PANORAMIC

COMPLEX COMMERCIAL LITIGATION

Australia

LEXOLOGY

Complex Commercial Litigation

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Contents

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Australia

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BACKGROUND

Frequency of use

How common is commercial litigation as a method of resolving high-value, complex disputes? What are the common alternatives to commercial litigation for resolving such disputes?

Commercial litigation in Australia remains the primary method of resolving high-value complex disputes. Litigation in each relevant State and Territory jurisdiction remains prevalent, together with the Federal Court of Australia (Federal Court).

Arbitration also remains a prevalent form of the resolution of complex disputes in Australia, along with the usual alternative dispute resolution (ADR) methods such as mediation. Arbitration is a widely accepted alternative to litigation for resolving commercial disputes, particularly those that are complex and which involve international parties. ADR methods, such as mediation, also remain common throughout commercial disputes and are often utilised after the commencement of formal proceedings in State and Territory Supreme Courts, and the Federal Court, as a means of settling disputes before trial.

Law stated - 14 July 2025

Litigation market

Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The litigation market in Australia remains busy for both domestic and international commercial disputes. At the end of 2023, foreign economies had a total of A$4.7 trillion invested in Australia (DFAT, 'Statistics on who invests in Australia').

In 2023, mining and quarrying, real estate and finance and insurance activities contributed to the largest areas of foreign investment in Australia (DFAT, 'Which Australian industries attract foreign direct investment?'). With this amount of foreign investment, it is unsurprising that international parties find themselves either initiating or defending claims in Australian jurisdictions.

One particular area that involves the participation of international parties in the litigation market is class actions. As at 30 May 2024, the primary area in which class actions were lodged was commercial and corporate law. For example, global brands Apple and Google Android recently found themselves on the back foot in Australia, defending lengthy and expensive class action suits for allegedly using their market power to force app developers to use Apple and Google payment systems for in-app purchases while charging commissions of up to 30 per cent. This comes as a result of a similar class action in the US, where Apple reached a settlement of US$100 million in August 2021. Further, the increase in large-scale data breaches has seen class actions commenced against Medicare and Optus on behalf of Australians whose personal information was compromised.

Table 2: Current First Instance Class Actions in the Federal Court (by NPA) (including related matters) as of 26 May 2025

Class action	Number of matters
Commercial and corporations (corporations and corporate insolvency)	15
Commercial and corporations (regulator and consumer protection)	42
Commercial and corporations (commercial contracts, banking, finance and insurance)	31
Commercial and corporations (economic regulator, competition and access)	8
Administrative and constitutional law and human rights/migration	20
Employment and industrial relations	49
Other federal jurisdiction	4
Taxation	2
Admiralty and maritime	1

Law stated - 14 July 2025

Legal framework

What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Australia and all its states and territories operate under the common law legal system. The main domestic sources of law (in order of hierarchy) are the Commonwealth of Australia Constitution, Commonwealth legislation, decisions of the High Court and Federal Courts of Australia interpreting the Constitution and Commonwealth legislation, state constitutions; and state legislation and decisions of the State Courts.

Civil procedure in Australia consists of statutory rules that govern procedure in the various courts and tribunals established by the Commonwealth, states and territories.

Law stated - 14 July 2025

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider
What key issues should a party consider before bringing a claim?

Typically, the key issues to consider before bringing any claim are twofold. Namely, can I bring a claim and should I bring a claim?

Can I bring a claim?

There are a range of factors to consider in answering this question. Chief among them is: do any statutory bars exist that prevent my ability to bring a claim? Australia has a range of statute of limitations provisions that apply to different areas of law. For instance, in New South Wales, the Limitation Act 1969 (NSW) bars an action in contract or tort from being brought more than six years after the date on which the cause of action accrued.

Should I bring a claim?

This consideration can be broken down into a further list of questions that a party should consider prior to bringing a claim. Those questions are:

- what are the merits of my claim? Do I have reasonable prospects of success?
- what outcome am I seeking to achieve?
- does litigation afford a remedy to achieve that outcome?
- does the cost of bringing the claim correlate with the remedy I am seeking and the prospect of success?
- does the defendant(s) have sufficient assets to meet my claim?
- is there a contractual obligation or commercial or financial benefit to engaging in alternative dispute resolution prior to commencing the proceeding?

Law stated - 14 July 2025

Pre-action conduct requirements
Are there requirements for pre-action conduct and what are the consequences of non-compliance?

At the time of filing a proceeding in the Federal Court, a claimant must file a genuine steps statement, specifying:

- the steps they took to try to resolve the issues in dispute; or
- the reasons why no such steps were taken, which may include the urgency of the proceedings, whether and the extent to which the safety or security of any person or property would have been compromised by taking such steps (Civil Dispute Resolution Act 2011 (Cth), section 6).

A failure to file a genuine steps statement does not invalidate the application instituting the proceedings, but the court may have regard to whether a person filed a genuine steps statement and took genuine steps to resolve the dispute when exercising their powers and awarding costs.

The Australian states and territories also have similar laws that require parties to take reasonable steps to resolve disputes.

Some examples of steps that could be taken to resolve a dispute prior to commencing a proceeding include, but are not limited to:

- notifying the other party of the issues and offering to discuss them, by sending a letter of claim;
- providing relevant information and documents to the other party to allow them to understand the dispute and possible bases for settlement; and
- alternative dispute resolution (CTH) Civil Dispute Resolution Act 2011 section 4 (definition of 'genuine steps to resolve a dispute').

In addition, lawyers have a duty to satisfy themselves that there is a reasonable basis on which to bring the proceeding. That is, a lawyer has a duty to determine the cause(s) of action and that there is more than mere speculation of legal rights arising.

Law stated - 14 July 2025

Establishing jurisdiction

How is jurisdiction established?

Jurisdiction in Australia's states and territories is established by legislative provisions. The highest court in each of Australia's six states and two territories is the (respective) state Supreme Court, which has unlimited civil jurisdiction to determine disputes under state laws and to hear claims over a certain monetary threshold. Claims for lower amounts are heard in lower courts, such as Local or District Courts. Most state and territory Supreme, Local and District courts have commercial lists that deal with complex commercial disputes.

In 1987, the Commonwealth and each of the States passed legislation, identically described as the Jurisdiction of Courts (Cross-Vesting) Act 1987, purporting to confer jurisdiction on the Federal and Family Courts and on the Supreme Courts of other States and Territories to hear and determine matters arising under State or Territorial law and providing for the transfer of proceedings between those courts.. The purpose of the cross-vesting scheme is to avoid jurisdictional disputes arising from commencing a proceeding in an inappropriate court and that matters are instituted in the most appropriate court.

