹ Federal Circuit Court Rules 2001, r 6.15.

- whether you have taken reasonable steps to serve the document;
- whether your prior attempts to serve the document were likely to have made the person aware of the existence and nature of the document;
- whether there is an alternative method of service that would likely be successful in making the person aware of the existence and nature of the document; and
- the likely cost of serving the document and your ability to meet this cost.

If your application is successful, the court can make any of the following orders, namely:

- substituting another method of service;
- dispensing with the need for service and stating that other steps can be taken to bring the document to the person's attention; or
- specifying that the document is taken to have been served with a certain event or at a certain time.³⁰

7.1 Applying for a substituted service order

The process to seek a substituted service order will depend on the type of documents you are trying to serve. **Annexure A** contains a list of websites containing the relevant documents mentioned below.

1. Completing an application for substituted service

- a) Applications for substituted service of a document will usually require you to make an application to the court (known as an '**interlocutory application**') which typically can be made without needing to notify or serve another party. The relevant form for the Federal Circuit Court and the Federal Court is specified in **Annexure A**.

2. Completing an affidavit(s) with supporting reasons that explains why the application is being made

- a) The Federal Court requires completion of a specific affidavit (Form 59); and
- b) The Federal Circuit Court requires completion of a general affidavit.

3. Filing the application and affidavit at the Federal Court or the Federal Circuit Court Registry, along with the applicable filing fee

³⁰ Federal Court Rules 2011, r 10.24 and Federal Circuit Court Rules 2001, r 6.14.

Most substituted service applications are determined by a Registrar online through an eCourtroom.

7.2 Substituted service using social media

Service by social media channels, such as Facebook and Twitter, is treated with **caution** by the courts. If you are seeking to serve someone using social media, you will need to show that you have complied with the relevant court rules and /or orders. Given the courts' current attitude towards service using social media, we recommend that you do **not** rely solely on serving a person in this way.

8. Consequences of improper service

Failing to serve a document at all or in the proper way can delay the proceeding and have other consequences. It is essential that you always follow the instructions about service set out in the relevant court rules. A proceeding will not normally progress further until the originating process has been served on the relevant parties in accordance with the relevant court rules. However, failing to comply with service requirements will not necessarily mean that the overall proceeding is set aside – this depends on a range of factors, including whether substantive injustice has been caused to the other party.³¹

Generally, a document cannot be served more than 12 months after it has been filed in the Federal Circuit Court.³²

If you do not properly serve documents during the course of the proceeding, then there may also be consequences. Failing to serve the other party may result in the proceeding being delayed, or the Judge might refuse to give you the orders that you seek. However in some limited cases, if you do not adhere to the service requirements, a Judge may still deem that your attempted method of service was effective where it is difficult to serve the documents in the required way and where you can prove that the document has been brought to the attention of the other party.³³ This is referred to as '**deemed service**'.

³¹ Federal Court of Australia Act, s 51(1).

³² Federal Circuit Court Rules 2001, r 6.17.

³³ Federal Court Rules 2011, r 10.23 and Federal Circuit Court Rules 2001, r 6.04(b).

ANNEXURE A

Reference in this fact sheet	Description
5.2.3	Address for Service Form – Federal Court
5.2.3	Address for Service Form – Federal Circuit Court
6	Affidavit of Service – Federal Circuit Court
6	Affidavit of Service – Fair Work
6	General Affidavit – Federal Court
7.1	Interlocutory Application – Federal Circuit Court
7.1	Interlocutory Application- Federal Court
7.1	Affidavit for Substituted Service – Federal Court
7.1	Affidavit for Substituted Service – Federal Circuit Court

All of these forms can be found on the [Federal Circuit Court](#) and [Federal Court](#) website.

Resources

Related Resources

- ✔ eLodgment is the electronic filing facility for the Federal Court of Australia and can be accessed here: www.fedcourt.gov.au/online-services/elodgment
- ✔ The Commonwealth Courts Portal is the is the electronic filing facility for the Federal Circuit Court and can be accessed here: www.comcourts.gov.au/

Legislation

- ✔ *Federal Circuit Court Rules 2001*
- ✔ *Federal Court Rules 2011*
- ✔ *Federal Court of Australia Act 1976*