PANORAMIC

DISPUTE RESOLUTION

Australia

Dispute Resolution

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LITIGATION

Court system
What is the structure of the civil court system?

The civil court system in Australia includes federal and state jurisdictions. There are also specialist tribunals at both the state and federal level.

The federal jurisdiction includes:

- Federal Court, which has jurisdiction to hear almost all civil matters arising under Australian federal law. At first instance, most matters are heard by one judge. Appeals are heard by the Full Court of the Federal Court requiring three or more judges.
- Federal Circuit and Family Court, which hears disputes involving family law, migration law, administrative law, admiralty law, bankruptcy, consumer law, human rights, some industrial and employment matters, intellectual property and privacy law.

Australia's states and territories have inferior courts which have limited jurisdiction, expressed in statute. These are known as the magistrates' or local court and county or district court. The magistrates' or local court handles smaller matters. The county or district court, which is the intermediate court in the court hierarchy, has jurisdiction over most matters with a set monetary threshold.

The Supreme Court of Australia's states and territories is the highest court in that state or territory and hears the most complex civil cases and appeals from state courts and tribunals. Specialist lists are managed by judicial officers with experience in that area of law.

The civil jurisdiction of state and territory Supreme Courts is unlimited; however, usually smaller claims are heard by lower courts.

Appeals are heard by the Court of Appeal or the Full Court of a Supreme Court. Only the High Court can review decisions of the Court of Appeal or Full Court of a Supreme Court.

The High Court of Australia is the highest court and its decisions are binding on all lower courts. The High Court's original jurisdiction includes constitutional matters. It hears appeals from the appellate divisions of the Federal Court and the state and territory Supreme Courts. Leave to appeal to the High Court is required.

Specialist tribunals at state and federal level are established by legislation and hear specific disputes. For example, the Fair Work Commission is a national workplace relations tribunal which hears applications by employees in relation to employment and offers alternative dispute resolution forums for employees and employers. The Administrative Appeals Tribunal conducts reviews and hears appeals of administrative decisions made under Commonwealth laws, such as decisions made by government bodies and departments.

Most states also have a Civil and Administrative Tribunal to hear specific disputes, for example, relating to leases, domestic building and smaller consumer matters.

Law stated - 29 May 2024

Judges and juries

What is the role of the judge and the jury in civil proceedings?

Judges of Australian courts preside over court proceedings either alone, as part of a panel or with a jury. Judges are required to make independent assessments of the facts presented to them and interpret and apply statute and common law. In doing so, judges must act with impartiality to administer justice.

Judges do not play an inquisitorial role, rather solicitors and barristers as officers of the court, gather and present evidence to the judge to assist them in making findings of fact and law. Judges are independent from other arms of government.

Judges of Federal Courts are appointed by the Governor-General in Council. Judges of state courts are appointed by the Governor in Council for each particular state.

Law stated - 29 May 2024

Limitation issues

What are the time limits for bringing civil claims?

Limitation periods are governed by statute. Broadly speaking, each state and territory has a Limitation Act or Limitations of Actions Act.

The time limit for the limitation period will depend on the nature of claim and are vastly different. For example, a claim for personal injury, recovery of money secured by a mortgage, under a mortgage all have different limitation periods.

In Victoria, actions for breach of contract or for tort must not be brought after the expiration of six years from the date on which the cause of action accrued pursuant to section 5Limitation of ActionsAct 1958 (Vic). However, an exception to this is expressed in section 134 of the Building Act 1993 (Vic), which provides that a 'building action' cannot be brought more than 10 years after the date of issue of the certificate of final inspection.

Some claims to the Fair Work Commission must be brought within 21 days of termination of employment.

Practitioners should refer to relevant legislation when considering limitation periods.

Law stated - 29 May 2024

Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

Parties to a dispute are required to take genuine or reasonable steps to resolve a dispute before issuing a proceeding. This may include the exchange of information, correspondence or documents or discussions between the parties.

