



# ICLG

The International Comparative Legal Guide to:

## Litigation & Dispute Resolution 2017

**10th Edition**

A practical cross-border insight into litigation and dispute resolution work

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**Group Consulting Editor**  
Alan Falach

**Publisher**  
Rory Smith

**Published by**  
Global Legal Group Ltd.  
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Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
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## EDITORIAL

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Welcome to the tenth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Cybersecurity, particularly from a UK perspective.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 41 jurisdictions, with the USA being sub-divided into 10 separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Greg Lascelles of Covington & Burling LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

Alan Falach LL.M.  
Group Consulting Editor  
Global Legal Group  
[Alan.Falach@glgroup.co.uk](mailto:Alan.Falach@glgroup.co.uk)

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# Australia



Colin Loveday



Scott Grahame

Clayton Utz

## I. LITIGATION

### 1 Preliminaries

#### 1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Australia has a common law system.

Australia has a Federal system of government. Legislative power is divided between the Commonwealth and the six constituent States and two self-governing Territories. Each State and Territory is a separate jurisdiction and has its own hierarchy of courts and tribunals. In addition, there is a hierarchy of courts and tribunals which have jurisdiction over laws made by the Commonwealth Government (“Federal Government”). The High Court of Australia unites these court hierarchies and is the ultimate court of appeal for all court systems.

Civil procedure is governed both at a Federal and State/Territory level by the civil procedure acts and rules of the respective jurisdiction.

#### 1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The High Court of Australia is Australia’s highest court and exercises both original and appellate jurisdiction. The majority of the High Court’s matters are appeals from the appellate divisions of the State and Territory Supreme Courts and the Federal Court of Australia after special leave to appeal is granted. Matters heard by the High Court in its original jurisdiction include challenges to the constitutional validity of laws. High Court decisions are binding on all lower courts in Australia.

Each of Australia’s six States and two Territories has a Supreme Court which is the highest court in that State’s court system, subject only to the High Court. Each has unlimited civil jurisdiction. The Supreme Court hears, at first instance, monetary claims above a certain threshold based on the amount claimed in the proceedings, or claims for equitable relief. Monetary claims below that threshold are heard by a lower court in the State court hierarchy. The appellate division of State courts is the Court of Appeal or Full Court, which hears appeals from single judges of the Supreme Court and from certain other State courts and tribunals. The Court of Appeal has both appellate and supervisory jurisdiction in respect of all other courts in the State system.

Most States have two further levels of inferior courts. The District Court (in some States called County Court) is the ‘middle court’ and has jurisdiction for most civil matters within a monetary threshold. There is then the Local Court (in some States called the Magistrates’ Court) which handles smaller, summary matters.

In keeping with the hierarchy of courts established under the laws of each State, there is also a hierarchy of courts which deal with disputes relating to Federal law.

The Federal Court of Australia (Federal Court) has jurisdiction covering almost all civil matters arising under Australian Federal law. Most notably, the Federal Court has jurisdiction to hear disputes on issues including trade practices laws, bankruptcy, corporations, industrial relations, intellectual property, native title and taxation.

The Federal Circuit Court hears less complex disputes relating to family law, administrative law, bankruptcy, industrial relations, migration and trade practices laws.

In addition, some States have established specialist courts and tribunals of limited statutory jurisdiction, designed to hear specific categories of disputes.

There are also a range of tribunals created under Federal law. For example, the Administrative Appeals Tribunal reviews a broad range of administrative decisions made by Australian Government ministers and officials, authorities and other tribunals.

#### 1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

While there are minor differences between the processes to be followed in the various Australian courts, the course of litigation is broadly the same throughout Australia.

In the first stage of the proceedings, the parties exchange pleadings (such as a statement of claim and defence), which serve to define the issues in dispute between the parties.

Once the parties have finalised their pleadings, the parties will give discovery (sometimes referred to as ‘disclosure’) which involves disclosing their relevant documents and inspecting their opponent’s relevant documents [see section 7]. Parties may also issue subpoenas to obtain documents from third parties.

