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Contents

Gilbert + Tobin has a disputes and investigations practice comprised of 14 partners and over 70 supporting fee earners based across its offices in Sydney, Melbourne and Perth. The firm's key areas of expertise are commercial litigation, class actions, commissions and inquiries, anti-bribery and corruption, regulatory compliance and investigations, corporate crime, employment disputes and resources litigation. Its lawyers have been and continue to be involved in Australia's most high-profile commercial disputes, litigation, investigations and inquiries. In 2016 Gilbert + Tobin obtained the largest commercial payout for misleading and deceptive conduct in Australian corporate history (AUD280 million). In 2017, it obtained two further nine-figure outcomes for clients (BrisConnections and Lowes), whilst providing team-wide support for the counsel assisting the Royal Commission into the Protection and Detention of Children in the Northern Territory and securing high-profile wins for Reliance Rail and Anglo American. Recently, the team was chosen to represent Westpac on the Financial Services Royal Commission and the Commonwealth in the Aged Care Royal Commission. It continues to be the go-to firm for regulatory enforcement and compliance advice, with particular strength in the area of financial services.

Authors

Richard Harris leads the disputes and investigations practice as a partner. An experienced, strategic and pragmatic litigator, he specialises in significant commercial litigation (including class actions), inquiries and investigations. Richard regularly advises banks, professional service firms, large corporations and their boards on major dispute and governance issues. He has been involved in a wide range of complex investigations and commercial litigation in Australian superior jurisdictions, including the High Court. In particular, Richard brings a deep understanding of the commercial issues, challenges and opportunities for clients operating in the financial services sector. Most recently, Richard led the team advising Westpac on its response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, as well as in its defence of the high-profile ASIC prosecution concerning alleged manipulation of the bank bill swap rate.

Jo Seto is a commercial litigator based in the Sydney office. She has particular experience advising clients in relation to class actions, regulatory investigations and contractual disputes. Jo has worked with numerous major clients in the financial services and technology sector, including major Australian banks such as Westpac and HSBC, as well as RBS, TAL, the NSW Treasury, NBN Co, Uber and PayPal. This experience has given Jo insight into the commercial drivers, opportunities and challenges facing clients in those sectors.

Janet Whiting heads the disputes and investigations practice in Melbourne, with extensive experience in corporate and regulatory areas as one of the pre-eminent commercial litigators in Australia. She has a proven ability to work with premiers, government ministers, boards, senior bureaucrats and senior executives. Presently, Janet is heading the team representing the State of Victoria in the Royal Commission into the Management of Police Informants. Janet is also acting for the US agricultural company, Cargill Inc, the Plaintiff in a dispute before the Supreme Court against Glencore. The trial ran from June 2018 to August 2019. Judgment is reserved. She previously acted for Asahi against private equity entities PEP and Unitas, obtaining one of the largest settlements in the Federal Court. Janet is the first female president of the Council of Trustees of the National Gallery of Victoria in its 158-year history and was made a Member of the Order of Australia in 2015 for her significant service to the community through the arts, health and major events sectors, and as a legal professional. Janet was named one of Australia's Ten Most Influential Women in the Westpac and Australian Financial Review 100 Women of Influence Awards in 2015.

1. General

1.1 General Characteristics of Legal System

The Australian legal system is adversarial, which means that the claims of opposing parties are presented to an independent decision-maker, a court or tribunal, for determination. The decision-maker will hear both sides of the dispute and then apply the law to that dispute.

Australia is a common law jurisdiction where courts are bound by the principle of precedent, which means that lower courts are bound to follow the decisions of a higher court. While the doctrine of precedent provides a fundamental constraint on judicial decision-making, lower courts are still permitted to develop legal principles that have not been the subject of a higher court's decision. Cases from other common law countries, such as the United Kingdom, while not binding on Australian courts, provide a source of comparative law.

Litigation proceedings are primarily conducted through oral argument before a court or tribunal. The preference for oral testimony reflects the common law rationale of providing a party with the opportunity to hear the case against it, and the court an opportunity to assess the credibility of the witness. While oral argument is a key feature of the Australian legal system, parties will also generally file and serve written submissions in advance of a hearing.

1.2 Court System

Australia is a federation of six states (Victoria, New South Wales, Queensland, South Australia, Tasmania and Western Australia) and two territories (the Australian Capital Territory and the Northern Territory). It has a federal court system and a separate hierarchy of courts in each state and territory.

The High Court of Australia is the highest court in the Australian judicial system and the final court of appeal in the federal and state/territory court systems. The High Court exercises original jurisdiction in defined areas, including all matters arising under the Commonwealth Constitution or involving its interpretation, and in disputes between states. It also exercises appellate jurisdiction and hears appeals made from lower courts.

The jurisdiction of the Federal Court is limited to matters vested in the court by laws made by the Commonwealth Parliament. The Federal Court's original jurisdiction is conferred by over 150 Commonwealth Acts and includes a range of subject matter, including tax, corporations law, IP, competition law, consumer law, judicial review of Commonwealth administrative decisions, industrial relations, native title and bankruptcy. It also exercises appellate jurisdiction. The Federal Circuit Court deals at first instance with less complex disputes in relation to some of this subject matter, as well as less complex family law disputes.

The superior court in each state and territory is the Supreme Court. The Supreme Courts exercise original and appellate jurisdiction, and have unlimited jurisdiction over all civil and criminal matters regardless of the subject matter of the claim, the amount in dispute or the place where the cause of action arose (subject only to any express statutory limitations or restrictions in the relevant state or territory).

Each state, other than Tasmania, has a mid-tier court called the District or County Court. Each state and territory also has a lower-level court called the Magistrates or Local Court. These mid-tier and lower-level courts have civil jurisdiction up to specified claim thresholds and criminal jurisdiction in respect of specified offences.

Within many of these courts and tribunals, cases involving areas of law that require particular expertise are allocated to specialist lists. In addition, there are a number of specialist Commonwealth, state and territory courts and tribunals with jurisdiction over specific subject matters. For example, the Family Court deals with family law disputes and family law appeals from the Federal Circuit Court. The Administrative Appeals Tribunal engages in merits review of Commonwealth administrative decisions, the Australian Competition Tribunal reviews certain decisions of the Australian competition regulator and the Coroner's Courts investigate and report on unexpected deaths.

1.3 Court Filings and Proceedings

The principle of open justice applies to all Australian courts and tribunals. As a general rule, all hearings should be open to members of the public to ensure transparency in judicial decision-making.

In certain circumstances, courts have the power to limit public access to proceedings. For example, orders may be made to suppress the publication of evidence, withhold the identity of a party or witness, or to exclude the public or a member of the public from attending a proceeding. A court may make such orders where it is satisfied that it is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means, or to prevent prejudice to national or international security interests.

The extent to which, and ease with which, a member of the public can inspect documents filed in court depends on the particular court in which proceedings are issued. In the Federal Court, a non-party to a proceeding can inspect certain categories of documents filed in a proceeding, including pleadings, interlocutory applications and court transcripts, unless the court has ordered that the document is confidential or restricted from publication to the person, or a class

of persons of which the person is a member. A non-party to a proceeding may also apply to the court for leave or permission to inspect a document that the person would not otherwise be entitled to inspect.

The position in the state and territory courts varies. For example, in the Victorian Supreme Court, any person may, on payment of the proper fee, inspect and obtain a copy of any document filed in a proceeding unless the court has ordered that the document remain confidential. A person who is not a party to the proceedings may not inspect or obtain a copy of a document if the prothonotary considers it ought to remain confidential.

In contrast, in the New South Wales Supreme Court, only the parties to the proceeding can access documents filed in the proceeding (unless the court orders otherwise). However, non-parties will generally be granted access to pleadings and judgments in proceedings that have been concluded, documents that record events in an open court, material admitted into evidence or information capable of being heard or seen by any person in open court. In certain circumstances, access may be restricted where the judge or registrar considers that particular materials should be kept confidential.

For an order for confidentiality to be made, it is not sufficient for a party simply to show that the document contains confidential material. A party seeking a confidentiality order must demonstrate that it would be seriously compromised or affected if the order is not made.

Costs of Litigation

Parties to legal proceedings in Australia must pay their own costs. However, the general rule in Australian courts is that costs follow the event; that is, in the absence of special circumstances, an unsuccessful party will be ordered to pay the costs of the successful party (including court fees, solicitors' fees, barristers' fees and certain disbursements).

The award of costs is, however, at the discretion of the court. If a party has been successful overall but failed on particular issues on which it has agitated, the court may order it to pay the costs incurred by the other party in responding to those specific issues. A court may also depart from the general rule that the unsuccessful party pays in some circumstances, including where a successful party has rejected a settlement offer that was more favourable than the outcome obtained on judgment.

A successful party will not recover all its costs. In most cases a court will order the unsuccessful party to pay the successful party's costs on a "party and party" or standard basis. Under such an award of costs, it is likely that the successful party will only recover approximately half its actual legal costs of the proceeding.