The Federal Court has broad jurisdiction, covering almost all civil matters arising under Commonwealth law.

After an initiating process has been filed in an Australian court, it must be served on the other party or parties. If the defendant is outside of Australia, they can:

- decide not to come to Australia to defend the proceedings, which may put their Australian assets at risk or impact any future Australian business;

- make a conditional appearance for the purpose of challenging jurisdiction by arguing that the Australian forum is clearly inappropriate because it has little to do with the local forum (forum non conveniens);
- appear in the Australian court to defend itself based on jurisdiction and substance; or
- file counter proceedings in the foreign jurisdiction and seek an order stopping the plaintiff's claim in Australia (anti-suit injunction).

If a dispute pertains to a contract, an Australian court will consider the operation of any jurisdictional clause in the contract and if so, whether it is exclusive, non-exclusive or one-way.

If a plaintiff successfully obtains an anti-suit injunction in Australia, it operates to restrain the party from continuing concurrent proceedings in the foreign forum. However, Australian courts will only make such an order if the applicant can show that there is a definite reason for restraint of the foreign proceeding to protect the process of the Australian court.

Law stated - 14 July 2025

Applicability of foreign laws

In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Australian law sets the parameters for the application of foreign law by Australian courts. Evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced in a proceeding, pursuant to Australian evidence law (see, for example, section 174 of the Evidence Act 1995 (Cth)).

Australian courts may need to determine the content of foreign law, for example where the proper law of a contract is foreign but the litigation is being conducted in Australia. The content of foreign law is a question of fact for the Australian court to determine. If there is a jury, the judge will determine the law of the foreign country that is applicable to the facts of the case. Expert evidence (usually from a lawyer from the relevant foreign jurisdiction) is commonly required to prove the meaning and application of foreign law. Plaintiffs rarely succeed in cases wholly governed by foreign law and instead, their reliance on foreign law is generally defensive and interlocutory.

Law stated - 14 July 2025

Freezing assets

When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

A freezing order is an extraordinary interim remedy because it can restrict the defendant's right to deal with assets before judgment, and is often granted without notice to the defendant.

The court may make a freezing order if it is satisfied that there is an arguable case against the defendant that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the prospective defendant might abscond or the assets of the prospective defendant or another person may be removed from Australia or a place inside or outside Australia or are disposed of, dealt with or diminished in value (Federal Court Rules 2011 (Cth), rule 7.35(4)). The court retains the power to make a freezing order if the court considers it is in the interests of justice to do so.

The court usually makes the order on an interim basis with a carve-out to allow the defendants to pay for reasonable living expenses and legal fees. There is usually then a further hearing, at which the defendant can give evidence as to why an ongoing freezing order should not be made.

Law stated - 14 July 2025

Other interim relief

What other forms of interim relief can be sought?

The types of interim relief that can be granted by Australian courts include injunctions that may prevent or force a party to take a certain action.

All jurisdictions in Australia have rules providing for interim relief, including:

- orders for the preservation of property;
- orders for disposal of perishable or similar property;
- orders for interim distribution of property or income surplus to the subject matter of the proceedings;
- orders for payment of shares in a fund before the ascertainment of all persons interested;
- freezing (***Mareva***) orders; and
- search and seizure (***Anton Piller***) orders.

Preliminary (Documentary) discovery may also be sought in some circumstances. Orders for preliminary discovery are generally made where an applicant has made reasonable inquiries but still has insufficient information to determine a prospective defendant's liability, their whereabouts and whether they have sufficient assets to meet or defend the claim. Preliminary discovery can assist an applicant in deciding whether or not to commence proceedings.

Some interim orders may be made in special circumstances of urgency without giving notice to the other party. In such ex parte instances, the party seeking orders has a duty to the court to disclose all known relevant facts and circumstances, even if they might be detrimental to the applicant's position.

Law stated - 14 July 2025

Alternative dispute resolution

Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

The overarching purpose of civil procedure in the Federal Court is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. In line with this purpose, Australian courts encourage parties to consider and employ ADR methods in the pre-action stage and later in the case in an attempt to resolve or narrow issues in dispute.

For example, at a pre-action stage, the Federal Court requires applicants to file a 'genuine steps statement' outlining the steps that have been taken to try and resolve a dispute. A failure to do so will not invalidate an application (section 10 of the Civil Dispute Resolution Act 2011 (Cth) (CDR Act)); however, the Federal Court may consider this non-compliance when exercising its discretion to award costs (section 12 of the CDR Act), as well as impose other consequences (such as through case management).

It is usual in most Australian litigation for the courts to make orders requiring the parties to attend mediation before the matter is set down for hearing, although this is not generally a requirement at the pre-action stage. Further, some Australian courts will stay litigation proceedings in favour of arbitration if the arbitration agreement is valid and the dispute falls within the terms of the agreement and is capable of arbitration.

A failure to engage in ADR when contractually obliged to do so may result in a proceeding being stayed.

Law stated - 14 July 2025

Claims against natural persons versus corporations
Are there different considerations for claims against natural persons as opposed to corporations?

Although a corporation has the same rights as a natural person (in that it can incur debt, sue and be sued), there are a number of different considerations for claims against natural persons versus corporations, including:

- corporations have limited liability, which means that their owners (shareholders) are not personally liable for the debts of the company. A company structure may, therefore, be advantageous to a high-risk business and may make it difficult for an applicant to recover from the company;
- corporations are separate legal entities but are managed and operated by directors or employees. Depending on the actions of the directors or employees, the company may not be at fault or liable, or there may be liability for both the company and certain individuals;
- corporations do not have standing to sue for some actions (for example, an action in privacy or defamation);
- in civil penalty proceedings brought by regulators (such as ASIC and the ACCC), different penalties may apply to corporations;
-

procedurally, a corporation that brings a claim may be ordered to put up security for any adverse cost order made against it in the proceeding if there is a risk the corporation would not have the financial capacity to pay the costs. As a general rule, that kind of order will not be made against an individual plaintiff;

- individuals may be self-represented. Corporations must engage lawyers unless leave is granted by the court (which rarely occurs);
- enforceability – to enforce a judgment against a natural person you may issue bankruptcy proceedings, a warrant for seizure and sale or an attachment of earnings or debt, whereas to enforce a judgment against a corporation you may issue a statutory demand (followed by winding up proceedings); and
- their ability to satisfy a judgment – certain assets of individuals (ie, those required for ordinary life) will not be available to satisfy a judgment. All assets of a corporation will be available.