Each party will then prepare its evidence for use at the final hearing. In the Federal and some Supreme Courts, witnesses will not generally give their evidence-in-chief orally. Instead, written witness statements or affidavits are prepared by lawyers and served on the other side. Parties may also elect to engage expert witnesses,

where required, to give evidence concerning fields of specialised knowledge [see question 8.4].

Throughout the proceedings, the parties will attend court at regular intervals for case management. At directions hearings, orders will be made to govern the conduct of the matter up to its final hearing.

Once all the parties' evidence has been prepared and all the interlocutory disputes resolved, the case proceeds to a final hearing.

The timeframes for each of the stages discussed above will vary depending on the complexity of the subject matter, case management objectives and the civil procedure rules of the relevant jurisdiction.

Some jurisdictions have in place procedures to expedite trials in certain circumstances, for example, there are judges dedicated to managing cases requiring expedition in the Supreme Court of New South Wales and County Court of Victoria. A party who seeks an expedited hearing will generally have to demonstrate grounds upon which their matter should take precedence over other cases before the court.

#### 1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Australian courts will generally respect an exclusive jurisdiction clause if it is consistent with the construction of the relevant contract. However, an exclusive jurisdiction clause does not necessarily prevent an Australian court from exercising jurisdiction where there is a strong case for the court to do so, namely, where the party would be deprived of a legitimate juridical advantage available in an Australian court.

#### 1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The costs of conducting civil proceedings in Australia differ depending on the size and complexity of the case. Generally, the cost of proceedings increases with the superiority of the court in which it is heard. In Australia, the victor in litigation is entitled to claim costs from their opponent. There are two main classes of costs:

- those that arise by virtue of the retainer with the client and are governed by contract ("solicitor-client" costs); and
- those that arise by order of the court, which may either be on an ordinary basis ("party/party" costs) or an indemnity basis ("solicitor/client" costs). Indemnity costs are usually awarded against a party in circumstances where that party has engaged in unreasonable behaviour in connection with the conduct of the proceedings.

Following the conclusion of proceedings, costs are assessed by the courts. It is unusual that a party will ever recover all of its costs, as a discount is often applied by the costs assessor to ensure costs are "proportional". Costs are closely prescribed in some jurisdictions. Special and particular costs orders are not unusual where there have been formal (without prejudice) offers of compromise.

Costs budgeting rules exist in the Family Court of Australia, where parties can be required to exchange and provide to the court a notice outlining the party's actual costs, estimated future costs, and any expenses paid or payable to an expert witness. Otherwise in other Australian jurisdictions, generally speaking, costs assessment and management procedures occur retrospectively.

#### 1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

While initially a matter of some debate, the validity of litigation funding was established by the High Court in 2006 and subsequently reaffirmed in 2012, when it unanimously held that litigation funders were not required to hold an Australian Financial Services Licence.

In 2012, the Federal Government passed legislation which exempted a person providing financial services for litigation and proof of debt schemes from certain requirements of the corporations law if that person meets certain conditions.

The flourishing litigation funding industry that has emerged as a result of the light-touch legislative scheme in Australia has been active particularly in class actions and in an insolvency context. In the insolvency context, such funding agreements require the approval of the court, which requires that the commission to be paid to a litigation funder be "reasonable".

A well-known feature of plaintiff firms in class actions in Australia is the "no win, no fee" retainer its solicitors often enter into with group members in a class action, who otherwise could not afford to fund the litigation. In the result of a win, the retainer agreement often contains provision for the payment of an "uplift" fee, in addition to professional costs. Subject to the court supervision inherent in the class action regime in Australia, this arrangement is permissible.

Usually in litigation in Australia, where a respondent does not expect to be able to recover costs from a plaintiff, it has an option to make an application for security for costs. The court has the power to award security for costs to restore the balance, as having to put up money upfront to potentially cover the respondent's costs forces an applicant to consider whether there is merit in pursuing the action, and avoids frivolous litigation. The involvement of third-party funders with no pre-existing interest in the proceedings, but who stand to benefit substantially from any recovery from the proceedings is a material consideration in the courts considering whether to grant security for costs. The courts proceed on the basis that funders who seek to benefit from litigation should bear the risks and burdens that the process entails.

