

INSTITUTE OF **MERCANTILE AGENTS LIMITED**



**I M A**



**BEST PRACTICE GUIDE**

**PROCESS SERVING**

# TABLE OF CONTENTS

<b>A   INTRODUCTION</b>	<b>4</b>
THE ASSOCIATION .....	4
THIS BEST PRACTICE GUIDE.....	4
LEGAL AND REGULATORY .....	5
THE INDUSTRY .....	5
PROCESS SERVING ASSIGNMENTS.....	5
“PRINCIPAL & AGENT” RELATIONSHIP .....	6
<b>B   KEY REQUIREMENTS</b>	<b>7</b>
<b>C   BUSINESS CONSIDERATIONS</b>	<b>9</b>
LICENSING.....	9
IDENTIFICATION .....	9
INSURANCES .....	9
SECURITY .....	11
IN THE OFFICE .....	11
IN THE FIELD .....	12
IN HOME OFFICES .....	12
BUSINESS CONTINUITY.....	12
TRAINING.....	13
IT & DATA.....	14
DATA PROTECTION AND CONFIDENTIALITY.....	14
MONITORING COMPLIANCE.....	15
MEDIA ENQUIRIES.....	15
<b>D   SUBJECT INTERACTIONS</b>	<b>16</b>
CONTACTING SUBJECTS .....	16
LEAVING MESSAGES.....	16
MENTAL HEALTH.....	16
ACTING APPROPRIATELY .....	16
<b>E   OPERATIONALLY</b>	<b>18</b>
GUIDANCE .....	18
INSTRUCTION TYPES .....	18
ACCC/ASIC GUIDELINE .....	18
SPECIFIC OPERATIONAL GUIDELINES.....	18
REPORTING.....	19
TRESPASS.....	20
FEES.....	21

MANAGING EXPECTATIONS .....	21
<i>PROVISION OF SERVICES</i> .....	21
<i>TIMEFRAMES FOR SERVICES</i> .....	21
<i>CHARGES FOR SERVICES</i> .....	22
<b>F   COMPLAINTS &amp; DISPUTES</b> .....	<b>23</b>
COMPLAINTS .....	23
DISPUTES .....	23
EXTERNAL DISPUTE RESOLUTION.....	24
<b>G   GLOSSARY</b> .....	<b>25</b>
<b>H   ANNEXURES</b> .....	<b>26</b>
ANNEXURE 1 TRAINING REGISTER .....	26
<b>I   INDEX</b> .....	<b>27</b>

## THE ASSOCIATION

The Institute of Mercantile Agents (IMA) which has a history dating back to 1961 is the only national association in Australia for businesses and persons providing process serving services.

The main objectives of the IMA are:

- to represent the professional interests of members;
- to foster a membership committed to the highest level of ethics, integrity and best business practice; and
- to advance members' interests nationally with government, business and the general community to provide an environment for their ongoing commercial success.

As the industry continues to develop, the IMA is proactively helping members to achieve and maintain best practice and will continue to engage with regulators and lobby on behalf of its members.

## THIS BEST PRACTICE GUIDE

The IMA is the industry association nationally representing businesses and persons engaged in collections, investigations, process serving and repossession services in Australia.

Membership of the IMA is voluntary - businesses and persons join to demonstrate their commitment to the high standards adopted and promoted by the association.

This Best Practice Guide sets out best practice standards expected from members involved in the provision of process serving services and which subjects and businesses engaging with members should expect. Members agree to comply with this Best Practice Guide by virtue of membership.

This Best Practice Guide will enable subjects and businesses to address their situation involving the service of documents in confidence of fair treatment by members.

We do not support any level of avoidance or delaying tactics from subjects, or any nuisance calls to our members through abuse or intentional misinterpretation of this Best Practice Guide or any other regulatory device.

This Best Practice Guide is intended as a helpful resource for subjects and clients, whilst compliance by members is intended to ensure best practice standards are maintained.

## **LEGAL AND REGULATORY**

The IMA expects its members to maintain all required regulatory licences, registrations and authorisations and to adhere to all relevant legal and regulatory requirements, guidance and best practice including this Best Practice Guide.

This Best Practice Guide is divided into sections relating to likely activities of members.

Some sections apply to all members whilst others apply only to members undertaking the particular activity.

To attain best practice, members should comply with all the sections of this Best Practice Guide relevant to their specific business activities.

Care has been taken to include legislative detail and obligations current to the date of preparing this guide, however readers should always review current versions of specific legislation and regulations to ensure they access the latest requirements.

## **THE INDUSTRY**

Businesses engaged in providing process serving services in Australia use a variety of descriptors including: mercantile agents, field agents and process serving agents.

The industry in Australia in its early years comprised mainly of businesses acting as general practitioners to deliver a “one stop” range of services including debt collection, process serving, repossessions and skiptracing.

Over time, the expectations of clients on the industry have matured and this coupled with increased regulatory compliance obligations has led to the industry adjusting to the new environment by adopting specialisation of service delivery.

Within regional and country locations, it is still the case that businesses in the industry continue to act as general practitioners offering a range of services to their clients, however increasingly and especially in city locations, businesses are specialists in one aspect of activity.