Pursuant to section 6 of the Civil Dispute Resolution Act section 6 of the Civil Dispute Resolution Act 2011 (Cth), an applicant to a proceeding in the Federal Court of Australia

must file a genuine steps statement at the time of filing an application which sets out the steps taken to try to resolve the issues in dispute.

Further, legal practitioners are bound by the obligations set out in the relevant civil procedure rules of their state. For example, Victorian lawyers must observe the overarching obligations set out at Part 2.3 of the Civil Procedure Act 2010(Vic).

Law stated - 29 May 2024

Starting proceedings

How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload? Do the courts charge a fee for starting proceedings or issuing a claim?

Proceedings are commenced by filing an originating document, such as an originating motion, writ or application with the relevant court or tribunal. Before the claim can be issued and the originating document accepted, a filing fee must be paid to the court. Once filed, the claim documents are then served on the defendants, either personally or by post depending on the jurisdiction.

Following the covid-19 pandemic, the courts and tribunals at all levels have experienced a degree of backlog in hearing matters.

Courts and tribunals have permanently adopted some of the processes that were introduced to assist navigate the covid-19 restrictions such as electronic or virtual hearings and electronic filing systems, which also assist with the listing of disputes in a timely manner. Many courts now conduct short procedural hearings via video conference rather than in person to support efficiency.

However, some courts that deal with larger volumes of matters continue to be impacted by a heavy case load. For example, a lack of resourcing in the Victorian Civil and Administrative Tribunal (VCAT) caused lengthy delays with matters being listed for hearing.

Law stated - 29 May 2024

Timetable

What is the typical procedure and timetable for a civil claim?

The typical civil proceeding is likely to include the following steps:

- filing a claim and service of claim documents;
- filing of a defence and any counterclaim;
- a directions hearing to set a timetable for the proceeding;
- mediation or conciliation;
- discovery, or an exchange of relevant documents;
- the filing of witness statements; and

- trial.

The time frame for a civil claim will vary depending on the jurisdiction and the complexity of the claim, the volume of documents, number of witnesses and complexity of evidence.

Law stated - 29 May 2024

Challenging the court's jurisdiction

Can the parties challenge the court's jurisdiction? If so, how can parties do this? Can parties apply for anti-suit orders and, if so, in what circumstances?

A defendant served with an originating process outside of Australia, can in an appropriate case, challenge the court's jurisdiction to hear the proceeding.

Jurisdiction of an Australian Court may be challenged on the following grounds:

1. The service of the originating process was not in accordance with the court's rules;
2. The Court may be an inappropriate forum for the trial of the proceeding; and
3. The plaintiff's prospects of success are insufficient to warrant putting the defendant to the time, expense and trouble of defending the claim.

In all Australian jurisdictions except New South Wales, a conditional appearance may be entered by a defendant to challenge the Court's jurisdiction. In New South Wales, a party may make an application to the court by way of a Notice of Motion to challenge the Court's jurisdiction and have the process set aside.

Parties may apply for anti-suit orders in the form of an anti-suit injunction. An anti-suit injunction is a court order to restrain someone (subject to the jurisdiction of that court) from commencing or continuing proceedings in a foreign court.

An anti-suit injunction operates ***in personam*** and has two bases for being granted:

1. To protect the integrity of the court's own processes; and
2. If there is no benefit in bringing the foreign proceeding as it amounts to the unconscionable exercise of a legal right, a breach of a legal/equitable right, or where the foreign proceedings are vexatious or oppressive.

Law stated - 29 May 2024

Case management

Can the parties control the procedure and the timetable? Can they extend time limits?

In Australia, parties exercise some control over the procedure and timetable of their case. However, that control is limited by the rules and practice notes governing each court or tribunal.

Australian courts exercise ultimate authority to set deadlines and make procedural rulings. If parties believe that they will be unable to meet the set deadlines, they may seek permission from the court for an extension of time. Typically, the party seeking an extension of time must provide an acceptable explanation of the delay and why it is fair and equitable in the circumstances.