Law stated - 14 July 2025

Class actions

Are any of the considerations different for class actions, multiparty or group litigations?

The same considerations largely apply to class actions and group litigations, however, given the size, nature and substance of such actions, such claims can take more time to be heard.

In Australia, there is no threshold requirement that class action proceedings be judicially certified as appropriate to be brought as a class action. Once a class action has commenced, it will continue until resolved unless the respondent applies to the court for an order terminating the proceedings as a class action. In Australian law, there must only be at least one 'substantial' common issue of law or fact between group members to a proceeding, regardless of taking into consideration individual issues (section 33C(1)(c) of the Federal Court of Australia Act 1976 (Cth) (FCA Act)). Moreover, the determination of 'sub-group' or individual issues is allowed as part of a class action (section 33Q–33R of the FCA Act).

To commence a class action, the action must satisfy three threshold requirements pursuant to section 33C(1) of the FCA Act:

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

Where the court finds in favour of the group, it may, inter alia, make an award of damages to group members, sub-group members or even individuals (section 33Z(1)(e) of the FCA Act).

Law stated - 14 July 2025

Third-party funding

What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Third-party litigation funding is allowable in Australia. There is no public policy objection to litigation funding per se in Australia in an ordinary commercial litigation context. However, courts will act to protect persons (eg, members of a class action group or creditors of an insolvent company) for litigation funding terms that are seen (in the context of the particular case) as oppressive, unconscionable, or disproportionate to the amount of the claim.

In 2022, the Commonwealth Government announced its plans to loosen the increased regulation of litigation funders that were implemented by the previous government under the Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (Old Regulations). Under the Old Regulations, litigation funders were required to hold an Australian Financial Services Licence (AFSL) and to comply with the managed investment scheme (MIS) regime under Chapter 5C of the Corporations Act 2001 (Cth) (Corporations Act).

In 2022, however, the full Federal Court in ***LCM Funding Pty Ltd v Stanwell Corporation Limited*** [2022] FCAFC 103 (Stanwell) reversed its previous position in ***Brookfield Multiplex Funds Management Pty Ltd v International Litigation Partners Pte Ltd*** (2009)180 FCR 11 (Multiplex), finding that litigation funding schemes do not constitute an MIS.

Following Stanwell, on 16 December 2022, the Commonwealth Government announced the commencement of the new litigation funding regulations, the Corporations Amendment (Litigation Funding) Regulations 2022 (Cth) (New Regulations). Under the New Regulations, litigation funding arrangements are now generally exempt from MIS and AFSL requirements, as well as the product disclosure regime and anti-hawking provisions under the Corporations Act.

ASIC has also provided further relief to litigation funders by:

- extending the ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37 to 31 January 2026. This instrument provides that litigation funding arrangements and proof of debt arrangements are exempt from the application of the National Credit Code;
- extending the ASIC Corporations (Conditional Costs Scheme) Instrument 2020/38 until 31 January 2026. This provides that litigation funding arrangements where the members are wholly or substantially funding their legal costs under a conditional cost agreement are exempt from MIS, AFSL, product disclosure and anti-hawking regimes under the Corporations Act; and
- revoking the ASIC Corporations (Disclosure in Dollars) Instrument 2016/767 and ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787. This is because the New Regulations have invalidated these instruments.

ASIC has stated that this relief was introduced to provide certainty to litigation funders and members of the litigation funding community while the Government deliberates its position on these funding arrangements (ASIC, 'ASIC amends relief for litigation funding arrangements,' 19 December 2022).

Law stated - 14 July 2025

Contingency fee arrangements

Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

Contingency fee arrangements are, with one exception in the State of Victoria, not allowable in Australia.

Under section 33ZDA of the Supreme Court Act 1986 (Vic), on application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done, may make an order that the legal costs payable to the law practice may be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being a percentage of the amount set out in the order.

Other jurisdictions in Australia, including the Commonwealth itself, have yet to adopt similar laws.

Other options include:

- 'no-win, no-fee' retainers that are very common in private client matters, particularly for personal injury litigation; and
- uplift arrangements in which the client and lawyer enter into a retainer, setting out agreed parameters for the lawyer to be able to recover a percentage uplift on fees in the event of a particular result being achieved. Uplifts are commonly limited (ie, by Professional Rules) to a maximum of 25 per cent of the fees chargeable.

Law stated - 14 July 2025

THE CLAIM

Launching claims

How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Claims are commenced by filing an originating process and paying the applicable filing fee with the registry of the court in which the claim is sought to be heard. Australian courts have specialist lists at both the federal and state level, and it will depend on the nature of the claim and jurisdictional limits as to which jurisdiction a claim is commenced in.

The nature of pleadings may vary between jurisdictions but they will generally include all allegations of fact necessary to prove or defend a claim, as well as a clear prayer for relief.

Depending on the type of claim commenced (for example, shareholder oppression matters in a specialist list), affidavit material may be appended to the originating process. Generally, all other documentation will be made available via the discovery or disclosure process.

Law stated - 14 July 2025

Serving claims on foreign parties

How are claims served on foreign parties?

Australia is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Hague Service Convention), which allows the transmission of judicial and extrajudicial documents for service to countries that are party to the Convention.

To serve a document overseas using the Hague Service Convention, an Australian litigant must refer to the relevant Australian state, territory or federal court rules where proceedings are occurring for the steps required. Generally, the rules will require the Australian litigant to lodge an application to the relevant court requesting foreign service. For example, the requirements for a request for service of overseas documents in New South Wales pursuant to the Hague Convention are set out in the Uniform Civil Procedure Rules (UCPR) 2005 (NSW) Rule 11A.13.

The request must take into account the receiving country's reservations, declarations and notifications relating to the operation of the Hague Service Convention.

If the court is satisfied that the requirements are complied with, the request will then be transmitted to the receiving country's central authority, additional authority or other authority.

Australia is also a party to bilateral treaties on judicial assistance with the Republic of Korea (South Korea) and the Kingdom of Thailand. It is a party to a number of bilateral treaties entered into by the United Kingdom, the rights and obligations under those treaties extending to Australia by virtue of Australia's membership to the British Commonwealth.

Law stated - 14 July 2025

Key causes of action

What are the key causes of action that typically arise in commercial litigation?