## **PROCESS SERVING ASSIGNMENTS**

The nature of the work undertaken for process serving necessarily requires physical attendance at addresses and with the geographic spread of the Australian population, it is a common practice that principal agencies when receiving instructions from clients are routinely required to on-forward those instructions to a secondary agency servicing the specific location to attend to the process serving task and report and invoice back to the principal agency for later reporting to the client.

The work involves acting on behalf of clients (mostly legal practitioners, financiers, insurance companies and government departments and authorities) to attend at an address to attempt service of legal documents. In the event the subject is no longer at the nominated address, the process serving agent is required to make enquiries of the current occupant at the address to establish any forwarding address.

The process serving agent is required to make contemporaneous notes of his attendance and outcome of his activities.

Upon completion of a process serving instruction, the agent provides a detailed report to his client.

Process serving agents are remunerated on a “fee for service” basis - such fees do not include any commission based component. The process serving agent is paid a fee to attend the address which is not dependent upon being able to effect the service.

## **“PRINCIPAL & AGENT” RELATIONSHIP**

The principal agency acts strictly under an agency agreement (principal & agent) to the client.

Generally, there are no service level agreements or contracts in place and the agency receives instructions in writing (which is a legal requirement in some jurisdictions) on a case by case basis. In some cases, there are service level agreements in place between the client and the principal agency specifying the required agent conduct and account management standards to be maintained by the principal agency.

Any complaints by a subject about alleged misconduct or activity of the process serving agent ultimately rest with the client on the basis of the “principal & agent” relationship. The principal agent due to the “principal & agent” relationship is bound by the lawful directions of the instructing client.

Every member shall:

1. conduct its business in compliance with all relevant legislation, regulations, regulatory guidance and requirements and this Best Practice Guide
2. conduct its business under names, titles and trading styles which are not intended to confuse, mislead or otherwise embarrass clients, subjects or members of the public and which will not imply any association with other organisations, government bodies or persons which either do not exist or carry no association with the business
3. cooperate with the IMA, regulators and organisations which regulate or supervise the process serving sector
4. make available on its website (if it has one) or upon a request, a copy of this Best Practice Guide
5. provide adequate and sufficient training to its employees including providing annual refresher training and independent assessment to confirm competency with and that they conduct themselves in accordance with this Best Practice Guide
6. regularly examine and audit their practices, strategies, communications and compliance culture against this Best Practice Guide
7. ensure that any communication complies with this Best Practice Guide and is in plain English
8. have and maintain clear and effective policies and procedures covering all business activities it is engaged in
9. not unlawfully discriminate against any person
10. inform its clients of the true rates of charges for services rendered
11. ensure it undertakes due diligence and desk audits on a regular basis of each secondary agent to whom sub contract instructions are issued to ensure adherence to regulatory requirements and this Best Practice Guide regardless of whether such secondary agent is a IMA member
12. comply with all reasonable requests for information made by subjects or their authorised representatives, regulators and clients, whether obliged to comply by regulation/legislation or not
13. treat businesses with whom it deals fairly and transparently
14. honour all payment terms agreed with secondary agents and other suppliers
15. make contact at reasonable times and at reasonable intervals (unless the matter is urgent, for example the hearing date/last date for service is approaching) taking into consideration the reasonable requests of the subject, which may include a preferred time and method of service
16. take appropriate steps to ensure the accuracy of data processed and in particular data relating to individuals and their circumstances
17. ensure sensitive data relating to subjects (including information such as health, racial or ethnic background or criminal records) is handled appropriately and specific consent obtained from the subject concerned prior to any disclosure
18. take reasonable steps to ensure that the person being served is in fact the subject
19. communicate with subjects fairly and transparently and not intentionally mislead them

20. cooperate with subjects and their authorised representatives and not act in a manner intended to publicly embarrass or cause them distress
21. treat subjects fairly and not subject them or their authorised representatives to aggressive practices or conduct which is deceitful, oppressive, unfair or improper, whether lawful or not



## LICENSING

Licensing requirements for businesses and persons in Australia engaged in providing process serving services vary according to the State or Territory jurisdiction where the services are provided.

Nationally, there is no single regulatory environment licensing corporations or persons providing process serving services. Instead, the regulatory environment is dependent upon the state or territory where the corporation or person providing process serving services is located.

Members are required to meet the relevant licensing requirements for their business and employees – the details of the current licensing regulations for each State and Territory are available at [www.imal.com.au](http://www.imal.com.au).

## IDENTIFICATION

Members should ensure their employees engaged in field work activities including service of documents at all times carry photo ID to be used to establish their bona fides as they undertake their duties and dealings particularly with subjects.

Depending upon the jurisdiction where the member operates its business the licensing regulator may issue suitable photo ID evidencing the licence issued, unfortunately this is not the case in all jurisdictions, particularly where there is no licensing requirements. In such circumstances, members are alternatively able to utilise an IMA Photo ID card for their employees and subcontractors.

A sample of the front and rear of an IMA Photo ID card appears below.



## INSURANCES

Clients of members will typically specify in the SLA executed between the parties, the minimum levels of insurance cover a member is required to have in place when undertaking assignments for the client. Members should seek independent advice from appropriately qualified and experienced insurance advisors/brokers to review the level and types of cover to be held to address their own individual business risks.