If the court considers that a party should recover a greater proportion of its costs, it may award costs on a "solicitor-client" or "indemnity costs" basis. Even if this more generous order is made, the party awarded costs is unlikely to recover all its legal costs. Circumstances that may justify the more generous approach include improper conduct on the part of the other party, such as issuing proceedings for an ulterior motive, or issuing or continuing proceedings where the party ought to have known its position was hopeless. Indemnity costs may also be awarded against a party that rejected an offer to settle the dispute that was more favourable than the outcome obtained on judgment.

Costs may also be ordered against lawyers personally, particularly if costs have been incurred as a result of the lawyers breaching their professional obligations, such as the obligation only to bring claims that have a proper basis in fact and law.

Orders for costs specify which party must bear the costs of the proceeding and on what basis, but usually do not specify the quantum of those costs. Accordingly, the parties may agree between themselves the amount of costs payable. If they are unable to reach agreement, each party entitled to recover costs can apply for a procedure known as a "taxation of costs". While the specific procedure varies across the Australian jurisdictions, in general, the party entitled to recover costs will prepare an itemised account of all costs that it claims, which is assessed by the Costs Court (or authorised court officer, as applicable) in the relevant jurisdiction. During this process, the other party (that is liable to pay the costs) is provided with an opportunity to object to each item, in which case the party seeking recovery bears the onus of justifying that item. The Costs Court may order a reduction in costs if it determines that items or amounts claimed are unreasonable. There are procedures to apply for a review of the Costs Court's decision.

Generally, an applicant must pay a filing fee when commencing a proceeding and a hearing fee once a proceeding has been set down for hearing or trial. These fees do not represent the full cost to the court of a proceeding. However, in recent years the Federal Court and High Court fees have increased so that regular court users, such as large corporations and government agencies, pay a higher proportion of the court's costs. When introducing these changes, the Australian government stated that the increased fees were intended to modify behaviour and provide greater incentives for the settlement of disputes.

1.4 Legal Representation in Court

This information is not available.

2. Litigation Funding

2.1 Third-Party Litigation Funding

In Australia, litigation funding is permitted subject to limited restrictions. A third-party funder may fund litigation so long as it has established procedures for managing the conflicts that may arise between its interests, the lawyers and the funded party. Due to limited regulation, third-party litigation funding has developed significantly in Australia over the past decade. Such funding is now an established part of Australian legal practice, particularly in respect to class actions. For example, in the last five years, 64% of class action proceedings filed in the Federal Court received funding from third-party litigation funders.

Litigation funding is available in relation to civil proceedings and may be used by plaintiffs or defendants. Recent statistics have confirmed that the majority of representative proceedings filed in the Federal Court in the last five years were commenced by shareholders and investors. There are no legal restrictions on the types of costs that may be included in the funding arrangements, nor the maximum or minimum amounts that may be funded. However, in practice, many third-party litigation funders impose their own criteria.

Litigation funders are not subject to licensing or capital adequacy requirements. There are no specific time limits by which a party must obtain third-party litigation funding, but special court rules can apply if litigation funders are involved with a proceeding. For example, the procedure for class actions in the Federal Court requires any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding (including any security for costs or any adverse costs order) to be disclosed at an early stage of the proceeding. Any funding agreement disclosed may be redacted to conceal information that might reasonably be expected to confer a tactical advantage on the other party. In the Western Australian Supreme Court, a litigation funder is considered an "interested non-party". Accordingly, it must notify the court and each other party to the proceeding of its identity as soon as is reasonably practicable after it becomes an "interested non-party" in the proceeding.

Litigation funders may enter into an arrangement with a party whereby its fees are calculated as a percentage or share of any judgment or settlement. In contrast, professional conduct rules prohibit lawyers from entering any arrangement to receive a share of the proceeds of litigation. However, lawyers may agree with a client that some or all legal costs will only be paid if the client is successful. Such conditional costs agreements are subject to specific provisions and professional conduct rules in each state and territory. Under these rules, the agreement may include a reasonable premium payment, in addition to the standard legal costs, if the party succeeds. Such premium or "uplift" payments are subject to regulation, such as the prohibition in Victoria on uplift payments that exceed 25% of the original fees payable.

In January 2019, the Australian Law Reform Commission published a report outlining its findings in respect of an inquiry conducted into class action proceedings and third-party litigation funders. The final report proposed 24 recommendations, which were broadly directed at providing greater oversight over the management of class action proceedings, and increasing the regulation of third-party funders, litigation funding agreements and percentage-based fee agreements. The report proposed various measures directed at reducing the potential for actual or perceived conflicts of interests between litigation funders, solicitors, representative applicants and group members, as well as the introduction of a voluntary accreditation scheme for solicitors acting in class action proceedings.

2.2 Third-Party Funding: Lawsuits

In Australia, there are currently no restrictions on the types of proceedings which may be funded by third parties. However, in recent years, litigation funders have typically been involved in funding shareholder and investor claims, mass-tort claims and consumer claims, due to the potential amount of recoverable damages available in such proceedings. For instance, in the last five years, those four categories of claims have accounted for 92% of all funded class action proceedings filed in the Federal Court of Australia. By way of illustration, 100% of class action claims commenced by shareholders and 65% of class actions commenced by investors in the last five years were funded by litigation funders. Outside the class action regime, third-party funding has also been used in the context of insolvency proceedings and commercial litigation proceedings involving large damages claims.

2.3 Third-Party Funding for Plaintiff and Defendant

While third-party funding is available to both plaintiffs and defendants in Australia, the entrepreneurial aspects of litigation funding has meant that third-party funding is most often provided to plaintiffs. However, there may be rare circumstances where it may be attractive for a third party to provide funding to a defendant, for instance, where such funding is motivated by political or ideological reasons, for example, where a public figure or civil rights group is a defendant to a proceeding.

2.4 Minimum and Maximum Amounts of Third-Party Funding

In Australia, there are no restrictions in regard to the amount of funding which a third party can provide to a plaintiff or defendant. As a practical matter, the amount of funding provided will generally depend on the estimated legal costs and the practical considerations relevant to the proceeding, such as the size of the class (which is relevant in the context

of class action claims) as well as the complexity and merit of the claim.

2.5 Types of Costs Considered under Third-Party Funding

The costs covered by a third-party funder will depend on the nature of the proceeding and any other relevant matters set out in the litigation funding agreement between the third-party funder and plaintiff or defendant. Generally, a third-party funder will advance funds to cover the relevant party's legal costs and related disbursements. In class action proceedings, the litigation funder may also advance funding to assist the representative applicant (and their solicitors) with project management, administration and pre-claim investigative costs. In most cases, the third-party funder will also indemnify the representative applicant in the event their claim is unsuccessful and adverse costs are awarded against them, and provide security for any costs for the other side which may be ordered by the court.

2.6 Contingency fees

Australian law prohibits legal practitioners from charging contingency fees. Those prohibitions are contained in the relevant legislation and professional conduct rules which apply to solicitors in each state and territory of Australia. In accordance with those rules, solicitors are prohibited from charging any legal fees which are calculated as a proportion of a settlement or judgment amount. Despite this rule, a legal practitioner may agree with a client that some or all legal costs are only payable if the client's claim is successful. In such cases, the agreement may include a reasonable premium payment payable to the solicitor, in addition to legal costs, if the client's claim is successful. As noted above, such premium or "uplift" payments are subject to various regulations, which differ according to each state or territory.

Comparatively, the use of contingency fees by third-party litigation funders is a widespread and standard practice in Australia. Currently, there are no laws regulating the fees which are charged by third-party funders, however, statistics collated by the Australian Law Reform Commission suggest that in respect of class action claims commenced and finalised in the Federal Court in the period between 2013 and 2018, on average, 22% of the settlement amount in such proceedings were applied to pay third-party funders' commissions.

2.7 Time Limit for Obtaining Third-Party Funding

There are currently no time limits in Australia which regulate the period in which a litigant can obtain third-party funding.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

In Australia, in contrast to other jurisdictions, there is no specific requirement for a potential plaintiff and defendant to issue and respond to a "pre-action letter" prior to the commencement of civil proceedings. However, certain jurisdictions impose compulsory formalities that must be completed before or at the time when civil proceedings are commenced.

For example, a party that commences civil proceedings in Victoria will be subject to the requirements of the Civil Procedure Act 2010 (Vic) (the CPA). Similar to the process in the United Kingdom, the CPA imposes overarching obligations on litigants, which are aimed at creating a model standard for the conduct of parties involved in civil proceedings. Parties are required to use reasonable endeavours to resolve the dispute, unless it is not in the interests of justice to do so, or the dispute is of such a nature that only judicial determination is appropriate. The CPA also requires the parties or their legal representatives to sign and file an Overarching Obligations Certificate, which is a document stating that each allegation, or denial of an allegation in a court document, has a proper basis on the legal and factual material available.

