



HERBERT  
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FREEHILLS

# DOING BUSINESS IN AUSTRALIA

DISPUTE RESOLUTION





## Chapter 23

# Dispute Resolution

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Australia has a well-developed and sophisticated system for the resolution of commercial disputes, both within and outside a formal court setting. As explained elsewhere, our legal system is based on both federal and state laws and the courts are also organised in that way. The courts are independent of both the executive and legislative arms of government, and judges are appointed rather than elected.

### The court system

The court system in Australia is divided into the federal court system and the state and territory court system, with each hearing different types of commercial disputes.

Federal courts generally deal with disputes arising under federal (Commonwealth) laws; typically disputes about tax matters, patents and trademarks, antitrust and consumer protection issues, corporations regulation and misconduct issues, takeovers and labour laws. Each state and territory of Australia has a Federal Court branch in which a dispute can be commenced, often depending on where the relevant parties to the dispute are based.

State and territory courts deal with non-federal matters for the most part, including the application of state and territory specific laws. Many contractual disputes and negligence claims are dealt with by those courts. There are different levels of state and territory courts depending on the size and nature of the dispute. Large commercial disputes will usually be dealt with in the Supreme Court, which is the highest court of each state or territory.

The Federal Court and each Supreme Court has an appellate division to which an appeal against a decision of a single judge of the Federal or Supreme Court, or a decision of an inferior federal, state or territory court may be made. In limited cases, a further and final appeal may then be made to the High Court of Australia.

Special fast-track services for commercial disputes exist in both the federal and state court systems. The parties to a dispute, and their lawyers, are expected and have a duty at law to cooperate with the court and to assist in facilitating the resolution of disputes as quickly,

inexpensively and efficiently as possible. The courts also encourage the parties to exhaust all avenues of settlement prior to trial and, in many instances, the court may order parties to participate in mandatory mediation.

The Federal Court and state and territory Supreme Courts have developed sophisticated methods to deal with complex disputes and are at the forefront internationally in using technology to streamline the conduct of cases. Large trials are often run electronically, with the judge, witnesses and lawyers all working from an electronic set of documents displayed on computer screens around the court room. Technology is also used in other ways to facilitate the efficient conduct of proceedings, for example, it may be possible for evidence from foreign witnesses to be taken by video link, without the need for personal attendance.

## **The litigation process**

The various courts have rules and practices which govern the way disputes are resolved, but the following are common features:

- most civil cases are decided by a judge alone, without a jury;
- civil cases commence with a written pleading document setting out the claims made and the orders sought (which may include monetary damages, orders requiring something to be done or not done, and other orders to suit the circumstances);
- the other party then produces a response in writing which may also include counter-claims against the original party, or may bring in other parties who it is said caused or contributed to the loss alleged;
- usually each party will be required to provide documentary evidence to the other party in advance of the hearing before the judge. Usually this will include primary documents relevant to the issues in dispute (by way of a process called 'discovery'), but will often also involve potential witnesses setting out in writing what evidence they can give. A party may also issue subpoenas to other persons who are not party to the proceedings, calling on them to produce documents which are relevant to the dispute;
- often the hearing before the judge will involve witnesses giving oral evidence in court, in which the witness must state on oath or by affirmation that they will tell the truth. The opposing lawyers can seek to challenge that evidence through cross-examination, which involves seeking to undermine the force of the evidence (for example, by showing the evidence is not consistent with a document the witness wrote at the time);
- after hearing evidence and legal argument from both sides, the judge then often takes

some time to give a judgment and make orders. Often in commercial disputes, the judge will order that the unsuccessful party pay the legal costs of the successful party, in addition to any other damages payable; and

- the parties then have a short period of time (usually less than one month) to decide whether to appeal the decision of the judge.

## **Alternative methods of dispute resolution**

It is well recognised that full-scale court proceedings can involve considerable time and expense and strain relationships between the parties to the dispute. In many cases we recommend that a dispute resolution process outside the court system be considered.

Some contracts require the parties to arbitrate any disputes they have. Commercial parties, particularly in international transactions, may prefer to arbitrate disputes if possible because arbitral awards are more readily enforceable around the world than judgments of national courts. Also, unlike court proceedings, arbitration proceedings are generally private and afford parties a greater degree of confidentiality in respect of their dispute. The arbitration process often involves a semi-formal hearing, and the decision-maker is often appointed by the parties to the dispute.

Other alternative dispute resolution techniques which are often used include:

- mediation, which is a non-binding negotiation facilitated by a mediator. The mediator does not have authority (unlike an arbitrator in an arbitration) to bind the parties to a decision but can assist the parties in coming to a mutually satisfactory settlement; and
- expert determination, which produces a binding decision by an independent expert. The independent expert will usually have particular expertise or technical knowledge in the subject matter of the dispute. Expert determination is usually employed to resolve disputes concerning technical, factual matters rather than complex legal issues.

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## Key contacts



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