Arthur J Gallagher Insurance Brokers (telephone 07 3387 1900) offers an insurance scheme for IMA members tailored to address the range of risks likely to be encountered by members in their business activities.

Members in consultation with their professional insurance advisor should ensure adequate sums insured, as "Co-Insurance Clauses" in nearly all policies will penalise for under-insurance even in the situation of a claim being made for only a partial loss.

Each member should maintain appropriate insurance cover for its specific business risks including but not limited to:

- **Workers Compensation Insurance (as appropriate in each state)**

If the member is a national organisation, it may possibly require Extraterritorial Workers Compensation Insurance (covering the difference in conditions between different State Workers Compensation Acts).

- **Professional Indemnity Insurance**

Where possible, the ideal is to obtain a “costs exclusive excess and limits” policy (this type of policy means any legal costs are paid without deteriorating the chosen limit of indemnity).

Such policy should be extended to include Fidelity Guarantee cover, or alternatively members should take out a separate Fidelity Guarantee policy (to cover the risk of theft by staff or internal operators).

The policy should also extend to cover Contractors or Subcontractors where applicable, or otherwise members should ensure they have proof such Contractors or Subcontractors have effected their own cover - either way, members should ensure their business is protected for liability that potentially attaches to their business arising from Contractor or Sub-Contractor Claims, even if its own policy does not cover the contractors/sub-contractors themselves.

Members should consider holding Professional Indemnity and Public Liability cover with the same insurer as this removes the possibility of two insurance companies fighting over who is paying the claim in an attempt to avoid liability.

- **Public Liability Insurance**

Members should consider holding Professional Indemnity and Public Liability cover with the same insurer as noted above.

Members should extend such policy to cover Contractors or Subcontractors where applicable, or otherwise ensure they have proof such Contractors or Subcontractors have effected their own cover as noted above.

Importantly, members should ensure cover is provided for “Goods in your Care Custody and Control” and that the limit is appropriate for the goods held on behalf of clients.

- **Business Insurance**

Members should consider extending cover to include Customers Goods with appropriate Limit/Sum Insured for minimum of Fire and Perils, and Theft with and without Forcible Entry.

As noted above members should consult their professional insurance adviser to determine whether having regard to all items likely to be repossessed a separate policy may be best option to protect their liability (e.g. Motor Vehicles, Boats, Aircraft, etc).

- **Motor Insurance**

Members should ensure their motor vehicles are covered appropriately for CTP Insurance and Comprehensive Motor Insurance as required. Additionally, if members are ever involved in driving vehicles on behalf of clients (not recommended as best practice) then cover may be required for “Driving Risk” and in the situation of driving an unregistered vehicle, then cover may be required for use of the vehicle under cover of an appropriately issued “Trade Plate”.

In summary, within the provision of process serving services, the potential risks applicable to each individual member can be extremely diverse and for this reason members should fully discuss appropriate cover for the specific needs of their business with an appropriately qualified and experienced professional insurance adviser.

## SECURITY

### IN THE OFFICE

Members should provide for the physical security of their office and assets. The member's security policy will depend on the type of building and location, and on what actually needs to be secured or protected.

Reasons driving the need for appropriate security devices, protocols and controls include:

- to provide for privacy and information security in relation to personal and confidential details held and handled in relation to individuals
- to provide for the situational risks associated with public contact
- to protect against:
  - Inappropriate access to internal sections of the premises
  - Unauthorised access to keys
  - Unauthorised access or entry of vehicles, persons or goods to the premises
  - Unauthorised access and/or intrusion to the member's computer systems
  - Deliberate destruction or loss of relevant information

Appropriate security devices, protocols and controls adopted by members, dependent upon the specific perceived risks may include but not necessarily be limited to:

- Fire protection:
  - Smoke detectors and alarms
  - Fire hoses
  - Fire extinguishers
  - Automated heat detectors within fire sprinkler system
- Access to office and building:
  - Use of deadlocks on all external doors
  - Use of a password security alarm with commercial grade back to base alarm monitoring
- Access to office (non-public access) areas:
  - Keyed or password accessible locks
  - Metal barring on all externally accessible windows
  - Security access/camera identification at all points of entry
  - Use of fireproof safe and lockable filing cabinets to secure physical files and documents outside of office hours
  - Sign in register for all visitors together with the issuing of a clear Visitor identification tag to each visitor
- Computer systems:
  - Use of unique passwords and appropriate access levels appropriate for duties for each user to the member's computer systems including providing for periodic changing of passwords
  - No storage of data on workstation PCs
  - Location of servers and associated equipment within locked air-conditioned cabinets or office accessible only by authorised staff

## IN THE FIELD

The work of agents engaged by members requires them to have documents out in the field whilst attending to assignments. Those documents can contain personal and confidential details relating to individual subjects which in the interests of privacy and information security must be adequately protected.

Members should ensure that their agents have an appropriate boot safe installed in their vehicle – such an item can be installed either in the boot area or the rear passenger floor area of the vehicle and must be securely affixed to the vehicle in a manner so as to prevent theft.

Items to be secured by agents in their vehicle's boot safe whenever the agent is outside his vehicle may include but not necessarily be limited to:

- All field work and client instructions
- Member instruction manuals
- All privacy related materials

## IN HOME OFFICES

The nature of the industry is that agents engaged by members often maintain an office within their own residential premises. Agents hold documents and other records containing personal and confidential details relating to individual subjects which in the interests of privacy and information security must be adequately protected. For these reasons, members should ensure that their agents have appropriate security arrangements for such documents and records within their home office.