The Federal Court requires parties to comply with similar formalities, which are aimed at promoting the facilitation of the just resolution of disputes as quickly, inexpensively and efficiently as possible. For instance, the Civil Dispute Resolution Act 2011 (Cth) (the CDRA) requires applicants to file a "genuine steps statement", which sets out the steps the parties have taken to resolve the dispute or explains why no such steps have been taken. The CDRA does not specify what will constitute genuine steps, as this will depend on the parties' circumstances and the nature of the dispute. However, it does provide a non-exhaustive list of examples of "genuine steps". For example, parties may participate in an alternative resolution mechanisms option, or attempt to negotiate with a view to resolving some or all of the issues in dispute. A party that does not file a genuine steps statement, or that has not taken genuine steps to resolve a dispute, will not be prevented from commencing a claim in the Federal Court. However, the court may take this into account when exercising its powers, including its discretion to award costs.

3.2 Statutes of Limitations

In Australia, each jurisdiction has enacted legislation limiting the period within which certain civil claims may be issued. Limitation periods in Australia are a matter of procedural law.

In general, a limitation period starts to run from the date on which the cause of action accrues. Different limitation periods apply according to the nature of the relevant cause of action. In most Australian jurisdictions, the limitation

period for actions in contract is six years from the date of the breach. For actions in tort, the limitation period is generally six years from the date on which damage is suffered (except for the Northern Territory, where the limitation period is three years).

Australian courts have a discretionary power to extend or postpone the relevant limitation period in certain circumstances; for example, where the plaintiff is under a disability, where there is an acknowledgement or part payment by the defendant or where there is fraud or mistake. In some jurisdictions, there are also special provisions applicable to certain types of matters, such as personal injury claims brought by minors or persons with a disability, or involving child abuse or dust diseases. New South Wales is the only jurisdiction that imposes an ultimate bar on the extension of a limitation period beyond 30 years from the date on which the limitation period runs. However, the bar does not apply in all circumstances.

The effect of the relevant limitations legislation is generally to restrict the plaintiff's entitlement to a remedy rather than to extinguish the plaintiff's rights. As such, if a defendant intends to rely on the expiry of a limitation period, the rules of the Supreme Courts in each state and the Federal Court rules require the defendant to plead the limitation of actions point by way of defence.

3.3 Jurisdictional Requirements for a Defendant

An Australian court will have jurisdiction over a foreign defendant provided that the proper originating documents are filed with the court and are properly served on the defendant.

A foreign defendant may challenge the court's jurisdiction if the proceeding has not been properly served. For example, a foreign defendant may challenge a proceeding on the basis that the claim does not meet the requirements for service outside Australia, or because service has not been properly effected. If the objection is upheld, the court will set aside service of the originating documents.

A foreign defendant may also challenge the jurisdiction of an Australian court on the basis that it is not the appropriate or convenient forum for the resolution of the dispute. The foreign defendant will bear the burden of proving that this is the case. In determining whether it is a convenient forum, the Australian court will consider various factors, including the connection between the subject matter and the parties to the jurisdiction, and whether the foreign defendant may be put to great expense and inconvenience in contesting the action in the jurisdiction. A court is more likely to accept jurisdiction where the facts and issues have an obvious connection with the Australian forum.

An Australian court can stay the proceedings if it is persuaded that another jurisdiction is the more convenient forum. Generally, an Australian court will not decline to deal with a proceeding unless the foreign defendant shows it is clearly an inappropriate forum for the determination of the dispute between the parties, in the sense that it would be oppressive or vexatious for the proceeding to continue. The issue is not one of comparative suitability; in contrast to other jurisdictions, an Australian court will not be considered a "clearly inappropriate forum" merely because another forum is more appropriate.

3.4 Initial Complaint

In Australian courts, a civil proceeding is generally commenced by filing a writ or originating application with the registry of the court in which it is sought to be heard. The writ or originating application may be accompanied by a general endorsement of the claim or a statement of claim. The particular requirements vary depending on the rules of the court in which the claim is filed and the subject matter of the claim.

A party commencing a proceeding in the Federal Court must file an originating application with a statement of claim or affidavit. In the Supreme Court of Victoria, a proceeding is commenced by filing a writ containing an endorsement of claim or an originating motion specifying particular details relating to the claim. In certain jurisdictions, a party may also be required to file a 'genuine steps statement' or other similar document to establish that the party has complied with the prerequisites for commencing a proceeding in Australia.

In general, a document filed to commence a proceeding cannot be amended without the leave or permission of the relevant court, or the consent of the other party (or parties). The power of the court to grant leave to amend is discretionary and may be influenced by factors including public policy considerations, scheduling issues and other matters relating to the conduct of the party seeking leave to amend.

3.5 Rules of Service

In Australian courts, the requirements for service on a party to a civil proceeding differ according to the type of document and, in some cases, the party to be served. The applicable court rules will specify which method must be used in particular circumstances. It is the responsibility of the party commencing proceedings to ensure service is effected in accordance with the applicable court rules.

There are two principal ways of effecting service: personal service and ordinary service. As a general rule, personal service is required where a writ or originating application must be served personally. Where the person to be served is a natural person, personal service is generally effected by leaving a copy of the document with the person to be served,

or putting it in the person's presence and stating the nature of the document. Personal service on a registered company can be effected by leaving the document at, or posting it to, the company's registered office or delivering a copy personally to a director of the company who resides in Australia.

Ordinary service generally applies to documents other than a writ or originating application and can be effected by leaving the document at, or posting it to, the proper address of the party (where the party is self-represented) or his or her solicitor (where the party has a legal representative). Some courts allow service by email, where a party has filed a notice authorising service by electronic communication.

A party that is outside Australia can be sued in an Australian court provided the party is validly served with the writ or originating application. In such cases, service is governed by the relevant court rules of civil procedure in each state and territory as well as the Federal Court and High Court civil procedure rules. The court rules outline the categories of claim that can be served outside Australia. Generally, the rules require a connection between the substance of, or the parties to, the litigation and Australia. In Federal Court proceedings, a party must apply for leave or permission to serve proceedings outside Australia or otherwise apply for an order confirming service.

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 (Hague Convention). As a result, where the foreign party is within the jurisdiction of another signatory to the Hague Convention, the state receiving the request to facilitate service cannot generally refuse the request. The Hague Convention applies to all civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad. In such instances, the relevant court rules (other than in relation to the High Court) specify the relevant procedure for service.

If the party is outside Australia and not in a country that is a signatory to the Hague Convention, the relevant court rules generally provide that service is effected in accordance with the law of the foreign country.

In addition to service on a party outside Australia, there is a process for service interstate (for example, where a proceeding is issued in the Supreme Court of Western Australia and a defendant is in Queensland). The Service and Execution of Process Act 1992 (Cth) governs the general process for service of a claim commenced in a state or territory on a party in another state or territory.

3.6 Failure to Respond

After a defendant has been served with a writ or originating application, they must file a notice of appearance (and in some circumstances, their defence) within a specified time. If the defendant fails to file the relevant documents within the prescribed time, a plaintiff may apply for a judgment in default without giving further notice to the defendant. In these circumstances, there is an assumption that a defendant that fails to protect its rights is taken to have admitted the allegations outlined in the originating document. The specific procedure for seeking default judgment varies depending on the rules of the court in which the proceeding was commenced and the type of claim made and relief sought.

As a matter of practice, seeking default judgment immediately on expiry of the period for filing a defence is likely to be futile if the plaintiff or its solicitors are aware that the defendant intends to dispute the claim. In these circumstances, a defendant's application to have the default judgment set aside is likely to be granted and the court may order that the plaintiff bear the costs of that procedure, which is particularly likely if it is clear on the face of the papers that the defendant has a meritorious defence.

3.7 Representative or Collective Actions

Class actions may be commenced in the Federal Court and in two states: New South Wales and Victoria. The regimes in these jurisdictions are broadly the same. In order to initiate a class action, the following requirements must be met:

- seven or more people must have a claim against the same person;
- the claims must relate to, or arise out of, the same, similar or related circumstances; and
- the claims must share a substantial common issue of law or fact.

Australian courts have interpreted the last two requirements broadly and will permit a class action to proceed even if resolution of the common issue is unlikely to resolve the claims of all class members. In contrast to the regime in the USA, an applicant is not required to certify that the class meets the above threshold requirements. Instead, the onus lies on the respondent to challenge the proceeding as being improperly commenced.

A court may order that a proceeding should not continue as a class action if it is in the interests of justice to do so. For example, such an order may be made where it is not appropriate or efficient for the claim to be pursued as a class action, or where the costs of each class member pursuing their claims individually are likely to be less than the costs of the class action.

In Australia, class action claims are brought on behalf of all class members by one (or a small number of) representative plaintiffs. The class action regime is an "opt out" regime, which means that each potential claimant who falls within the class definition is a member of the class unless they opt

out of the proceeding. The class can be defined by a list of names or by a set of criteria (for example, all persons who acquired shares in a particular company during a defined period). It is not necessary to name members of the class or to specify the number of people in the class or the total value of their claims.

