

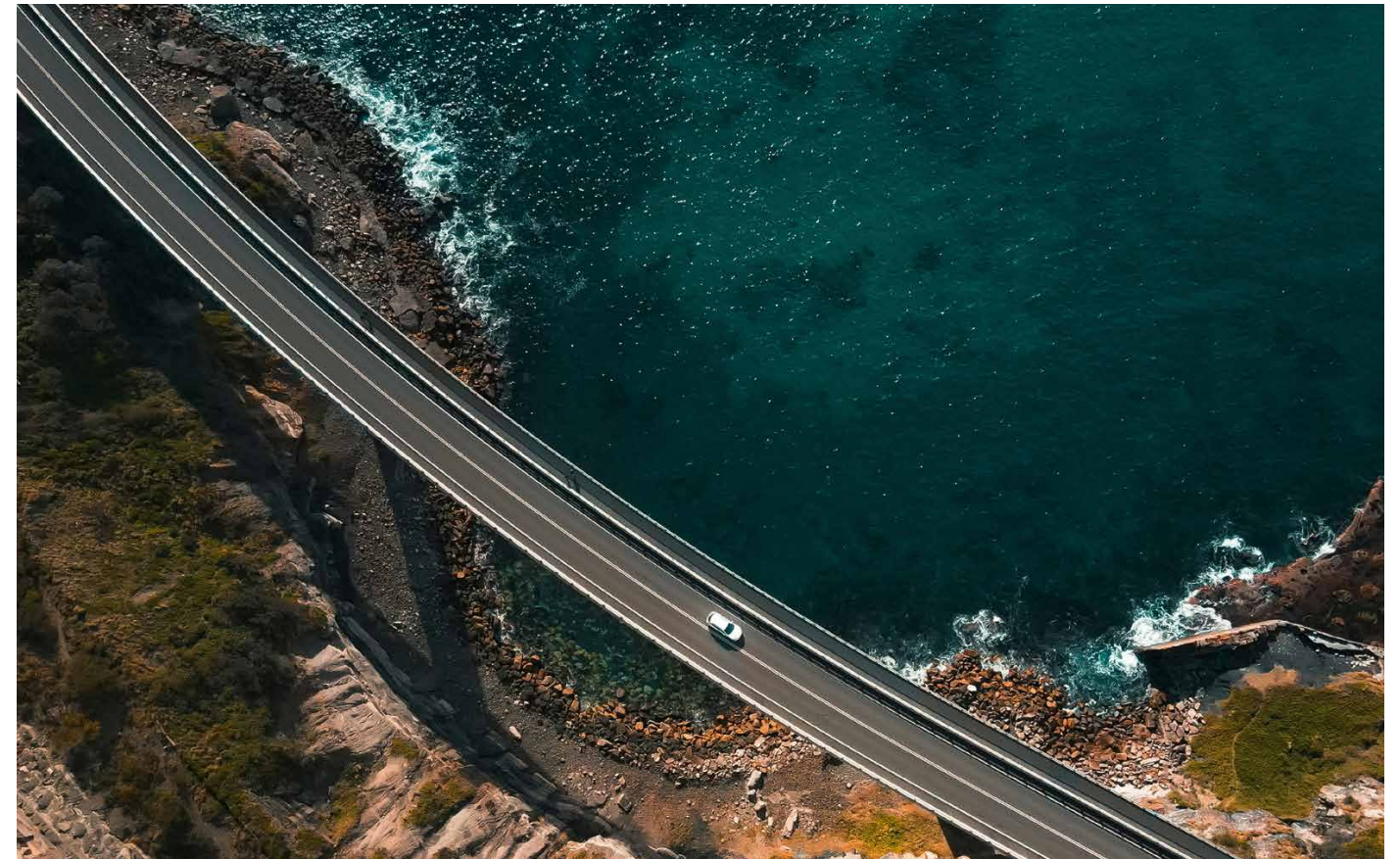
Litigation in Australia

A practical guide for global
businesses and counsel



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Introduction

Disputes are an inevitable part of doing business, especially across borders. When they arise in Australia, understanding the local litigation landscape can make all the difference in how quickly and effectively you respond.

In this guide, our experts walk you through the key stages of the litigation process in Australia, from early strategic decisions, right through to trial and enforcement. You'll also find case studies that provide illustrative examples of Australian litigation.

This resource is designed to guide those who are looking to mitigate disputes and manage risk. We hope you find it useful.



Brit Ibanez
Deputy Managing Partner
and Head of Litigation

Australia's legal system

Need to know

- Australian law stems from statute and common law, ensuring consistency through court precedents.
- The High Court is the top authority, with federal and state courts addressing different types of disputes.
- Foreign judgments may be enforced, and Australia shares common law roots with major jurisdictions.

Australia's economic and political stability make it a popular jurisdiction for investment, trade, tourism and innovation. One of the pillars that maintains that stability is Australia's legal system.

The legal system is comprised of two sources of law: statute law and common law. Statute law is the legislation drafted and enacted by both federal and state governments. Common law is the body of law developed by Australia's federal and state courts.

Australia's court system

Laws are made by the federal and state parliaments passing legislation (statute law) and by Australian courts (common law). A decision made in a superior court is binding on all the courts below it, providing consistency and predictability of the application of the laws and creating a 'precedent'.

The highest court in Australia is the High Court. It has original jurisdiction to hear certain matters, such as questions arising from the Australian constitution, and appellate jurisdiction to hear appeals from other courts. High Court decisions are final and binding on all lower courts.