Security arrangements which might be appropriate depending upon the unique circumstances of the specific agent's home office may include but not necessarily be limited to:

- Alarmed security
- Metal bars, security film or roller shutter on any external windows to the home office
- A keyed lockable door to the home office area or if this is not possible an appropriate lockable facility to secure all confidential documents and records within the home office
- A lockable cabinet (filing cabinet) to securely store all confidential documents and records
- The securing of the agent's computer tower to the floor or desk
- The use of password protection for accessing the agent's computer

## BUSINESS CONTINUITY

Members should maintain an up to date Business Continuity Plan / Disaster Recovery Plan, such plans being critical to the transparent and continuous operation of the member's business in the event of a disaster event and importantly with the increasing reliance upon technology providing strategies on how in the event of an unforeseen event to maintain and/or re-establish IT and communication services for the business.

A disaster event might be a power cut, a computer virus attack, equipment failure, theft, fire, flooding or accidental damage.

By planning, members will acquire the confidence to make right decisions quickly, to cut downtime and to minimise financial losses in the event of a disaster.

Once a plan is established, members should regularly test and update it at least annually, making sure to adjust the plan to take account of changes to the business or the location(s) the business operates from.

Some strategies for members to test their plans include:

- Drills and training for workplace health and safety aspects of the plan
- Planning meetings to:
  - inform staff of the plan and their individual responsibilities in an incident
  - examine the plan to identify problems and solutions
- Scenario testing by simulating a live event and allowing staff to make decisions as the scenario unfolds in the way they would if it were a real incident
- Testing of disaster recovery plans for IT systems

Members should document the testing and revisions of their Business Continuity Plan including the sign off of the Plan by their management team.

## **TRAINING**

All members shall provide appropriate and adequate training for their new employees and subcontractors together with regular periodic refresher and update training for all existing employees and sub-contractors, relevant to their work responsibilities.

Members shall maintain suitable evidence of compliance and other workplace training provided including the scope of the actual training sessions, the names of the employees and subcontractors to whom training was provided and on what dates. A template of a sample Training Register is included with this guide as Annexure 1.

Training for field agents and support staff should include:

- ACCC/ASIC "Debt collection guideline: for collectors & creditors"
- Code of Banking Practice
- Corporations Act
- EDR Schemes i.e. the Financial Ombudsman Service & the Credit Ombudsman Service Limited
- National Consumer Credit Protection Act
- National Privacy Principles Compliance Training (Privacy Act 1988)
- Privacy Act
- Relevant State Legislation / Court Rules (rules of service)
- Trade Practices Act

Additionally, training for other workplace matters may include but not necessarily be limited to the member's policies in relation to:

- Anti-Discrimination
- Equal Employment Opportunities
- Ergonomic Assessment
- Fire & Safety
- Occupational Health & Safety
- Quality Assurance Systems
- Stress Management and
- Work & Environmental Hazards
- Work Related Incidents

The IMA's website includes a training portal for members to access industry specific online training provided by SafeTrac Australia and Credit Education Services Australia. Online training is available for a variety of subjects including but not limited to:

- ACCC/ASIC Debt Collection Guideline
- Australian Consumer Law
- Code of Banking practice
- Code of Conduct
- Debt collection
- National Consumer Credit Protection Act
- Occupational Health & Safety
- Privacy Act

## **IT & DATA**

Every member shall ensure:

1. It keeps proper data records relating to assignments, which may be best achieved by use of an appropriate database application
2. Its database applications have individual password protection log on protocols and maintain an audit log of all activities and the responsible user within such system
3. The use of data encryption programs and/or authorisation keys whenever transferring customer data
4. All data is backed up regularly, preferably on a daily basis with the data backup securely stored off site from the member's business premises and is regularly tested for retrieval in the event of a system failure
5. Access to its data storage room and/or server storage room is restricted to necessary personnel only
6. It maintains appropriate system and download protocols in relation to flash drives, mobile telephones and smart phones, CD burners, flat files and emails so as to prevent unauthorised access to data
7. Firewalls to its systems are maintained to ensure maximum protection of data – this includes transfers of data to and from agents
8. It maintains a policy and procedure for the archiving and storage of hard copy files including a process for destruction on a scheduled basis
9. All third party service providers accessing its IT systems sign confidentiality and privacy agreements documenting their permitted access to data and systems
10. Its Business Continuity Plan includes a strategy for alternative third party service providers for its IT systems

## **DATA PROTECTION AND CONFIDENTIALITY**

Every member shall:

1. process personal and sensitive data in accordance with the relevant privacy legislation ensuring compliance to privacy principles
2. only obtain and process data from legitimate sources or publicly accessible databases
3. take proper steps to correct data where aware that the data is out of date or inaccurate