A class may, however, be defined in a way that effectively requires members to opt in to the class (including by entering into a retainer with a particular law firm or an arrangement with a particular litigation funder).

3.8 Requirements for Cost Estimate

Australian lawyers owe various duties to their clients, including a duty to disclose certain information in relation to costs and billing. These obligations are contained in laws regulating the legal profession in each Australian jurisdiction.

In Victoria and New South Wales, law practices are required to provide clients with an estimate of the total legal costs for the matter and the basis on which the legal costs will be calculated. This information must be provided at the time, or as soon as practicable, after instructions are received. Law practices also have an ongoing obligation to notify clients of any substantial change to this information when, or as soon as practicable after, the change occurs. Prior to the execution of a settlement in a litigious matter, a law practice is also required to provide a client with a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay) and a reasonable estimate of any contributions towards those costs that are likely to be received from another party.

4. Rules on Pre-action Conduct

4.1 Interim Applications/Motions

A party may bring an interim or interlocutory application before or during proceedings. Such applications are generally made to preserve a party's rights or property pending final resolution of the proceedings, or for the purpose of dealing with pre-trial formalities, such as particulars, discovery and interrogation.

An interlocutory application is any application that seeks an order, other than final judgment. Where the order sought is a temporary order, and only intended to apply until a further application extending the order is heard, the application and order are described as "interim". A party may make an interlocutory or interim application for "freezing" orders, search orders, orders for the presentation of property, or disposal of perishable or similar property. Often, a party will seek interim orders or injunctions as a matter of urgency (for example, to ensure certain rights or property are preserved before a court order is obtained). In these cases the application may be made on an ex parte basis.

4.2 Early Judgment Applications

A party can apply by motion for early judgment on certain issues in dispute. The court has a general discretion to give directions in relation to the order in which issues in dispute are to be tried. The court may make orders for the separate decision of any question of fact or law and the point in the proceedings at which it will be heard. However, courts are generally reluctant to order that an issue be determined separately, and a party seeking early determination will need to demonstrate the utility, economy and fairness of ordering a single-issue trial. For example, a separate hearing might be appropriate where a determination of a specific issue could dispose of the proceedings entirely or substantially assist in the settlement of the proceedings, or where the question is common to a number of pending cases and would otherwise have to be decided more than once.

The court also has the power upon application by a party to strike out the other party's case, in whole or part, before trial or substantive hearing of the claim. This order may be available where the case pursued by the other party:

- discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading;
- has a tendency to cause prejudice, embarrassment or delay in the proceedings; or
- is otherwise an abuse of the process of the court.

This procedure is generally directed at the form, rather than merits, of a case and a party is usually granted leave to amend its case.

4.3 Dispositive Motions

A party may apply for a summary judgment or dismissal of proceedings. This procedure is useful in circumstances where one party has brought an elaborate and wide-ranging claim, and the other party will incur considerable expenses in preparing evidence to refute those allegations. In contrast to the strike-out procedure described above, these remedies are concerned with the merits (and not the form) of a case.

A defendant may seek the summary dismissal of a claim in circumstances where the proceeding is an abuse of process or scandalous, frivolous or vexatious. A claim may be considered frivolous where it has no reasonable grounds, or vexatious where it is brought to harass, annoy, cause delay or for some ulterior purpose that lacks reasonable grounds. If a claim is challenged on these grounds, a court will consider whether the proceeding was commenced for a collateral purpose, or to annoy or embarrass the person against whom it is brought.

In rare circumstances, a plaintiff may obtain a summary judgment if the defendant has no defence to its claim, or part of the claim. In such cases, it is necessary for the plaintiff to show that any defence intended to be relied on is untenable

and cannot possibly succeed. This remedy is used sparingly and a court will generally exercise exceptional caution before entering summary judgment.

4.4 Requirements for Interested Parties to join a Lawsuit

A third party may be joined to a proceeding in accordance with the relevant court rules. As a general principle, a party can be joined to a proceeding if the court considers it necessary to determine all matters in dispute in the proceeding (including ancillary or preliminary questions).

Joinder may occur where a defendant:

- claims contribution or indemnity from the third party;
- claims relief from the third party, which is substantially similar to that which the plaintiff seeks against the defendant; or
- seeks the determination of a question in the original proceeding, as between the third party and another party.

A court will only permit a third party to be joined to a proceeding if it is "just and convenient". As part of its assessment, the court will consider various factors, including whether joinder will minimise the parties' costs, or result in unfairness to any party. The court will assess this by reference to the issues between the existing parties and will not consider fresh issues that might be raised by the added parties.

Certain jurisdictions do not have court rules that directly provide for third-party joinder. However, in these jurisdictions, a similar outcome may be achieved by using alternative procedures provided in the rules. The process for joining third parties varies between different jurisdictions. For example, in Victoria, a defendant must file and service a third-party notice, which must be endorsed with a statement of claim. In South Australia, a court may (on application or its own initiative) order that a third party is joined to a proceeding where the person has an interest in the subject matter of the action or a question of law or fact involved in the action.

4.5 Applications for Security for Defendant's Costs

A defendant can apply to the court for an order for security for costs from the plaintiff. The court has wide discretion in such matters and may consider various factors such as the financial position of the plaintiff (including whether the plaintiff's impecuniosity is attributable to the defendant), the genuineness and prospects of success of the proceedings, the likely costs of the proceedings and the effect that an order for security would have on the plaintiff's ability to pursue the claim.

It is ordinarily necessary for the defendant to provide evidence in relation to its probable recoverable costs in the matter (including future costs), which may include its professional fees, counsel's fees and other disbursements. In some cases, parties may seek to rely on expert evidence from costs assessors in demonstrating that its estimated costs are reasonable. Other matters, such as evidence relating to a corporation's financial circumstances or a plaintiff's residence overseas, may be tendered in the form of an affidavit.

If the application is successful, the plaintiff may be required to pay funds to the court (or on trust) as security for the defendant's legal costs. If the security is not provided, the proceedings may be stayed until payment is made.

4.6 Costs of Interim Applications/Motions

A court can make orders for an unsuccessful party in an application or motion to bear the other party's costs. Usually, this results in a portion of the successful party's actual costs being paid, but the court has the power to make an order that all such costs be paid on a solicitor/client basis. However, the court has wide discretion to make orders in relation to costs and will consider issues such as whether the successful party has incurred excessive costs or has in fact failed on the substantive aspects of the application.

Whether the costs of an application can be recovered following the application or only after the final resolution of the dispute depends on the jurisdiction and circumstances of the case. In practice, costs orders in relation to interim applications are usually dealt with as part of the process of settling overall costs after final judgment.

4.7 Application/Motion Timeframe

The timeframes for dealing with applications or motions vary significantly and depend on factors including the nature and complexity of the application, the circumstances of the matter and the capacity of the court.

A party can request that the application be dealt with urgently. It is necessary for the party to demonstrate that the determination of the application is time sensitive. There are few limits on the arguments that a party might raise in an effort to persuade the court of this urgency. The court is usually available to hear an application at any time of day if satisfied that it is required by the circumstances.

5. Discovery

5.1 Discovery and Civil Cases

In Australia, the discovery process is limited to the discovery of documents and does not extend to the taking of witness testimony. A party will generally be able to access documents that are in the possession, custody or power of a party to litigation and that relate to an issue in dispute in the proceedings.

Discovery procedures vary between the different jurisdictions. In the Federal Court, a party to litigation must apply to

the court for an order for discovery. A party is not entitled to recover costs associated with discovery made without such an order. A party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

For state and territory courts, the rules generally provide that where the pleadings between any parties to a proceeding are closed, a party may require by written notice that the other party provides discovery of documents relevant to the issues in dispute. However, in practice, orders for discovery according to categories (whether agreed between the parties or ordered by the court) are often made by the court after the close of pleadings as part of the court timetable for the proceeding.

In all jurisdictions, discovery is generally made by providing a list of documents together with an affidavit. Inspection of discovered documents is provided subject to any claim for legal professional privilege or any other applicable privilege (for example, "without prejudice" privilege or, less commonly, the privilege against self-incrimination).

Courts have increasingly sought to curb the extent of the discovery process by modifying their practices in relation to making orders for discovery. As noted above, orders for discovery by categories (rather than for general discovery) are common, which might reduce the scope of documents required to be discovered. In some jurisdictions, courts usually refuse to make an order for discovery until after the parties have served their evidence, on the basis that the matters in dispute should have narrowed by that stage. In practice, it remains to be seen to what extent these practices curb the scope of discovery.

There is also scope for the parties (either with or independently of the court's involvement) to agree to practical strategies to manage the burden of discovery. For example, the parties might agree to the application of particular search terms or other filtering strategies for locating discoverable documents among electronic materials, or that certain types of electronic data need not be discovered.