The key causes of action in commercial litigation that typically arise in Australia include:

- breach of contract;
- monies owing under a debt;
- equitable causes of action relating to property, including breach of trust, misuse of trust assets and enforcement of interests in land;
- other equitable causes of action, including breach of fiduciary duty, estoppel and specific performance;
- claims for restitution in the category of unjust enrichment, including for mistaken payments and quantum meruit;
- statutory and common law causes of action, including shareholder oppression, misleading and deceptive conduct, unconscionable conduct, breach of directors' duties, and claims with respect to financial services;
-

tortious causes of action at common law, including passing off, conversion and detinue, negligence, professional negligence, misrepresentation, nuisance and trespass; and

- general claims based on the inherent jurisdiction of the superior courts, such as declaratory relief and injunctive relief.

Law stated - 14 July 2025

Claim amendments

Under what circumstances can amendments to claims be made?

A court may, at any stage of the proceedings and on application by any party or of its own motion, order that any document in the proceedings be amended or that any party have leave to amend any document in the proceedings, in such manner as the court thinks fit. In New South Wales, the Uniform Civil Procedure Rules outline the procedural requirements for two scenarios when amending a statement of claim:

- Rule 19.1(1) provides a plaintiff may, without leave of the court, amend a statement of claim once within 28 days after the date on which it was filed. Once a date has been fixed for trial, the plaintiff is unable to amend the statement of claim, unless the court orders otherwise; and
- Rule 19.1(2) of the UCPR provides that, if a plaintiff amends their statement of claim under Rule 19.1(1) after the defendant has filed its defence, the defendant may then amend its defence within 14 days of the amended statement of claim has been served.

All necessary amendments shall be made for the purpose of determining the real questions raised by (or otherwise depending upon) the proceedings, correcting any defect or error in the proceedings, or avoiding multiplicity of proceedings.

As a general rule, a party should be entitled to make an amendment, even at a late stage in a trial, to permit the real issues in dispute between the parties to be finally resolved, with this rule being qualified by case management principles in certain circumstances to ensure the prompt and efficient disposal of litigation.

Amendments to a claim can also be made with the consent of the other parties to the proceedings.

Matters that may result in refusal of or inability to make an amendment include where:

- the amendment is so fruitless that it would be struck out if it appeared in an original pleading;
- it will require a further hearing after judgment has been reserved;
- the application is made mala fides;
- an order for costs is not sufficient to cure any prejudice to another party to the proceedings;
- the application of case management principles so requires; and

- the amendment seeks to introduce or extend a claim that is statute barred due to the effluxion of time.

Law stated - 14 July 2025

Remedies

What remedies are available to a claimant in your jurisdiction?

Legal and equitable remedies are available to claimants in Australia. Common remedies include:

- damages: an award of money to the claimant, with the intended purpose of compensating the claimant rather than punishing the defendant. Orders include direct orders for the payment of cash or an account of profits;
- orders that require or prohibit specified conduct: mandatory injunctions, orders for specific performance, delivery up (where the defendant is ordered to deliver the goods to, or allow them to be taken by, the claimant);
- declarations: binding statements of parties' rights with respect to a particular matter;
- orders with respect to corporations, including winding up or the appointment of a controller;
- equitable compensation: a discretionary remedy that compensates the claimant for its loss;
- account of profits: seen as an alternative to equitable compensation. An account of profits intends to prevent the defendant's unjust enrichment following an equitable breach. Some examples of equitable breach which may give rise to an account of profits include:

  - breach of trust;
  - breach of fiduciary duty;
  - breach of confidence; and
  - breach of contract.

Law stated - 14 July 2025

Recoverable damages

What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Damages may be awarded in breach of contract, tort cases and under certain statutory provisions. The fundamental principle governing the award of damages at common law is that they are compensatory in nature. Compensation may be awarded in equity as well.

Types of damages that may be awarded include:

- compensatory damages: the purpose of which is to compensate the claimant for its loss arising as a result of the defendant's conduct. This may (unless the right to claim is excluded under the contract) include damages for consequential loss (ie, damages for indirect economic impacts of wrongdoing);
- liquidated damages: if a contract specifies a fixed amount of damages that will be payable in case of a breach, the court may award this amount to the claimant, provided the court is satisfied that the specified amount represents a genuine pre-estimate of the claimant's loss;
- exemplary damages: the purpose of which is to punish a defendant. They are not awarded for breach of contract and rarely used in Australia;
- special damages: compensate the claimant for out-of-pocket expenses incurred because of the defendant's breach; and
- nominal damages: may be awarded where a claimant fails to establish substantial loss, yet is able to prove that some wrong has occurred.

Law stated - 14 July 2025

RESPONDING TO THE CLAIM

Early steps available
What steps are open to a defendant in the early part of a case?

If a defendant considers that the claim brought against it does not disclose a proper cause of action, is frivolous or vexatious or is an abuse of process, it may make an application to have part or all of the claim struck out or amended. Such an application should be made promptly and before the close of pleadings.

A defendant may bring a counterclaim against the plaintiff as part of its defence to the claim. It may also bring a claim against a third party or seek to join a third party to the proceeding where it claims any contribution or indemnity, or seeks relief or remedy connected to the subject matter of the proceeding, against that third party.

A defendant who considers that the court is not suited to hear the claims made by the plaintiff (for example because of lack of jurisdiction or forum non-conveniens) may make an application for its dismissal or transfer to another court.

A defendant should also consider whether the claim has been commenced within the relevant time limits set out in the applicable Limitation of Actions legislation in the relevant state or territory.

If the plaintiff resides outside of the state or territory in which the claim is issued, or is a corporation and sues for the benefit of some other person and there is reason to believe the plaintiff has insufficient assets in Victoria to pay the defendant's costs if ordered to do so, the defendant may apply to the court for an order that the plaintiff gives security for the defendant's costs of the proceeding. If an order for security is made, the plaintiff will be required to deposit security into court and the proceeding will be stayed until the security is given.

Law stated - 14 July 2025

Defence structure

How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

Defences must be set out in consecutively numbered paragraphs. They must either admit, deny or require the plaintiff to prove each of the matters set out in the statement of claim. Denials must be specific and deal with the point of substance, setting out the basis for the denial. If a defendant intends to prove different facts than those pleaded by the plaintiff, they must be set out. Where any defence or answer to be raised by the defendant arises under any Act, the specific provision relied on must be identified in the defence.

The time for filing a defence varies according to the rules of the particular court. Parties to complex litigation will often agree on a timetable that includes provision for the filing of a defence by a particular date.