In deciding whether or not to grant the extension of time, the court will consider whether any action has been taken by the party seeking an extension of time and whether extending time would cause any prejudice to the other party in the proceeding.

The parties and their lawyers have a statutory duty to work with the court, and among themselves, to facilitate the just and efficient resolution of disputes.

This cooperation requires disputing parties (and their lawyers) to consider the best way of managing their case, including alternative dispute resolution (eg, mediation). The core objective of the court, and the parties, is to reduce costs and delay.

Civil procedure rules enable courts to manage litigation. A failure to comply with court orders may result in sanctions against a party.

Law stated - 29 May 2024

Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

In Victoria, the destruction of documents which are likely to be required in evidence in a legal proceeding is an indictable offence section 254 Crimes Act 1958(Vic).

Further, under both Australian common law and statute, parties must preserve documents and other evidence, including those unhelpful to their case, in order to comply with their discovery obligations, namely the process of compulsory disclosure.

Through the process of discovery, parties are required to discover documents which support their position and which are prejudicial to their case or support the case of another party.

The obligation to discover documents in a proceeding is ongoing and accordingly if documents come into a party's possession after discovery has been made, there is an obligation to make supplementary discovery.

Law stated - 29 May 2024

Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Under both common law and statute, confidential communications passing between a client and lawyer attract legal professional privilege if:

- documents were produced for the dominant purpose of providing legal advice; or
- the dominant purpose is to provide legal advice relating to actual, anticipated or pending legal proceedings.

At common law, legal professional privilege extends to documents that a lawyer has created, but not yet communicated or provided to the client.

Legal professional privilege may apply to communications or documents involving in-house legal counsel only insofar as they meet the dominant purpose test. However, a party claiming privilege over in-house counsel communications and documents must establish that the in-house counsel was:

- acting in a strictly legal capacity, and not in an operational or commercial capacity; and
- sufficiently independent from the organisation in order to be acting as an independent legal adviser.

If legal professional privilege applies, no disclosure obligations exist barring an express statutory exception, waiver or illegal purpose.

Law stated - 29 May 2024

Evidence – pretrial
Do parties exchange written evidence from witnesses and experts prior to trial?

In most Australian courts and tribunals, parties exchange affidavits, statutory declarations or witness statements before trial. Usually, witnesses sign such documents under oath or affirmation.

Where a party seeks to rely on expert evidence, notice of the evidence must be provided to the court and other party prior to trial, usually in the form of a signed expert statement.

Law stated - 29 May 2024

Evidence – trial
How is evidence presented at trial? Do witnesses and experts give oral evidence?

If a witness becomes hostile, a party may seek leave of the court to question them as though it were a cross-examination. In these circumstances, the hostile or unfavourable witness may only be questioned about matters arising from the prior cross-examination.

Law stated - 29 May 2024

Interim remedies

What interim remedies are available?

Interim injunctions protect a party's rights via orders to maintain the status quo pending the outcome of a dispute before the court.

An interim injunction may be required, for example, to prevent the imminent publication of material or to prevent the demolition of a building.

Freezing orders prevent the disposal of funds or assets and search orders permit the search of a premises for evidence that may otherwise be destroyed. Such applications are usually ex parte.

Superior courts have jurisdiction to grant interim relief to support foreign proceedings in defined circumstances.

Law stated - 29 May 2024

Remedies

What substantive remedies are available?

Damages are monetary judgments awarded to compensate a plaintiff for a loss suffered or to put them in a position they would have been in but for the wrong doing of a defendant.

Exemplary or 'punitive damages' are rare and only awarded when the defendant has engaged in conduct that shows a disregard for the other person's rights, or an intention to harm.

In a claim for damages, interest can also be awarded pursuant to statute.

Costs are in the discretion of the court. Courts will usually make orders requiring the unsuccessful party to pay the costs of the successful party.

