COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Australia

LITIGATION

Contributor

Thomson Geer

Scott Castledine,

Partner, Sydney | scastledine@tglaw.com.au

Bronwyn Lincoln

Partner, Melbourne | blincoln@tglaw.com.au

Hendrik van Aswegen

Partner, Perth | hvanaswegen@tglaw.com.au

This country-specific Q&A provides an overview of litigation laws and regulations applicable in Australia.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

AUSTRALIA
LITIGATION

1. What are the main methods of resolving disputes in your jurisdiction?

Litigation, arbitration, mediation and informal negotiation are the main methods of resolving commercial disputes in Australia. Litigation involves the formal prosecution of proceedings before a court. The court will hear the parties' arguments and resolve the dispute by delivering a judgment (usually in writing). Arbitration is a quasi-judicial process in which the parties agree to argue their dispute before an independent arbitrator and to be bound by a decision of that arbitrator. Mediation is a structured negotiation, led by an impartial mediator. Informal negotiation can occur independently of, or in addition to, litigation and arbitration. Informal negotiation can be conducted by the parties directly, or via their lawyers.

2. What are the main procedural rules governing litigation in your jurisdiction?

Each court in Australia imposes different procedural rules on the parties to litigation. For example, the procedural rules governing litigation before the Federal Court of Australia are set out in the *Federal Court Rules 2011* (Cth). Courts will also often publish practice notes, to supplement the applicable rules. It is important that parties to litigation in Australia determine which court is hearing the litigation and which procedural rules and practice notes apply.

3. What is the structure and organisation of local courts dealing with claims in your jurisdiction? What is the final court of appeal?

Commercial disputes in Australia are heard by both state and territory courts and by federal courts.

Each state and territory in Australia has its own hierarchy of first instance courts. For example, the hierarchy of first instance courts in the state of New South Wales (in ascending order) is the: Local Court, District Court and Supreme Court. The most appropriate state or territory courts to hear a commercial dispute will often depend on the quantum in dispute, the matters of law which inform the dispute and the geographical nexus of the dispute (which is informed by factors including: the location of the parties and witnesses and any agreement between the parties as to jurisdiction). Each state and territory also has its own appellate jurisdiction known as Courts of Appeal or Full Courts.

Commercial disputes are also heard in the Federal Court of Australia. The Federal Court of Australia often hears disputes involving the application of legislation enacted by federal parliament (although those disputes can also be heard by some state and territory superior courts). The Federal Court of Australia has its own appellate jurisdiction known as the Full Court.

The final court of appeal in Australia is the High Court of Australia. The High Court of Australia has jurisdiction to hear appeals from both federal and state and territory appellate courts.

4. How long does it typically take from commencing proceedings to get to trial in your jurisdiction?

It is not uncommon for proceedings in Australia to take 12-18 months to get to a trial (often longer). Some Australian courts have specialised lists which are directed at resolving commercial disputes more efficiently and expeditiously. In addition, most Australian courts also have the capacity to hear urgent proceedings for discrete relief quickly and at short notice, if parties can demonstrate the basis for the urgency.

5. Are hearings held in public and are documents filed at court available to the public in your jurisdiction? Are there any exceptions?

Other than in exceptional circumstances, all hearings are public and judgments handed down by Australian courts are published online. Some documents filed in proceedings are available to the public, either via online registers maintained by the courts or upon application by interested parties. The extent to which documents are publicly available is unique to each court.

6. What, if any, are the relevant limitation periods in your jurisdiction?

Each Australian state and territory has passed its own legislation to govern the limitation periods. Each such piece of legislation is substantially similar. For example, claims for breach of contract are subject to a 6-year limitation period, accruing from the date of the breach, in every state and territory other than the Northern Territory (where a 3-year limitation period applies). Parties should ensure that they consider the legislation which is applicable to their particular dispute, prior to commencing proceedings.

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

Each first instance state and territory court and the Federal Court imposes different pre-action requirements. Those requirements are typically set out in the respective court's rules or practice notes. For example, parties to proceedings in the Federal Court of Australia are required to file "genuine steps statements", which specify the steps that have been taken to attempt to resolve the dispute, prior to the commencement of proceedings. If a party fails to file a "genuine steps statement", the court will take that failure into account when considering the appropriate costs orders to be made in the proceedings. Conversely, the state courts of New South Wales do not impose any pre-action conduct requirements.

8. How are proceedings commenced in your jurisdiction? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Proceedings in Australian courts are typically commenced by filing an "originating process". There are several types of originating process, including: statements of claim, originating applications, writs and summonses. Parties to potential litigation in Australia should consult the rules of the court in which they intend to commence proceedings, to identify the appropriate originating process.