A defendant who has a claim against the plaintiff may bring a counterclaim in the proceeding. A counterclaim is usually issued in the same document, which is headed 'defence and counterclaim'.

No documents need to be appended to the defence. If a document is referred to in the defence, the particulars of that document should be noted. The plaintiff can later call for its production.

Law stated - 14 July 2025

Changing defence

Under what circumstances may a defendant change a defence at a later stage in the proceedings?

A party may amend its defence once prior to the close of pleadings without leave of the court. The court can reject these amendments in part or whole upon application of another party within 21 days after service.

Additionally, a party may seek leave of the court, or the consent of all other parties, to amend its defence at any other time. ***Aon Risk Services v Australian National University*** (2009) 239 CLR 175 is a binding High Court judgment, which reinforces that, before an application for leave to amend can be considered seriously, a court must be furnished with solid reasons as to why pleadings were lacking and, where applicable, why there were delays in seeking an amendment. An application will not be accepted solely because the applicant is entitled to raise an arguable defence or counterclaim. Factors such as delay, wasted cost and concerns of case management generally weigh against an application being accepted.

Law stated - 14 July 2025

Sharing liability

How can a defendant establish the passing on or sharing of liability?

Outside of ordinary contractual principals relating to joint and several liability, a defendant may:

- bring a claim against a third party;
- file a counterclaim against a plaintiff in circumstances relating to contributory negligence; or
- seek to join a third party whom the defendant considers shares liability.

In Australia, a legislative regime of proportionate liability exists. In NSW, this is provided for under Part 4 of the Civil Liability Act 2002 (NSW).

While the legislation is slightly different in each state and territory, as a general rule, the regime provides that a defendant who is able to establish that other parties are concurrent wrongdoers in respect of the acts or omissions that caused the claimant's loss or damage may succeed in having some of its liability for the loss or damage apportioned to those concurrent wrongdoers as a several obligation. In NSW, apportionable claims may include the following:

- a claim for economic loss or damage to property in an action for damages, from a failure to take reasonable care, but not including any claim arising out of personal injury; and
- a claim for economic loss or damage to property in an action for damages for breach of section 18 of the Australian Consumer Law.

Considering the possibility of concurrent wrongdoers is an important aspect of bringing and defending a claim.

Law stated - 14 July 2025

Avoiding trial

How can a defendant avoid trial?

The most common way to avoid trial is for the parties to reach an early resolution and mutually agree on a settlement. This can occur as a result of the parties' own volition, but is commonly a result of court-ordered mediation with a private or court-appointed mediator. Almost all commercial matters in Australia will feature mediation as part of the case management process.

An application to the court for summary dismissal may be made if:

- the limitation period has expired;
- the cause of action is invalid due to being without reasonable grounds or a proper basis, an abuse of process or commenced for a wrongful purpose and has no real prospects of success;
- the court does not have jurisdiction to hear the case; or
- a plaintiff is failing to properly prosecute its case in an efficient manner or is failing repeatedly to comply with orders of the court or is conducting its case in a vexatious way.

Consideration might also be had to questions of issue estoppel where parties are involved in successive litigations. Similarly, particular cases may be suitable for determination of preliminary questions of law to be determined at an early stage by application to court.

Law stated - 14 July 2025

Case of no defence

What happens in the case of a no-show or if no defence is offered?

The court may award summary judgment in favour of the plaintiff if it is satisfied that the defendant does not have a defence or the prospects of successfully defending the case are so low as to be negligible. If granted, the party seeking the order will be granted judgment in its favour, without having to go through the trial process.

If the defendant fails to file and serve an appearance or a defence within the required timeframe pursuant to the court rules, the plaintiff can make an application for default judgment, generally inclusive of costs.

As with plaintiffs, if a defendant fails to properly conduct its case in an efficient manner or is failing repeatedly to comply with orders of the court or is conducting its case in a vexatious way, a plaintiff may be entitled to have the defence struck out and judgment awarded in its favour.

In either of the above cases, where a plaintiff claims damages to be determined, the court will likely still require the plaintiff to proceed and prove its damages claim.

Law stated - 14 July 2025

Claiming security

Can a defendant claim security for costs? If so, what form of security can be provided?

Yes. A defendant is entitled to require a corporate plaintiff to establish its financial capacity to pay costs should the cause of action be unsuccessful. If a plaintiff is unable to provide evidence to satisfy the defendant, the defendant may bring an application for security of costs.

A defendant should act on the question of security for costs as soon as possible following the commencement of a proceeding. Delay may be a factor that counts against a defendant when seeking security for costs.

The court's power to order security for costs is discretionary. The onus is on the defendant to establish that the plaintiff should be required to provide security. If the defendant can establish this, several forms of security may be sought including:

- money paid into court;
- bank bonds or guarantees; or
- charges over property or assets owned by the plaintiff.

A security for costs order against a natural person (rather than a corporation) is only granted in extremely limited circumstances. This is to ensure that people with limited financial resources still have fair and equal access to justice.

The exercise of the power to order security for costs is a balancing process, requiring the court to achieve a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out from proceedings.

Law stated - 14 July 2025

PROGRESSING THE CASE

Typical procedural steps

What is the typical sequence of procedural steps in commercial litigation in this country?

The typical sequence of procedural steps in commercial litigation is as follows:

- a plaintiff commences a proceeding by filing an originating process, accompanied by payment of the relevant filing fee, with a court of competent jurisdiction. The originating process, typically a writ or an originating motion, is filed together with the plaintiff's statement of claim or affidavit in support, which sets out the basis or cause of action for the proceeding;
- upon being served with the originating process, the defendant is required to formally enter an 'appearance', signalling an intention to answer or defend the claim (at least in part). Appearances may be 'conditional' or 'unconditional'. Unconditional appearances are the most common, and acknowledge that the defendant accepts service of the claim and the court's jurisdiction to hear the claim. Conditional appearances preserve the right of the defendant to argue that the claim lacks jurisdiction or is otherwise irregular (for example, if the defendant intends to argue that service has not regularly occurred);
- if a statement of claim is served together with the originating process, then the civil procedure rules in each jurisdiction prescribe the time by which the defendant is required to file and serve a statement or notice of defence;
- the matter will then typically be listed for a first directions hearing, to make procedural timetabling orders for interlocutory steps. Many courts utilise intensive case management, often by the judge assigned to hear the matter (or a judicial registrar), to keep the parties focused on narrowing the issues in dispute and preparing the matter for hearing. Typical orders at a directions hearing are for the exchange of pleadings (statement of claim, defence and any counterclaim, reply and any defence to counterclaim, joinder of parties), discovery, mediation, exchange of lay and expert evidence, expert conferral, and the dates for issuing of any subpoenas;
- in recent years, the mediation process has become a more important step in proceedings, and most judges will not set a matter down for trial until the parties have attended a mediation and attempted to settle the matter. Judges have also taken a more active role in case management and supervision of interlocutory steps; and

- once the interlocutory steps have been completed, the matter will be listed for trial. The length of the trial is likely to depend on the number (and complexity) of legal issues in the case and the number of lay and expert witnesses that will be required to give evidence at the hearing.