4. pass on or make properly available information to the client in relation to the subject's circumstances, any dispute or complaint, or mental health problem in order to prevent activity from continuing where it is inappropriate
5. use appropriate controls to ensure that any exchange of data to any third party is lawful and adequately protected
6. ensure it has the technical and organisational measures in place to prevent unauthorised unlawful processing and disclosure of information
7. ensure appropriate data protection checks are carried out when speaking with subjects to verify their identity and where necessary and appropriate, validate and update information received from the subject
8. observe and protect each client's data, strategies, integrity and business methods
9. operate a written data retention policy

## **MONITORING COMPLIANCE**

Every member shall:

1. keep abreast of relevant legislation, regulations, regulatory guidance and requirements and updates to and guidance relating to this Best Practice Guide
2. periodically test the compliance knowledge of its staff is appropriate to their job functions
3. employ appropriate and sufficient organisational processes to enable the routine monitoring of its compliance performance, including that of its staff and agents
4. keep records of compliance monitoring and testing undertaken in sufficient detail to illustrate compliance performance

## **MEDIA ENQUIRIES**

Australia's media are regularly attracted to the activities of the industry as an opportunity to run stories which often have the effect of exploiting the misfortunes of individuals.

Members should not participate in media interviews involving actual cases due to privacy considerations and SLA restrictions.

The work of members is undertaken pursuant to a "principal & agent" relationship - consequentially all information and photographic and/or video images gathered in the course of a specific assignment are the intellectual property of the client and as such not available without the client's specific consent for the member's own use for purposes other than to complete the client's instructions in relation to the specific assignment.

## CONTACTING SUBJECTS

Every member shall ensure the first task of its agents whenever making direct contact with a subject is to ensure the person being dealt with is the actual individual subject – this task is to be done before divulging any confidential information.

Upon establishing and verifying the subject’s identity, the agent should then identify themselves, who he is working for and the purpose of the contact.

## LEAVING MESSAGES

Australia’s privacy laws and the specific licensing acts regulating the industry influence the manner in which messages may be left with third parties for subjects – members should be aware of the regulatory requirements for the jurisdiction(s) where they work.

Members shall ensure their agents do not divulge their identity as a process serving agent or provide any information to any third party about the nature of their specific assignment

Agents should not leave their business card in any open manner such as to allow a third party to infer the nature of the agent’s interest in contacting the subject.

Instead, it is best practice that agents leave in a sealed envelope marked both “private & confidential” and to the subject’s attention, a plain contact card with a simple but professional message along the lines of the following examples:

**To:**  
 .....  
**I called at your address to find no one present.**  
**Could you please phone me on:**  
**[AGENT’S NO &/or OFFICE NUMBER]**  
**Regarding:.....**  
**Date: .....**

**ATTENTION:**  
 .....  
**Please call [AGENT’S NAME] regarding:**  
**Reference No:.....**  
**If this person does not live here, could you please call me to confirm same?**  
**PHONE: [AGENT’S NO &/or OFFICE NUMBER]**

## MENTAL HEALTH

Every member shall ensure sensitive information gathered in relation to a subject’s mental health problems is immediately and appropriately passed onto the client and/or any secondary agent instructed for the assignment.

## ACTING APPROPRIATELY

Every member shall ensure its agents go about their duties appropriately and always act in a professional and ethical manner.

Agents undertaking their assignments should always conduct themselves appropriately, including:

- being appropriately attired having regard to the social and climatic conditions of the area being serviced



- using appropriate transportation, which should not display any signage, sign writing, advertising or anything which might cause a member of the public to identify the nature of the agent's business or occupation
- being respectful of the subject's or third party's property
- not behaving in any manner that a reasonable person might find offensive or anti-social
- treating all subjects and third parties with respect, dignity and courtesy at all times and
- not engaging with any subject or third party using misleading, humiliating or intimidating tactics

It is appropriate if an agent perceives a threat upon contacting a subject to seek lawful protection which may include police attendance to "keep the peace". Every member should ensure its agents are aware to never place oneself in a position of danger and to always retreat or remove oneself from any confrontation or perceived unrest when contacting a subject.

Every member should ensure its agents do not use any of the following items as part of their duties in the field:

- weapons of any kind (including, knives, pocket knives or batons of any kind)
- mace or similar self-defence style products, regardless of whether or not such products are lawful
- any item, article of clothing or other insignia which might cause persons to believe the agent is from a law enforcement or similar agency

## GUIDANCE

### INSTRUCTION TYPES

Most instructions issued to members are in writing and ideally should detail the following:

1. The individual/business [including the name, gender (if an individual) and address] required to be served
2. The documents which are required to be served
3. The method of service
4. The last date for service
5. Whether an Affidavit of Service is required to be drafted by the process server or will be prepared by the client based on the Agent's report
6. In the event the document is a subpoena or similar, the amount of conduct money to be tendered at the time of service
7. Any other information relevant to the service, including but not limited to:
  - a. Whether the process server might encounter any threat of violence
  - b. Whether the individual is likely to be agitated or aggressive due to excessive alcohol or drug use

### ACCC/ASIC GUIDELINE

Although Process Servers are not caught by these guidelines, it is suggested that they be familiar with them.

