Dispute Resolution

Contributing editors
Martin Davies and Kavan Bakhda

2018

GETTING THE DEAL THROUGH

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Dispute Resolution 2018

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Latham & Watkins

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Dispute Resolution 2018

Sixteenth edition

Getting the Deal Through is delighted to publish the sixteenth edition of *Dispute Resolution*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bermuda, Ghana, Greece, Korea and United Arab Emirates.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Kavan Bakhda of Latham & Watkins, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
June 2018

Australia

Colin Loveday and Alexandra Rose
Clayton Utz

Litigation

1 Court system

What is the structure of the civil court system?

The High Court of Australia is the highest court and exercises both original and appellate jurisdiction. The majority of the court's matters are appeals from the appellate divisions of the state and territory Supreme Courts and the Federal Court of Australia after special leave to appeal is granted. Matters heard by the High Court of Australia in its original jurisdiction include challenges to the constitutional validity of laws. Significant matters including constitutional matters are heard by a full court of seven justices assuming they are able to sit. Most other matters are heard by at least two justices. High Court of Australia decisions are binding on all lower courts.

Each of Australia's six states and two territories has a Supreme Court which is the highest court in that state's court system (subject only to the High Court of Australia). Each has unlimited civil jurisdiction. The Supreme Court constituted by a single judge hears, at first instance, monetary claims above a certain threshold based on the amount claimed in the proceedings, or claims for equitable relief. In most state Supreme Courts, there are commercial lists that are expressly designed to manage large commercial disputes. Such lists provide intensive case management and a streamlined procedure designed to promote the just, quick and inexpensive resolution of matters.

The appellate division of state courts is the Court of Appeal or Full Court. Typically three judges will hear appeals from single judges of the Supreme Court and from certain other state courts and tribunals. The Court of Appeal has both appellate and supervisory jurisdiction in respect of all other courts in the state system.

Most states have two further levels of inferior courts, which hear matters below the threshold limits for the Supreme Courts. The District Court (in some states called County Court) is the middle court and has jurisdiction over most civil matters within a monetary threshold. Some district courts have commercial lists. There is then the local court (in some states called the Magistrates' Court), which handles smaller, summary matters.

In keeping with the hierarchy of courts established under the laws of each state, there is also a hierarchy of courts which deal with disputes relating to federal law. The Federal Court of Australia has jurisdiction covering almost all civil matters arising under Australian federal law. Most notably, the court has jurisdiction to hear disputes on issues including competition and consumer protection laws, bankruptcy, corporations, industrial relations, intellectual property, native title and taxation. The Family Court of Australia has jurisdiction to resolve most complex family law disputes. The Federal Circuit Court hears less complex disputes relating to child support, administrative law, bankruptcy, industrial relations, migration and consumer laws.

There are also various tribunals designed to hear specific categories of disputes.

2 Judges and juries

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

Under Australia's Constitution, the separation of powers doctrine means that the judiciary is independent from the other arms of government. Judges must act to apply or determine the law independently and without interference from the parliament or the executive.

Most civil actions are heard by a judge alone. By way of example, in New South Wales the Supreme Court Act stipulates that all civil proceedings are to be tried without a jury unless the court otherwise orders, but the court may make an order for trial by jury on application of a party if the court is satisfied that 'the interests of justice require a trial by jury in the proceedings'. Parties in defamation proceedings may elect to have a jury appointed unless the court otherwise orders.

3 Limitation issues

What are the time limits for bringing civil claims?

Limitation periods are governed by state and territory legislation and are treated as substantive rather than procedural. Limitation periods vary in terms of length and how they are calculated depending upon the cause of action.

In tort, the cause of action generally accrues from the time the damage was suffered. In contract, the cause of action accrues from the time of the breach.

Parties may agree to suspend (or toll) time limits.

4 Pre-action behaviour

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

In the federal and several state jurisdictions, legislation imposes pre-litigation requirements on parties involved in civil disputes before commencing proceedings. Generally, a failure to comply with pre-litigation requirements will not invalidate the proceedings, but the court can take it into consideration when awarding costs.

In the Federal Court of Australia, the parties to a dispute must file a 'genuine steps statement', which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

5 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?

Proceedings are commenced by filing an originating process and payment of the applicable filing fee with the registry of the court in which the claim is sought to be heard. Defendants to an action are typically first made aware of a filed claim when it is served on them in accordance with the court rules. In many jurisdictions it is also possible to conduct a search of the court files to determine whether claims have been filed but not served.