Law stated - 14 July 2025

Bringing in additional parties

Can additional parties be brought into a case after commencement?

The civil procedure rules in each jurisdiction allow for further persons or entities to be brought into a case in certain circumstances. This may be by way of application for joinder of an additional party by any of the parties that are already a party to the proceeding, and depending on the circumstances surrounding the proposed joinder, the leave of the court may be required.

Law stated - 14 July 2025

Consolidating proceedings

Can proceedings be consolidated or split?

A court may separately determine issues arising out of the same proceedings (as a split trial), or conversely consolidate proceedings, if it considers it more cost-efficient and expedient to resolve those questions in such a manner. In a split trial, a party may seek separate determination of liability before the quantum of damages is assessed. For example, trial as to the determination of liability alone will save the cost and expense associated with proving loss or damage if liability is not proven. In a 'consolidated' trial, if two or more proceedings are pending in the court and the proceedings involve common questions of law or fact, or are subject of claims arising out of the same transaction or series of transactions, any party to any of the proceedings may apply to the court for an order that the proceedings be consolidated or heard together. This provides for the efficient use of court resources and avoids incurring costs twice.

Law stated - 14 July 2025

Case allocation

How are cases allocated? Are cases allocated to a specific judge? If so, at what stage?

The allocation of cases to judges in Australian courts is governed by both statutory provisions and the court's inherent powers, with the process designed to ensure effective case management and effective handling of court business. The court's inherent power involves acting effectively to regulate its own proceedings.

Each court in each jurisdiction has its own systems for case management. The general method for caseload allocation in most Australian courts is via a master calendaring system

where cases are allocated to a particular list, depending on the type of case and the stage the case has reached. Usually, individual judges are separately allocated to a list, rather than being allocated to specific cases from the beginning. However, in exceptional circumstances, cases may be allocated directly to an individual judge at an early stage if the matter is particularly urgent, raises certain security concerns or is overtly complex or time-consuming.

The key objective of the lists is the early identification of issues and the management of proceedings in a way that ensures their just, quick and cheap resolution. For example, the Supreme Court of New South Wales maintains various specialist lists, such as the Commercial List and Technology and Construction List as governed by Practice Note SC Eq 3. These lists outline procedures for pleadings, motions, discovery, evidence and hearings, and are designed to handle specific types of disputes such as commercial transactions and construction matters. Pursuant to paragraph 21 of the Practice Note, the cases are managed by the List Judge to ensure a speedy resolution of the real issues between the parties, reflecting the case management principles.

Similar specialist lists and allocation processes exist in other jurisdictions, such as in Victoria and Queensland through the Supreme Court of Victoria's Commercial Court Practice Note SC CC 1 and the Supreme Court of Queensland's Practice Direction 8 of 2023, which establishes a Class Actions List. This reflects a consistent approach to case management across different jurisdictions and different courts in Australia.

Law stated - 14 July 2025

Court decision making

How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The standard of proof differs between criminal and civil cases. In criminal matters, the case against the defendant must be proved beyond reasonable doubt. Typically in more serious criminal matters, a jury will decide the guilt of the accused. The civil standard of proof is lower than the criminal standard and requires proof on the balance of probabilities, meaning that the court must consider it to be more probable than not that the plaintiff's case has been made out. There are some jury trials in the civil jurisdiction, but commercial trials are largely determined by a judge alone.

Law stated - 14 July 2025

Court decision making

How does a court decide what judgments, remedies and orders it will issue?

The remedies sought by a plaintiff are required to be identified as part of the plaintiff's originating process and proved at trial, usually through the court's acceptance of lay and expert evidence. Depending on the nature of the plaintiff's application, it may seek interlocutory or final orders.

While there is a range of remedies available to the court, such as declaratory relief, injunctions, restraints or damages, a court will seldom order relief beyond that which is identified in the plaintiff's originating process.

Law stated - 14 July 2025

Evidence
How is witness, documentary and expert evidence dealt with?

Witness evidence may be led orally or in writing, at the direction of the judge. Generally, the use of a witness statement is not appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the credit of the witness is likely to be challenged.

Documentary evidence may be adduced by affidavit, or by tendering admissible documents during the hearing or trial. In addition to tendering a document, the contents of a document can be proved by an admission of a party to the proceedings as to its contents, by tendering a copy or summary of, or extract from, a business record, or by adducing oral evidence of its contents (if the document is unavailable).

The use of expert evidence provides the court with relevant and impartial evidence on a particular matter based on the person's specialised knowledge – knowledge which is acquired through their training, study or experience. Instruments in each state and territory regulating the procedural and evidentiary requirements for presenting expert evidence are as follows:

- New South Wales – Uniform Civil Procedure Rules 2005, Part 31;
- Queensland – Uniform Civil Procedure Rules 1999, Chapter 11, Part 5.
- Australian Capital Territory – Court Procedure Rules 2006, Chapter 2, Part 2.12;
- Victoria – Civil Procedure Act 2010, Part 4.6;
- Western Australia – Rules of the Supreme Court 1971, Order 36A;
- South Australia – Uniform Civil Rules 2020, Chapter 7, Part 14;
- Tasmania – Supreme Court Rules 2000, Part 19; and
- Northern Territory – Supreme Court Rules 1987, Order 44.

Law stated - 14 July 2025

Evidence
How does the court deal with large volumes of commercial or technical evidence?

In New South Wales, the court expects parties to acquit their obligations under the Civil Procedure Act 2005 (NSW) to ensure costs are reasonable and proportionate by employing technology to save time and costs wherever possible. While the court does not mandate a single approach to the use of technology, it makes the assumption that dealings in hard

copy are to be the exception rather than the rule, wherever possible parties are to exchange documents in a useable searchable format, and parties are expected to address the court on the use of technology at an early stage of the proceeding to produce efficiencies for both the parties and the court.