Law stated - 29 May 2024

Settlement

Are there any rules governing the settlement process? Can parties keep settlement discussions confidential from the court?

The vast majority of civil disputes are settled by an agreement between the parties involved. If the parties are able to reach a mutual agreement, there is no need for a court hearing.

If parties are able to reach this agreement, it should be put in writing and signed by both parties. Typically, this type of agreement will come in the form of a 'terms of settlement' or 'consent orders'.

Once finalised between the parties, the agreement is presented to the court who will formalise it if the agreement is considered appropriate.

In coming to these agreements, parties are entitled to make 'without prejudice' communications to one another. Broadly speaking, 'without prejudice' communications are

inadmissible (meaning they cannot be provided to a court) so long as they contain a genuine attempt to settle a dispute outside of court. This protection encourages parties to make concessions and compromises without the fear of statements being used against them. The protections will not apply in situations where the communication:

- Is used to hide any form of impropriety or illegal activity.
- Is expressly stated that the communication is not confidential.
- Lacks a genuine offer or attempt to resolve the dispute.
- Contains already disclosed material in open correspondence with the parties' consent.

A communication may also be 'without prejudice save as to costs', in which the same protections will apply until the question of costs arises in court. Once the question of costs arises, the court may inspect the communication for the purpose of formulating a costs order.

Law stated - 29 May 2024

Enforcement
What means of enforcement are available?

There are a range of enforcement options, from judicial enquiry through to bankruptcy or liquidation of the debtor.

On application, a court may make orders for the examination of a debtor, or for a warrant to seize and sell a debtor's assets or property, or compel an employer or third party to divert payments otherwise due to the debtor, to pay off the debt.

If the judgment debt is A$10,000 or more against an individual, or A$4,000 or more against a company, the personal insolvency or corporate insolvency legislation can be used to bankrupt or wind up the debtor.

Law stated - 29 May 2024

Public access
Are court hearings held in public? Are court documents available to the public? Are there circumstances in which hearings can be held in private? Is there a mechanism to preserve documents disclosed as part of the court process?

All court proceedings are open for the public to attend, with a few exceptions. A judge can decide to keep a case private in the interests of justice.

Most court filed documents can be publicly inspected and copied on payment of a fee. Some documents are confidential and may require a court order to allow inspection.

A judge may grant a suppression order to prohibit the publication of particular evidence or information to prevent prejudice to the administration of justice, for national or international

security, or to protect a person's safety. Documents that are subject to a suppression order cannot be publicly accessed.

Law stated - 29 May 2024

Costs

Does the court have power to order costs? Are there any steps a party can take to protect their position on costs both before the start of proceedings and while proceedings are in progress?

The courts have broad powers to award costs at any time in a proceeding. Costs are generally awarded against an unsuccessful party.

Costs are usually assessed by a taxing master or specialist costs court (or by an external costs assessor regime), and usually by reference to an itemised fixed scale of costs, that may differ from how a party is charged costs by their solicitor.

Recent developments amongst some Australian courts and specialist lists have sought to manage the costs of litigation by reducing the reliance on a fixed scale in favour of legal costing guidelines or by imposing the regular disclosure of a party's costs to the court.

When a defendant has reasonable concerns that a plaintiff may not have the means to meet an adverse costs order, the defendant can apply for security for costs, to protect their ability to recover costs.

Costs in civil claims operate differently in each Australian jurisdiction, with each state adopting different processes for determining how costs are calculated.

Law stated - 29 May 2024

Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

'No win, no fee', or 'conditional' cost agreements, involving the payment of an uplift fee are available and are commonly used by plaintiff firms to assist with financial hardship.

Contingency fee arrangements, where a lawyer is paid a percentage of the client's recovery are generally prohibited, with the exception of 'group costs orders' in Victorian class actions, by leave of the court.

The use of a third party or litigation funder is permitted, and the use of commercial funders is particularly prevalent in class actions.