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

For service of an originating process outside Australia, the relevant court rules will generally provide a power to serve an originating process outside Australia where there is a connection between the jurisdiction and the person's acts or the consequences of those acts. Australia is a signatory to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

Matters. The Convention is designed to simplify the process for serving court documents on international litigants and receiving court documents relating to foreign litigation. It applies in all civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad.

Australia is a highly litigious jurisdiction and many courts have a heavy caseload. A variety of means are implemented to manage this caseload including specialist lists, docket judge management, streamlined interlocutory processes and case management conferences.

6 Timetable

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

Rules relating to the service of an originating process can be located in the civil procedure rules of the relevant jurisdiction. For example, in New South Wales, an originating process must be personally served on each defendant. For most other documents, service can be effected by ordinary service which includes sending documents by post, facsimile and email (where the other party consents). A claim in the Supreme Court once filed is valid if served within six months. A statement of defence must be filed within 28 days after service of the statement of claim, unless otherwise ordered by the court. This time frame does not take into account the fact that in some circumstances it will be necessary to seek further and better particulars of the matters pleaded in the statement of claim in order to better understand it.

Timelines for civil claims vary considerably depending upon the complexity of the claim, the volume of evidence to be addressed and the court hearing the dispute. Commercial disputes in specialist lists can be heard and determined within one year. Representative (class action) proceedings may take more than five years.

7 Case management

Can the parties control the procedure and the timetable?

Australian courts have broad case management powers which are generally defined by the relevant court rules. Each court has its own allocation system. Judges have a wide discretion to manage cases as they see fit to ensure that the real issues in dispute are identified and the matter is progressed to trial as soon as possible. Some courts issue standard directions or practice notes that set timetables that the parties are expected to comply with absent special circumstances.

Australian court systems have, over time, introduced methods of court-instigated 'management' of litigation. The reforms have involved shifting control of aspects of the conduct of litigation from lawyers to the courts. Australian courts have a wide discretion to impose sanctions (which may include adverse costs orders) on a party that has not complied with court orders or directions.

8 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)?

There are both common law and statutory requirements to preserve evidence pending trial. Severe sanctions may apply for the destruction of evidence. The disclosure process is referred to as 'discovery'. Discovery is an interlocutory procedure whereby a party can obtain from an opponent the disclosure and subsequent production of documents that are relevant to a fact in issue in the proceedings. Disclosure must be made of all existing documents that the party has in their possession, custody or power. Failure to comply will trigger court sanctions.

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

In most jurisdictions, discovery will be ordered by the court or obtained by filing a notice to produce for inspection of documents contained in pleadings, affidavits and witness statements filed or served by the other party. General discovery involves discovery of all documents relevant to a fact in issue, which includes documents that are unhelpful to a party's case. While most jurisdictions permit an order for general discovery to be made, courts and the parties will usually avoid general discovery by limiting the documents to be discovered to those falling within a particular category or class. In the Federal Court of Australia, a party must not apply for an order for discovery unless it will facilitate the resolution of the proceedings as quickly, inexpensively and efficiently as possible.

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

9 Evidence – privilege

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

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

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

The uniform Evidence Acts create a privilege for confidential communications made, or prepared, for the dominant purpose of a lawyer providing:

- legal advice; or
- professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is, or may be, or was, or might have been, a party.

'Dominant' in this context means the ruling or prevailing purpose. The purpose or intended use for which a document is brought into existence will be a question of fact. Legal professional privilege may be waived or lost where there is conduct inconsistent with the maintenance of the privilege. Advice from lawyers including in-house lawyers must pass these tests in order to be privileged.

Other types of privilege also exist including for example 'without prejudice privilege'. This involves communications between parties that are generally aimed at settlement. These communications cannot be put into evidence without the consent of parties in the event that negotiations are unsuccessful or later in relation to an application for costs following the determination of liability and damages.

10 Evidence – pretrial

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

Generally in Australia, witnesses provide written statements of their evidence, in the form of affidavits, statutory declarations or witness statements before the hearing. These documents are usually signed under oath or affirmed.

For expert evidence, if a party intends to call expert evidence, the rules of most courts require notice of that intention and an expert witness report to be served in advance of the hearing. There are two possible expert reports that can be admitted in proceedings, a joint report (arising out of a conference of experts) and an individual expert's report. Unless otherwise ordered, an expert's evidence in-chief must be given through one or more expert's reports.

11 Evidence – trial

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

As a general rule, witnesses of fact give oral evidence, although some courts can order service of a witness statement in advance. Written statements exchanged before trial may form the basis for evidence-in-chief of a witness at trial. Such documents are 'read' onto the record in court, and serve as evidence-in-chief for that witness. Witnesses are then usually cross-examined and re-examined in court by counsel.