Ordinarily, an originating process must be filed and sealed by a court. A sealed copy of the originating process and any supporting documents must then be served on each defendant party to the proceedings. Typically, the party that instituted the proceedings bears the onus of effecting service. Australian companies can be served by delivering a copy of the originating process to the company's registered office. Ordinarily, individual parties to proceedings must be personally served.

9. How does the court determine whether it has jurisdiction over a claim in your jurisdiction?

Subject to the matters set out below, Australian courts have jurisdiction to hear claims concerning matters arising under Australian law. They also have jurisdiction to hear claims which are governed by exclusive jurisdiction clauses in favour of Australia, or which have a sufficient nexus to Australia (such as claims concerning Australian land, a contract performed in Australia or a tort committed in Australia).

Each Australian state and territory has a Supreme Court, which has jurisdiction to hear almost all civil disputes. Within each state and territory there are also lesser courts, which typically have jurisdiction to hear limited types of commercial disputes up to certain monetary thresholds. For example, the lowest court in the state of New South Wales is the Local Court. It has jurisdiction to hear limited types of civil disputes, up to a monetary limit of $100,000 AUD. The jurisdiction of state and territory courts is conveyed by state and territory legislation, such as each state and territory's "*Supreme Court Act*".

The Federal Court of Australia also has jurisdiction to hear civil disputes arising under Australian federal legislation.

The Commonwealth of Australia and each Australian state and territory has passed uniform legislation, identically described as the *Jurisdiction of Courts (Cross-Vesting) Act 1987*, which empowers each Australian state and territory Supreme Court to hear civil disputes arising under another state or territory's laws. That legislation also empowers state and territory Supreme Courts to hear civil disputes arising under Australian federal legislation.

Pursuant to the *Jurisdiction of Courts (Cross-Vesting) Act 1987*, proceedings can also be transferred between the Supreme Courts of each state and territory and between

any of those Supreme Courts and the Federal Court. In determining whether to transfer proceedings, the court will consider factors such as: the location of the parties, witnesses and their legal representatives, the procedures available in each court and any contractual exclusive jurisdiction clauses which apply to the dispute.

10. How does the court determine which law governs the claims in your jurisdiction?

Australian courts will consider a range of factors to determine which law governs a claim, such as: the type of the claim, the causes of action relied on by the parties, whether the claim invokes state or federal jurisdiction, who the parties are (i.e. corporations or individuals) and the remedy sought.

11. In what circumstances, if any, can claims be disposed of without a full trial in your jurisdiction?

There are several ways in which a claim can be disposed of without a full trial in Australia. For example, if a party can demonstrate that its counterpart has no reasonable prospects of succeeding in the litigation, it could apply to a court for a summary judgment (in the case of a plaintiff party) or summary dismissal (in the case of a defendant party) of the proceedings. A plaintiff party can also obtain a default judgment if a defendant party fails to participate in the proceedings (ordinarily by failing to file a defence). A plaintiff party can also abandon (discontinue) proceedings. However, discontinuing proceedings typically results in an adverse costs order in favour of the defendant party.

Separately, the commercial settlement of proceedings will often include agreement to dispose of the proceedings.

12. What, if any, are the main types of interim remedies available in your jurisdiction?

Australian courts will often grant interim remedies targeted at preserving rights and property, pending the resolution of proceedings. The purpose of such remedies is to preserve the status quo as between the parties and to ensure that a successful party is not unfairly prejudiced by the conduct of its counterpart during the proceedings. Examples of interim remedies granted by Australian courts include: orders for the preservation of property, orders for disposal of perishable or similar property, orders for interim distribution of property or income surplus to the subject matter of the proceedings, orders for payment of shares in a fund before the ascertainment of all persons interested, freezing orders (also known as *Mareva* orders); and search orders (also known as *Anton Piller* orders).

The power of the inferior courts to grant interim remedies is often more limited than superior courts. For example, the Local Court of New South Wales cannot make a freezing order or search order.

13. After a claim has been commenced, what written documents must (or can) the parties submit in your jurisdiction? What is the usual timetable?

Each Australian court requires parties to adopt different types of written documents. However, the following documents are commonly used to progress Australian proceedings to trial:

- pleadings (such as statements of claim, defences and replies)
- applications for interlocutory orders;
- affidavits, witness statements or witness outlines; and
- notices to produce and subpoenas.

The usual timetable and order in which the above documents may be filed and/or served will depend on the court in which a claim is filed.

14. What, if any, are the rules for disclosure of documents in your jurisdiction? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

Each Australian court adopts different rules to govern the disclosure of documents in proceedings. Some Australian courts adopt a *"general disclosure"* regime, which requires parties to disclose all documents that are broadly relevant to the issues in dispute in the proceedings (including documents which are adverse to that party's interests). Other courts adopt a narrower approach to disclosure and will only require the parties to disclose documents by reference to specified categories.