#### 1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Generally, a claim or cause of action may be assigned except where the cause of action relates to a personal right, such as an action in tort for personal injury. Contractual rights, including the ability to enforce those rights, are *prima facie* assignable; however, this position is not entirely settled at law.

It is permissible for a non-party to litigation to finance proceedings [see question 1.6].

#### 1.8 Can a party obtain security for/a guarantee over its legal costs?

Security for costs orders may be sought where a defendant alleges that the plaintiff will not hold enough funds to satisfy a costs order. The defendant asks the court to order the plaintiff to provide "security" to "protect" the defendant from this occurrence. The forms of security may include:

- (a) money paid into court;



- (b) payment into an interest-earning bank account under the control of a third party or solicitor for the plaintiff, who has given an undertaking regarding the circumstances when the money will be released;
- (c) a bank guarantee in favour of the court to be held by the court until further order; or
- (d) a deed of guarantee pursuant to which another entity agrees to guarantee payment of the amount to satisfy the costs order.

Applications for security for costs are discretionary. The court will consider and weigh the totality of the circumstances.

If the plaintiff fails to pay security in accordance with a court order, the court will order that the proceedings be stayed until the security is given.

## 2 Before Commencing Proceedings

### 2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In the Federal and several State jurisdictions, legislation has been enacted to impose pre-litigation requirements on persons involved in civil disputes prior to commencing proceedings. While generally a failure to comply with pre-litigation requirements will not invalidate the proceedings, the court may take this into consideration when awarding costs associated with the proceedings.

In the Federal Court, the parties to a dispute are required to file a “genuine steps statement” which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

### 2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In Australia, limitation periods are governed by State and Territory legislation and are treated as substantive rather than procedural.

In New South Wales, the Limitation Act 1969 (NSW) outlines the periods of limitations relating to specific causes of action. For example, section 14 of the Limitation Act states that a cause of action founded on contract or tort will not be maintainable if brought after the expiration of a limitation period of six years from the date the cause of action accrued.

## 3 Commencing Proceedings

### 3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Proceedings are commenced by filing an originating process and payment of the applicable filing fee with the registry of the court in which the claim is sought to be heard.

Rules relating to the service of an originating process can be located in the civil procedure rules of the relevant jurisdiction. For example, in New South Wales, an originating process must be personally served on each defendant; however, for most other documents, service can be effected by ordinary service which includes sending documents by post, facsimile and email (where the other party consents).

Where a document is personally served by the document being left with a person or put down in his or her presence, service is generally effected at that time.

For service of an originating process outside Australia, the relevant court rules will generally provide a power to serve an originating process outside Australia where there is a connection between the jurisdiction and the person’s acts or the consequences of those acts.

Australia is a signatory to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Convention is designed to simplify the process for serving court documents on international litigants and receiving court documents relating to foreign litigation. It applies in all civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad.

### 3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Generally speaking, Australian courts have a wide discretion in determining whether to grant injunctive relief to a party. An injunction is a court order that restrains a person from performing a particular act (prohibitory injunction) or requires a person to perform a specified act (mandatory injunction). Injunctions may have an effect for a limited time, or permanently, and may be granted before proceedings are commenced, during a proceeding, or as final relief.

When seeking an interlocutory injunction, an applicant is required to prove that there is a serious question of law to be tried, and that the balance of convenience favours the granting of the injunction sought. The court will have regard to factors including whether damages would otherwise be an adequate remedy and whether the grant of an injunction would preserve the *status quo*. Typically, such applications are made on *ex parte* basis and without notice to the other party.

Australian courts may also grant other interim orders including freezing orders (sometimes referred to as “Mareva orders”), and search orders (known as “Anton Piller orders”).

Another pre-action interim remedy which may be granted by Australian courts is preliminary (documentary) discovery. Orders for preliminary discovery are generally made where the applicant has made reasonable inquiries but still has insufficient information for the purpose of determining a prospective defendant’s liability or whereabouts for the purpose of commencing proceedings, or deciding whether or not to commence proceedings against the prospective defendant.