The highest state-based court is the Supreme Court of that state. The Supreme Court usually hears the most complex disputes or claims involving large sums of money.

Decisions made by lower courts can be appealed to the court above. Certain matters, such as administrative or specialised disputes, can be heard by a tribunal instead of a court.

Federal courts usually hear disputes arising out of federal legislation, such as corporations, competition and consumer law, and state courts hear disputes arising out of state-based legislation and common law, such as property law, breach of trust and negligence. There is some overlap because the state supreme courts can exercise federal jurisdiction for certain matters, most commonly those concerning corporations law such as schemes of arrangement, restructuring and duties of directors of a company.

International litigation in Australia

International enforcement of judgments

Foreign judgments can, in some circumstances, be enforced in Australia. The process depends on the originating jurisdiction and the type of judgment that was issued. Some countries are covered by statutory registration regimes, while others require enforcement at common law (commencing fresh proceedings based on the foreign judgment). Whether enforcement is available often turns on reciprocity and jurisdictional rules.

Overlap with other common law countries

Australia's legal system shares common law roots with the UK, US, Canada, Hong Kong, Singapore and others. It is not uncommon for regulatory issues or private litigation themes to overlap across these jurisdictions, with regulators coordinating investigations and litigants testing similar arguments in multiple forums.

Key stages of litigation in Australia

Need to know

- Australian courts encourage alternative dispute resolution (ADR) and may require genuine steps be taken before proceedings begin.
- Legal proceedings usually follow stages of pleadings, evidence, then trial, with increasingly restrictive approaches to discovery of documents.
- The losing party typically pays a portion of the winner's costs.

Court procedures in Australia differ across state and federal jurisdictions. Generally, all share a common focus on managing cases to ensure a just and efficient outcome. This approach allows parties to regularly assess and refine their litigation strategy at each stage to work toward their desired result.

Pre-litigation action

Prior to issuing proceedings, parties may attempt to resolve the dispute by correspondence or alternative dispute resolution (ADR) methods like mediation. Further information about ADR can be found in our section on [alternatives to litigation](#).

Australian courts encourage parties to utilise ADR methods and usually require the parties to attempt mediation at least once after the commencement of proceedings.

In some jurisdictions, it is necessary to show that genuine steps have been taken to seek to resolve the dispute before the commencement of proceedings. Failure to comply with that obligation can lead to cost orders being made against a party.

Some disputes warrant the commencement of legal proceedings without prior notice to the parties. For example, if there is a significant risk the defendant will hide or dispose of assets to avoid complying with the court's orders, or to preserve the subject matter of the dispute (including the current state of affairs).

Australian courts can make urgent orders when required. Orders can be made on an interim basis to maintain the status quo while the case is ongoing, in addition to any final orders granted at the end of the proceedings.

If a party believes they have a claim but it lacks sufficient information to decide whether to start proceedings, or against whom the proceedings should be brought, they can apply for pre-action discovery orders. These orders, if made, provide for the respondent to produce specific documents or categories of documents. After reviewing the disclosed documents, the applicant can then decide whether to proceed with their claim.

Pleadings

Legal proceedings usually begin by filing an originating process (e.g. writ, summons, claim or originating application) with the relevant court then serving that document on the defendant (in certain jurisdictions called respondent). The method of service depends on the type of defendant:

- A corporation can be served by delivering the document to its registered office.
- An individual must be served by handing it to the person.
- Solicitors can accept service on behalf of their clients.
- If the defendant takes steps to avoid service, the court may allow alternative methods of service, such as email or post.
- If the defendant is overseas, it may be necessary to seek the leave of the court to serve them.

Once a proceeding is commenced, the parties are usually required to exchange pleadings that detail the cause of action alleged, the nature of the defence and the facts to be relied upon. The pleadings are to be sufficiently detailed so as to ensure the other party is aware of the case they must meet and not be surprised at trial. Pre-trial disputes about whether pleadings are satisfactory are common.

Case management

Australian courts use case management procedures with the aim of resolving disputes as quickly and efficiently as possible by pushing the parties to prepare the matter for hearing.

Case management hearings (also known as directions hearings) are held regularly to enable the court to supervise the progress of the litigation and ensure compliance with orders.

A trial will be set down after pleadings have closed and evidence exchanged. The time of trial will depend on factors such as the urgency and complexity of the matter, the court's availability, and the steps taken by parties to progress the action. It may be possible to list a matter for trial urgently if the court considers it necessary. However, for more complex cases, it can take several years before the case is ready to proceed to trial.