5.2 Discovery and Third Parties

A party to litigation proceedings may seek orders requiring a third party to provide discovery. Such discovery is not available as a right, but requires application for an order from the court in accordance with that court's rules. An applicant must satisfy the court that the third party possesses documents that are relevant to the proceeding.

Certain jurisdictions impose additional conditions on non-party discovery. For example, it might not be available if the documents in question could be obtained from a more convenient source. The non-party is generally entitled to recover its costs from the party applying for discovery.

In general, the application must be served personally on the third party, with a copy of the supporting affidavits. The application should describe the documents sought by the applicant, and the facts demonstrating the relevance of the documents and the likelihood that the third party has the documents in their possession, custody or power.

Some jurisdictions do not generally allow non-party discovery. However, a similar outcome could be achieved by compelling a non-party to produce documents by applying to the court to have a subpoena issued to that person.

5.3 Discovery in This Jurisdiction

See **5.1 Discovery and Civil Cases**.

5.4 Alternatives to Discovery Mechanisms

Discovery mechanisms are provided for, so this does not arise.

5.5 Legal Privilege

Legal professional privilege provides a basis on which a party may object to the production of otherwise discoverable documents. It applies to confidential communications or documents that are made or created for the dominant purpose of a client seeking legal advice from a lawyer, or a lawyer providing legal advice to a client or use in connection with the conduct of existing or anticipated legal proceedings.

An in-house counsel may claim legal professional privilege in respect to advice provided to their employer. However, in circumstances where the in-house counsel is acting in a dual role and providing commercial and legal advice, it may be difficult to establish that they were acting in the necessary legal capacity when creating documents or engaging in communications and that those documents or communications were created for the "dominant purpose" of providing legal advice. It is also important that any in-house counsel be in a position to establish that they are sufficiently independent from the subject matter of the advice for the company to be able to claim privilege.

5.6 Rules Disallowing Disclosure of a Document

See **5.5 Legal Privilege**.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

A party may seek various injunctive relief depending on the circumstances.

A permanent injunction is a final settlement of the parties' rights and lasts indefinitely unless it is restricted by the terms

of the order or dissolved by a further court order. A court will only grant a permanent injunction once it has made a final determination after hearing the matter at trial. The applicant must demonstrate the elements of the cause of action in respect to the infringing conduct and the prospect of continuing or recurrent injury.

An interlocutory injunction is granted to preserve a state of affairs until the parties' rights are determined at trial and so usually applies to a person's conduct until the trial or a further order is made in the proceedings.

An interim injunction applies in respect of conduct until a specified day or the return date of an application for an interlocutory injunction. The order generally lasts for a few days and is granted in urgent circumstances, where a court is convinced that an applicant would otherwise suffer irreparable harm if the injunction were not granted. An application for such an order is made without notice to the person to be affected by the order. As such, the applicant must present all information relevant to the court's exercise of its discretion and provide certain undertakings.

Injunctive relief can also be classified according to the type of conduct to be secured or restrained. A prohibitory (or restrictive) injunction requires a person to cease doing a particular act, while a mandatory injunction directs a person to perform a particular act. Courts are generally more reluctant to grant a mandatory interlocutory injunction (as opposed to a prohibitory injunction). Accordingly, an applicant seeking a mandatory injunction must satisfy the court that the applicant would be granted a similar injunction at the final determination of the hearing.

A quia timet injunction restrains a person from performing a particular act that they have threatened to do but has not yet done. To grant this relief, a court must be satisfied there is a real threat of the respondent carrying out an actionable wrong.

There are also injunctions that seek to preserve property and prevent the defendant frustrating the court's ability to administer justice. A freezing order (or Mareva order) restrains a person from disposing of their assets until the trial of a proceeding or a further order of the court. A court will grant a freezing order when it is satisfied that there is a real risk that the defendant will dissipate assets to frustrate a judgment in favour of the plaintiff.

A search order (or "Anton Piller order") requires a person to allow the applicant to access their premises to search for, copy and collect for safekeeping specific materials that are listed in the order and that are to be used in evidence in civil proceedings between the parties. A court must be satisfied that there is a real possibility that the defendant may destroy such material. A "John Doe order" (or a "roving Anton Piller order") is a type of search order when the identity of the infringer is unknown, and can be granted against anyone in the unidentified class of respondents.

Parties can also seek an injunction to restrain a party to a proceeding from bringing or continuing proceedings in a jurisdiction outside Australia (also known as an anti-suit injunction), including but not limited to parallel proceedings. This order is granted to preserve the efficacy of the court's ability to administer justice within its jurisdiction.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Injunctions can be obtained relatively quickly in urgent circumstances, provided the requirements for the injunctive relief are met, particularly when an application is made on an ex parte basis. The urgency of an application should be brought to the attention of the relevant judge upon making the application.

In circumstances where an application for injunctive relief is made after the court has finished sitting for the day, the applicant should attempt to contact the relevant judge's chambers if the proceedings are on foot. Otherwise, the relevant court website will provide an after-hours contact number for the duty judge or contact person.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

A party can seek injunctive relief on an ex parte basis in situations of urgency or where there is a serious risk the court's administration of justice will be frustrated. At an ex parte hearing, the respondent is absent and does not have notice of the application. Accordingly, the applicant has an obligation to disclose to the court all material facts relevant to the applicant's right to the injunction, including any evidence that could be submitted in the respondent's favour. If an applicant fails to disclose all material facts fairly and candidly, the injunction can be dissolved or the applicant refused continued interlocutory injunctive relief.

At an ex parte hearing, the applicant must justify why the application is made without notice to the respondent and why the matter is urgent. If granted, the injunction will generally last for the shortest period that must lapse before the matter can be brought back on notice to the opposite party. The applicant must provide the judge with a draft of the orders sought. In an ex parte situation, such orders would ordinarily include an undertaking as to damages, the time for which any restraint provided will apply, directions about service for interlocutory relief and costs.

If proceedings have not yet commenced, the applicant must give an undertaking to the court to start proceedings within such time as the court may order, or the time provided by the

relevant state or Commonwealth legislation after the urgent application has been determined.

6.4 Liability for Damages for the Applicant

A compulsory feature of an application for an interlocutory injunction is that the applicant must give the "usual undertaking as to damages". That is an undertaking to submit to such order (if any) as the court may consider to be just for the payment of compensation, to be assessed by the court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interlocutory order or undertaking or any continuation (with or without variation) thereof and to pay the compensation to the person there referred to.

If the applicant fails at trial, the respondent can be compensated for any loss suffered due to being temporarily prevented from performing what he or she was legally entitled to have done.

The respondent will, as far as possible, be put in the same position as he or she would have been if the injunction had not been granted. Only damage flowing from the injunction proceedings will be covered, not damages flowing from the general litigation proceedings.

This principle also applies to ex parte injunctions. The suitability of damages as compensation for any potential loss the respondent may suffer as a result of granting an injunction ex parte is part of the assessment of whether to grant the injunction.

6.5 Respondent's Worldwide Assets and Injunctive Relief

Parties to legal proceedings outside Australia may seek a "freezing order" to preserve assets within Australia on the basis that a prospective judgment in that overseas proceeding would be registrable under the Foreign Judgments Act 1991 (Cth). The High Court in Australia has recognised that freezing orders are designed to protect "a prospective enforcement process". Therefore, it is no impediment to the making of an order that the court in the overseas jurisdiction had not yet handed down a judgment in favour of the applicant or that such judgment had not yet been registered by the Supreme Court in accordance with the Foreign Judgments Act.

In order to obtain a freezing order against a respondent with overseas assets, a party must still satisfy the requirements of the relevant Supreme Court Rules that govern the making of freezing orders in that jurisdiction (see PT Bayan Resources TBK v BCBC Singapore Pte Ltd [2015] HCA 36).

6.6 Third Parties and Injunctive Relief

Injunctive relief can be obtained against third parties. A third party served with a copy of an injunction is obliged to act in accordance with its terms. Failure to do so may result in the third party being found to be in contempt of court. Courts tend to distinguish between innocent third parties, such as banks that merely hold a respondent's assets, and third parties that are, or appear to be, acting in co-operation with a respondent with fraudulent intent.

With regard to freezing orders, a court is less likely to grant a freezing order that affects the rights of innocent third parties. That is, if an applicant seeks a freezing order that by its terms will substantially interfere with the third party's business, it is likely that the third party's rights will prevail over the applicant's desire to secure the ultimate recovery of debts or damages from the respondent (to whom the third party is in no way connected).

If an applicant can demonstrate to the court that there is good reason for believing that the assets that appear to be in the name of a third party are, in truth, the respondent's assets and were effectively disposed of to frustrate the applicant, those third-party conveyees and holders of properties can be restrained by freezing orders.

6.7 Consequences of a Respondent's Non-compliance

If the respondent fails to comply with the terms of an injunction, the applicant can seek to have the respondent held in contempt of court. If this occurs, the respondent may be issued with a fine, or have their property sequestrated or be imprisoned. The applicant must first prove, beyond reasonable doubt, that the respondent breached the injunction. A judgment is unlikely to be enforced unless the defendant had proper notice of the terms of the injunction. However, if a respondent liable to committal or sequestration was present in court when the order was made, the order can be enforced even though service was not effected in accordance with the rules.