### 3.3 What are the main elements of the claimant’s pleadings?

The plaintiff’s primary pleading is the statement of claim. The relevant court rules for each jurisdiction outline the required format and generally require the statement of claim to contain the following elements:

- a summary of all the material facts on which the party relies, however this should not include evidence by which the facts are to be proven;
- adequate particulars of the claim as are necessary for the defendant to know the case it has to meet;
- the relief or remedy sought;
- a statement by a legal practitioner certifying that there are reasonable prospects of success; and
- often, an affidavit verifying that the allegations in the pleadings are true.

### 3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended; however, any amendments must be made in accordance with the civil procedure rules in the relevant jurisdiction. In some instances, there may be cost sanctions associated with a late amendment to the pleadings.

### 3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn. However, this depends upon what stage the litigation has reached. This is likely to lead to adverse cost orders and sanctions. If a defence is withdrawn this is likely to lead to an application for summary judgment.

## 4 Defending a Claim

### 4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defence must address the following:

- the allegations pleaded in the statement of claim that the defendant admits, does not admit, or denies; and
- any alternative versions of the facts underlying the dispute.

The form of the defence must be in accordance with the court rules and format of the relevant jurisdiction.

A defendant may counterclaim against the plaintiff. The plaintiff's claim and the counterclaim will generally be heard together unless the court orders otherwise.

Where the defendant has a claim against the plaintiff for money, the defendant may set it off against the plaintiff's claim for money by way of a defence.

### 4.2 What is the time limit within which the statement of defence has to be served?

The time limit within which the defence has to be served is set out in the civil procedure rules of the relevant jurisdiction. In New South Wales, the statement of defence must be filed within 28 days after service of the statement of claim, unless otherwise ordered by the court. This timeframe does not take into account the fact that in some circumstances it may be necessary to seek further and better particulars of the matters pleaded in the statement of claim in order to better understand the claim.

### 4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Third parties may be joined to the proceedings where contribution or indemnity is sought from the third party in respect to all or part of the claim made against the defendant. This obviates the need to commence new proceedings against the third party and ensures that all common issues are dealt with in one set of proceedings.

In each Australian jurisdiction, legislation provides that liability may be apportioned to a concurrent wrongdoer to limit the extent of a defendant's responsibility for the plaintiff's loss.

### 4.4 What happens if the defendant does not defend the claim?

Where a defendant fails to file a defence within the time limit provided in the court rules, the plaintiff is generally able to apply to the court to enter a judgment in default.

In New South Wales, the Uniform Civil Procedure Rules 2005 ("UCPR") provide that judgment may be given for the plaintiff against the defendant on a liquidated claim for a sum not greater than the amount claimed, interest up to judgment, and costs. On an unliquidated claim, judgment may be given for the plaintiff for damages to be assessed and for costs.

### 4.5 Can the defendant dispute the court's jurisdiction?

Yes. To dispute the court's jurisdiction, the defendant must file an application with an affidavit in support. The application would generally seek orders that the court lacks jurisdiction and therefore the originating process or its service should be set aside, or an order that the proceedings should be stayed.

## 5 Joinder & Consolidation

### 5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may be joined to existing proceedings. The relevant court rules in each jurisdiction set out the circumstances in which a party may be joined to the proceedings. In New South Wales, the UCPR provides that the court may order a person be joined as a party where it considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings. A third party may also apply to the court to be joined as a party, either as a plaintiff or a defendant.

### 5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The courts will generally allow for the consolidation or joint hearing of proceedings where the proceedings give rise to a common question of law or fact and where all rights of relief claimed in the originating process are in respect of, or arise out of, the same transaction.

### 5.3 Do you have split trials/bifurcation of proceedings?

In Australia, the court has the power to order that a question arising in a proceeding be heard separately from another question in the proceeding where it is convenient for the just, quick and cheap disposal of the issues in dispute.

## 6 Duties & Powers of the Courts

### 6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Each Australian court has its own case allocation system.

The Federal Court has adopted the individual docket system where cases are randomly allocated to judges and the case will ordinarily stay with the same judge from commencement until it is finalised. Cases requiring particular expertise are allocated to a judge who is a member of a specialist panel.