### SPECIFIC OPERATIONAL GUIDELINES

When a process server is in the field attempting service then the following guidelines should be followed:

1. The process server, prior to attempting service should read the instructions issued to them and seek further clarification if those instructions are not clear or if the process server has any issues or concerns including as to the lawfulness of the instructions as relates to relevant court service rules
2. The process server should attempt service in the first instance within reasonable hours and consistent with the availability of the subject.
3. The process server should be familiar with the service rules in the relevant jurisdiction and taking into account the nature of the documents being served
4. It is recommended that a process server attempt service at the residential address of the subject and only in cases where such address is no longer current or the subject is avoiding service there or in the event of urgency, before attempting to locate the subject at any work or business addresses for the subject - first attempts at work or business addresses should only be made where there is a legitimate purpose for doing so
5. When effecting service the process server should refrain from providing advice to the subject and instead should refer the subject to the documents which will provide contact details for the issuing party/parties

6. The process server should not be familiar with the contents of the documents being served - the process server's role to solely ensure that the subject being served is the person/business referred to in the documents
7. When swearing Affidavits of Service the process server should carefully read the Affidavit to ensure that the contents of the Affidavit are correct and are a true reflection of what actually occurred at the time of service

## REPORTING

Members should regularly and promptly provide update status and final reports to their clients on process serving assignments handled.

It is recommended that reports be written in the 3rd person, as "our agent attended" rather than in the 1st person as "I attended".

Updates to clients should be informative and provide a clear picture of all actions taken at specific times and the outcomes of such actions. Updates should be accurate and concise. The content should be factual based and avoid the use of gratuitous opinion and speculation.

Update status and final reports should clearly detail the date, time and place for each action taken and the parties involved in the specific action – refer sample update report below:

### Sample update status report

*05/03/17 at 10.15am our agent attended the given address of 1A Subject Ave Subjectsville NSW 2100.*

*Our agent attempted to serve the subject but established there were no persons in attendance at the address.*

*A contact card was left in a sealed envelope addressed to the subject "private and confidential".*

Members should ensure every activity undertaken on a file is clearly updated and reported to their client.

Such updates should include dates, times, addresses attended and telephone numbers in full as well as accurately detailing all conversations which took place, for example but not limited to any arrangements accepted, issues raised or messages left etc.

Additionally, members should ensure their agents also attempt to update with the subject, his/her current details and/or any authorised third party including addresses, telephone numbers etc. and where appropriate, report such updated details to allow the client to easily reference these details and update its own systems.

Members should not in reports include any references to the subject's or third party's race, ethnicity, specific medical conditions, colour, religion, sexual preference, political persuasion, intelligence, social status, physical characteristics or character.

If during an attempted or actual service, it becomes evident to the process server that the subject has or may have a disability or impairment such as:

- Affecting the ability to communicate (e.g. hearing impairment)
- A mental incapacity apparently affecting the ability to comprehend his/her legal rights and obligations (e.g. an apparent psychological/psychiatric condition)

then the member should report the subject has a medical condition and recommend an appropriate course of action, such as to specify the type of assistance likely required or as requested by the subject. Unless the subject gives express consent for his medical condition (e.g. cancer, HIV, bi-polar disorder etc) to be specifically recorded and reported to the client, then such specific sensitive information should not be recorded or reported by the process server.

Similarly, if a language barrier impacting on effective communication with the subject is encountered, the process server should attempt to identify the language spoken by the subject and report to the client, the need for an appropriate interpreter to assist with any further dealings with the subject.

In circumstances where the conduct of a subject or third party encountered is what might be characterised as abusive, aggressive or threatening, the agent should appropriately report to the client what the subject or third party did or said – reports should not include any subjective assessment or judgment as to the subject's or third party's character. In the event an agent encounters conduct by a subject or third party is violent, the agent should factually report the incident.

Whilst impossible to provide an absolute timeframe for the frequency of reports to clients, members should have regard to the following:

- Updates should be provided in accordance with the specific client's requirement detailed in the SLA or instructions, or in the absence of any specific requirements being detailed, within a timely fashion
- Routine updates (e.g. attended an address, left a card for the customer to make contact) ought to be provided wherever possible no later than the morning of the next business day or in the case of agents working in distant and remote areas, where access to a communication device is not possible, as soon as practicably possible
- Upon the documents being served it may be more appropriate to provide an immediate update to the client, depending upon the requirements of the SLA entered into with that client and the technology available to the agent and/or agency - in the event an agent is working in distant and remote areas, where access to a communication device is not possible, then as soon as practicably possible.

## **TRESPASS**

Whether an act of trespass might be committed when attending properties is a concept members shall ensure their agents are aware of and consider as they go about their lawful duties undertaking process serving.

An act of trespass is committed where consent to enter premises is not granted, or where consent is withdrawn by an occupier, and if there is no other lawful authority to be on the land by way of legislation or court order.

A contract to give consent is neither a piece of legislation, nor a court order, but rather a civil agreement which is subject to hearing by a court if the terms of the agreement are alleged to have been breached. A person giving consent to enter premises in a contract, can subsequently withdraw such consent if he so wishes. The remedy for withdrawal of such consent (which would be effectively a breach of contract) is a hearing before a civil court for damages.

A civil contract does not constitute law overriding the law surrounding trespass, which is the common law surrounding the protection of private property. The prevailing authority on trespass is the High Court of Australia case, *PLENTY v. DILLON* [1991] HCA 5 (1991), 171 CLR 635.