The applicant may also apply for the court to appoint a person to perform the act that the respondent failed to do.

7. Trials and Hearings

7.1 Trial Proceedings

Civil trials in Australia are conducted orally in accordance with the common law tradition. A trial usually commences with the plaintiff, who bears the burden of proof, opening their case. The plaintiff will make oral submissions to the court outlining their case and summarising the plaintiff's evidence and any legal arguments upon which the case depends. Following this, the plaintiff will call any lay and expert witnesses to give evidence and the defendant will be provided with an opportunity to cross-examine those witnesses. In Australia, witnesses are examined and cross-examined orally, although in many courts there is a general

practice of allowing evidence to be given by witness statement that has been provided to the other party prior to trial.

After the conclusion of the plaintiff's evidence, the defendant will decide whether to call any evidence. If the defendant calls evidence, it will open its case by making opening submissions and calling its lay and/or expert witnesses (who may then be cross-examined by the plaintiff). Once the defendant's evidence is concluded, the defendant will proceed to make its closing submissions. The plaintiff will then make its closing submissions. However, if the defendant chooses not to call any evidence, the plaintiff will proceed to make its closing submissions, which will be followed by the defendant's submissions.

An option available to the defendant is to submit a "no case submission" at the conclusion of the plaintiff's case, which involves a submission that the plaintiff has not established a prima facie case. Australian courts will usually only allow a no case submission where the defendant elects not to call any evidence.

Following the parties' closing submissions, the court will generally adjourn to provide the judge with time to decide the case and write a judgment. However, in some instances (particularly in urgent cases), the judge may make a decision immediately and provide written reasons at a later date or, in rare instances, provide oral reasons.

7.2 Case Management Hearings

Before a civil trial commences, there will usually be shorter hearings at which the court sets a timetable to progress the matter to trial and deals with interlocutory disputes. These interlocutory matters may involve substantive disputes (for example, where a party seeks an interim order, such as an injunction, to preserve the status quo until trial, or applies to strike out or dismiss the other party's case without proceeding to trial), or procedural disputes relating to the parties' evidence.

An interlocutory hearing is less formal than a trial. Written evidence by way of affidavit is generally required and it is common for affidavits to be filed ahead of any timetabled hearing. Evidence is rarely given orally by a witness present in court. A witness will only be required to attend if the other party has indicated that they intend to cross-examine the witness on their affidavit. Such cross-examination, however, is rare.

A court will generally make procedural orders that set out the timing of various steps that each party must take to progress the matter for trial (such as filing pleadings, evidence and submissions, raising objections to the opposing party's evidence and giving discovery). These orders usually also schedule further interlocutory hearings for the parties to provide the court with an update on the matter's progress. In most cases, such orders are made early in the proceeding and revised (in the form of new orders) as the matter progresses.

7.3 Jury Trials in Civil Cases

Jury trials are available for some types of civil cases (for example, defamation actions), although the vast majority of civil cases in Australia are conducted before a judge alone. Civil trials by jury are very rare in Australia. The precise circumstances in which a jury trial is available vary between each of the states and territories. In South Australia and the Australian Capital Territory, jury trials have been completely abolished.

Where a jury trial is available and a party has elected for trial by jury, the court may nevertheless order the matter to be heard by a judge alone. When considering whether the trial is suitable for determination by a jury, the court will consider factors such as the cost and efficiency of a jury trial, and whether such a trial is likely to be unfair to one of the parties. Even where it is available, a jury trial is less likely to be ordered where the case concerns complex legal issues and the dispute is likely to be decided based more on the law, rather than the facts, of the matter.

7.4 Rules That Govern Admission of Evidence

Evidence is generally admissible in civil proceedings if it bears a logical connection with a fact in issue. Most relevant evidence is admissible; however, a party may object to the admission of evidence at trial that is otherwise relevant on certain grounds.

"Hearsay evidence" is evidence of a statement made to a witness by another person who is not called as a witness in the proceedings. It is generally excluded on the basis that it is considered unreliable, or potentially concocted. Hearsay evidence may be admitted in certain circumstances; for example, if it falls under the "business records" exception, which provides that a document that forms part of the records of a business may be admitted into evidence to prove the truth of the matters contained in that record.

Evidence that is subject to a claim for privilege, whether that be legal professional privilege, without prejudice privilege, or the privilege against self-incrimination, is also inadmissible. The most common privilege claims are those that relate to client legal privilege; that is, between a lawyer and client. In deciding whether evidence is protected by legal privilege, a court will consider whether the claim for privilege has been established and, if so, whether privilege has been waived (for example, through knowing and voluntary disclosure). In Australian trials, claims for privilege will usually be determined at an interlocutory stage, before the trial commences.

Opinion evidence is also not admissible unless it constitutes expert evidence. Expert opinion evidence is admissible so long as:

- there is a field of specialised knowledge about which expert evidence can be given;
- the witness is able to demonstrate they are an expert in that field; and
- the opinion given by the expert is wholly or substantially based on the expert's knowledge.

There are numerous other rules of evidence, but the rules above are the most relevant to civil proceedings in Australia.

7.5 Expert Testimony

Parties routinely engage expert witnesses to prepare an expert report that addresses an issue or issues raised in the proceeding and to give evidence at trial. Each jurisdiction has specific rules and practice notes that govern how experts should be instructed and how their evidence can be given. An expert has a paramount duty to the court. They must provide an independent opinion and not act as an advocate for the party. When signing their expert report, the expert is generally required to give a declaration that they agree to be bound by the applicable expert code of conduct.

The expert's opinion must be based on facts that are proved at trial. Accordingly, all documents provided to the expert will generally need to be admitted into evidence at trial. Court orders will usually require expert reports to be provided to the opposing party ahead of trial and that report generally stands as the expert's evidence in chief.

Where there is more than one expert giving evidence, a court may order that the experts confer before trial, endeavour to reach agreement on material issues and submit a joint report demonstrating matters about which they agree and disagree, including their supporting reasons. This is known as an "expert conclave". A court may also order that experts for different parties provide evidence at trial concurrently. Such a mode of giving evidence is known as "hot tubbing". Its main advantage is that it provides the judge with the opportunity to listen to the experts discuss the real issues in dispute and to ask them questions as a group.

In civil cases, the court also has the power to appoint a referee or an assessor to report to the court on an issue arising in a proceeding. A reference may be made where complex technical matters have to be determined, or where a lengthy examination of documents or accounts is necessary. A court may accept or reject the report provided by the referee and deliver judgment as it sees fit.

7.6 Extent to Which Hearings are Open to the Public

Open justice is a central principle in the Australian legal system. Accordingly, the vast majority of trials and interlocutory proceedings in the courts of Australia are open to the public. Parties need to apply to have a matter heard in private and – particularly in civil matters – will need to provide persuasive reasons for restricting public access.

Different courts have different rules and practices in relation to providing documents and transcripts to the public. In most courts, a person will need to submit an application (and pay a fee) to receive a copy of a court transcript.

7.7 Level of Intervention by a Judge

Trial procedure in Australia is adversarial in nature, meaning that the judge will not usually intervene in proceedings unless one of the parties seeks the judge's intervention (for example, where a party objects to the other party's evidence). The judge's role is to hear the evidence given, not to ask questions of witnesses, and to ensure that the trial is conducted fairly and in accordance with the law. However, judges frequently ask questions of counsel, and sometimes witnesses, to clarify their understanding of matters or to enquire about a legal argument.

At the end of the trial, the judge may give judgment immediately or reserve judgment. Judgment will usually be reserved in complex litigation or where significant questions of law have been raised; however, it is entirely in the judge's discretion whether to do so. Judges in Australia have a duty to give reasons for their decision, which can be given with the judgment, or published or delivered at a later date.

If a matter needs to be decided urgently, the judge may make an oral decision, with written reasons given later. Similarly, oral decisions are also likely to be given in short interlocutory applications.

7.8 General Timeframes for Proceedings

The time between the commencement of proceedings and a trial depends on a number of factors, which means it is not possible to give a general timeframe for a proceeding. The length of a trial will depend on the number and complexity of the relevant issues, the nature and volume of the parties' evidence and whether the parties engage in any interlocutory disputes.

In general, civil proceedings in Australia are by their nature formal and lengthy processes. The courts also recognise that negotiated or mediated settlement will often be more desirable than a protracted adjudicated decision (particularly from the perspective of costs to the parties and the use of public resources), so time will usually be allowed to facilitate negotiations. Even a relatively straightforward commercial dispute is unlikely to be resolved and heard within less than six months and may take a number of years to be resolved at trial. The courts do, however, allow for urgent matters to be expedited. Such expedition will be ordered where there are matters that require urgent resolution by the court; for example, where delay may severely prejudice a party.