One of the significant developments the courts have adopted in the past three years is the use of technology in response to the covid-19 pandemic. This includes the management of digital evidence, electronic document exchange and the format and preparation of digital court books.

In managing digital evidence, a digital court file in the Federal Court, Family Court and Federal Circuit Court can be accessed remotely through the Court's Digital Court Program.

Law stated - 14 July 2025

Evidence

Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

In New South Wales, the Evidence on Commission Act 1995(NSW) provides for taking evidence in a civil trial from a person outside Australia. Part 2 of the Foreign Evidence Act 1994 (Cth) creates a similar procedure for use in Commonwealth matters where the witness is outside Australia. Furthermore, parts 1A and 1B of the Evidence (Audio and Audio Visual Links) Act 1998(NSW) regulate the provision of evidence from non-participating states and foreign countries through AVL for NSW proceedings.

In proceedings for an offence against the law of New South Wales in the Supreme Court or the District Court, a party may apply for an order to take evidence from a witness outside Australia, if it appears to be in the interests of justice to do so under the Evidence (Audio and Audio Visual Links) Act 1998 (NSW). Such an order may include any directions the court considers just concerning the procedure for the examination of the witness, including the time, place and manner of the examination and any other relevant matters. Evidence taken following the order is admissible in the proceeding on any terms the trial judge thinks fit.

In proceedings before the Local or District Court, a party may apply to the Supreme Court for one of the orders discussed above to permit the examination of a witness abroad under section 9 of the Evidence on Commission Act 1995 (NSW).

When determining whether it is in the interests of justice to make such an order, the court must consider whether the witness is willing or able to come to New South Wales to give evidence in the proceeding, whether the witness will be able to give material evidence to an issue in the proceeding, whether, having regard to the interests of the parties, justice will be better served by granting or refusing the order.

While the risk that the judicial authorities of another jurisdiction will refuse to comply with a letter of request is not a basis for declining to make the order sought, such a letter may affect diplomatic relations between Australia and another country.

Part 3 of the Foreign Evidence Act 1994 (Cth) (FE Act) provides a mechanism by which the testimony and exhibits annexed to the testimony of a person obtained from a foreign country

pursuant to a formal request for mutual legal assistance from the Australian government may be admissible in criminal and related civil proceedings in Australia in the absence of an available witness to provide oral testimony.

The FE Act requires certain criteria to be met, including the requirement for the testimony to have been taken under oath or affirmation, for example, an affidavit, or provided under such caution or admonition that would be acceptable in that foreign country. The FE Act also provides that the evidence must comply with the admissibility requirements in the relevant state or territory Evidence Act in the jurisdiction in which the evidence is adduced.

Law stated - 14 July 2025

Evidence

How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Generally, any witness who is called to give evidence may be cross-examined by any party against whom he or she has testified, or by any party to the proceeding other than the party calling the witness. However, there are some limited exceptions to this rule. For example, a person called for the sole purpose of producing a document or documents that are not examined in chief may not be cross-examined.

Cross-examination of a witness will generally take the form of leading questions, subject to the control of the judge. Confusing or misleading questions may not be asked, nor those that are properly objectionable. A witness may be cross-examined on the facts in issue and also as to credit. These are matters that are put with a view to impugning the credit of the witness and discrediting his or her testimony generally. There are numerous ways in which the credit of the witness may be attacked, including attacking the competency of the witness, testing the ability of the witness to accurately recall the relevant factual circumstances, and establishing bias or lack of impartiality. It is important to confine a witness in giving evidence in cross-examination to matters of fact that are strictly admissible. A witness should not be invited to speculate, engage in argument, give hearsay evidence, or give any answer directly outside his or her actual knowledge. Compound or rolled up questions are objectionable and should not be asked.

A witness who is a party to the proceedings may be asked in cross-examination to make an admission about a relevant matter of fact, but he or she may not be asked a question that goes to a question of law, or mixed fact and law.

Law stated - 14 July 2025

Evidence

What options are there to gather evidence from third parties?

Subpoenas are a disclosure mechanism that can be issued by the court to compel a third party to produce documents or attend court to give evidence. Subpoenas are typically used in connection with a trial or hearing and must have a legitimate forensic purpose. The documents sought must be relevant to the issues in the proceedings and not overly broad

or oppressive. In *National Employers Mutual General Association Limited v Waind* (1978) 1 NSWLR 372, the New South Wales Court of Appeal set out three key steps of having a third party bring documents in court, pursuant to a subpoena: (1) obeying the subpoena by the witness bringing the documents to court and handing them to the judge who determines any objections of the witness to the subpoena or production of the documents to the Court, (2) decision of the judge regarding the preliminary use of the documents and (3) admitting the document in whole or in part.

While the process of discovery is usually between parties to the proceedings, there may be discovery of documents from non-parties. For example, Rule 5.4 in the Uniform Civil Procedure Rules 2005 governs discovery against persons who are not parties to the proceedings in New South Wales civil proceedings.

Law stated - 14 July 2025

Time frame

How long do the proceedings typically last, and in what circumstances can they be expedited?

The timelines for proceedings will vary considerably depending on factors such as the type of matter, its complexity and the number of parties.

Complex civil litigation will generally last for upwards of 12 months, and sometimes run for many years. For example, class actions may run for between three and five years. In most jurisdictions, parties can apply for timetabling directions, including an application to have the matter listed for an early trial, or specifically an expedited trial. These types of trials generally involve truncated hearings and more informal pleadings.

Additionally, courts may have a list for expedited actions, such as Victoria's County Court. A proceeding may also be expedited by splitting determination of liability from quantum, or the hearing of a preliminary point on a threshold legal argument that will dispose of the balance of the proceeding if determined in a certain way.

Law stated - 14 July 2025

Gaining an advantage

What other steps can a party take during proceedings to achieve tactical advantage in a case?

Parties can apply to dispose of the whole or a part of another party's case to gain a tactical advantage in proceedings. Parties can apply for default judgment to dispose of a case without trial where the other party does not enter an appearance or file a statement of claim. A summary judgment can be obtained where another party's case, or part of it, is unmeritorious and has no prospect of success.

Additionally, a party may apply to strike out another party's case, or an aspect of it, where aspects of the pleadings or particulars are defective. Although there have been recent reforms in certain states to liberalise the ability of a party to obtain these orders, courts are

still cautious as these will deprive a party of a chance to pursue to its claim or defence, and they will generally only be granted in clear cases.