Australian courts have criticised funding agreements when the commission is deemed to be excessive. A judge has the power to reduce the funder's commission to an amount they consider to be fair and reasonable.

Law stated - 29 May 2024

Insurance
Is insurance available to cover all or part of a party's legal costs?

Legal Expenses Insurance (LEI) is a particular class of insurance that provides coverage for expenses that a party may incur throughout a legal dispute.

LEI will often cover a party's own legal costs, as well as providing coverage against any exposure to having to pay an opponent's legal costs following an adverse costs order.

Typically, corporations will also insure for professional indemnity, directors' and officers' liability and public liability which policies typically offer coverage for a party's legal costs.

Law stated - 29 May 2024

Class action
May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class actions or 'representative' or 'group' proceedings are now prominent within Australia as an essential method of facilitating access to Australia's civil justice system.

Class actions in Australia may be commenced in the Federal Court of Australia (under Part IVA of the Federal Court of Australia Act1976 (Cth)) or in the State Supreme Courts, following state-based regulations.

The requirements for commencing a proceeding under the Federal and state regimes are substantially the same and include where:

- seven or more persons have claims against the same defendant(s);
- the claims are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims give rise to at least one substantial common issue of law or fact.

In addition, under the relevant regimes:

- The proceeding should be brought by a class representative (or more than one, where there are differences between sub-groups of members) on behalf of all class members.
- There need be only one substantial common issue of fact or law between class members.
- Once a proceeding has been commenced, it will continue until finally resolved by judgment or settlement.

The filing of class actions have steadily increased largely due to the prevalence of third-party litigation funding.

Law stated - 29 May 2024

Appeal
On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

An appeal can only be made if the original decision contains an error of law. This may include the incorrect application of a principle of law or a finding made that was not supported by the evidence.

The relevant court's legislation establishes the appeal procedure and whether an appeal can be made of right or whether leave of the court is required for an appeal.

Judgments may be appealed to a higher court, such as the appellate Courts of the Supreme Courts of each state, or the Full Court of the Federal Court of Australia, by any party to the proceeding.

The High Court of Australia is the final Court of appeal. Appeals to the High Court are permitted only by special leave that is granted in matters of public importance, interpretation of the Commonwealth Constitution, or instances of inconsistent application of the law across States and Territories.

Law stated - 29 May 2024

Foreign judgments
What procedures exist for recognition and enforcement of foreign judgments?

The Foreign Judgments Act 1991(Cth) and the Foreign Judgments Regulations*1992* (Cth) establish the scope and procedure for the enforcement of foreign judgments.

The Agreement for the Reciprocal Recognition and Enforcement of Judgments in Ci vil and Commercial Matters 1994 permits the mutual recognition of civil and commercial judgments from the United Kingdom, provided they involve the payment of money.

The Trans-Tasman Proceedings Act 2010(Cth) facilitate the registration of New Zealand judgments in Australia.

Where a reciprocal agreement is not applicable, recognition and enforcement of foreign judgments within Australia is regulated by statute and common law.

Some foreign judgments may be enforced under common law principles.

Law stated - 29 May 2024

Foreign proceedings
Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Australia is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (Hague Evidence Convention).

A party to a civil matter may approach a court that is also a signatory to the Hague Evidence Convention and issue a letter of request for an Australian court to obtain oral or documentary evidence. This letter of request must comply with Australian rules for taking evidence. If successful, the Australian court will order the production of the requested evidence.

Law stated - 29 May 2024

ARBITRATION

UNCITRAL Model Law
Is the arbitration law based on the UNCITRAL Model Law?

Australia is a Model Law state. International arbitration is governed by the International Arbitration Act 1974 (Cth) (IAA) that gives the Model Law the force of law in Australia.

Domestic commercial arbitration is separately governed by uniform legislation enacted in all states and territories, that substantially reflects the Model Law, with some departures to accommodate the domestic context. The domestic uniform legislation follows the structure and character of the Model Law and is marked up with reference to the Model Law.