In many State and Territory courts, cases are allocated to judges in particular divisions according to the subject matter of the claim.

### 6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes. Australian courts have broad case management powers which are generally defined by the relevant court rules. Judges have a wide discretion to manage cases as they see fit to ensure that the real issues in dispute are identified and the matter is progressed to trial as soon as possible.

Parties may apply to the court for a wide range of interim orders including orders for evidence, discovery, the issue of subpoenas and the referral of the matter to mediation.

Australian courts have wide jurisdiction in relation to costs and can make interim costs orders against a party. Where a party has failed to comply with case management orders and the other party has incurred costs as a result, the non-complying party will usually be required to pay the costs incurred by the innocent party.

### 6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The Australian courts have a wide discretion to impose sanctions on a party that has not complied with court orders or directions. Sanctions may include adverse costs orders imposed against a party and or against the party's solicitor, the striking out or dismissal of matters and the rejection of evidence.

### 6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Yes. Australian courts have the power to strike out the whole or part of a statement of case in the following circumstances:

- where the pleading discloses no reasonable cause of action;
- where the pleading has a tendency to cause prejudice, embarrassment or delay in the proceeding; or
- where the pleading is otherwise an abuse of process of the court which may arise on a number of bases.

### 6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes, civil courts in Australia have the power to enter summary

judgment. Courts may enter summary judgment where there is reasonable evidence that the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed.

### 6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes. A discontinuance of proceedings typically occurs once a settlement of the proceedings has been reached between the parties.

Australian courts have the power to order proceedings be stayed in certain circumstances. For example, the court may stay the proceedings until such time as a plaintiff (who has been ordered to provide security) does so.

## 7 Disclosure

### 7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

In Australia, the disclosure process is often referred to as "discovery". Discovery is an interlocutory procedure whereby a party is able to obtain from an opponent the disclosure and subsequent production of documents which are relevant to a fact in issue in the proceedings. Disclosure must be made of the existence of all documents which the party has in its possession, custody or power.

While in many jurisdictions an application may be made for pre-action or preliminary discovery, documentary discovery usually occurs once pleadings have closed but before witness statements or affidavits are served.

In most jurisdictions, discovery may be ordered by the court or obtained by filing a notice to produce for inspection documents contained in pleadings, affidavits and witness statements filed or served by the other party.

General discovery involves discovery of all documents relevant to a fact in issue. While most jurisdictions permit an order for general discovery to be made, the courts and the parties will usually avoid general discovery by limiting the documents to be discovered to those falling within a particular category or class.

In the Federal Court, the Federal Court Rules 2011 (Cth) provide that a party must not apply for an order for discovery unless it will facilitate the just resolution of the proceedings as quickly, inexpensively and efficiently as possible.

In most jurisdictions, where an order for discovery is made by the court, the parties are required to compile and exchange lists of discoverable documents in the appropriate form prescribed by the relevant court rules. Documents that are not relevant to a fact in issue do not need to be disclosed. After the lists have been exchanged, the documents will be produced for inspection by the other party.

Under the evidentiary rules, a document includes any record of information stored or recorded by mechanical or electronic means. Most Australian courts have implemented practice guidelines in relation to the use of electronic technology in the discovery process. These practice guidelines encourage the use of technology for the listing and exchange of discoverable documents. They also set



out the court's expectations for the management and disclosure of electronic documents and recommend a framework for that process.

Australian courts are increasingly embracing the use of technology to reduce costs and increase efficiency in civil litigation; however, the technology of predictive coding is yet to be accepted as a valid tool in discovery.

## 7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

At common law, legal privilege is known as "legal professional privilege". The introduction of the uniform Evidence Acts in the Federal jurisdiction and some States, including New South Wales, renamed privilege "client legal privilege". This has created a situation where two sets of laws operate in the area of privilege in Evidence Act jurisdictions. In broad terms, the uniform Evidence Acts govern privilege issues on occasions when evidence is adduced at trial, while the common law governs questions concerning privilege which arise pre-trial, except to the extent otherwise provided by statute or rules of the court.