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

12 Interim remedies

What interim remedies are available?

Courts have a wide discretion to determine whether to grant interim relief to a party in order to prevent the court process from being frustrated. In general terms these involve:

- *Mareva* injunctions to prevent a defendant from disposing of assets to deprive a claimant of the benefit of a judgment; and
- possession orders to allow a claimant to take possession of property that a defendant has retained in breach of a proven prima facie right to possession.

Superior courts have the power to grant relief such as a *Mareva* injunction to support foreign proceedings. There are two kinds of transnational freezing orders:

- orders that apply to foreign assets in aid of Australian judicial proceedings (worldwide orders). These are freezing and ancillary orders made against a person over whom the court has jurisdiction even if they reside overseas and in relation to overseas assets. To prevent harassment of a respondent in multiple actions around the world, the Australian example form of freezing order contains undertakings that must be given by the claimant to the court. These reflect 'Dadourian guidelines', which have been laid down by the English Court of Appeal; and
- orders that apply to Australian assets in aid of foreign judicial proceedings.

The primary elements for obtaining such an order from an Australian court are:

- a foreign judgment or 'good arguable case' in a foreign court;
- a sufficient prospect of registration or enforcement of the foreign judgment or prospective judgment in the Australian court;
- a danger that the foreign judgment will go unsatisfied; and
- satisfaction of discretionary matters (such as the effects on the respondent and third parties and the diligence and expedience of the applicant in bringing the application).

13 Remedies

What substantive remedies are available?

A judgment is a formal order by a court which concludes the proceedings before it.

The judgment can relate to the substantive question in the proceedings, or to a question in an interlocutory application such as an application for an injunction or a notice of motion seeking orders for discovery. Courts are also empowered to make consent, summary and default judgments.

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

While costs orders are generally discretionary, courts will usually make orders in accordance with the principle that 'costs follow the event', whereby the unsuccessful party in the litigation pays some portion of the successful party's costs.

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

14 Enforcement

What means of enforcement are available?

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

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

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

15 Public access

Are court hearings held in public? Are court documents available to the public?

The default position is that court proceedings are conducted in an open court. In commercial disputes, a court can order a confidential hearing or make confidentiality orders to protect intellectual property, trade secrets or commercially sensitive information. Certain court documents such as court orders in the Federal Court of Australia are now available to the public via online portals. In most cases, however, the public must apply for access to documents on the court file. Subject to special circumstances and confidentiality orders, access will normally be granted in respect of materials that been tendered into evidence or otherwise disclosed in open court.

16 Costs

Does the court have power to order costs?

Courts have broad discretion over the costs of all proceedings. In effect, a court can make whatever order as to costs is justified in the circumstances, but there are generally court rules that govern the exercise of that power.

Ordinarily, costs follow the event, which means a successful litigant receives costs in the absence of special circumstances justifying some other order. A party is usually entitled to costs of any issue on which it succeeds assessed on an ordinary basis.

There are two main classes of costs:

- Those that arise by virtue of the retainer with the client and are governed by contract (solicitor/client costs).
- Those that arise by order of the court, which can either be on an ordinary basis (party/party costs) or an indemnity basis (solicitor/client costs). Indemnity costs are usually awarded against a party in circumstances where that party has engaged in unreasonable behaviour in connection with the conduct of the proceedings. An offer of settlement can entitle the party making the offer to obtain costs on an indemnity basis. The offer will not be the only issue that determines the court's decision on this issue, but it is certainly a key factor.

17 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' agreements are often offered by plaintiff law firms in certain cases. Many class action plaintiff firms offer a 'no win, no fee' retainer for group members who otherwise could not afford to fund the litigation. In the case of a win, the retainer agreement often contains a provision for payment of an 'uplift' fee, in addition to professional costs. This arrangement is permissible subject to the court supervision inherent in Australian class actions.

Third-party funding of claims is permitted in Australia and is becoming increasingly prevalent in class actions. The involvement of third-party funders with no pre-existing interest in the proceedings, but who stand to benefit substantially from any recovery from the proceedings, is a material consideration in the courts deciding whether to grant security for costs. The courts proceed on the basis that funders who seek to benefit from litigation should bear the risks and burdens that the process entails. Courts have recently recognised the option to make a 'common fund' order in class actions where third-party litigation funders are recompensed from the common fund of proceeds obtained by the class as a whole in any settlement or judgment (and not just from class members who have signed a funding agreement).

18 Insurance

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

Most corporate entities are insured for public liability, professional indemnity and directors' and officers' liability.

Litigation insurance is not common in Australia but it is possible for parties to obtain coverage, for example, by way of 'adverse costs insurance'.

