AUSTRALIA

Global litigation guide

DLA PIPER

About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

Key contacts

Ewald Netten
Partner
DLA Piper Nederland N.V.
ewald.netten@dlapiper.com
T: +31 20 5419 865

Australia

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Overview of court system

Australia's courts operate under the common law legal system. Australia has a federal system of government, with legislative power divided between the federal branch of government and six state and two territory governments (for ease, we refer collectively to the states and territories as the state or states). Australia's courts are similarly divided into eight separate state jurisdictions and a federal jurisdiction, which each operate on a parallel but independent hierarchy of courts. Lower courts are bound by previous decisions made by higher courts in the same hierarchy. Decisions made by higher courts are persuasive, but not binding, on lower courts in a different hierarchy (for example, decisions made by the Federal Court do not bind a state District Court).

State and federal courts broadly have jurisdiction over the application of legislation enacted by the state and federal parliaments respectively. The High Court of Australia is the ultimate court of appeal in Australia for all court systems. There are also tribunals created by specific legislation under state and federal jurisdictions. Courts often have jurisdictional limits as to the types of matters, and quantum in dispute, that they will hear. A dispute over a small quantum cannot be commenced, at first instance, before a state Supreme Court.

Australia's official language is English. All Court proceedings will be conducted in English and judgments will be delivered in English.

Limitation

In each state or territory of Australia, specific legislation imposes a time period before the end of which proceedings must be commenced for a claim or dispute.

The specific legislation is:

- Limitation Act 1985 (ACT)
- Limitation Act 1981 (NT)
- Limitation Act 1969 (NSW)
- Limitation of Actions Act 1974 (QLD)
- Limitation of Actions Act 1936 (SA)
- Limitation Act 1974 (TAS)
- Limitation of Actions Act 1958 (VIC)
- Limitation Act 2005 (WA)

These time periods vary from state to state and depend upon the type of claim. A failure to issue proceedings before the relevant time period expires is likely to result in that claim becoming time barred.

In most Australian states, actions in simple contract or tort must be brought within six years of either the date of breach (contract) or the date on which loss was incurred (tort).

The limitation period may be extended in some circumstances, for example where someone with legal incapacity (such as a minor or a person of unsound mind) has entered into a contract. Some jurisdictions also permit for the limitation period to be extended at the court' s discretion.

Procedural steps and timing

The process of litigation is broadly similar across Australian courts. Proceedings are initiated by a claim or application, which must be filed in the relevant court and by the initiating party on all parties to the proceeding. Parties will then exchange pleadings (such as statements of claim, defences, counterclaims, and replies) which define the parameters of the dispute between the parties and the specific issues which are to be proved by each party. Timeframes for the progression of litigation are found in the civil procedure rules applicable in each jurisdiction. Generally, a defence must be filed within 28 days of service of a statement of claim.

For proceedings in the Federal Court, parties are required to file a genuine steps statement, which outlines the steps taken to make a sincere and genuine attempt to resolve the dispute prior to commencing litigation. Superior courts in the states may also require a party to litigation to provide details of attempts made to resolve a dispute before proceedings were commenced.

Once the exchange of pleadings is complete, parties will generally undertake the discovery (also known as the disclosure) process, and then go on to prepare their evidence for a final hearing of the dispute. It is common, particularly in complex litigation, for the parties to be obliged to attend court at regular intervals for directions hearings, in which orders are given to manage the conduct and timeframes of the case up until its final hearing.

Timeframes for each stage of proceedings vary greatly with the complexity and case management style of an individual matter and the specific jurisdiction in which the case is commenced. Each superior court in the states has in place specific practice notes or directions for the conduct of commercial disputes with the aim of ensuring that those commercial disputes are resolved in the most cost-effective and time-efficient manner possible. Generally, across all jurisdictions, parties will have 28 days from receipt of a claim to put on a defence. As noted above, the timetable from that point of time will depend on the nature of the dispute.

A straightforward commercial contract dispute will normally, court resources permitting, be resolved within 12 months.