The uniform Evidence Acts create a privilege for confidential communications made, and/or prepared, for the dominant purpose of a lawyer providing legal advice or legal services relating to actual or anticipated litigation.

At common law, there are three elements necessary to establish legal professional privilege over communications passing between a legal adviser and client:

- the communication must pass between the client and the client's legal adviser;
- the communication must be made for the dominant purpose of enabling the client to obtain legal advice, or for the purpose of actual or contemplated litigation; and
- the communication must be confidential.

A third stream of privilege exists in the form of "without prejudice privilege". This involves communications between parties which are generally aimed at settlement. These communications cannot be put into evidence without the consent of all parties, in the event that negotiations are unsuccessful.

## 7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The relevant court rules in each jurisdiction provide that a party to proceedings can apply for an order for discovery against a non-party. In New South Wales, the UCPR provides that, where it appears to the court that a person who is not a party to the proceedings may have or have had possession of a document that relates to any question in the proceedings, the court may order such person to give discovery to the applicant of all documents that are, or have been, in the person's possession and which relate to that question.

In the alternative, a party may choose to seek discovery from a non-party by way of subpoena. While a party cannot seek general disclosure from a non-party through a subpoena, it can request documents that relate to narrowly defined categories.

## 7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Australian courts are involved in making orders for discovery to direct a party to produce or deliver up requested information. The courts are sometimes required to determine the scope of discovery upon application to the court.

## 7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Documents obtained on discovery cannot be used for any purpose other than the proceedings in which they were disclosed. The "Harman Undertaking" is the implied undertaking given to the court by any party obtaining documents on discovery (or by virtue of some other compulsory process) that it will not use such documents (or any other information gained from them) for any collateral purpose.

The Harman Undertaking is a common law doctrine which has been enshrined or referred to in the rules of the courts of various jurisdictions (although varied in the breadth of its application).

## 8 Evidence

### 8.1 What are the basic rules of evidence in your jurisdiction?

The Evidence Act 1995 (Cth) applies to all proceedings in Federal courts. Rules of evidence in State/Territory courts are established by legislation enacted by the respective State or Territory. The Evidence Acts are based largely on the common law, but also expand upon it and represent the most comprehensive codification of the law to date. The Acts include rules of evidence in areas including:

- hearsay evidence;
- opinion evidence;
- admissions;
- credibility evidence;
- character evidence;
- privilege; and
- proof and burden.

In some speciality tribunals, such as the Administrative Appeals Tribunal at the Federal level, or the Independent Commission Against Corruption in New South Wales, judge equivalents in those tribunals are generally guided by considerations of probity and prejudice. Given the general "fact finding" mission of such tribunals, they are not bound by the strict rules of evidence that may otherwise apply to the courts.

### 8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Evidence is admissible if it is relevant and not otherwise excluded either by the common law or the relevant Evidence Act in the State/Territory or Federal jurisdiction. For example, hearsay is generally inadmissible.

Evidence of an opinion is not admissible to prove the existence of a fact about which the opinion is expressed, unless that opinion is given by a person with specialised knowledge based on that person's training, study or experience. These persons are known as "expert witnesses". There are several conditions for expert evidence to be admissible, namely that:

- there must be a field of specialised knowledge;
- there must be an identified aspect of that field in which the witness demonstrates that he/she has become an expert; and
- the opinion proffered must be wholly or substantially based on the witness's expert knowledge.

### 8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Generally in Australia, witnesses provide written statements of their evidence, in the form of affidavits, statutory declarations or witness statements before the hearing. These documents are usually signed under oath or affirmed. These documents are then “read” onto the record in court, and serve as evidence-in-chief for that witness. Witnesses are then usually cross-examined and re-examined in court by Counsel.

With the leave of the court, a hostile or unfavourable witness may be questioned by the party that called the witness as though it were cross-examining the witness with the leave of the court. In re-examination, the witness may only be questioned about matters arising out of the cross-examination, and leading the witness is not permissible.