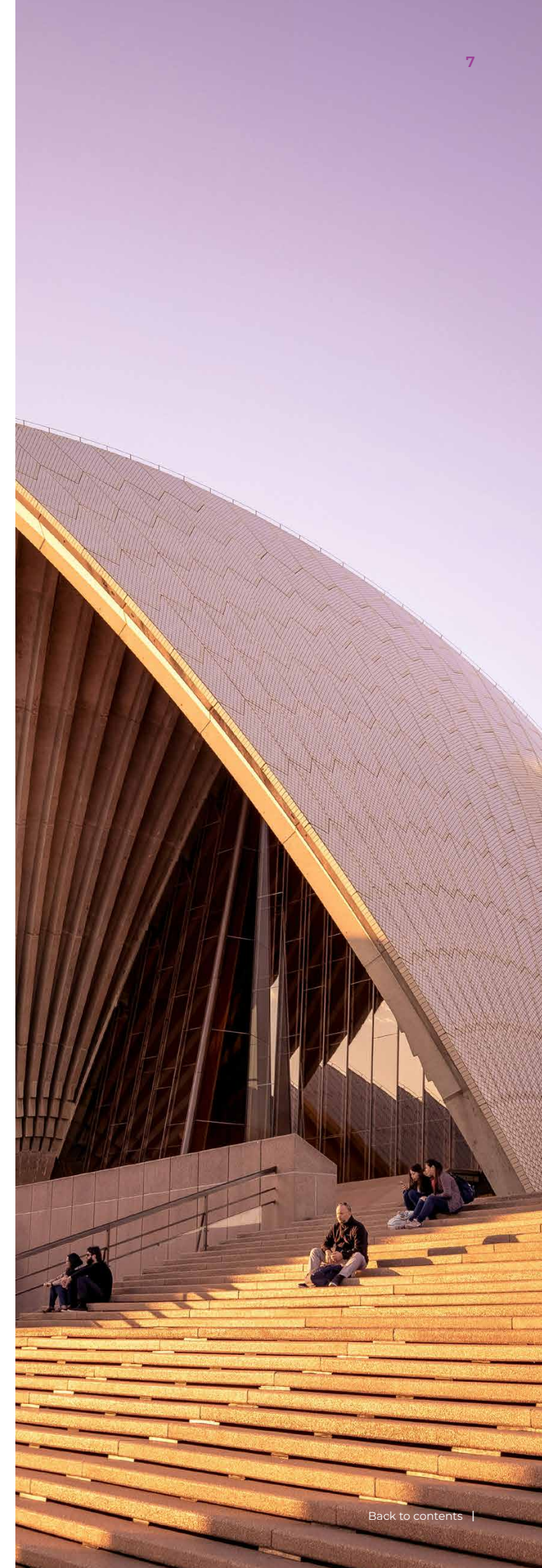
Documentary evidence

Documentary evidence can be obtained through various processes provided for in the relevant court's rules:

- discovery involves the exchange of documents relevant to the proceeding (or limited to certain categories) between the parties;
- subpoenas are issued to non-parties to compel production of specific documents; and
- notices to produce are issued to other parties requesting specific documents.

A failure to comply with requests for evidence can result in a range of consequences including adverse cost orders, the refusal to allow a party to rely upon documents they only disclose at trial, and /or inferences being drawn about a party's credibility.

Whichever disclosure process is adopted, parties will have an opportunity to withhold documents from production on the basis of legal professional privilege, without prejudice privilege and/or public interest immunity.



Witness evidence

Parties may need to lead evidence from both witnesses of fact and expert witnesses. Witnesses of fact will give evidence of their recollection of facts relevant to the case and refer to relevant documents. In commercial cases, evidence in chief may be given by way of written statements or affidavits or orally at trial. The process varies between the courts in Australia.

Expert witnesses will provide an opinion on issues within their specialist field. Expert witnesses will prepare a report ahead of the trial, which will be provided to the parties. It is common for parties’ expert witnesses to hold a conclave, where the experts consult with one another in an attempt to agree elements of their evidence, such as methodologies. Experts are regularly cross-examined on the content of their reports and commonly examined together at the same time.

Trial processes

At trial, the parties will typically each give an opening address, lead evidence from their lay witnesses and thereafter any expert witnesses, and conclude by making closing submissions.

Witnesses in commercial and civil cases typically provide their evidence in written affidavits or witness statements prepared and provided to other parties in advance. The opposing party will then typically have an opportunity to cross examine each witness at trial. Re-examination of the witness may also occur, however limited to the scope of the questions asked. Evidence in chief may be adduced orally in certain circumstances, such as where an affidavit or statement has not been obtained beforehand or the rules require it (e.g. criminal jurisdiction). There is not usually an opportunity to cross examine a witness before a final hearing.

Civil and commercial suits are decided by judges, while criminal trials of significant offences tend to be heard by juries with limited exceptions.

There is no set timeframe within which a court must deliver judgment; however, many Australian courts aim to publish judgments within three months of the conclusion of trial.

Remedies

There are a wide range of remedies available in Australian courts ranging from damages or other monetary compensation, injunctions requiring a party to do something or restraining them from doing something, or a declaration affirming the rights in respect of a power or thing. In some claims, courts also have a broad jurisdiction to craft orders to address the circumstances of the case.

Costs

Costs usually follow the event, with some exceptions. This means that an unsuccessful party is generally ordered to pay a portion of the successful party’s costs of the proceeding. Typically, a party will not be able to recover the full extent of the costs they incurred. These adverse costs orders prevent frivolous applications being issued and encourage resolution of issues early.

