# OVERSEAS SERVICE AND EVIDENCE PRACTICE NOTE (GPN-OSE)

## General Practice Note

### INTRODUCTION

* 1. This practice note provides guidance on service of originating applications and other documents outside Australia, as well as on taking evidence abroad. Subject to paragraph 2.7 below, this practice note applies to all proceedings in the Federal Court.
  2. This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

### SERVICE OF PROCESS OVERSEAS

* 1. The kinds of proceedings in which an originating application may be served outside Australia without leave are identified in r 10.42 of the *[Federal Court Rules 2011](https://www.legislation.gov.au/F2011L01551/latest/text)* [(Cth)](https://www.legislation.gov.au/F2011L01551/latest/text) (“**Federal Court Rules**”), and include proceedings that are based on a cause of action arising in Australia and proceedings in which the person to be served has submitted to the jurisdiction of the Court.
  2. A proceeding where service is not allowed under r 10.42 may be served outside Australia with the leave of the Court pursuant to r 10.43. In such a case, leave of the Court should be obtained prior to serving an originating application or other court document outside Australia. Leave to serve an originating application outside Australia may be granted if the Court is satisfied that the proceeding has a real and substantial connection to Australia, Australia is an appropriate forum, and in all the circumstances the Court should exercise jurisdiction in the proceeding (see r 10.43(4) of the [Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text)).
  3. The Court has a discretion pursuant to r 10.43A to dismiss or stay a proceeding that has been served outside Australia or set aside that service on application by the person served, including where it is satisfied that the service of the originating application is not authorised by the [Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text), Australia is an inappropriate forum, or the claim has insufficient prospects of success to warrant putting the person served to the time, expense and trouble of defending it.
  4. If a person is served outside Australia with an originating application, the person served must also be served with a notice informing the person of the matters specified in r 10.43B and any other documents required to accompany the originating application, such as the documents required by r 8.05 or r 10.43(5) (see r 10.42 and 10.43(1)).
  5. If a person served with an originating application outside Australia does not file a notice of address for service within the time fixed by r 10.43C, the person serving the document may not proceed against the person served except with the leave of the Court pursuant to r 10.43D.
  6. Any court document other than an originating application may be served outside Australia with leave of the Court pursuant to r 10.44.
  7. The [*Trans-Tasman Proceedings Act 2010* (Cth)](https://www.legislation.gov.au/Series/C2010A00035) (**“TTPA”**) provides for service in New Zealand of initiating documents in civil proceedings started in Australian courts. Where service may be effected under the [TTPA](https://www.legislation.gov.au/Series/C2010A00035), an applicant in a proceeding in this Court should proceed under that Act rather than under Division 10.4 of the [Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text) (see r 10.41).
  8. A party applying for leave to serve an originating application or other court documents on a person in a country other than Australia under Division 10.4 of the [Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text) , or for an order confirming service already undertaken, should support the application with an affidavit as required by r 10.43(3) of the [Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text) . The rules require that the affidavit state any facts or matters related to the desirability of the Court assuming jurisdiction, including the place or country in which the person to be served is or possibly may be found, and whether or not the person to be served is an Australian citizen.

### TAKING OF EVIDENCE OVERSEAS

* 1. Parties and their legal representatives should be aware of the [*Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*](https://www.hcch.net/en/instruments/conventions/full-text/?cid=82). There are two fundamental methods of taking evidence abroad under the Convention: Chapter I – Letters of Request; and Chapter II – Taking of evidence by Diplomatic Officers, Consular Agents and Commissioners. The Convention and useful working and explanatory documents can be found on the website of the [Hague Conference on Private International Law](http://www.hcch.net/en/home).[[1]](#footnote-1)

##### Applying for an Order to Examine a Witness outside Australia

* 1. A party may apply under Division 29.2 of the[Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text) for an order for the examination of a witness before a Judge[[2]](#footnote-2) outside Australia. A draft of the order sought must be lodged with the application (see r 29.11(2) of the[Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text)). The application should also be accompanied by an affidavit or other evidence relied on in support.
  2. In deciding whether to make the order, the Court will consider whether the examinee is willing or able to come to Australia to give evidence, whether the evidence is expected to be material and whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.[[3]](#footnote-3)
  3. If an order is made, parties should expect that, in the ordinary course, the order will:
     1. provide that the examination will be conducted before a Judge in a specified place outside Australia;
     2. provide for witnesses (usually named) to be examined on oath or affirmation; and
     3. be expressly conditional upon the payment into Court of an amount, to be subsequently determined, as provision for expenses of the Judge and Court staff in relation to the examination.
  4. The parties (if appropriate) should arrange suitable accommodation for the conduct of each examination and for transcription facilities.
  5. The costs and expenses of, and incidental to, the examinations will be borne in the first instance equally by the parties to the proceedings and, subject to any order to the contrary, be treated as part of the general costs of the proceeding.
  6. Evidence should be adduced of whether or not each witness proposed to be examined is an Australian citizen and whether or not each witness is expected to give evidence voluntarily.
  7. Under Government policy, all official overseas travel by judges of the Court must be approved by the Chief Justice. The hearing of any application should be timed to allow the judge hearing it to consult with the Chief Justice and ascertain whether, should an order to appoint a judge to take evidence outside Australia be made in the proceeding, approval to travel will be given.