### 8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

There are two possible expert reports that may be admitted in proceedings: a joint report, arising out of a conference of experts; and an individual expert’s report. While specific requirements differ between jurisdictions, generally an expert’s report must include:

- the expert’s qualifications on the subject of the report;
- the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instruction may be annexed);
- the expert’s reasons for each opinion expressed;
- any literature or materials utilised in support of the opinions;
- any examinations, tests or investigations on which the expert has relied; and
- the qualifications of persons who conducted such tests/examinations/investigations.

Unless otherwise ordered, an expert’s evidence-in-chief must be given by the tender of one or more expert’s reports.

The expert’s paramount duty is to the court, not the engaging party. An expert is not an advocate for a party, but has an overriding duty to provide impartial assistance to the court on matters within the expert’s area of expertise. Generally, unless the court orders otherwise, an expert will not be permitted to give oral evidence unless the court is satisfied that the expert has acknowledged that they have read the appropriate guidelines or code of conduct which pertains to experts, and agree to be bound by it.

## 9 Judgments & Orders

### 9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

A judgment is a formal order by a court which concludes the proceedings before it. The judgment may relate to the substantive question in the proceedings, or it may be a question in an interlocutory application such as an application for an injunction or a notice of motion seeking orders for discovery. Courts in Australia are also empowered to make consent, summary and default judgments.

### 9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The Australian courts may award damages to compensate the plaintiff for loss. Generally, damages are awarded by Australian courts to compensate the plaintiff for loss suffered as a result of the defendant’s wrongdoing. In some circumstances, the court may make orders for other types of damages including exemplary damages, restitutionary damages, nominal damages and liquidated damages.

While costs orders are generally discretionary, the Australian courts will usually make orders in accordance with the principle that “costs follow the event”, whereby the unsuccessful party in the litigation pays the costs of the successful party on a party/party basis [see question 1.5].

Australian courts are empowered to order interest on awards of damages and costs.

### 9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments can be enforced by writ of execution, garnishee order or charging order.

The registration and enforcement of foreign judgments in Australia is governed by both statute and by common law principles. Within the statutory regime, the Foreign Judgments Act 1991 (Cth) provides for the procedure and scope of judgments that can be enforceable within the statutory regime. Registering a judgment under the Act is a straightforward and cost-effective procedure.

Where Australia does not have an international agreement or the circumstances are not caught by the statute, the foreign judgment may be enforced at common law.

### 9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Judgments of a civil court in Australia may be appealed to a superior court. Leave may be required in order to appeal. The relevant court legislation or procedural provisions set out the relevant rules of appeal.

The appellate division of most States is the Court of Appeal or Full Court, which hears appeals from single judges of the Supreme Court and from certain other State courts and tribunals. The High Court of Australia is the ultimate court of appeal in Australia [see question 1.2].

## 10 Settlement

### 10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

A number of formal mechanisms exist in Australian courts which are designed to encourage the settlement of civil claims. Those that exist in the Federal Court are a good example.

In the Federal Court, legislation has been enacted with an object of ensuring that, as far as possible, parties take genuine steps to resolve disputes before certain civil proceedings are instituted. Under this legislation, a claimant is required to file a “genuine steps statement” which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

Under the Federal Court Rules, parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable. The Court has express powers to implement those options.

In addition, the Federal Court Rules prescribe offers to compromise. Such rules exist in most jurisdictions and they set out a process whereby offers of settlement may be made with resulting cost penalties.

## II. ALTERNATIVE DISPUTE RESOLUTION

### 1 General

#### 1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

There are a number of dispute resolution mechanisms in use in Australia, including arbitration and mediation.

Arbitration is widely used in commercial disputes. In its most common form, parties select their arbitrator/s and are bound by that person or panel's decision, either by prior agreement or by statute.

Mediation is a structured negotiation process in which a neutral third party, the mediator, assists the parties to agree on their own solution to their dispute. The process usually involves isolating the issues in dispute (typically, by use of a position paper which outlines the issues), developing options for resolution and reaching an agreement which accommodates the interests of the parties as much as possible.

In some instances, the parties will have agreed to refer any disputes arising for expert determination. The independent expert is appointed by the parties to investigate and deliver a binding opinion on the issues in dispute. This may be appropriate in circumstances where the dispute involves a highly technical subject matter, such as, for example, construction disputes.