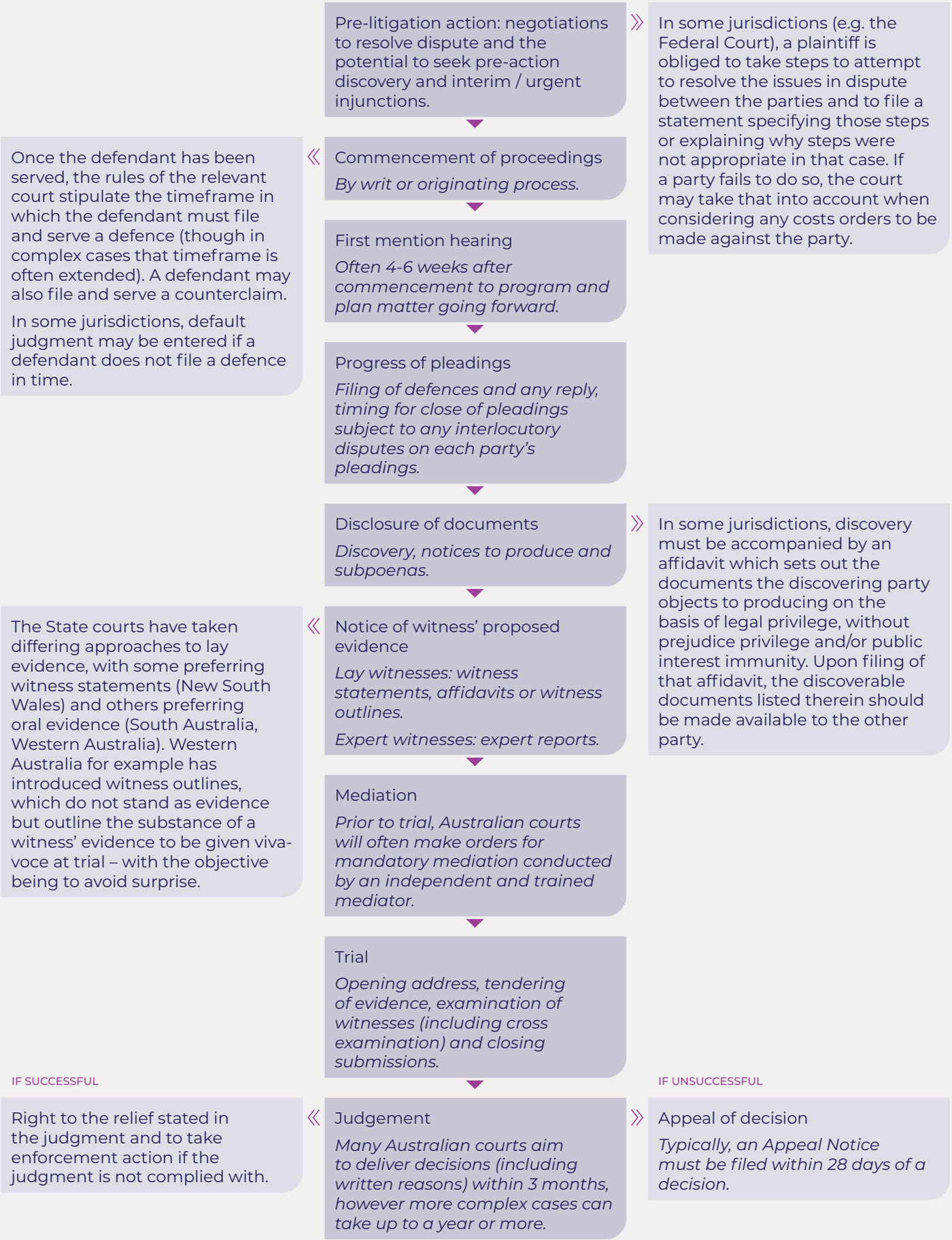
In exceptional circumstances (such as where a party has advanced a hopeless case, abused the court’s processes or acted vexatiously) the court may make orders for costs on a full indemnity basis.

Appeals

The avenues for appeal vary between jurisdiction, but in general, any appeal is heard by a higher court. Not all orders can be appealed. Orders are usually stayed, or postponed, pending the outcome of the appeal. To certain courts, leave (or permission) to appeal is required before the appeal itself is heard. Special leave to appeal is sometimes required in order to appeal to the High Court of Australia, which is the final appellate court.

Procedural steps

The below outlines the key procedural steps in a typical Australian litigation case, from pre-litigation action to judgement.



Case study

Four cases brought by Epic Games against Apple and Google are very recent landmark cases in competition law and digital markets heard together before the Federal Court of Australia. The case brought by Epic mirrored a very similar successful jury trial in the USA (the subject of an appeal at the time of publication). It demonstrates that:

- Multi-jurisdictional litigation can be an effective strategy where the issues are common across forums, especially concerning global markets such as online gaming and entertainment platforms, social media and cybersecurity.
- Australian class actions follow, and as in this case, travel with the liability hearing – increasing the exposure for the defendants.

The dispute began in 2020 when Apple and Google removed Fortnite from their app stores after Epic offered alternative methods of payment which bypassed the stores' 30% in-app payment fee. Epic responded with its "Project Liberty" campaign, pursuing coordinated litigation against the tech giants across jurisdictions in the USA, UK and Australia. After nearly five years of litigation, the Federal Court in three joint-judgments ultimately found that:

1. Apple and Google misused their market power under section 46 of the Competition and Consumer Act 2010 (Cth); and
2. this conduct deprived developers of a valuable commercial opportunity by preventing them from paying materially lower commissions.

Epic sought orders to restrain anti-competitive conduct, while class actions brought by other developers succeeded on liability, with the scope of orders and the amount of compensation to be determined in future hearings.

The case is remarkable in both scale and complexity: four consolidated proceedings (including two class actions), a 16-week trial, four major law firms, 32 barristers (nine senior counsel), and evidence given by senior executives, many of whom were based overseas.

Epic Games v Apple & Google (Federal Court of Australia, 2025)

The court's decision is significant because it adopted a narrow definition of the market, which meant that Apple and Google each held substantial power. Their restrictions on alternative app stores, payment systems, and operating system licensing were found to have the effect of substantially lessening competition.

While Apple and Google argued that these restrictions were justified on security and intellectual property grounds, the court concluded that such considerations did not outweigh the anti-competitive effects. The judgment confirmed that section 46 is a robust, effects-focused provision, and made clear that the US "rule of reason" has no application in Australia.

The broader implications of the case extend well beyond the parties involved. For global technology platforms, the case highlights the risks of restricting access to markets in ways that limit competition.