##### Notification

* 1. Following the making of any order appointing a judge to take evidence outside Australia, the following letters are sent by the Court. Further letters may be necessary to confirm dates and other arrangements.

| **Sender** | **Recipient** | **Reason** |
| --- | --- | --- |
| Chief Justice | Counterpart in overseas jurisdiction  Attorney-General | To obtain permission for the judicial officer to examine witnesses in that jurisdiction  To comply with Government policy requiring notification, at least three weeks in advance, of any proposed official overseas travel by federal judges |
| District Registrar of relevant registry | Department of Foreign Affairs and Trade | To ensure that the relevant government authorities are informed and all approvals are sought, including approval for the examiner to administer an oath or affirmation |
| District Registrar of relevant registry | Relevant court administrator in overseas jurisdiction | To obtain courtroom or chambers accommodation, if required. |

##### Calculation of Travel Expenses

* 1. Travel expenses of a judge are determined according to the determination in force from time to time of the Remuneration Tribunal under the [*Remuneration Tribunal Act 1973* (Cth)](https://www.legislation.gov.au/C2004A00043/latest/text). Further information is available on the [Remuneration Tribunal website](http://www.remtribunal.gov.au).
  2. Travel expenses for Court staff are determined by the Chief Executive Officer and Principal Registrar of the Court or delegate. This normally includes accommodation at a standard reasonably equivalent to that provided to Court staff in Australia, and meal and incidental allowances at the rates determined annually by the [Australian Taxation Office](http://law.ato.gov.au) in its taxation ruling dealing with reasonable travelling allowance amounts. Further information is available from the District Registrar of the relevant [registry](http://www.fedcourt.gov.au/contact).

##### Travel Proposal and Projection of Costs

* 1. As soon as possible after any order is made for the taking of evidence outside of Australia, the parties should prepare and lodge with the District Registrar of the relevant registry a travel proposal for the Judge and any Court staff, together with a projection of costs including:
     1. proposed dates, route, flights, class, carrier and ticketing (fully flexible return tickets must be provided) for travel;
     2. proposed arrangements for ground travel;
     3. three options (if possible) for hotel accommodation;
     4. daily allowance for meals and incidentals; and
     5. any other anticipated expenses.
  2. The parties will also provide to the District Registrar details of what arrangements are proposed for the conduct of each examination and for transcription.

##### Payment into Court

* 1. On receiving the travel proposal and the projection of costs, the District Registrar will liaise with the Judge to identify whether the proposal is satisfactory and consider whether the cost projection made is sufficient to provide for the likely expenses of the examination. The District Registrar will, if necessary, liaise with the parties about any possible modifications. If required, the District Registrar may seek directions from a judge. Once the amount for the provision for the Court’s expenses of the examination is determined, and before the commencement of the examination, the parties will pay that amount in equal shares into Court.

##### Reconciling Expenses

* 1. As soon as possible after the examination, the District Registrar will reconcile and account to the parties for the costs actually incurred by the Court of and incidental to the examination. If the amount paid as a provision for those expenses exceeds those costs, the excess will be refunded to the parties in equal shares. If there is a shortfall in the amount paid as a provision for those expenses against those costs, the parties will pay the amount of the shortfall into Court in equal shares within seven (7) days of receiving written notification.

##### Evidence from Overseas by Video Link

* 1. Refer to the [Technology and the Court Practice Note (GPN-TECH)](http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-tech) and the Court’s website for further information on arrangements for the use of a [video link in a hearing](http://www.fedcourt.gov.au/services/videoconferencing-guide).

D. S Mortimer  
Chief Justice

12 August 2024

1. See: [www.hcch.net/en/home](http://www.hcch.net/en/home). A Practical Handbook on the operation of the Convention can be purchased from this website. [↑](#footnote-ref-1)
2. Although the examiner will usually be a judge, a registrar of the Court or other person may also be appointed for the purpose of an examination (see r 29.11 and the definition of “examiner” in Schedule 1 of the [Federal Court Rules](https://www.legislation.gov.au/F2011L01551/latest/text)). [↑](#footnote-ref-2)
3. See s 7(2) of the [*Foreign Evidence Act 1994* (Cth)](https://www.legislation.gov.au/Series/C2004A04735). [↑](#footnote-ref-3)