Most state and federal courts require a corporate entity to be represented by a lawyer (which could include a lawyer employed by a company). Some jurisdictions dealing with small claims/employment issues may allow a company to appear by its director. Individuals may appear on their own behalf in most jurisdictions without a lawyer.

Disclosure and discovery

In Australia, the discovery process is designed to allow parties to civil litigation to obtain from an opponent all documents relevant to the issues in dispute. Australian courts strictly prohibit "fishing expeditions" through discovery. Discovery is usually undertaken after the close of pleadings (although in some courts in some states this may not be permitted until after evidence is complete) when the points of dispute between the parties have crystallized. Discovery may however be ordered, in limited circumstances, prior to the commencement of proceedings where an applicant is able to satisfy the court that he or she needs to obtain discovery in order to find out whether or not a cause of action exists against a potential defendant.

The practice of disclosure varies between those jurisdictions which mandate a general right of discovery and those in which the right is more limited. In the Northern Territory and the states of South Australia and Queensland, parties have a mandatory duty of disclosure which is discharged by the exchange of lists or copies of discoverable documents. In Tasmania, Victoria and Western Australia, a party may, by written notice to another party, require that party to make general discovery. In the Federal Court of Australia and New South Wales, the right to discovery is limited and requires an order of the court and will usually be limited to specific categories.

There have been recent attempts by some of the states' superior courts to more tightly control the disclosure process. For example, the preparation of disclosure plans (which identify the categories of documents to be disclosed and how they will be disclosed), and the courts ordering that discovery being provided after the exchange of written evidence with a view to limiting the number of documents to be exchanged.

In the Federal Court and most state courts, discovery can be ordered to be made by non-parties to the dispute where the court is satisfied as to the likelihood of the non-party having relevant documents. Courts in Australia will also generally permit the issuing of subpoenas to produce documents to non-parties to litigation and this process will be more straightforward than seeking non-party disclosure orders.

Default judgment

Default judgment can be applied for in proceedings in any court where a defendant does not:

- file a defence within the specified timeframe after a statement of claim has been served; or
- fails to make an appearance at a hearing.

A default judgment is not a judgment on the merits of the claim, but rather a sanction for a party's failure to comply with the rules or orders of the Court. Once a default judgment is ordered against a defendant, a defendant can, in limited circumstances, seek to challenge the granting of that default judgment. The defendant will need to file an application or motion to set aside the default judgment within a specified period of time and show cause for why (usually lack of notice of the claim or that notice was given of intent to defend but that notice was not brought to the attention of the court which granted the default judgment) the judgment should be set aside.

Appeals

Judgments of civil courts in Australia can be appealed to a superior court. An appeal does not suspend the effect of the judgment being appealed, except in so far as a court having jurisdiction in the matter may direct. Civil procedure legislation in each jurisdiction sets out the rules and procedure for appeals. Ordinarily, it will be necessary to seek leave from the superior court to appeal. The Court of Appeal in each state, and the Full Federal Court, are the ultimate courts of appeal for each of those jurisdictions. Cases that emanate from the Federal Circuit Court are appealable to the Federal Court and then the Full Federal Court, whereas matters emanating from a State Magistrates Court are appealable to the Supreme Court and the Court of Appeal. Decisions made by the District Court (County Court in certain states) are appealable to the Supreme Court and decisions of the Supreme Court can be appealed to the state's Court of Appeal. The High Court of Australia hears appeals from courts of appeal (sometimes referred to as the full court) in all jurisdictions, and has limited original jurisdiction (which predominantly relates to constitutional matters).

Parties generally, depending on the jurisdiction, have 28 days from the date of judgment or final order, to lodge an appeal in a civil matter to the relevant appeal court. Appeals will generally, because of the limitation of introducing new evidence in most civil appeals, be resolved more quickly than matters at first instance. Most appeals of civil matters will be heard and judgment given within six to eight months from commencement of the appeal.

Interim relief proceedings

All superior Australian courts have a wide power and discretion to grant both interlocutory orders and interlocutory injunctions. An interlocutory application, generally speaking, is an application which seeks any order other than a final judgment.