8. Settlement

8.1 Court Approval

As a general proposition, parties are not required to seek the court's approval to settle a lawsuit (although courts are required to make final orders to bring the proceeding to an end). If the settlement is consensual, parties usually arrange for draft orders dismissing the proceeding to be provided to the court and those orders are made as a matter of course.

If the party that commenced a proceeding wishes to resolve it without the defendant's consent, this can be carried out in most jurisdictions by filing a notice discontinuing the claim. Parties filing a notice of discontinuance in those circumstances may bear an obligation to meet the legal costs incurred by the other parties to the proceedings up to that point in time.

A notable exception to the principle that parties can resolve proceedings without approval of the court is in the case of representative or class actions. Where proceedings are brought by representative plaintiffs in the form of a class action, any resolution of the proceeding must be approved by the court after being provided with all the relevant settlement details. The court is obliged to examine the settlement and determine whether, in all the circumstances, it is fair and reasonable, having particular regard to the interests of the class members.

8.2 Settlement of Lawsuits and Confidentiality

The terms upon which parties have resolved a proceeding can, if parties' consent, remain confidential. Most commonly, parties will agree to reflect the terms of their settlement in a confidential agreement and the court will only be informed that the matter has been settled and that the proceeding should be dismissed. The fact that the proceeding has been dismissed will not be capable of being kept confidential.

8.3 Enforcement of Settlement Agreements

A settlement agreement is primarily enforceable as a contract between the parties. As a result, parties entering into settlement agreements should closely review the proposed terms. A settlement agreement will usually contain a clause whereby the plaintiff agrees not to commence further proceedings against the defendant and to indemnify the defendant for any loss suffered due to breach of this obligation.

A settlement agreement may require the parties to consent to court orders effecting the settlement. Commonly the consent orders will be that the proceeding be discontinued, that claims and counterclaims be dismissed, or that judgment be given in favour of one party or the other. Where judgment is given, the court order will prevent the action being reopened. Where the action has been dismissed, the court would not be inclined to reopen the matter without good reason and the existence of a settlement agreement would almost always prevent the matter from being reopened.

8.4 Setting Aside Settlement Agreements

A settlement agreement may be set aside on the same grounds as any other contract in Australian law. The grounds for an agreement to be set aside or deemed unenforceable include mistake, misrepresentation, misleading or deceptive conduct, unconscionable conduct, duress, undue influence, lack of certainty, lack of consideration or frustration.

If the matter has also been discontinued when the agreement is set aside or sought to be set aside, the party seeking to set aside the agreement will also need leave to reinstate the proceeding. Where a judgment has been made by consent under a settlement agreement, it will be more difficult to set aside that judgment. However, if the settlement under which judgment has been given has been set aside, the court may refuse to stay a new proceeding brought by the plaintiff litigating the same issues as the original proceeding. This decision will be made at the court's discretion.

9. Damages and Judgment

9.1 Awards Available to Successful Litigant

The most common form of award to a successful party in litigation proceedings is monetary damages. Damages are fundamentally measured as the value of the loss or damage suffered by the plaintiff as a result of the defendant's unlawful behaviour. Damages are typically available in cases of breach of contract and tort. Compensation is also available in respect of losses caused by tort-like equitable wrongs or statutory wrongs such as misleading or deceptive conduct.

Other remedies available as part of a judgment to a plaintiff in Australia include injunctive relief (which compels a defendant to act or refrain from performing a particular action), restitution (which requires the defendant to return the plaintiff's property, or the value of that property or some other benefit received from the plaintiff, to the plaintiff), an account of profits (which requires the defendant to pay the profits it made as a result of a wrong committed against the plaintiff) and declarations (where the court declares the rights of a party).

9.2 Rules Regarding Damages

The types of damages available, and the method of calculating the amount of damages awarded to a plaintiff, will depend on the nature of the cause of action pursued. In Australia, the types of damages available include damages for loss of opportunity, indirect or consequential loss, restitution and damages calculated by account of profit. Australian courts may also award punitive damages (also referred to as exemplary damages); however, such awards are made

relatively infrequently and typically calculated far more conservatively than awards in jurisdictions such as the USA.

9.3 Pre and Post-Judgment Interest

A successful party in a proceeding is generally entitled to recover interest in relation to any principal amount, calculated from the date on which the court finds the amount should have been paid. The prescribed interest rate and the basis upon which interest is to be calculated will vary according to the court rules of each jurisdiction. The rate is usually a favourable benchmark amount above the Reserve Bank cash rate. In most jurisdictions, a successful party is also entitled to recover interest on a debt arising from a court order (a "judgment debt"), which accrues from the date on which a judgment is entered. In many jurisdictions, the interest rate is even more favourable than the pre-judgment amount.

9.4 Enforcement Mechanisms of a Domestic Judgment

A plaintiff has a number of enforcement options where the defendant refuses to pay a judgment debt. The most common enforcement option is by a writ that provides for the sale of the real and personal property of the judgment debtor.

Other enforcement mechanisms include garnishing the defendant's salary or wages, seizing and selling the defendant's property, appropriating debts due to the defendant, or bankrupting (in the case of a natural person) or winding up (in the case of a corporation) the defendant. A court order is required to use these mechanisms.

9.5 Enforcement of a Judgment from a Foreign Country

There are two ways to enforce a foreign judgment in Australia: registration under the Foreign Judgments Act 1991 (Cth), or under the common law. The Act can only be used to enforce judgments entered in the countries listed in the Foreign Judgments Regulations 1992 (Cth). Broadly speaking, a foreign judgment can be registered in Australia if it is for a sum of money (other than tax or a penalty, although the Act does extend to some non-money judgments specified in the regulations on the basis of reciprocity) and it is final and conclusive. The foreign judgment will not be registered if it has been wholly satisfied, or if (as at the date of applying for registration) the foreign judgment would not be enforceable in the country of origin. Once registered, the foreign judgment has the same force and effect as if it were a judgment in the Australian court in which it was registered.

At common law, a foreign judgment can be enforced by bringing a liquidated claim, if the foreign judgment meets the following four requirements:

- it is for a fixed sum of money (other than taxes or penalties);
- it is final and conclusive;
- the foreign court had jurisdiction to hear the matter according to Australian conflict of law rules; and
- the parties to the judgment in the foreign court and in the enforcement proceedings are identical.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

In Australia, unsuccessful litigation parties have a general right of appeal in relation to final orders made by a court. Most courts also provide for a party to seek leave to appeal from an adverse interlocutory or interim order.

In general, any first instance decision made by a trial judge can be appealed to a higher court. Decisions made at a state level may be appealed to the Court of Appeal or the Full Court of the Supreme Court of the relevant state or territory. Appeals against decisions of the Federal Court are made to the Full Federal Court, which has a bench of three judges (as opposed to one judge in the Federal Court). Further, the final court of appeal in Australia is the High Court of Australia. Special leave must be obtained to appeal to the High Court, which is granted in rare cases, such as where a case involves new or inconsistently decided points of law, or is of high public importance. There is no right of appeal beyond a final determination of the High Court. Appeals from Australian courts are conducted by way of a rehearing. Generally, appeal courts do not accept any new evidence and will rely on the transcript of the trial. Accordingly, in most cases, any findings of fact by the trial judge will not be challenged. Instead, the appeal court will focus on questions of law and will consider whether the lower court made any errors of law in its decision-making.

10.2 Rules Concerning Appeals of Judgments

See **10.1 Levels of Appeal or Review to a Litigation**.

10.3 Procedure for Taking an Appeal

The time period for making an appeal is set out in the specific rules of each court and jurisdiction. Generally, a party must lodge an appeal within 28 days from the date the relevant decision is made. In certain circumstances, parties can seek extensions of that time period, or file holding appeals until a final decision is made.

The procedure for making an appeal is also set out in the specific rules of each court. Generally, the appellant will need to file and serve a notice setting out the party's intention to appeal the decision. The respondent will then have the option to give notice that it intends to oppose the appeal. The appellant will then need to file a document setting out their grounds for appeal and the respondent will file an answer to those grounds.

If the respondent chooses not to respond to the appeal, that does not guarantee the appeal's success. The appeal court will consider the appellant's case and decide whether setting aside the trial decision is justified. However, a respondent would usually wish to be involved in the hearing to have the opportunity to advocate for their position. Appeal hearings are conducted orally, with all parties making written and oral submissions.

10.4 Issues Considered by the Appeal Court at an Appeal

An appellant will not be permitted to raise new issues that were not raised at trial except in truly exceptional instances. Similarly, no new evidence will be allowed on appeal except in exceptional circumstances.

The appeal court will consider whether the primary judge made an error that affected the decision. The error may be an error of fact or an error of law; however, it is unusual for an appeal court to overturn a finding of fact, because a trial judge has the benefit of being present at the examination and cross-examination of witnesses.

10.5 Court-Imposed Conditions on Granting an Appeal

Following an appeal, the appeal court will make orders that can uphold, dismiss or vary the original orders of the lower court.