There is an implied right to enter private property for any lawful purpose – an agent who enters any property in exercising such a right, must walk directly to the front door. However, when such right is withdrawn, e.g. by the occupier of the private property directing a person to leave, then the person must immediately leave it or he will at that point be committing an act of trespass.

## **FEES**

There are wide variances in what fees are charged by businesses providing process serving services. In some jurisdictions there are specific fee structures set out in the jurisdiction's court rules whereas in other jurisdictions the situation is not so clear.

Ideally, members should provide a fee quotation to clients – this can be pursuant to a SLA or alternatively issued on an individual assignment basis for occasional clients. Although, in many situations it may be not possible or impractical to give a fixed price quotation until the assignment is worked, it is appropriate for members to provide to its clients the basis for the charges to be raised to attend to an assignment.

## **MANAGING EXPECTATIONS**

Challenges for all businesses include managing the expectations of clients in respect to such issues as:

- ◇ What will the service to be provided include?
- ◇ In what time frame will the service be provided?
- ◇ What will be the basis for charges for the service provided?

It is best practice for members to be transparent and up front as to what the clients can reasonably expect in relation to service delivery as well as the basis of their charges for services provided.

## ***PROVISION OF SERVICES***

Members should not guarantee a specific subject will be served with documents by a certain date or time as obstacles to such a guarantee include whether the address provided for the subject is current or indeed even relevant to the subject and whether the subject is avoiding service.

Instead any guarantee offered should be in relation to making all reasonable efforts to effect service (in accordance with the specific court's service rules) upon the subject at the instructed address within an agreed timeframe and in accordance with the client's specific instructions.

Members should be transparent when describing what services will be provided in response to instructions received. Matters which might be clarified include:

- Attending the provided address to attempt and effect service in accordance with the specific court's rules for service and any client specific service instructions
- Subsequent provision of a report and Affidavit of Service

## ***TIMEFRAMES FOR SERVICES***

A concern for many clients is understanding when an issued process serving assignment will be attended to and when an Affidavit of Service will be provided:

- Members should provide clear advice to clients as to what their firm's turnaround time is for actioning assignments, attending to service and subsequent provision of a report and Affidavit of Service

- Sometimes required by some SLAs and otherwise considered good practice is for members to acknowledge the receipt of each assignment from clients – such acknowledgements by email are not onerous as they can often be set up to issue as an automated process when instructions are entered into the member’s database systems
- In advising their standards for turnaround times, members should clarify:
  - Turnaround times are dependent upon the subject being at the given address and not deliberately avoiding service
  - The different timeframes applicable for:
    - Metro locations
    - Regional locations
    - Distant and/or remote locations

### **CHARGES FOR SERVICES**

Members should not accept process serving assignments on a contingent basis where fees only apply if the process is served as such arrangements are potentially drivers for poor conduct.

Members should advise clients upon receipt of instructions, the basis on which fees for the services to be provided will be calculated – where applicable, matters which might be clarified include:

- The anticipated service fee for each supplied address including the number of attempted services which will be included before additional fees apply
- Whether a separate charge will be levied for the kilometres travelled to effect service upon the subject
- How fees will be calculated in situations when serving more than one subject at the same address at the same time
- Any loadings or additional fees applying for urgent/fast tracked service including the definition of what will constitute urgent service e.g. same day service / service within 4 hours / service within 2 hours
- Any loadings or additional fees applying when service requires personal delivery to the subject
- Any additional fees applying for such items as:
  - Printing and collating emailed/faxed documents
  - Skip tracing charges / making enquiries to attempt to locate the current whereabouts of the subject
- Where a subject is being deliberately evasive, the client and process server on rare occasions might determine surveillance of premises is warranted to say locate and serve the subject as he enters or leaves the premises. As the provision of surveillance is a specialist and non-routine activity, it is considered good practice that both parties control the risks and costs in a transparent manner, such that members before embarking on such activity should disclose to the client the basis for the charges for the proposed surveillance and obtain specific authorisation from the client to proceed.

The IMA considers a "complaint" means any expression of dissatisfaction (implied or explicit) about the way in which a member has conducted itself and a "dispute" means any denial of certain facts in relation to how service was effected.

Members should maintain an effective dispute and complaint handling procedure and that it does not operate any unreasonable barrier for subjects to submit a complaint or dispute – in the interests of transparency, such procedure should be posted in a visible location on the member's website.

Every member should develop with reference to the relevant jurisdiction's licensing regulations, a written procedure outlining its process for the efficient and fair resolution of complaints and disputes. Where there is no such regulatory requirement then the procedure should be developed in accordance with ASIC's Regulatory Guide 165.

## **COMPLAINTS**

Every member shall:

1. Cease process serving activity in relation to a specific subject whilst investigating any complaints in relation to dealings with that subject
2. Acknowledge receipt of each complaint and advise the complainant, the timeline for its investigation of the complaint
3. Following a request, provide subjects with a copy of its complaint handling procedures, which should be visible and accessible to the public on the member's website
4. Handle and deal with complaints, whether verbal or written (there is no requirement for complaints to be made in writing) properly and in a clear manner
5. Advise complainants of their right to refer the complaint to the client as and where appropriate
6. In consultation with the specific client take appropriate remedial action in response to proven complaints
7. Undertake root cause & trend analysis of complaints and take corresponding action to improve business practices
8. Keep a record of all complaints, howsoever received, and ensure the appropriate management are aware of the level, nature and root cause of complaints

## **DISPUTES**

Every member shall:

1. Engage with clients and subjects to ensure disputes are investigated and dealt with properly and efficiently
2. Cease process serving activity relating to the subject whilst investigating a valid dispute
3. Provide a response to the subject detailing the member's conclusion to the dispute
4. Provide sufficient information to the subject to justify the stated conclusion of the dispute

## **EXTERNAL DISPUTE RESOLUTION**

Recognising the work of members is mainly undertaken pursuant to “principal & agency” relationships with their clients, there is currently no regulatory or general obligation requiring members to belong to an EDR Scheme.