As in other jurisdictions, interlocutory injunctions are a species of interlocutory orders. Where those orders are sought on an urgent and temporary basis until a more extended form of relief is sought, they are often referred to as interim orders.

Interlocutory orders (including interlocutory injunctions) can require a party to undertake or refrain from a particular act, and can be granted before proceedings have commenced, once they are on foot and after judgment has been entered. Applications for these types of orders may be made by self-represented litigants or through legal representation.

The categories of non-urgent interlocutory orders that an applicant may seek are many and varied and include, by way of example, applications for security for costs, discovery (including preliminary discovery before proceedings have been commenced), the filing of expert evidence or orders for particulars. The evidence required to obtain non-urgent interlocutory orders will turn on the type of orders sought, although at the very least substantive interlocutory applications usually require a sworn affidavit to be filed.

The kinds of relief that can be sought by way of an urgent interlocutory injunction are equally varied. This is because the orders have the purpose of preserving the status quo until the rights of the parties can be determined finally, and the types of matters that can be heard by the court are vast. Common urgent interlocutory injunctions include applications for the preservation of property, the freezing of assets and applications to search premises to preserve evidence.

An applicant for an interlocutory injunction (either urgent or not) must prove that:

- there is a serious question of law to be tried;
- the balance of convenience favours the granting of the injunction; and

- an award of damages (at the conclusion of the proceeding) would not be an adequate remedy.

It is possible for urgent interlocutory injunction applications to be heard by the court ex parte, without the opposing party's involvement. Any orders given ex parte will generally operate only for a limited period of time until the matter can be brought to a hearing. The duration of any ex parte order will ordinarily be limited to a period terminating on the return date of the summons, which should be as early as practicable (usually not more than a day or two) after the order was made, when the respondent will have the opportunity to be heard. For this reason appeals of ex parte interlocutory injunctions are not usually made to a superior court. The applicant will then bear the onus of satisfying the court that the order should be continued or renewed. A party seeking an interlocutory injunction will ordinarily be obliged to give an undertaking to pay any damages by the defendant suffered as a result of the injunction in the event that the claim for final relief at trial fails.

The decision to grant an interlocutory injunction can be on an urgent basis to a relevant appeal court. The appeal court will usually list the matter before a single judge to assess the urgency (often the same or the day following the day on which the appeal is lodged) and set a timetable based on the information provided at that first listing.

Prejudgment attachments and freezing orders

Australian state and federal courts can grant interim freezing orders, which restrain a defendant from disposing of property prior to judgment. These orders are a species of interlocutory orders. Such applications may be filed at the Supreme Court or Federal Court. A freezing order is normally obtained ex parte without notice to the respondent, before service of the originating process, because notice or service may prompt the feared dissipation or dealing with assets. A freezing order or an ancillary order may be limited to assets in Australia or in a defined part of Australia, or may extend to assets anywhere in the world, and may cover all assets without limitation, assets of a particular class, or specific assets. It would therefore be possible for a freezing order to encompass bank accounts as well as assets such as real property, art, securities or motor vehicles. Such orders would, however, normally allow for access to funds for reasonable expenses, living costs and payments in the ordinary course of a defendant or third party's business. A court may also order a freezing order against a third party, where it can be established that there is a risk that a judgment or prospective judgment may be unsatisfied as a result of a third party's power, possession or influence over the assets in question. The power to issue a freezing order is a function of courts' authority to prevent an abuse of the court process by the frustration of court-ordered remedies. A freezing order will be made only to preserve the status quo for the purpose of resolving a substantive cause of action brought by the plaintiff, and not as a stand-alone remedy.

The criteria for the issue of a freezing order is similar to the ordinary principles for the grant of interim relief, as discussed above, although the potentially serious impact on a defendant's property rights raises the threshold for the granting of a freezing order. This may be overcome by an undertaking as to damages given by the applicant of the freezing order, where the applicant undertakes 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 affected by the operation of the order. The High Court of Australia described freezing orders as '"a drastic remedy which should not be granted lightly". Broadly and generally, an applicant must show that:

- the applicant has a good arguable case (in the substantive cause of action);
- the refusal of a freezing order will give rise to a real risk that any judgment pronounced in the action will remain unsatisfied, or that the recovery of any judgment will be prejudiced by reason of the removal by the defendant of assets from the jurisdiction, or their dissipation within it; and
- the balance of convenience favours the making of the order.

