

DENTONS

Litigation and arbitration

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1. Australia's judicial system

The Australian judicial system comprises both state and federal (Commonwealth) courts, complemented by various tribunals and forums for arbitration. The High Court of Australia is the apex court of Australia, and hears matters of constitutional interpretation, as well as final appeals in both civil and criminal matters from state and federal courts. At a federal level, commercial matters are heard in the Federal Court of Australia, or in the Federal Circuit Court for less complex disputes.

The states and territories each have their own court systems that operate independently of the federal courts. These are arranged in a hierarchical structure; the Supreme Court being the superior court in all jurisdictions. State and territory courts have inherent jurisdiction to hear matters dealing with state or territory legislation, and each Supreme Court has been conferred federal jurisdiction in all matters except some specialist areas such as family or competition law. The forum in which a party chooses to commence proceedings will depend on a number of factors, in particular the jurisdiction of a court to hear the dispute, and the quantum of the claim.

Independence

Australia is a politically stable country with a strictly independent judicial system. The Australian Constitution provides for a separation of powers between the judiciary and the other arms of government, ensuring judicial officers are able to decide cases without interference from parliament or the executive government. Judicial officers are also constitutionally guaranteed tenure and remuneration to further ensure that they carry out their duties impartially.

Stability and predictability

Australian courts apply both statute and the common law of Australia, and, in doing so, are bound by the rules of precedent. This provides for some degree of predictability in the outcome of disputes, as judicial officers cannot deviate from earlier established principles of superior courts.

Alternative dispute resolution

Civil procedure in Australia places a strong emphasis on the early resolution of disputes by encouraging parties to pursue alternative dispute resolution methods such as mediation or arbitration. Most jurisdictions will require parties to demonstrate that they have made genuine attempts to settle a matter prior to commencing judicial proceedings, and it is in the court's discretion to award costs on an increased basis where an unsuccessful party has unreasonably declined earlier offers to settle.

Enforcement of Foreign Judgments

Under the *Foreign Judgments Act 1991* (Cth), some foreign judgments are recognised and can be enforced by Australian courts if an application to do so is brought within six years after the judgment. The subordinate regulations to the *Foreign Judgments Act 1991* (Cth) list specific foreign courts from which judgments can be recognised, which notably does not include the United States of America. Where neither the *Foreign Judgments Act 1991* (Cth) nor any international agreement applies, enforcement of foreign judgments must be done by reference to common law principles.

2. Arbitration

Arbitration is an effective method for resolving commercial disputes without recourse to court proceedings. It is a process through which parties mutually agree to present arguments and evidence before an independent arbitrator, who then makes a binding and enforceable determination. Arbitration can be confidential, and is seen as a flexible and efficient method of alternative dispute resolution.

Australia is signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and a popular forum for the arbitration of commercial disputes, especially given its proximity to the Asia Pacific region. International arbitration is governed at a federal level by the *International Arbitration Act 1974* (Cth), while domestic commercial arbitration is governed by uniform state-based legislation. These statutory regimes are consistent with global best practices to facilitate the fair and final resolution of commercial disputes, without unnecessary delay or expense.

Arbitration in Australia is supported by independent institutions such as the Australian Centre for International Commercial Arbitration, the Australian Disputes Centre, and the Melbourne Commercial Arbitration and Mediation Centre. This network provides parties to a dispute with world-class hearing facilities, arbitrators and other resources, including arbitration rules and standard form arbitration clauses.

3. Class actions

Class action proceedings in Australia, formally referred to as ‘representative proceedings’, are cases in which named representatives bring proceedings on behalf of a larger group or ‘class’ of persons. This class of persons must comprise seven or more people, all with a claim against the same person, arising from similar circumstances, and based on at least one common issue of law or fact.

Class actions can be brought in the Federal Court of Australia and in most State Supreme Courts. They proceed on an ‘opt-out’ model, meaning all potential claimants are named as members when the claim is filed, and will have to opt-out if they do not wish to be bound by the outcome of the claim.

Class action proceedings can be costly, and are commonly funded by third party litigation funders. Funders generally operate on the basis that they will only require claimants to repay the funds where an action is wholly successful.

4. Regulatory investigations

Regulatory investigations into those carrying on business in Australia can lead to enforcement remedies being pursued through the courts, including by way of class action. Examples of enforcement regimes include the following.

Australian Securities & Investments Commission (ASIC)

ASIC has the power to conduct investigations into unlawful conduct by corporations, managed investment schemes, participants in the financial services industry and any other persons engaged in credit activities. Where an investigation uncovers unlawful conduct, it is within ASIC’s discretion to commence civil proceedings, or to act as an intervener or *amicus curiae* (friend of the court) in private litigation where in the public interest to do

so. ASIC may look to recover damages and property for persons who have suffered loss as a result of unlawful behaviour, as well as seeking pecuniary damages to punish and deter misconduct.

Australian Competition and Consumer Commission (ACCC)

As mentioned in Chapter 7, the ACCC has extensive powers to investigate suspected contraventions of the *Competition and Consumer Act*. It is also within their power to commence civil proceedings for alleged contraventions in the Federal Court, or to intervene in private proceedings that relate to the Act.

ACCC’s discretion to do so is informed by their overriding purpose to promote competition and improve consumer welfare in Australia. Depending on the circumstances of the contravention, the ACCC may apply for orders for divestiture, to have transactions declared void, to impose civil pecuniary penalties, or to ban individuals from being involved in management.

Australian Prudential Regulation Authority (APRA)

As mentioned in Chapter 14, the Australian Prudential Regulation Authority regulates the financial services industry. APRA has an array of formal enforcement powers that can include commencing legal proceedings against non-compliant entities, directing an entity to take or cease particular actions, or the imposition of licence conditions for a particular entity.

APRA can apply to the Federal Court to disqualify an individual from holding a senior role in the industry.

Australian Transaction Reports and Analysis Centre (AUSTRAC)

AUSTRAC is a government agency that monitors financial transactions to identify money laundering, organised crime, tax evasion, welfare fraud and terrorism financing. AUSTRAC enforces breaches of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and *Financial Transactions Reports Act 1988* (Cth), which can include applying to the Federal Court for a civil penalty order against a non-complying entity.

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