19 Class action

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

The Australian representative proceeding (class action) regime is a key feature in the litigation landscape. Outside of North America, Australia is the place where a corporation is most likely to find itself defending a class action.

The Australian representative proceeding regime comprises essentially identical rules in the federal court system and the courts of New South Wales, Victoria and Queensland. It has the following important features:

- There is no certification requirement, meaning that there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a class action. Once a class action is commenced it continues until finally resolved by judgment or settlement, unless the defendant can convince the court to terminate the proceedings on certain limited grounds.
- There is no requirement that common issues predominate over individual issues.
- The rules expressly allow for the determination of 'sub-groups' or even individual issues as part of a class action.
- A representative plaintiff can define the class members by description. This means that a person who meets the criteria set out in the class definition will be a class member unless they opt out of the proceedings. If a class member fails to opt out by the specified date, they are included in the proceedings. Therefore, a person can be a class member and bound by the outcome of the proceedings without their knowledge or consent, simply on the basis that they fall within the definition.

To commence representative proceedings, claims must satisfy three threshold requirements:

- at least seven persons must have claims against the same person or persons;
- the claims of all these persons must rise out of the same, similar or related circumstances; and
- the claims of all of these persons must give rise to at least one substantial common issue of law or fact.

While public funding via legal aid services is technically available, vigorous means and merit tests are applied to determine eligibility for aid.

As a general rule, public funds will not be available in commercial disputes.

However, third-party funding of claims is permitted in Australia and is becoming increasingly prevalent in class actions.

20 Appeal

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

Grounds for appeal must identify a significant and relevant error of fact or law in the first instance judgment.

Judgments of a civil court in Australia can be appealed to a superior court.

Leave will be required in order to appeal.

The relevant court legislation or procedural provisions set out the relevant rules of appeal.

The appellate division of most states is the Court of Appeal or Full Court, which hears appeals from single judges of the Supreme Court and from certain other state courts and tribunals.

The High Court of Australia is the ultimate court of appeal.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The registration and enforcement of foreign judgments in Australia is governed by both statute and common law principles. Within the statutory regime, the Foreign Judgments Act 1991 (Cth) governs the procedure and scope of judgments that are enforceable. Registering a judgment under the Act is a straightforward and cost-effective procedure. Where Australia does not have an international agreement or the circumstances are not caught by the statute, the foreign judgment can be enforced at common law.

22 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 Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, which governs the international service of process on a defendant who resides in Australia. The primary method for taking evidence in Australia for a foreign proceeding is through the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).

Australian authorities will not accept any letters of request that require a person to state which documents relevant to the proceedings are or have been in their possession, or produce any documents, other than particular documents specified in the letter of request that the requested court believes to be in their possession. Given the strict statutory regime regarding pretrial discovery in Australia, any veiled request for pretrial discovery that circumvents that process is likely to be rejected.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Arbitration law in Australia differs based upon whether it is classified as domestic arbitration (both parties to the arbitration agreement have their places of business in Australia), or international arbitration (being anything else). Domestic arbitration in Australia is regulated under the uniform Commercial Arbitration Acts (the Arbitration Acts), which are largely based on the UNCITRAL Model Law. Section 2a of the Acts requires courts to have regard to the Model Law in the process of interpretation. There are, however, some important differences between the two. For example, section 34A, which allows for appeals against awards, has no parallel in the Model Law.

International arbitration in Australia is regulated under the International Arbitration Act 1974 (Cth). Under section 16 of that Act, the Model Law has the force of law in Australia.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Under the Arbitration Acts, an arbitration agreement must exist in writing. However, a broad understanding of 'writing' is taken to include: electronic communications; any record of the agreement irrespective of whether it was concluded orally; or the exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

25 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 parties fail to make an agreement, the number of arbitrators will be one (noting also the difference with the Model Law, which provides for three). In such a situation, the court makes the appointment at the request of a party, having due regard to the qualifications required of

Update and trends

There is ongoing debate and calls for reform in respect of the regulation of litigation funders or those providing litigation funding services given their rising importance in and promotion of financial loss class actions. The Australian Law Reform Commission is currently considering these and other litigation funding issues. The more entrepreneurial players and a number of ambitious law firms are far less enthusiastic about the calls for regulation. While there is a lively debate whether regulation will have any appreciable impact on the ambitions of the active class actions market players, the courts continue to be asked to adjudicate issues about funding. These issues are usually not at the heart of the controversies that brought the matters to the particular courts, but the management of competing interests in the potential financial outcome appears set to continue to require judicial consideration.

the arbitrator and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

An arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to impartiality or independence, or if the arbitrator does not possess the qualifications agreed to by the parties. A justifiable doubt is one where there exists a real danger of bias.