Costs

Australian courts have wide discretion to award costs orders against either party to cover the opposing party's costs of litigation. The general rule is that costs follow the event. This means that the unsuccessful party will be liable to pay the litigation costs of the successful party. The aim of this rule is to achieve a just outcome by shifting the costs burden on to the party which is found to have either unjustifiably brought another party before the court or given another party cause to have recourse to the court to obtain their rights.

Where each litigant has enjoyed some success in the proceedings, courts may modify the general rule to make costs orders that reflect the litigants' relative success and failure. Courts may depart from the general rule by requiring a successful party to bear their own costs where there is good cause to do so. Such an outcome may be justified where, for example, a successful plaintiff is awarded only nominal damages, or a party succeeds only due to late and substantial amendments to their case.

Of particular strategic importance is the rule that generally a court will not award costs to a successful party which has obtained relief no more favourable than had already been offered by his or her opponent in settlement discussions. This rule is designed to encourage the early resolution of litigated disputes.

Costs orders are subject to a costs assessment process administered by the courts. It is unusual that a party will be able to recover all of its actual legal costs through this process. On a standard assessment, parties may recover approximately 60% to 75% of their actual costs. A higher rate of assessment, on an indemnity basis, may be employed where a party has engaged in unreasonable conduct in the proceeding.

All courts in Australia will charge fees for commencing civil proceedings (often referred to as a filing fee). Some jurisdictions, particularly superior courts, will also charge additional fees including but not limited to daily hearing fees (calculated by reference to the length of the trial), filing fees for notices of motions/applications and the issuing of subpoenas to third parties. These fees are set by the courts and are published on their websites. They are usually reviewed on a yearly basis. By way of example, the current rate (effective from 1 July 2023) for commencing proceedings in the Federal Court of Australia is AUD4,760 for corporations and the daily hearing fee for corporations can range from AUD3,180 (for the first four days) and AUD16,945 (for the 15th and subsequent days).

Class actions

In all Australian jurisdictions, a representative proceeding, or class action (as it is more commonly known in Australia) may be commenced by or against any one person as a representative of numerous persons (the minimum number required is generally seven people) who have the same interest in the proceeding and the claims brought give rise to a substantial common issue of law or fact. It is possible to commence a class action against multiple defendants and there is no requirement for every group member to have a claim against every defendant.

An overarching consideration of the courts in hearing a representative proceeding is whether it involves less delay, expense, and prejudice to the parties than alternative forms of trial. If not, the court may discontinue the proceedings.

The Federal, New South Wales, Victorian and, most recently, Queensland jurisdictions contain further statutory provisions in relation to representative proceedings, which are arguably more liberal and plaintiff-friendly than other jurisdictions. These jurisdictions allow representative proceedings to be brought where seven or more people have claims which arise out of the same or related circumstances and give rise to a substantial common issue of fact or law. Over 90% of all class actions filed in Australia from 1992-2009 were filed in the Federal Court of Australia.

When a representative proceeding is commenced, all potential plaintiffs who fall within a class become members of the class, whether they are aware of the claim or not. Members can then opt out of the proceedings before a date set by the court. All class members who do not opt out will be bound by the judgment of the court or by any approved settlement.

It is important to note that, although some states have yet to formally abolish the law of champerty and maintenance, outside of the US, Australia has one of the most developed class action industries, with a variety of large, class action plaintiff law firms and with many litigation funders having been active in the jurisdiction for over 20 years. This active funding industry has seen a continued increase in the number of class actions being commenced in Australia.

Key contacts

Liam Prescott
Partner
DLA Piper Australia - Brisbane
liam.prescott@dlapiper.com
T: T: +61 7 3246 4169

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