

KELLEHERS AUSTRALIA

In-House Briefing Memorandum

Substituted Service

Substituted service is a form of serving legal proceedings where it is otherwise impracticable to serve a document on a person. The Court may order that specified steps be taken for the purpose of bringing the document to the notice of the person to be served. This may arise where a defendant has withdrawn himself to avoid service: *Howse v Campbell* [1881] 7 VLR (E) 145. The rules of substituted service address this problem by allowing the Court to order that instead of service in the usual manner prescribed by the Court Rules, steps are taken, as the court directs, to bring the document to the notice of the person to be served.

A substituted service order requires two elements:¹

1. a **practical impossibility** of actual service; and,
2. that the method of substituted service proposed would in **all reasonable probability**, if not certainty, be effective to bring knowledge of the writ to the defendant.

The Court requires sufficient evidence of the attempts and difficulties in serving the document in the usual manner to show that such service is impracticable. Inability to serve promptly is insufficient. For example, where an application for an order for substituted service of a writ was made on the last day for service of the writ, and it was practicable to serve the writ personally on the next day but not on that day, service was not considered impracticable and the order was refused: *Paragon Group Ltd v Burnell* [1991] 2 All ER 388. Service may be shown to be impracticable if any attempt to effect service would be so futile as to be unwarranted: *Ricegrowers Co-op Ltd v ABC Containerline NV* [1996] 138 ALR 480; *British American Tobacco Australasia Ltd v Taleb (No 1)* [2012] FCA 1065.

The standard in determining practical impossibility is one of reasonableness, not over a particular period but rather at the time the application for substituted service is made: *Foxe v Brown* [1984] 58 ALR 542. However, even where difficulties in service are shown to have existed, if there are deficiencies in the documents to be served, there is no point in a substituted service order and the Court will refuse an order: *Transfield Phillipines Inc v Pacific Hydro Ltd* [2006] VSC 175 at [94].

Substituted service is not to be confused with international service or service outside the jurisdiction. Service in these circumstances is governed by its own set of rules and procedures. If the defendant resides out of Australia, the fact that the plaintiff must follow the procedure for service **out** of the jurisdiction is no basis for claiming that service is impracticable so as to justify an order for substituted service in Australia: *Mondial Trading Pty Ltd v Interocean Marine Transport Inc* [1985] 65 ALR 155.

Leave to effect substituted service in the Supreme Court of Victoria is obtained on application made *ex parte* to a List Associate Judge. The application must be supported by an affidavit setting out the circumstances relied on to justify the grant of leave, including all the efforts to serve the document, particulars of time and place, and, where personal service was attempted, who was seen and what occurred. The affidavit should set out an appropriate method of service and reasons for believing that this method will ensure the proceedings come to the notice of the person to be served. In *Howse v Campbell*, the affidavit recorded difficulties serving the defendant: the plaintiff's solicitor wrote to the defendant's solicitor asking him to accept service, to which the reply came that the defendant's whereabouts were not known. A process server swore that he had made every effort to effect service, without results, and could learn nothing about his whereabouts. There were just grounds for believing the defendant had withdrawn himself to avoid service, and an order was made for substituted service on the defendant's solicitor.

Substituted service is an effective method for bringing proceedings against a defendant where personal service is impossible. While it does not circumvent the ordinary Court requirements for bringing a document to the knowledge of the person to be served, it provides scope for service in situations where it would otherwise be impracticable.

¹ *Porter v Freudenberg* [1915] 1 KB 857; *Hilaire v Harvie* [1951] 68 WN (NSW) 61; *London Discount & Mortgage Bank v Daish* [1890] 16 VLR 325; *Zinc Corp Ltd v Hirsch* [1916] VLR 550; *Abbey National Plc v Frost* [1998] 2 All ER 321;
Copyright © Kellehers Australia 2013

This fact sheet is intended only to provide a summary and general overview on matters of interest. It does not constitute legal advice. You should always seek legal and other professional advice which takes account of your individual circumstances.

KELLEHERS AUSTRALIA: www.kellehers.com.au / e: kelllegal@kellehers.com.au

497 Swan Street, Burnley, 3121, Victoria, Australia