Australian courts are prepared to grant structural and behavioural remedies that reshape digital markets, even in the absence of damages claims. For developers, it opens the door to alternative distribution and payment channels, as well as potential compensation for excessive commissions. For class actions, it provides a clear example of liability-first strategies succeeding, with damages to be determined in later phases. Australia's opt-out class action regime (see further our section on [class actions](#)), combined with loser-pays costs, creates significant exposure.

The Federal Court's approach also reflects broader regulatory momentum. Its reasoning is consistent with global trends towards constraining the power of digital gatekeepers, reflecting developments in the USA, UK, South Korea, Japan and India. Domestically, the Australian Competition and Consumer Commission is advancing proposals for a dedicated regulatory framework for digital platforms, making clear that the litigation is only one part of a larger policy shift.

Looking ahead (at the time of publication), the quantum of compensation for developers and specific relief for Epic will be resolved in subsequent hearings. Appeals to the Full Federal Court seem likely.



Enforcement of orders using court processes

Need to know

- There are various enforcement options available according to the objectives and assets.
- Australia follows international arbitration laws, making it a pro-arbitration jurisdiction where foreign and domestic arbitral awards are enforced through federal or state courts.
- Challenges to arbitral awards are limited and strictly timed.

A successful litigant has various enforcement options, each varying in cost and effectiveness. The choice of method should be guided by the debtor's available assets and the litigant's strategic goals. Depending on the jurisdiction and the nature of the claim, enforcement can generally be pursued some years following the order. Potential enforcement steps are outlined in the table below.

Enforcement option	How it works	When to use it
Examination notice	This compels a debtor to answer questions about their assets in an oral examination in a court.	You need information about the debtor's assets to decide which enforcement option to pursue.
Writ of execution, seizure and levy of property	This directs a court official to take and sell property of the person that owes the money.	The debtor has illiquid assets (such as housing, vehicles or other items of value) that can be liquidated or available money.
Garnishee order	Order of the court to a third party directing it to pay assets of the debtor to you directly instead (such as a person's employer).	You have the bank account or other key details so you can direct the bank to pay you the debtor's money directly.
Charging order	Creates a security interest over specific assets owned by the debtor to the value of the judgment debt and restrains the debtor from dealing with the asset.	There is a particular asset of value which you seek to secure.
Asset preservation orders, provisional liquidation or receivership	Freezing orders restrain the debtor from dealing with their assets in a way intended to put them beyond reach and frustrate the court's process. Provisional liquidators or receivers can be appointed to corporate debtors to take control of their affairs and assets where it appears the assets of the company will be dissipated and a lack of control and proper corporate governance.	You have reason to believe assets are being put beyond reach or dissipated outside of the ordinary course of the debtor's business.
Winding up and bankruptcy proceedings	Appointing an independent third party to the debtor's assets with a view to liquidating them and paying out creditors. The most common method in Australia is to issue a statutory demand or bankruptcy notice, which gives the debtor 21 days to pay, failing which they are presumed insolvent and liable to have an administrator or trustee appointed.	The process of appointing an external administrator presents an existential threat to the debtor, who may offer up assets to preserve their reputation and credit rating. If external administrators are appointed, it is their duty to investigate and gather in all assets of the debtor for distribution to creditors. They have extraordinary powers of investigation and can prosecute antecedent transactions and claims against the former officers of the company.



Enforcement of arbitral awards

Arbitration awards, the product of a successful arbitration, can also be enforced. An award is final and binding with limited recourse to challenge. Sometimes, a creditor needs to enforce the award in a country other than that which issued the award.

Australia has implemented the central international arbitration framework (UNCITRAL Model Law and the New York Convention) into federal legislation through the International Arbitration Act 1974 (Cth) (IAA). Domestic arbitration sits at state and territory level, with each Australian state giving effect to the UNCITRAL Model Law through their respective Commercial Arbitration Acts, such as the Commercial Arbitration Act 2010 (NSW).

The legislation provides international parties with reassurance as to Australia's approach to foreign arbitral awards, particularly given one of the IAA's objects is to encourage the use of arbitration as a method of resolving disputes. Overall, Australia is considered a pro-arbitration jurisdiction, and recognition and enforcement of both foreign and domestic arbitral awards is typically conducted with consistency and transparency.

Federal or Supreme Courts

The Federal Court of Australia or an Australian state or territory court may enforce foreign and domestic international arbitral award as if it were a judgment or order of that court. The Federal Court enforces most international arbitral awards. Domestic commercial arbitral awards are enforced by the relevant state or territory supreme court, unless the parties agree another court has jurisdiction.

The enforcement process

A party seeking to enforce an arbitral award will need to make a written application, with accompanying affidavit evidence, to the appropriate court to recognise and enforce the award as a judgment. This process can occur within a few weeks.

Challenges to the award

Parties have strictly defined parameters within which they can seek review of the award (with a view to it being set aside) or challenge enforcement and recognition of the award, with different timing requirements applying.

Potential grounds to challenge an arbitral award (fairness and procedural)	
1	Incapacity of a party to the arbitration agreement.
2	Invalid arbitration agreement under applicable laws of the agreement or where the award was made.
3	Inadequate notice of an arbitrator’s appointment or the arbitral proceedings, or a party was otherwise unable to present their case.
4	Award addresses issues not contemplated by arbitration submission or goes beyond its scope.
5	Non-compliance of arbitral tribunal or procedure with parties’ agreement or laws of arbitration venue.
6	Subject matter incapable of settlement by arbitration (by reference to law of the country reviewing or enforcing the award).
7	Enforcement would be contrary to public policy e.g. fraud or corruption in relation to the making of award; breach of natural rules of justice.
8	Recognition / enforcement challenge: award is not yet binding or has been annulled or suspended by a competent authority in the relevant country.