Parties can object to the disclosure of documents on the basis that those documents are subject to legal professional privilege or are confidential. The party objecting to the disclosure of documents bears the onus of proving that the documents fall within an exception.

The Australian Government has a statutory right to resist disclosing a document on the basis that disclosure would be injurious to or prejudice the public interest.

15. How is witness evidence dealt with in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

Each Australian court adopts a slightly different approach to evidence. For example, evidence in New South Wales courts is typically given by written affidavit. Conversely, evidence in South Australian courts is typically given viva-voce. Regardless of the form of their evidence in chief, witnesses to proceedings in Australia are regularly cross-examined. Generally, cross-examination takes the form of leading questions on the facts in issue or as to credit. A cross-examiner is not permitted to ask questions that are: confusing, misleading, invite speculation or argument or concern a question of law. Depositions are not typically conducted in Australian civil litigation but courts in most Australian jurisdictions do have general powers to order them if they are considered to be in the interests of justice.

16. Is expert evidence permitted in your jurisdiction? If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)?

Expert evidence is regularly used in all Australian courts. Each Australian court imposes different rules to govern the engagement of expert witnesses and the evidence given by those witnesses. Expert witnesses are typically appointed by the parties to the proceedings. Occasionally, a court might direct the parties to appoint a single expert witness for each issue requiring expert evidence (as opposed to each party appointing their own, opposing, expert witnesses). Expert witnesses owe duties to the court, including duties to:

- provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise;
- state all the facts and assumptions upon which their opinion is based;
- state any particular question or issue which falls outside of their expertise; and
- advise the court without delay if they become aware of anything that would change their view on a material matter.

17. Can final and interim decisions be appealed in your jurisdiction? If so, to which court(s) and within what timescale?

Final and interim decisions of first instance courts in Australian can typically be appealed. The avenues of appeal depend on which court made the initial decision. For example, decisions of the Supreme Court of New South Wales are appealable to the New South Wales Court of Appeal. In some Courts, such as the Supreme Court of Victoria, parties to civil litigation do not have an automatic entitlement to appeal. Instead, in those Courts, appellant parties are required to apply for and obtain leave to appeal. An appeal (or application for leave to appeal) must be commenced within the period of time prescribed by the applicable court rules. Typically, a party must commence an appeal (or apply for leave to appeal) within 21 to 28 days of the date of the decision. However, some courts have adopted regimes to extend that period.

Appellate proceedings do not usually involve a de novo re-hearing of the first instance decision. Instead, an appellant must ordinarily demonstrate that the inferior court made an error of law which resulted in an incorrect decision.

18. What are the rules governing enforcement of foreign judgments in your jurisdiction?

The *Foreign Judgments Act 1991* (Cth) ("FJA") and the subordinate *Foreign Judgments Regulations 1992* (Cth) ("FJR") provide a statutory scheme for the recognition and enforcement of certain foreign judgments (whether final or interlocutory) in Australia. The FJA applies only to specific countries that have entered into reciprocal arrangements with Australia including *inter alia* the UK, Canada, Singapore, Japan, Germany and France.

To be enforceable under the FJA the foreign judgment must be a monetary sum and must be final and conclusive (though a judgment can be pending or subject to appeal). Where the FJA is not applicable, a foreign judgment may be enforceable under common law principles which are more prescriptive than the statutory scheme.

In respect of UK judgments, Australia is also a party to the bilateral treaty for the *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994* which provides for the reciprocal recognition of certain civil and commercial judgments.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side in your jurisdiction?

Yes. The general rule for a costs order is that "costs follow the event" (that is, a successful party obtains a costs order in its favour) subject to the discretion of the court to make further or other orders as it sees fit. The quantum of costs is resolved by assessment of the court, failing agreement between the parties.

Costs are assessed by the court either on an ordinary "party/party" basis or an "indemnity" basis. Where costs are assessed on an ordinary basis, a party is entitled to recover the costs that it reasonably incurred in the conduct of the litigation (typically 65-75% recovery). If there are special circumstances, the court may depart from the general rule to award costs on an indemnity basis (closer to 90-100% recovery).

A further distinction is typically drawn between professional fees (solicitor fees) and disbursements (barrister, expert and court fees). A successful party usually recovers a higher percentage of its disbursements as compared to professional fees.

20. What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

Australia has a mature class action (and third-party funding) landscape that is a well-established feature of the Australian legal system and arguably the most active outside of the US.

In Australia, the forum of choice for class actions is typically the Federal Court though State Supreme Courts have (broadly) equivalent class action regimes and are increasingly used. For example, the recent changes to permit contingency fees to be charged by class action lawyers before the Supreme Court of Victoria (subject to court order) has marked it as an increasingly attractive jurisdiction for plaintiffs. Class actions (or "representative proceedings") are brought by one or a small number of representative plaintiff(s) who are the litigants on behalf of a class.

