

SERVICE of court process abroad

Based on calls to the National Office, members are often called upon to arrange service of documents overseas but some may have little understanding of what is required in specific countries and so turn down the assignments. **Alan Harries** outlines some tips on how to handle such instructions.

Overseas assignments can be tedious and time consuming.

Usually you will deal with an agency for the first time and have no efficiencies from past dealings. Sometimes there will be language issues to be overcome.

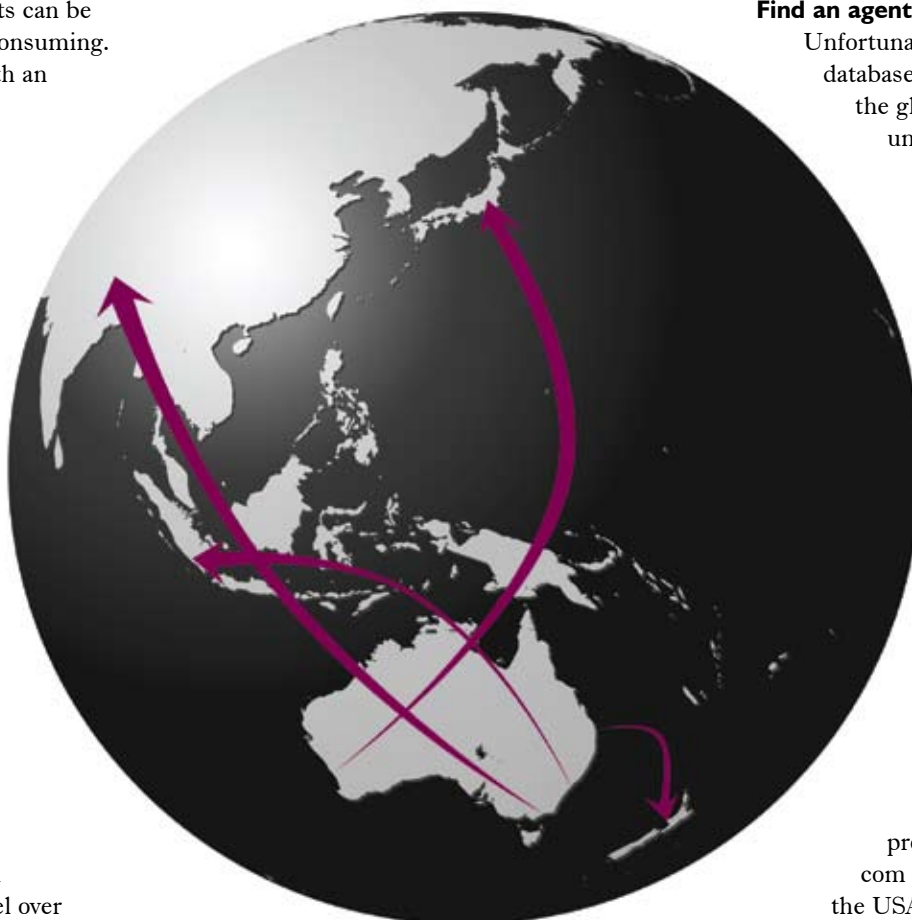
In taking on these assignments, ensure your client realises overseas service is much more expensive than a local service and even to get a quotation will take time and attract a fee as you are in the business of selling your time!

A helpful online resource is provided by the Australian Attorney General's Department at www.ag.gov.au - see details in the handy resource panel over the page. When visiting the site, simply navigate through the menu, under Australia's Legal and Justice System select Private International Law to open up useful material, including information sheets on the specific requirements of individual countries.

In undertaking overseas assignments, my suggestions are:

Review with your client:

1. The time frame for the task - the more urgent, the bigger the risk to getting the process served in time and the higher the likely costs involved.
2. The mode of service required - presumably this will be by personal delivery but explore whether there



are other acceptable options.

3. Can a faxed or emailed copy of the documents be served or does it need to be an original court sealed document?
4. Is an affidavit of service required? If so, does the client wish to prepare it or review it prior to it being sworn? Is there any specific requirement as to who the affidavit should be sworn before eg before a Public Notary or a Commissioner for Oaths?
5. Whether the client first wants a quotation or just needs the process served regardless? If the former, that the client undertakes to pay your reasonable fees in making enquiries to establish a quotation.

Find an agent to use:

Unfortunately, there is no central database of agents to use across the globe and you will need to undertake some research to locate an agent to entrust with the assignment. In seeking to identify available agents to use you might:

1. Search the IMA's Online Directory of members at www.imal.com.au to check if a fellow member services the specific location.
2. Search other sites which offer online directories such as:
 - Nationwide Process Servers Association at www.processserversassociation.com if you need an agent in the USA

- International Process Servers Association at www.processservers.com (mostly the USA but has some other listings)
 - National Association of Professional Process Servers at www.napps.org (USA and 29 other countries)
 - National Professional Process Server Network at www.nppsregistry.com (mostly the USA but has some other listings)
 - World Association of Professional Investigators at www.wapi.com (UK and 33 other countries)
 - Association of British Investigators at www.theabi.org.uk (UK and 33 other countries)
3. Do a search at www.google.com -

such as “process server” + specific location

4. Post an email to the newsgroup operated by www.wapi.com – this newsgroup is extremely useful as even if you don’t get a direct response from an agent in the required location, often other subscribers will respond and share details of agencies they have used in the location.
5. Contact the country’s Embassy within Australia to make enquiries of a Trade Counsel for details of an agent to use in his/her country.
6. If your enquiries are coming up blank, consider researching and contacting a law firm in the location and making enquiries as to the agent they use locally to serve process - sometimes the law firm will be prepared to act as the agent to effect service.