Appeal (domestic tribunal award only)

A domestic arbitral award can be appealed on a question of law, subject to the appeal application being made within three months of the award, with the parties’ agreement, and the court’s leave. The court will only grant leave if satisfied one of the parties’ rights would be substantially affected by determination of the question of law, and the arbitral tribunal’s decision on the question was obviously wrong or open to serious doubt.

There is no equivalent section in the Model Law as applicable to foreign arbitral awards.

What if a sovereign State is involved?

Where seeking to enforce the foreign arbitral award against a foreign State, or separate entity of a Foreign State, the Foreign States Immunities Act 1985 grants immunity from the jurisdiction of Australian courts in a proceeding, although it can submit to the jurisdiction by agreement (such as by a contract or treaty).



“Enforcing a court order is a critical phase of litigation that often requires as much strategy as the original claim. The key is selecting the right enforcement method based on the debtor’s financial position and your organisation’s broader objectives. Effective enforcement turns a legal win into a real-world outcome.”

Brit Ibanez
Deputy Managing Partner and Head of Litigation

Case study

Productivity Partners Pty Ltd v ACCC; Wills v ACCC
[2024] HCA 27

This case provides important clarification on the frequently litigated unconscionable conduct and misleading and deceptive conduct causes of action under common and statutory law.

A lack of intention to engage in such conduct, or taking a hands-off approach, may not inoculate one from liability. Critically, the High Court of Australia (Australia’s most senior court) found:

- 1. individual officers of a company can be held accessorially liable for the conduct of the company, where the evidence establishes that officer is knowingly concerned in the impugned conduct; and
- 2. liability of the company may be established even where an intention for the relevant risks did not exist, because the court may have regard to the circumstances that were reasonably foreseeable at the time of the alleged contravention.

This is an essential risk management point for all who do business in Australia.

The appellant was found to have engaged in systematic unconscionable conduct in the way it enrolled students into vocational training courses, leaving many with large debts and little education. The court also considered whether Mr Wills, COO of the parent company of the College and acting CEO of the College for a period, was “knowingly concerned” in the relevant conduct and thus liable as an accessory.

The ultimate decision that Mr Wills was liable underscores how officers and executives may be exposed to accessorial liability where they intentionally participate in conduct with knowledge of its essential features, even if they do not recognise the conduct as being contrary to the law.

Put another way, a person is knowingly concerned in a contravention when two elements are satisfied:

- 1. intentional participation: the individual must play a role in, or oversee, the contravening conduct; and
- 2. knowledge of essential facts: the individual must know the critical circumstances that make up the contravention, though not the legal consequences.

This case has significant implications for businesses and its officers and employees, including:

- **Companies** may be directly liable for unconscionable conduct where their systems fail.
- **Individuals** may be personally, accessorially liable if they knowingly weaken risk management protocols and risks eventuate.
- **Risk oversight and management** must be active, not passive, and function diligently.

Class actions

Need to know

- Class actions in Australia use an opt-out model binding non-opted members to outcomes.
- They are heard in federal or state supreme courts.
- Court approval is required for funding agreements, group costs orders (in Victoria), considering claim value, litigation risks, duration, and class member objections to ensure fairness.

Class actions are available where seven or more plaintiffs have a claim against the same person or corporate entity, and those claims share substantial common issues of law or fact.

Australia's class action regime:

1. often involves similar claims litigated abroad, usually involving the same parties (see case study); and
2. adopts the common features in most Australian litigation, including the 'loser pays' costs regime.

Class actions can be brought in the Federal Court or the state supreme courts in respect of almost any civil cause of action. These proceedings typically adopt an 'opt-out' model. This enables the proceeding to be brought on behalf of a class without them taking positive steps to be included. Those who opt-out can bring their own separate proceedings. Those who do not opt-out are bound by any judgment or settlement.

The options for funding a class action include:

1. litigation funding agreements, where the funder takes a percentage of any damages awarded or settlement sum (known as a common fund order or CFO);
2. group costs order or GCO, which enables the lawyers bringing the claim to be paid a percentage of any award of damages or settlement sum. A GCO is only available in the State of Victoria, making it a popular jurisdiction. The funding arrangement must be approved by the court and disclosed to class members; or
3. litigation funders or lawyers may also seek to be paid their actual costs out of any award of damages or settlement sum.

Any settlement of a class action must be approved by the court, which facilitates a process for objections by class members. The court will scrutinise the settlement proposal, including the proposed scheme of distribution (which accounts for a deduction of legal costs and the litigation funder's commission if there is a CFO in place).

In deciding whether a settlement is reasonable, the courts will consider a number of factors, including: the value of the claims; risks in the proceeding; the benefits of certainty from settlement rather than litigating through to judgment; the complexity and duration of litigation; and the class' position on the settlement.



"The class action landscape in Australia has matured over the last 30 years and continues to evolve. We are seeing increased activity in claims the subject of multi-jurisdictional contests, costs and funding, and the nature of issues prosecuted – raising the complexity of the management of the issues for stakeholders facing that litigation. It is essential to partner with teams that understand that dynamic and can lead through the complexity."