Both the IAA (section 16) and domestic legislation (section 2A) recognise the international nature of the Model Law and permit reference to UNCITRAL documents and working groups to aide in its interpretation.

Law stated - 29 May 2024

Arbitration agreements
What are the formal requirements for an enforceable arbitration agreement?

Following the Model Law, to be enforceable an arbitration agreement must be in writing. However, a liberal approach is adopted, so long as the content is in written form, including electronic communications or by the exchange of statements of claim and defence (where the agreement is not denied) and whether or not concluded orally or by conduct.

To be binding, an arbitration agreement must also contain a procedure that compels the parties to arbitrate, it is not enough that arbitration is but a possibility.

Law stated - 29 May 2024

Choice of arbitrator
If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed?

Are there restrictions on the right to challenge the appointment of an arbitrator?

If the agreement is silent, either one or three arbitrators are appointed.

For international arbitrations, three arbitrators are appointed, with each party appointing one arbitrator and the appointees then appoint a third.

Under section 10(2) of the domestic arbitration legislation, one arbitrator is appointed. If the parties cannot agree on an arbitrator, either party can apply to the court for the appointment.

For both international and domestic arbitrations, an arbitrator may only be challenged in limited circumstances, such as if there is reasonable doubt about an arbitrator's qualifications, impartiality or independence, and where a party is involved in the appointment, only if that circumstance is discovered after the appointment.

Law stated - 29 May 2024

Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

There are a number of arbitration institutions, such as Australian Centre for International Commercial Arbitration (ACICA), that organise and assist parties to select experienced arbitrators, including non-legal experts. Senior barristers and retired judges are also commonly engaged as highly experienced arbitrators.

ACICA is the only prescribed nominating authority for the appointment of arbitrators for international arbitrations.

Law stated - 29 May 2024

Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

Parties are free to agree on the procedure to be followed for arbitration, and although the domestic legislation provides for a process in default of agreement, it is generally subject to any agreement. The domestic arbitration law extends the Model Law by imposing an obligation on parties to act in aide of proper conduct and with due expedition, and not to wilfully do or cause any delay or prevention of an award being made.

In addition, parties must be treated with equality and be given a reasonable opportunity to present their case.

Law stated - 29 May 2024

Court powers to support the arbitral process

What powers do national courts have to support the arbitral process before and during an arbitration?

Under both the international and domestic arbitration laws, Courts may only provide support during an arbitration where the Model Law or domestic law permits. This can include in a limited capacity matters such as the appointment of arbitrators, jurisdiction, capacity, enforcement of interim measures, the taking of evidence and matters concerning procedural fairness or natural justice.

These grounds cannot be overruled by a party's agreement.

Law stated - 29 May 2024

Interim relief

Do arbitrators have powers to grant interim relief?

Both the Model Law and the domestic law grant the arbitral tribunal with a range of powers to order 'interim measures' to preserve the status quo, evidence, or assets from which an award may be satisfied, or to prevent harm or prejudice to the arbitration process.

The domestic law extends the Model Law by making specific reference to orders such as for security for costs, discovery and interrogatories, and the giving of evidence by affidavit.

Law stated - 29 May 2024

Award

When and in what form must the award be delivered?

The award must be in writing and signed by the arbitrators and state the reasons on which the award is based, unless the parties have agreed no reasons are to be given. The award must also give its date and place of arbitration. There are no time limits as to its delivery.

Law stated - 29 May 2024

Appeal or challenge

On what grounds can an award be appealed or challenged in the courts?

Under the domestic law, the parties may by agreement appeal to the court on questions of law.

Otherwise, the grounds to set aside an award are limited to those provided in the Model Law, that includes grounds such as incapacity, invalidity of the arbitration agreement, exceedances of the terms of reference, failure to give notice or errors in the arbitral composition or process.

In addition, an award may be set aside if it is not capable of settlement by arbitration under the law of the State or if it conflicts with the public policy of the state.