Given the underlying “principal & agent” relationship, any complaint by a subject about the alleged conduct or activities of a member should be directed to the specific client. Each member is responsible to its client for any breach of agreed conduct and activity standards set out in the SLA between those parties.



In this Best Practices Guide, the following interpretations shall apply:

The singular includes the plural and vice versa.

A reference to one gender includes a reference to all other genders.

Headings are included for the sake of convenience only and shall not affect the interpretation of the sections to which they relate.

References to any statute or statutory provision include that statute or statutory provision as amended, extended, consolidated or replaced by subsequent legislation and any orders, regulations, instruments or other subordinate legislation made under the relevant statute.

**ACCC** is a reference to the Australian Competition & Consumer Commission.

**Agent** means the person who is the commercial agent who attends to the actual field work for the client's assignment, being a person working either as an employee or sub-contractor

**ASIC** is a reference to the Australian Securities & Investments Commission.

**Authorised representative** means a person such as a financial counsellor, solicitor, financial advisor, carer, trustee or guardian who has been authorised by the Subject to act on behalf of the Subject.

**Client** means a person which provides original instructions to the Principal Agency for field work to be undertaken for the purpose of service of documents.

**Guideline** means the joint ACCC/ASIC Debt Collection Guideline for creditors and collectors.

**IMA** means the Institute of Mercantile Agents Limited, an industry association representing through sector groups businesses and individuals providing services in Australia as collectors, investigators, process servers and/or process serving agents.

**Member** means a financial member of the IMA.

**Person** means and includes a natural person, a Principal, a firm or any other legal entity whether acting as a trustee or not.

**Principal Agency** means a person which has the express, implied or ostensible authority having received the original instructions from the Client for field work to be undertaken for the purpose of service of documents.

**Secondary Agency** means the party which receives subcontracted instructions from the Principal Agency to provide services to complete the original instructions from the Client for field work to be undertaken for the purpose of service of documents.

**SLA** means a service level agreement between a member and its client setting out various obligations of those parties including the required conduct and activities of the member.

**Third party** means any person other than the Subject, but does not include a Subject's legal representative, trustee, or other authorised representative.



ACCC .....	13, 14, 18, 25
Affidavit of Service .....	18, 19, 21
ASIC .....	13, 14, 18, 23, 25
Authorised Representative .....	7, 8
Best Practice Guide .....	4, 5, 7, 15
Business Continuity .....	12, 13, 14
Business Insurance .....	10
Complaint .....	6, 15, 23, 24
Compliance .....	4, 5, 7, 13, 14, 15
Confidentiality .....	14
Contacting Subjects .....	16
Data Protection .....	14, 15
Debt Collection Guideline .....	13, 14, 18, 25
Disaster Recovery Plan .....	12
Dispute .....	15, 23
Employees .....	7, 9, 13
External Dispute Resolution .....	13, 24
Fees .....	21, 22
Field Agent .....	5
Industry .....	5
Institute of Mercantile Agents (IMA) .....	4, 5, 7, 9, 14, 23, 25
Insurance .....	9
IT & Data .....	14
Legal & Regulatory .....	5
Liability Insurance .....	10
Licensing .....	9
Media .....	15
Mental Health .....	16
Mercantile Agent .....	5
Messages for Subjects .....	16
Motor Insurance .....	10
Photo ID .....	9
Principal & Agent .....	6, 15, 24
Principal Agent .....	5, 6, 25
Privacy .....	11, 12, 14, 15, 16
Process Server .....	18, 19, 20, 22
Process Serving Agent .....	5, 6, 16
Process Serving Assignments .....	5, 19, 22
Professional Indemnity Insurance .....	10
Public Liability Insurance .....	10
Regulator .....	4, 7
Reporting .....	19
Residential Premises .....	12
Secondary Agent .....	25
Security .....	11, 12
Sensitive Data .....	7, 14
Service Level Agreement .....	6, 9, 15, 20, 21, 22, 24, 25
Service Rules .....	18, 21
Subcontractors .....	10
Third Party .....	14, 15, 16, 17, 19, 20, 25
Training .....	7, 13, 14, 26
Trespass .....	20, 21
Workers Compensation Insurance .....	10

## CONTACT DETAILS

---

### **Institute of Mercantile Agents**

17B Denney Street, BROADMEADOW NSW 2292

PO Box 233, WARATAH NSW 2298

Tel: 61 (2) 4927 0477

Fax: 61 (2) 4927 0677

Email: [admin@imal.com.au](mailto:admin@imal.com.au)

Website: [www.imal.com.au](http://www.imal.com.au)