Instruct the Agent properly:

Having located one or more agents in the specific country, make contact and get a written quotation of what their fees and turnaround time will be. Things to canvass with the agent include:

1. Location of service - is that area serviced and how often.
2. If location not serviced, can he/she recommend another agency?
3. Description of who is to be served, including any anticipated difficulties and how service is to be effected (personal or other means).
4. Urgency of the assignment.
5. Whether you will prepare the affidavit of service and require an emailed report of service for the details to draft and email the affidavit to be printed out.
6. Any requirement to have the affidavit sworn before a Justice of the Peace/ Commissioner of Oaths/Public Notary.
7. Any requirement to courier back the affidavit (Tip: get the agent to fax you the sworn affidavit before it goes off by courier, in case it goes astray.)
8. The all inclusive costs and how they can be paid - credit card/direct transfer or international bank draft (credit card is best as it saves a trip to the bank to arrange a draft etc).

Cautionary advice:

Sometimes organising overseas service can be straightforward but this is not always the case. Take steps to protect yourself including:

- Get a written undertaking from your client to meet all of your reasonable fees and disbursements;
- Charge for your professional services appropriately, it is worth a premium fee - getting overseas service arranged is time consuming, remember to charge for all your costs including: your time; courier costs; international calls & faxes; bank charges for currency conversions etc.
- Get and rely upon a written quotation from the agent to protect yourself from escalating fees;
- Keep your client informed: of the costs, advice that service has been effected and a draft affidavit has been forwarded for execution.

Don’t assume the overseas agent has the knowledge and experience you have in completing service correctly or where to sign the affidavit - give detailed instructions. To overcome a situation of an inadequate or missing affidavit see if your client can work with you swearing an affidavit of service detailing what was reported back to you, annexing your agent’s report of service to the affidavit. ■

HANDY RESOURCE: www.ag.gov.au

Rated 

The Attorney General's website provides information sheets on each country as a step by step guide to serving Australian court process abroad and explains regulating the service of Australian court process abroad are:

1. the Court Rules in Australia which regulate service abroad, and
2. the procedure that the foreign country will allow.

Information sheets accessible under an 'A-Z Country list' at the website provide information on the procedure each foreign country allows.

The procedure adopted for service overseas can be based upon provisions of a treaty or agreement between Australia and the foreign country, or where no treaty exists, procedures which are accepted international practice. The most commonly accepted forms of service overseas are:

A. Diplomatic Channel

The different permutations are:

- The service request must be transmitted via the diplomatic channel and served by a judicial authority in the foreign country.
- The service request may, but is not required to, be transmitted via the diplomatic channel.
- The foreign country will not accept service requests transmitted via the diplomatic channel.

Use of the diplomatic channel involves the Australian Department of Foreign Affairs and Trade (DFAT) transmitting the request for service to the Australian embassy in the foreign country. The Australian embassy then transmits the request to the relevant foreign affairs authority in the foreign country. The foreign affairs authority then transmits the request to the authority responsible for justice services and that authority transmits the request to the relevant court. The executed request is returned via the same path. The number of agencies involved in the diplomatic channel contributes to the substantial delays that can be experienced when serving documents using the diplomatic channel.

B. Private Agent

The different permutations are:

- The court process may be served by private agent in the foreign country.
- The foreign country does not allow service by private agent. The objection to use of a private agent usually stems from the foreign country's view that service by another country's court is that court exercising jurisdiction in their territory. It is considered an incursion on territorial sovereignty.

When use of a private agent is permitted, it is arranged by the relevant court or a party to the matter before the court and no government agencies are involved. The private agent is usually a practitioner in the relevant foreign jurisdiction. Some companies specialise in the service of process internationally. The Australian

Attorney General's Department doesn't provide details about how to contact private agents but notes the US Department of State keeps such information on its website.

C. Central Authority

The service request is transmitted via designated Central Authorities under a bilateral treaty or convention and served by a judicial authority in the foreign country.

The designated Central Authority procedure involves the Australian Government Attorney-General's Department transmitting the request for service to their counterpart in the foreign country. The foreign country's equivalent of the Australian Government Attorney-General's Department then transmits the request to the relevant court for execution.

D. Dual options

In many instances both service through the diplomatic channel and service by private agent will be available.

The Department recommends the use of a private agent where possible as it is the most efficient method of service, but notes, a party may prefer to use the diplomatic channel as it provides recognised formal channels to prove service.

Fact Sheet Format

Where a treaty or agreement is in place between Australia and the foreign country it is generally considered exclusive. This means that the procedure available under the treaty must be followed for service of documents. Where a particular procedure is not mentioned in a treaty it generally means that procedure is not available. Accordingly, when seeking to serve documents in a foreign country the first question to ask is "Does a treaty apply?"

The fact sheets accessible under the 'A-Z Country list' are set out as follows:

1. Whether there is a convention, treaty or other agreement in place.
2. The procedure which the relevant convention or agreement provides for, or if there is no convention or agreement, the procedure allowed by the relevant foreign country.
3. Information about how a letter of request should be written if service will be under a treaty, through the diplomatic channel or Central Authority, addresses to which letters of request should be sent and information related to fees and charges which may apply.