Challenges to awards must be brought within three months. The court has discretion to enforce an award even if a ground to set it aside is established. The award may be partially set aside or remitted to the tribunal for reconsideration.

Law stated - 29 May 2024

Enforcement
What procedures exist for enforcement of foreign and domestic awards?

The High Court has recognised the enforceability of international arbitration awards. See *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l.* [2023] HCA 11.

A party seeking to enforce an international award can apply to the Federal Court of Australia or the Supreme Court of any Australian State or Territory. Domestic awards are enforceable by application to the Supreme Courts of any State or Territory, irrespective of where they are made.

On application, the courts must recognise and enforce an award, unless one of the limited grounds for refusal apply, including if the award is not capable of settlement by arbitration under the law of Australia, or if it conflicts with public policy.

Australia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. Being a party to the New York Convention means that the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration will be according to the terms of the Convention.

Law stated - 29 May 2024

Costs
Can a successful party recover its costs?

The arbitral tribunal has broad discretion to award and assess the amount of costs a party may recover, and to whom and by whom costs are paid. It is not limited to any costs scales or rules used by any court that may assist with orders or the taxation of costs.

Law stated - 29 May 2024

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR
What types of ADR process are commonly used? Is a particular ADR process popular?

Non-judicial alternative despite resolution (ADR) processes are widely embraced in Australia and throughout its legal systems. The most common ADR processes used are mediations, conciliations, arbitration and expert referrals, and there has been recent uptake in some courts and specialist lists to encourage early neutral evaluation.

The most common sources of ADR are mediation and conciliation, on account of their widespread use as part of the compulsive processes of Australian courts and tribunals, to lessen the burden on state resources and on litigants to proceedings.

Law stated - 29 May 2024

Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Courts and tribunals throughout Australia recognise the value of ADR as an essential part of effective case management.

Usually, mediation or conciliation is required to be completed by the parties either as a precondition to the right to commence proceedings, or before litigants are permitted to proceed to a trial or hearing.

In proceedings in the Federal Court of Australia, for example, the parties must demonstrate to the court that they have taken genuine steps to resolve a dispute before commencing proceedings. A mediation or judicially-assisted conciliation is also usually ordered during the course of proceedings.

Law stated - 29 May 2024

MISCELLANEOUS

Interesting features

Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Although Courts in Australia are based upon a traditional adversarial model, alternative (appropriate) dispute resolution (ADR) procedures are broadly embraced in much of the Australian legal system's rules and processes, to assist with the early resolution of disputes before judicial intervention becomes necessary.

Retired judges and specialist or senior counsel are valued for their expertise as effective mediators, arbitrators and expert referees, as an alternative to judicial resolution.

Law stated - 29 May 2024

UPDATE AND TRENDS

Recent developments and future reforms

What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The extensive shutdowns across Australian jurisdictions during the covid-19 pandemic resulted in significant congestion and delays throughout the Australian judicial system, that have led to changes in the way litigants engage with the judicial system in the interests of efficient case management and expediency.

Courts and tribunals have required and continue to require virtual hearings on an ad-hoc basis, for both interlocutory and final hearings. Some courts have regularised the hybridisation of virtual and in-person hearings as part of their rules and practices.

Although online access to court files and filing processes were reasonably common prior to the pandemic, these systems are now universally adopted.

The jurisdiction of State-based tribunals has come under scrutiny in light of the High Court's decision in ***Citta Hobart Pty Ltd v Cawthorn*** [2022] 96 ALJR 476, where it was held that state-based tribunals were restricted from exercising judicial power in relation to matters arising under a Commonwealth law, on constitutional grounds. This has required a significant mobilisation effort on the part of tribunals to refer active matters out to state courts.

The High Court has also cemented Australia as pro-arbitration state by recognising and upholding the enforcement of an international award made against a nation-state, in the recent decision of ***Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l.*** [2023] HCA 11, further promoting its international standing for efficient dispute resolution.

Law stated - 29 May 2024