To commence a class action in the Federal Court there must be: seven or more persons with claims against the same person(s); the claims must arise out of the same, similar or related circumstances; and the claims must give rise to at least one substantial common issue of law or fact.

Contrary to the US, there is no class certification process. The Federal Court adopts an "opt-out" model whereby all potential claimants who fall within the definition of the class become members of the class action (whether or not they are aware of that fact) and will be bound by the outcome of the litigation, unless they opt-out. Any settlement of a class action must receive court approval.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

The court may make an order to join a party to ongoing proceedings if the court considers the person ought to have been joined as a party, or where it is necessary to the determination of all matters in dispute. The court may also grant leave to a party to be joined to proceedings.

In respect of the consolidation of separate proceedings, the court may make such an order where the proceedings involve a common question; the relief claimed is in respect of, or arises out of, the same or same series of transaction(s); or if there is some other reason why making the order is desirable. The court is unlikely to exercise its discretion to consolidate proceedings if a party can demonstrate a real possibility of prejudice.

22. Are third parties allowed to fund litigation in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

Yes. In the seminal case of *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* (2006) 229 CLR 386 ("*Fostif*"), the High Court held by majority that litigation funding was not an abuse of process or contrary to public policy. The *Fostif* decision does not however affect the court's protective and supervisory role and it remains within the court's discretion to invalidate a litigation funding scheme if it is contrary to public policy.

Litigation funders are also regulated by the *Corporations Act 2001* (Cth); subject to the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001 (*Cth) which prohibit unfair contract terms, unconscionable conduct and misleading and deceptive conduct; as well as the general law.

A costs order can be made against a third party funder.

In determining whether to exercise its discretion to make a "non-party" costs order, the court will inquire into the connection between the non-party and the proceedings, and whether the interests of justice justify a departure from the general rule (see response to question 19).

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction?

While the pandemic invariably contributed to court backlog, the findings from a survey conducted by the legal membership association in Australia (the "Law Society") indicated that COVID-related changes in court processes were – on the whole – positively received. In brief, litigators welcomed time and cost efficiencies which arose out of viewing and downloading court files remotely; lodging documents electronically; and the remote conduct of case management, return of subpoena lists and directions hearings. Various courts have, to differing extents, retained these processes. The exceptions to this were: remote cross-examination of witnesses; and remote court hearings with a self-represented party, in respect of which litigators expressed a preference for pre-COVID processes.

24. What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

In most Australian courts, cases are closely, regularly and actively case managed by specialist judges and there are structural mechanisms such as Commercial Lists and accompanying specific case management procedures all employed for just, quick and cheap disposal of proceedings. These well-established structural and procedural developments arguably make Australia one of the swiftest jurisdictions in which to litigate commercial disputes when compared globally.

In addition, Australian courts typically actively encourage parties to engage in robust alternative dispute resolution ("ADR") mechanisms. Indeed, in certain cases, the court can make an order requiring parties to engage in ADR. This is consistent with overarching principles by which Australian courts are committed to the just, quick and cheap resolution of commercial disputes.

The main disadvantage is that cross border matters can give rise to complex jurisdictional arguments and/or prescriptive procedural steps. For example, on a practical level, a proceeding can be stymied by delay from the outset where parties are required to follow the prescriptive steps to effect extra-territorial service of an originating process.

25. What is the most likely growth area for commercial disputes in your jurisdiction for the next 5 years?

Data breaches and cybersecurity is an area of key litigation risk in Australia in coming years.

Following a raft of high profile data breaches and cyber attacks, Australia implemented swift legislative reform in late December 2022 *under the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022* (Cth) which strengthened the regulatory powers of the Office of the Australian Information Commissioner ("OAIC") and introduced significantly higher penalties for serious or repeated interferences with privacy (the greater of AUD$50 million; three times the value of the benefit obtained; or, if the benefit is indeterminable, 30 per cent of the company's domestic turnover).

The new privacy laws which set forth a tougher regulatory landscape in relation to cybersecurity are expected to lead to an increased risk of regulatory investigations and litigation including potential class actions.

26. What, if any, will be the impact of technology on commercial litigation in your jurisdiction in the next 5 years?

The Australian courts are likely to continue to adopt new technology where it can be shown to contribute to the efficient resolution of commercial disputes. This may result in more remote hearings (particularly for interlocutory applications or case management hearings), more limited disclosure (where AI with, agreed parameters, can be used to filter large quantities of documents) and greater accessibility (for example, many courts already now livestream proceedings where there is public interest or a party is unable to attend in person).

Contributors

Scott Castledine,
Partner, Sydney
scastledine@tglaw.com.au

Bronwyn Lincoln
Partner, Melbourne
blincoln@tglaw.com.au

Hendrik van Aswegen
Partner, Perth
hvanaswegen@tglaw.com.au