10.6 Powers of the Appellate Court After an Appeal Hearing

See **10.5 Court-Imposed Conditions on Granting an Appeal**.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

In Australia, the general rule is that costs follow the event, which means that in the absence of special circumstances, a court will usually make orders requiring the unsuccessful litigant to pay the costs incurred by a successful party in bringing or defending the relevant claim. The costs payable by the unsuccessful party are referred to as party/party costs and generally include successful party's solicitors' fees, counsel's fees and other related expenses and disbursements.

A successful party is only entitled to receive costs which are deemed to have been properly or necessarily incurred. Accordingly, in practice, a successful party may only receive a proportion of its total costs. Generally, a costs assessor will make a determination as to the fair and reasonable amount of the successful party's costs and in doing so, will consider whether the work carried out was reasonable and conducted in a reasonable manner, and whether the fees charged reflect a fair amount for the work concerned. Solicitors' costs may be considered unreasonable where such costs involve unusually high hourly fees or excessive time undertaken for routine tasks.

A party who is dissatisfied with the decision of a costs assessor may appeal that decision. The appeal procedures vary according to each state or territory jurisdiction. In New South Wales, a party may seek a review of a costs assessment by a panel (which will include two experienced costs assessors) or appeal to the District Court of New South Wales. An application for a review must be lodged within 30 days of the costs certificate being provided to the parties.

In certain circumstances, a court may make orders requiring a litigant to pay indemnity costs to the other party. Such orders may be made where one party has declined an offer of compromise made by the other side and proceeded to obtain an order or judgment which provides that party with an equal or less favourable outcome (when compared to the terms of the proposed settlement offer). If this occurs, a court may order that party to pay the other party's costs on a party/party basis from the date on which it declined the offer of compromise. Indemnity costs may also be awarded in circumstances where a party commences or continues a claim with little prospects of success, or where proceedings represent an abuse of process or a party has engaged in fraudulent conduct.

11.2 Factors Considered When Awarding Costs

As explained above, the general principle in Australia law is that costs follow the event, which means an unsuccessful party will be responsible for the costs of a successful party. A court has discretion to apportion costs, where the successful party has failed on issues of substance, or where it has incurred excessive costs. When deciding an order for costs or assessing costs on an ordinary basis, Australian courts will generally have regard the conduct of both parties and their legal representatives. Additionally, a court may follow certain conventions depending on the type of matter. See **4.6 Cost of Interim Applications/Motions**.

11.3 Interest Awarded on Costs

In Australia, interest is payable on costs, however, the date on which interest is payable varies according to the relevant jurisdiction. For instance, in New South Wales interest begins accruing on the judgment date, while in Victoria, interest accrues from the date of the relevant costs order.

12. Alternative Dispute Resolution

12.1 Views of Alternative Dispute Resolution Within the Country

Alternative dispute resolution (ADR) has become increasingly common and is accepted as an important tool for resolving disputes outside the formal court system. Processes

such as negotiation, conciliation and mediation provide parties with cost-effective and efficient avenues for resolving their disputes that are not restricted by the complexities of court adjudication (and its associated costs). Mediation, in particular, has become a popular alternative in commercial disputes. Reports on ADR also indicate that participants in ADR express higher levels of satisfaction with mediation outcomes than litigants in the court system.

The success of ADR in Australia is, in large part, due to the support it has received from the legislature, the judiciary and the legal profession. Legislation in many jurisdictions makes ADR a mandatory first step to resolving a number of disputes. Courts also discourage protracted litigation by making court-approved ADR programmes readily available to parties. ADR is viewed as an integral part of achieving the court's paramount objective: the "just, quick and cheap" resolution of disputes and proceedings.

12.2 ADR Within the Legal System

Certain jurisdictions require parties to engage in an ADR process before they are eligible to file their claim in court. As discussed earlier, at the federal level, the Civil Dispute Resolution Act 2011 (Cth) requires parties to take "genuine steps" to resolve their disputes through a negotiation or third party-assisted ADR process before they are permitted to commence civil proceedings in the Federal Court or Federal Circuit Court. A court may consider a party's failure to comply with this obligation when exercising its case management powers and discretion as to costs.

Once a matter has commenced, other legislative provisions grant courts and tribunals the power to refer a legal dispute to mediation or arbitration at any time during the proceedings, with or without the consent of the parties. In New South Wales, for example, a court may make an order to refer any proceedings before it, or part thereof, to mediation if "it considers the circumstances are appropriate." Exercise of the court's discretion is not dependent on the parties' consent. Parties referred to ADR are not forced to settle and may generally continue the formal court process without penalty. However, if a proceeding has been referred to ADR and one party does not attend, the court may order the absent party to pay the costs "thrown away". Similar provisions for mandatory ADR exist in other jurisdictions within Australia.

In addition, lawyers in Australia are required to advise their clients on alternatives to litigation. Under the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, solicitors have a professional duty to inform their clients about the alternatives to litigation, unless the solicitor reasonably believes their client is aware of the ADR options available to them. Barristers in Australia are also bound by the same duty under the Barristers' Rules for each state and territory.

12.3 ADR Institutions

Outside the legal profession and court system, a number of institutions at the national and state level promote and offer ADR for disputes across a range of areas. The success of these institutions in resolving legal disputes is largely dependent on the level of industry collaboration, which in Australia is fairly high.

A particular challenge in the Australian legal context is ensuring consistency in ADR practices and procedures across different jurisdictions. To this end, collaboration at the national and state level between organisations offering ADR has been key to the effective provision of these services in Australia.

At the national level, the Mediator Standards Board (MSB), introduced in 2010, has contributed considerably to improving the organisation of this aspect of ADR in particular. The MSB is the central entity responsible for mediator standards and accreditation in Australia and has implemented a National Mediator Accreditation System. This sets a nationwide benchmark for all mediators in Australia and has paved the way for the creation of a national register to streamline the provision of these services. Equally, annual national collaborative forums such as the National Mediation Conference Australia provide an opportunity for industry-wide co-operation.

Other organisations that offer ADR services at a national level include the Australian Disputes Centre and the Resolution Institute. The majority of these organisations have a dual function of promoting ADR in the community through training programmes as well as facilitating connections between ADR practitioners and clients. This referral process, where clients are connected with practitioner members of the organisation, is a relatively streamlined process. However, to the extent that there are a number of organisations to choose from at this level, it will not necessarily be immediately clear which organisation is the most appropriate for the client's needs.

At a state level, there are numerous organisations offering ADR services in specialised areas of law, including family law, industrial disputes and tenancy disputes. In this context, organisations with the capacity to co-ordinate at a high level are necessary for the effective provision of ADR services. While arrangements vary from state to state, organisations such as the Victorian Association for Dispute Resolution and the Law Society of New South Wales work as effective gatekeepers in channelling ADR requests to the appropriate specialist service provider.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

Australia has two separate regimes for international commercial arbitrations and domestic commercial arbitrations. Both regimes draw upon international conventions, legislation and the common law. International arbitrations are governed by federal legislation, namely the International Arbitration Act 1974 (IA Act). Domestic arbitrations are governed by state and territory legislation, namely, the Commercial Arbitration Acts (CA Acts).

International law has heavily influenced the development of the IA Act and the CA Acts. The IA Act gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1975 (ICSID Convention). Australia has made no reservations in acceding to the New York Convention and the ICSID Convention.

Both the IA Act and CA Acts were amended in recent years to incorporate the UNCITRAL Model Law on International Arbitration 1985, which provides a template for nations to implement rules regarding international arbitrations. Its integration into Australian law has assisted in reconciling the dualist regime for international and domestic arbitrations in Australia.

Under both regimes, a court must stay legal proceedings commenced in breach of an agreement between the parties to arbitrate their disputes. Parties to an arbitration may, however, have recourse to the courts for interlocutory relief (concerning matters such as the preservation of property).

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Once an arbitral tribunal has issued an award, it is considered final and binding on the parties and may be enforced in the Federal Court of Australia (under the IA Act) or a court of a state or territory (under the IA Act or CA Acts) as if the award were a judgment. The procedure for enforcing awards is similar under both regimes. The party seeking enforcement must provide the court with an original or certified copy of the award and arbitration agreement. If a document is not in English, the party must also provide a certified translation.

A court can refuse to enforce an award in limited circumstances. For example, a court may refuse enforcement due to serious irregularities or breaches of natural justice in the arbitration process, or if enforcement of the award would be contrary to public policy. Generally, Australian courts cannot review an international arbitration award on the basis of an error of fact or law. However, in domestic arbitrations, a question of law may be appealed if the parties agree such an appeal can be made and the court grants leave.

13.2 Subject Matters not Referred to Arbitration

At a general level, criminal law matters and enforcement proceedings commenced by regulators cannot be referred to arbitration.

13.3 Circumstances to Challenge an Arbitral Award

See **13.1 Laws Regarding the Conduct of Arbitration**.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

See **13.1 Laws Regarding the Conduct of Arbitration.**