Sophie Uhlhorn
Partner, Dispute Resolution and Litigation

Case study

Bogan & Anor v The Estate of Peter John Smedley (Deceased) & Ors [2025] HCA 7

A class action against Arrium Ltd (Arrium Class Action) was brought by shareholders of Arrium who acquired ordinary shares between 2014-2016. The shareholders alleged Arrium's former directors and auditor made misleading or deceptive statements, resulting in an inflated share price. The decision is recognition by the High Court of the group costs order regime in the State of Victoria as facilitating greater access to justice.

The High Court was called upon to consider whether a group costs order (GCO) made in the Supreme Court of Victoria (in Melbourne) could transfer with the proceedings to the Supreme Court of New South Wales (in Sydney) and be enforced in New South Wales. A GCO enables lawyers to be paid by way of a percentage of an award of damages or settlement sum.

At the heart of the High Court's decision was the application of s 1337H(2) of the Corporations Act 2001 (Cth) which permits a transfer of proceedings if the transferee court is more appropriate to decide the matter "having regard to the interests of justice."

The High Court found that if the proceeding was transferred, it would continue without the benefit of the GCO because a GCO can only be made in Victoria.

GCOs were found to be an attempt to promote greater access to justice – so a transfer which prevents class members from relying on the benefit of a GCO was considered not in the interests of justice as it may result in that claim being abandoned.

The High Court's decision in Arrium has cemented Victoria's position as a friendly jurisdiction for class actions, enabling lawyers and funders to obtain orders for funding the proceedings which are efficient and practical.

Alternatives to litigation

Need to know

- Alternative dispute resolution (ADR) methods in Australia include mediation, arbitration, expert determination, and dispute boards.
- Courts encourage parties to attend mediation or identify questions early which would be appropriate for referral to an expert.

Proven alternatives to formal litigation are embraced in Australia to seek effective, flexible, and cost-efficient ways to resolve disputes. Some of the most common alternative dispute resolution (ADR) methods in Australia include mediation, arbitration, expert determination and dispute boards. These forms of ADR are all options that may be chosen by the parties rather than instituting formal proceedings through the courts.

Mediation

Mediation is a form of structured negotiation where the parties attempt to resolve their dispute by identifying and assessing different options of settlement. The negotiation is facilitated by an independent and impartial third party, known as a mediator, who typically has expertise in the subject matter of the dispute. Mediation is private, confidential and without prejudice.

Arbitration

Arbitration is similar to proceedings before a court; it can be private and confidential with tailored rules to facilitate a determination. The parties to a dispute present their evidence and arguments to the arbitrator, who is an independent third party. Depending on the size and complexity of the dispute, there may be a single arbitrator or a panel of arbitrators presiding over the matter. Enforcement of arbitral awards is discussed in our section on [enforcement](#).

Arbitration is a well-known form of ADR. There are globally and domestically recognised organisations that publish arbitration rules. In Australia, the International Arbitration Act 1974 (Cth) incorporates the UNCITRAL (a legislative template created by the United Nations Commission on International Trade Law) Model Law. Additionally, the Australian Centre for International Commercial Arbitration (ACICA) publishes a set of rules that parties can adopt for arbitrations with their location in Australia.

Relevantly, the arbitrator's decision (i.e. the arbitral award) is binding and enforceable; there are very limited avenues for parties to appeal an arbitral award.

Expert determination

Expert determination is an ADR process where a neutral and highly specialised independent third-party provides their determination on the dispute between the parties. The determination can be either binding, binding subject to limited exceptions, or non-binding – the nature of the expert's determination will be chosen by the parties.

Expert determinations are particularly useful in matters where the relationship between the parties will continue for some time because of the nature of the contract or the project. They are also useful where there is a technical and commercial dispute requiring non-legal expertise, and quick and cost-effective determination. They are commonly used for issues of valuation.

The expert(s) chosen by the parties will draw on their professional knowledge, background, and experience to assess the evidence and submissions made by the parties in coming to their determination.

Dispute boards

Dispute boards are created at the beginning of large construction or infrastructure projects and comprise impartial experts who assist parties in dispute avoidance and resolution throughout the project's lifecycle.

Typically, dispute boards comprise three independent and impartial individuals (the Board) who have relevant expertise in the project. For example, a senior engineer, project manager, and/or lawyer.

The dispute board and its processes are set out within the project contract and will start when the project is initiated. The Board is thoroughly briefed on the project and assists parties in identifying potential issues that may arise, while facilitating effective collaboration and communication.



Regulatory processes and investigations

Need to know

- ASIC and the ACCC are key commercial regulators with broad powers to investigate and enforce laws on competition, consumer protection, and financial markets.
- ASIC and the ACCC can compel evidence during investigations, and regulatory enforcement often precedes private litigation such as class actions.
- Serious misconduct can lead to criminal referrals to the Commonwealth Director of Public Prosecutions, while less serious issues may be addressed through disciplinary or civil actions.

Australian regulatory bodies are specifically charged with their remit and authority by statutes and are reliably impartial and independent to political changes. They oversee the enforcement of Australian laws and take action to investigate and respond to unlawful conduct.

The most prominent for businesses are:

- A.** the Australian Competition and Consumer Commission (ACCC), which monitors competition, fair trading and consumer protection issues;
- B.** the Australian Securities and Investments Commission (ASIC) which regulates Australia's financial markets, corporations and financial services and is generally seen as the Australian corporate police, and
- C.** the Australian Taxation Office (ATO).

The regulators have been known to work with the police force to investigate and enforce Australian laws.

Australia's regulators investigate matters that are also the subject of regulatory investigation or enforcement abroad, such as global cartels, conduct arising from firms headquartered in other countries, and multi-regulator investigations.

