New rules for extra-territorial jurisdiction in Western Australia

The rules regarding service outside the jurisdiction are about to change for the Supreme Court of Western Australia.

In a March notice to practitioners, the Chief Justice informed the profession that the *Supreme Court Amendment Rules 2024* (WA) (**Amendment Rules**) were published on the WA legislation website on 26 March 2024.

The Amendment Rules amend the *Rules of the Supreme Court 1971* (WA) (**RSC**). The primary change is the replacement of the current RSC Order 10 (Service outside the jurisdiction) while amending other relevant rules, including some within Order 11 (Service of foreign process) and Order 11A (Service under the Hague Convention).

The combined effect of the changes is to align the Court's approach to that which has been applicable in the other State Supreme Courts for some years.

The changes will take effect on 9 April 2024.

Background

The rules as to service outside the jurisdiction are important to cross-border litigation in Australian courts. Among other things, the rules on service provide the limits to the court's jurisdiction *in personam*: *Laurie v Carroll* (1957) 98 CLR 310, 323.

Whether a litigant has a judicial remedy before a court with respect to a person located outside of that court's territorial jurisdiction will depend on that court's rules as to service, among other things.

'[C]ivil jurisdiction is territorial': *Gosper v Sawyer* (1985) 160 CLR 548, 564 (Mason and Deane JJ). So historically, the rules on service would authorise 'service out' when there was an appropriate connection between the subject matter of the claim and the court's territory. For example, a court would have the requisite connection to a contract dispute where the contract was made in the

forum jurisdiction, even though the defendant in breach was located outside the jurisdiction.

The requisite connection to forum territory sufficient to justify a court's extra-territorial jurisdiction over a person not within the forum would depend on the rules of that particular court.

State Supreme Courts' approaches to 'long-arm jurisdiction' depend on where the defendant is located. If within Australia, the rules are effected by the *Service and Execution of Process Act 1992* (Cth) as modified by the rules of the forum court. Within New Zealand, the rules are in the *Trans-Tasman Proceedings Act 2010* (Cth)—legislation in the spirit of the Hague Conference on Private International Law—as modified by the rules of the forum court. Defendants in any other foreign country are captured by the rules of the forum court. The same goes for the Federal Court of Australia via the *Federal Court Rules 2011* (Cth); see *Overseas Service and Evidence Practice Note* (GPN-OSE).

In characteristically Western Australian fashion, the Supreme Court of Western Australia has historically taken a unique approach to service out as compared to other State Supreme Courts of the Federation. As Edelman J explained in *Crawley Investments Pty Ltd v Elman* [2014] WASC 233, [45], the Western Australian rules have derived from Chancery practice, whereas the approach under the historical *Supreme Court Rules 1970* (NSW) pt 10—underpinning leading authorities like *Agar v Hyde* (2000) 201 CLR 552—was quite different. See *Agar v Hyde*, CLR 572 [16].

The key difference was that the Supreme Court of WA had retained a need for leave to serve outside of the jurisdiction in advance, together with leave to have the writ issued, for persons outside Australia and not in New Zealand: see historical RSC O r 9 and O 10 r 4. Previously, the Federal Court was somewhat similar by also requiring leave, until it took a new approach from January 2023.

Some years ago, the Council of Chief Justices' Rules Harmonisation Committee agreed to harmonise the rules as to service out as between Australia's superior courts. New South Wales took the step of giving effect to what were then 'new rules' back in 2016. I discussed those changes with Professor Vivienne Bath: Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules'

(2017) 44(2) *Australian Bar Review* 160. Other States took the same approach.

In comparison to WA, the 'new approach' of the eastern States' courts required very little connection between the forum jurisdiction and the subject matter of the dispute. For example, the Supreme Court of NSW could claim jurisdiction over a claim involving a tort occurring outside Australia provided there was just *some* damage occurring in Australia (not occurring in New South Wales—occurring in Australia): see *Uniform Civil Procedure Rules 2005* (NSW) sch 6(a). Damage in the forum was not enough in the Supreme Court of WA: the tort had to occur in Western Australia (not just occurring in Australia): see historical RSC O 10 r 1(1)(k).

Through the Amendment Rules, the Supreme Court of WA is finally giving effect to what was agreed by the Rules Harmonisation Committee.

The changes

The changes for practice in the Supreme Court of Western Australia are significant in a number of respects. The full impact of the changes will require further pondering. The following is immediately apparent.

First, RSC Order 10 has been replaced with most significant impact for cases where the person to be served is outside Australia and not in New Zealand: see the new RSC O 10 div 3.

Second, service outside Australia is now possible without leave in the same circumstances that service would be permitted without leave in other 'harmonised' jurisdictions, like the Supreme Court of NSW. See the new RSC O 10 r 5.

Third, even if the circumstances do not satisfy the very broad pigeonholes of connection specified by the new RSC O 10 r 5, service outside Australia is still permissible with leave if the claim has a real and substantial connection with Australia, and Australia is an appropriate forum (which oddly means not a clearly inappropriate forum per the Australian doctrine of *forum non conveniens*—a whole other conundrum), among other things: see the new RSC O 10 r 6(5).

A remaining issue is the interaction between the new RSC O 10 and RSC OO 11

and 11A, particularly as regards service in accordance with the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The latter order deals with service under the Hague Convention, but it is not clear if the Hague Convention procedure for service out displaces the autochthonous procedure for service out under RSC O 10, or merely prescribes the manner or mode of service in convention countries as opposed to impacting substantive bases for whether long-arm jurisdiction is warranted.

The relationship between the historical OO 10, 11 and 11A has been one for debate, as recognised by my co-author Bell CJ in chapter 3 of the latest edition of *Nygh's Conflict of Laws in Australia*: see [3.27]. The situation remains confusing. I am still confused. I look forward to becoming less confused after conferring with more learned colleagues.

Comment

The changes will likely be welcomed by the profession. They make cross-border litigation easier in Western Australia. They will make life easier for 'foreign' east-coast practitioners trying to dabble at practice in WA.

But I expect they will be lamented by many in the private international law community. Most academics I know subscribe to the Savigny orthodoxy that forum shopping is bad, and courts should only seize themselves of jurisdiction when they have a genuine, or *real and substantive*, territorial connection to the subject matter of the dispute. I know Professor Reid Mortensen will criticise these changes as 'exorbitant' and contrary to principle. I disagree with Reid (to hell with multilateralism—Australia first!) but I respect the arguments to the contrary. We can all agree: these changes reaffirm Australia's unique willingness to exercise jurisdiction in a way that many foreign courts would consider exorbitant.