Further, a party is restricted to challenging an arbitrator that they appointed only for reasons which it becomes aware of after the appointment was made, and must do so within 15 days. As is typical, the tribunal itself decides the challenge, however, if rejected, a party may request the court to also make a determination.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The parties are, as always, free to select whichever arbitrators they feel are best placed to resolve their dispute. The reality, however, is that the arbitrators of choice for major commercial arbitrations are often retired judges of superior courts.

Courts in Australia tend to adopt a pro-arbitration stance, and hence judges are often attuned to the differences between arbitration and litigation.

27 Arbitral procedure

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

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Of course, this is subject to the overriding duty imposed to treat the parties equally, and provide them with a reasonable opportunity to present their case.

28 Court intervention

On what grounds can the court intervene during an arbitration?

The court has a limited power of intervention. This may include a role in respect of appeals and deciding challenges to arbitrator appointments as well as the court having power to play an assistive role, such as in taking evidence or in enforcing interim measures granted by a tribunal. These powers cannot be overruled by the parties' agreement.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Yes, unless otherwise agreed between the parties. This power to grant interim measures allows the tribunal to make orders requiring a party to take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or to preserve evidence that may be relevant and material to the resolution of the dispute. With limitation, this may include the ability to order relief such as security of costs, discovery of documents, and inspection of property. As a precondition to granting this relief, however, the tribunal must be satisfied that:

- harm not adequately reparable by an award of damages is likely to result if the measure is not ordered;
- that harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted, and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

An interim measure granted by a tribunal can be enforced, upon the application of a party, by the court.

30 Award

When and in what form must the award be delivered?

Domestic arbitration law imposes no time limits on the delivery of an award.

The parties can, however, agree to this, and many arbitral institutions also contain such limits.

31 Appeal

On what grounds can an award be appealed to the court?

An appeal from an award can be made on a question of law only if the parties agree that an appeal can be brought, and the court grants leave. The court, however, must not grant leave unless the following four conditions are satisfied:

- the determination of the question will substantially affect the rights of a party;
- the question is one which the tribunal was asked to determine;
- the decision of the tribunal is either obviously wrong, or is of general public importance and the decision is at least open to serious doubt; and
- that despite the arbitration agreement of the parties, it is just and proper for the court to determine the question.

An appeal must be brought within three months.

After an appeal is heard by the court, a party can bring a further appeal as against that court's judgment. Importantly, however, this is no longer an appeal against the award itself, but rather an appeal against the lower court's judgment.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

With regards to domestic awards, an arbitral award is to be recognised as binding and, upon application to the court, can be enforce. The only exception to this is if the opposing party can convince the court that it should not recognise or enforce the award on the grounds found in section 36 (which mirror the grounds found in the Model Law and the New York Convention).

With regards to foreign awards, section 8 of the International Arbitration Act has the same effect as that described above for domestic awards. The courts do not have discretion to determine whether to recognise and enforce the award, but must do so unless one of the limited grounds provided are satisfied. This reflects the pro-arbitration stance of Australian arbitration law.

33 Costs

Can a successful party recover its costs?

The costs of an arbitration are at the discretion of the tribunal, which may make whatever orders it sees fit in this regard. In practice, many arbitral rules provide guidance on the considerations that the tribunal should have in mind when making such orders.

Alternative dispute resolution

34 Types of ADR

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

Alternative dispute resolution mechanisms, including arbitration and mediation, are increasingly popular in commercial matters in Australia. Indeed, some of the Australian courts are now directing parties to use specific alternative dispute resolution mechanisms to attempt to

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

35 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?

There has been an increasing focus by the judiciary on the costs of litigation, which in turn has promoted a greater use of alternative dispute resolution in Australia. In the Federal Court of Australia, the parties to a dispute are required to file a 'genuine steps statement', which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

In the commercial list of the Supreme Court of New South Wales, it is common for the court to order that the parties mediate before the matter is set down for hearing.

Many contractual agreements now contain alternative dispute resolution clauses that require the parties to attempt to resolve the dispute in a specific way, prior to the commencement of proceedings.

In Australia, the court may order that the proceedings be stayed until such time as the process referred to in the dispute resolution clause is completed.

Miscellaneous

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

Australia is currently experiencing increased class action activity. Class action procedures have been introduced in both the Federal and State Court systems. The threshold requirement for commencing class actions is low compared to other jurisdictions. Litigation funding is a regular feature of class actions, as are 'follow-on' class actions commenced following regulatory enforcement actions. Class actions are a regular feature of dispute resolution and of increasing importance.

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