In addition, there are a number of tribunals in each jurisdiction which have been established to deal with disputes in a specific area and provide affordable alternative dispute resolution mechanisms.

#### 1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

In Australia, there are no uniform laws or rules that govern the conduct of alternative dispute resolution mechanisms such as mediation or expert determination. Rather, the laws and rules vary in different jurisdictions. In New South Wales, courts have the power to refer matters to mediation and make directions regulating the practice and procedure to be followed by the parties in a mediation. Commercial arbitration is governed by both State and Federal legislation. The International Arbitration Act 1974 (Cth) governs international arbitrations, while domestic arbitrations are governed by legislation enacted in each State or Territory.

#### 1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration and mediation are commonly utilised in commercial matters in Australia. Similarly, in some jurisdictions, such as the

Family Court of Australia, parties are required to mediate prior to the matter proceeding to trial. Generally, however, criminal and family law matters are considered non-arbitral.

The alternative dispute resolution methods exercised by a tribunal or ombudsman are generally restricted to resolving disputes regarding a specific industry or area to which the tribunal or ombudsman relates.

#### 1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Generally speaking, Australian courts are supportive of the different methods of alternative dispute resolution. For example, in the Commercial List of the Supreme Court of New South Wales, it is common for the court to order that the parties mediate before the matter is set down for hearing.

Australian courts will, where appropriate, enforce binding arbitration clauses. An Australian court will stay litigation proceedings in favour of arbitration if the arbitration agreement is valid and where the dispute falls within the terms of the agreement and is capable of arbitration.

#### 1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

There are limited rights available to a party to challenge an arbitral award. The only recourse available is an application to set aside an award in certain prescribed circumstances (Article 34(1), UNCITRAL Model Law).

It is necessary to consider the particular terms of the alternative dispute resolution clause in question to determine whether an expert determination is binding.

Settlement agreements reached at mediation do not require court sanction and will be binding and enforceable upon the parties if a valid contract has been formed.

## 2 Alternative Dispute Resolution Institutions

### 2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major dispute resolution institutions in Australia are the Australian Centre for International Commercial Arbitration and the Australian Commercial Disputes Centre.



### Colin Loveday

Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000  
Australia

Tel: +61 2 9353 4193  
Email: [cloveday@claytonutz.com](mailto:cloveday@claytonutz.com)  
URL: [www.claytonutz.com](http://www.claytonutz.com)

Colin Loveday is internationally recognised as an experienced litigation lawyer specialising in complex commercial litigation, the defence of class actions and product liability claims. He is one of the leaders of the Clayton Utz Class Actions team and head of the national Product Liability group.

Colin has defended some of Australia's most high-profile class actions involving complex consumer product and financial services claims. He has worked extensively with lawyers in other jurisdictions in the co-ordinated defence of multinational claims, developing international defence strategies and working with international expert witnesses. He also advises corporations and financial institutions on securities class actions and in regulatory investigations and inquiries.

Colin was named 'Product Liability Lawyer of the Year, Sydney' by 2013 Best Lawyers Australia. He is regularly voted by peers as one of Australia's 'best lawyers' in Litigation (2013) and Product Liability (2010–2013) by Best Lawyers Australia.



### Scott Grahame

Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000  
Australia

Tel: +61 2 9353 4676  
Email: [sgrahame@claytonutz.com](mailto:sgrahame@claytonutz.com)  
URL: [www.claytonutz.com](http://www.claytonutz.com)

Scott Grahame's main focus is mass consumer remediation and regulatory investigations.

His work in regulatory investigations sees him dealing with complex factual and legal issues in a high-pressure, high-profile environment in which the client's reputation and business are on the line.

When designing large-scale remediation programmes, Scott provides legal and strategic advice to management, and liaising between it, independent experts and clients to set the parameters of the programme and the operational implementation of the programme. This has included ensuring compliance with any regulatory regimes.

Scott's clients include retail and investment banks, mining and resources companies and Commonwealth and State government agencies.

## CLAYTON UTZ

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