ASIC and the ACCC have wide powers to investigate suspected contraventions of the applicable legislation, including to compel individuals or corporations to provide information or produce documents. They can summon officers of corporations to answer questions to assist their investigations before any proceedings have commenced (see further below).

Once ASIC or the ACCC has concluded an investigation, and is satisfied that it has sufficient evidence of a suspected contravention, it may decide to take enforcement action. The action each is empowered to take will depend on the particular contravention and provision of the relevant legislation.

Relevantly, ASIC or the ACCC may determine to institute proceedings to address more serious civil contraventions including breaches of civil penalty provisions or criminal offences. Alternatively, and often in response to less serious misconduct, ASIC and the ACCC may address contraventions through disciplinary action, disqualification orders, restricting certain activities, issuing public notices and requiring the implementation of training and compliance programs. They have limited ability to impose fines without first prosecuting a case to judgment in court. Accordingly, ASIC has been known to use its position as the provider of Australian Financial Services Licences to impose conditions on the licence or compel entry into an enforceable undertaking to obtain early remedial action. It can then move to more severe measures such as cancellation or suspension of the licence.

Criminal proceedings

Once an investigation has reached a point where ASIC or the ACCC take a view a crime is likely to have been committed, the matter can be referred to the Commonwealth Director of Public Prosecutions (CDPP), which is the independent prosecuting body for federal matters. The CDPP will assess the evidence available against its Prosecution Policy as to reasonable prospects of conviction and public interest; it may then commence criminal proceedings.

Matters which ASIC or the ACCC may decide to refer to the CDPP can include insider trading, offences relating to fraud and false or misleading documents, falsification or concealment or alteration of financial records, and cartel conduct. ASIC is also authorised to prosecute some minor regulatory offences on its own behalf, such as breaching financial reporting obligations.

If the CDPP elects to commence criminal proceedings against an individual or company, the litigation follows the typical steps that the CDPP would take in other criminal prosecutions. The criminal burden of proof, namely beyond all reasonable doubt, applies. An individual or company may also seek to engage in charge negotiations with the CDPP.

Generally, an individual accused of a crime in Australia enjoys a right to silence and the prosecution must establish the elements of the offence without the assistance of the accused. However, certain legislation has been enacted which partially abrogates that right to silence.

For example, pursuant to certain sections of the Australian Securities and Investments Commission Act 2001 (Cth), ASIC can require attendance at an examination to answer questions by a regulator and the production of books and information by both individuals and companies.

It is a crime to refuse to answer a question on grounds that it may tend to incriminate a person in circumstances where an investigating body compels an individual to attend an examination and answer questions. The use of the answers to those questions is heavily regulated, however in some circumstances, those answers can be given to prosecuting bodies to aid in the preparation of criminal proceedings for those crimes.

Civil proceedings

Civil litigation brought by ASIC or the ACCC follows a similar process to litigation brought by private parties.

ASIC or the ACCC may utilise litigation to pursue a wide range of outcomes designed to address and deter misconduct. This may include the imposition of civil penalties for contraventions which may require the payment of a sum of money. The civil penalty regime is intended to provide an easier route for regulators to obtain outcomes without satisfying the higher burdens of proof in criminal cases and enduring lengthier criminal processes.

It is not uncommon for private suits to follow regulatory enforcement, such as class actions (discussed in our section on [class actions](#)).



“ASIC and the ACCC are two of the most influential regulators that feature as part of the Australian commercial landscape. Their investigations can lead to serious consequences, from follow-on class actions to civil penalty

proceedings and criminal referrals. All of these actions can result in serious reputational damage. For international businesses operating in Australia, it's essential to take regulatory compliance seriously and work proactively with experienced local advisors to develop a well-informed, strategic response at an early stage to any possible enforcement action.”

Tim Grave
Partner, Dispute Resolution and Litigation

Costs of litigation

Need to know

- The unsuccessful party usually pays a portion (50%-75%) of the successful party's legal costs.
- Indemnity costs (~90%) may be awarded for misconduct or unreasonable behaviour in the prosecution of the case.
- Settlement offers can influence the costs award and increase a party's costs exposure, encouraging parties to compromise.

Costs of litigation in Australia are generally borne partially by the unsuccessful party. That party is typically ordered to pay the successful party's legal costs, being expenses deemed necessary and reasonable for the conduct of the case of amounts representing approximately 50% to 70% of the actual legal fees incurred. Indemnity costs can be awarded in more exceptional circumstances, which increases the range to 85% to 95%.

This approach encourages parties to litigate efficiently and discourages the pursuit of marginal claims without impeding access to justice.

Indemnity costs are most often awarded where a party has acted unreasonably in its conduct of the litigation, most commonly in refusing a reasonable offer of settlement. In this sense, costs orders are used to provide a degree of fairness (in that the loser bears the costs) as well as regulating the conduct of participants before the courts. They can be ordered in relation to the entirety of the litigation, or an aspect of it. As with costs orders generally, the possibility of an indemnity costs order serves as a brake on high-risk litigation tactics that may otherwise absorb the resources of the parties and the courts.

When conducting litigation in Australia, it is important to bear the following in mind:

- **Anticipate the shortfall:** even when successful, parties rarely recover all legal costs. This should be factored into any cost-benefit analysis of pursuing litigation.
- **Consider whether offers are for cost purposes or substantive purposes:** making a well-timed and carefully considered offer of compromise can provide significant costs protection and may increase the incentive on the opposing party to resolve some or all issues in dispute.
- **Beware of conduct risks:** conduct that the court views as unreasonable or wasteful may expose a party to indemnity costs, even if they succeed on some issues, such as refusing to consent to procedural orders.



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