Law stated - 14 July 2025

Impact of third-party funding

If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

Complex commercial litigation is by its nature resource intensive, both in terms of costs and time. Third-party funders offer a range of products and structures that lessen the costs for claimants. This has facilitated greater access to justice for some parties, as they can commence actions where they would otherwise be unable to do so owing to lack of resources. Third-party funding may also allow claimants to maintain claims against more well-resourced parties where they would otherwise be on an unequal footing in terms of parties' ability to fund the high costs associated with litigation. There are certain factors which influence the demand for third-party litigation funding in Australia. This includes economic certainty, the demand for legal services and the degree of government intervention.

This has impacted the Australian legal landscape as a large proportion of class actions being filed are being funded by third parties. Third-party funders also fund a range of other claims such as insolvency claims. Third-party funders will typically take a pre-agreed proportion of the settlement or judgment amount if the case is successful, usually around 28.5 per cent (Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third-Party Litigation Funders Final Report, December 2018, 66). However common, fund orders have been criticised by many as the growing prevalence of third-party funders in the litigation landscape – whilst improving access to justice for many – has resulted in uncertainty, including multiple and competing class actions, with criticism that the main beneficiaries in litigation are litigation funders and plaintiff lawyers, rather than the members of the class.

In 2020, the Australian government considered whether to impose greater regulation on funders, the fees and commissions they realise and the influence they may bring to a case, and established a Joint Parliamentary Committee to consider legislative reform to the conduct of class actions in Australia. The Parliamentary Committee delivered its report titled 'Litigation funding and the regulation of the class action industry' in December 2020, which included a list of recommendations for reform.

Law stated - 14 July 2025

Impact of technology

What impact is technology having on complex commercial litigation in your jurisdiction?

Many Australian courts are now encouraging the use of technology in trials to save both time and costs in complex commercial litigation.

At both the state and federal levels, courts have indicated parties should ensure costs are reasonable and proportionate by employing technology to save time and costs wherever possible. Where there is a large amount of discovery, the court may order discovery by technology-assisted review. In large-scale litigation, parties are expected to engage a third-party e-trial provider to manage documents, including the court book, and courtroom processes such as the exhibit list. Witnesses and experts can give evidence via video link if the court directs.

The use of technology in the courts increased during the covid-19 pandemic, with many courts operating remotely, particularly in respect of interlocutory matters. The NSW Supreme Court Practice Notes provide guidance on the use of technology in the courtroom while ensuring it is in the interests of administering justice for both parties.

Law stated - 14 July 2025

Parallel proceedings

How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Civil proceedings will not automatically be stayed where criminal proceedings are on foot that involve the same facts. However, the court has a discretion to stay civil proceedings if it is in the interests of justice to do so. The court will consider whether there is a risk of prejudice to an accused facing criminal charges. A party considering a civil action could gain an advantage by awaiting the completion of criminal proceedings, as facts or evidence may become apparent in that proceeding that will assist their case.

Private criminal prosecutions can be instigated in Australia, although this is rare. They are generally taken over by federal or state prosecutors or regulators.

Law stated - 14 July 2025

TRIAL

Trial conduct

How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

Most trials proceed before a single judge who will hear the evidence in regard to liability and damages. Trial duration can vary from a single day for straightforward cases to several months for complex commercial litigation, which may involve voluminous amounts of documents and extensive expert and lay evidence.

Law stated - 14 July 2025

Use of juries

Are jury trials the norm, and can they be denied?

In Australia, jury trials are not the norm and most civil actions are heard by a judge alone. Legislation and the rules in each jurisdiction provide for a variety of other modes of trial. In all jurisdictions, except in the Australian Capital Territory and South Australia, there is a provision for trial by jury. Furthermore, the Federal Court of Australia Act 1976 (Cth) preserves the power of the Federal Court to order civil jury trials.

Law stated - 14 July 2025

Confidentiality

How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

The principle of open justice means that in civil litigation the public (including the media) have access to court files and can observe court hearings. Prior to trial, the general public can obtain copies of pleadings but not evidence (except in special circumstances). Once any evidence is 'read into court' at trial, it loses such confidentiality. However, during trial, the court may make orders to maintain confidentiality over commercially sensitive information.

Documents containing sensitive commercial information may be subject to a confidentiality scheme where access to specified confidential documents is restricted to approved individuals such as lawyers and expert witnesses. In the courtroom, confidentiality can be maintained at trial by the parties agreeing that they will not read out or refer to specified confidential information. Parties to proceedings who obtain evidence of other parties, which might otherwise be confidential, are subject to an implied undertaking not to use that evidence for a collateral or ulterior purpose unrelated to the proceedings in which that production occurs.

There is an implied obligation in Australian courts, known as the ***Harman*** or ***Hearne v Street*** obligation, which prevents litigants and their respective legal representatives from making collateral use of information obtained through compulsory court processes (***Harman v Secretary of State for the Home Department*** [1983] 1 AC 280; ***Hearne v Street*** (2008) 235 CLR 125, [96]). It means, for example, that a party that obtains copies of documents from discovery by the other party to the proceeding cannot use those documents for some other purpose, except with the leave of the court.

Law stated - 14 July 2025

Media and public interest

How is media interest dealt with? Is the media ever ordered not to report on certain information? Are trials public? How do the public and media access trials?

The principle of open justice allows for the media to access the court files (for pleadings but not evidence) and observe hearings to encourage the accurate reporting of proceedings. In limited circumstances, the court will make orders to suppress and restrict what can be published. The power to make such orders is both statutory and part of the inherent

jurisdiction of the court. For example, the Supreme Court of Victoria may make suppression orders where necessary to prevent prejudice to the interest of the Commonwealth, a state or territory in relation to national or international security. There are also extensive statutory obligations on the media which restrict the extent of their media reporting. However, these restrictions are mostly to facilitate jury trials by, for example, preventing negative bias that may impact upon jury impartiality and fairness in trials.

Law stated - 14 July 2025

Proving claims

How are monetary claims valued and proved?

At trial, the plaintiff must prove, by witness and documentary evidence, that the breach was the cause of the loss and damage suffered by the plaintiff and also prove the amount (or quantum) of the loss that was suffered. In many commercial matters, expert evidence is required to substantiate and quantify a claim for damages, such as evidence from a forensic accountant.

In some instances there may be a 'split trial', which is where liability and quantum are dealt with as separate issues. If liability is established, a trial in respect of damages will be listed. The decision to hold a split trial is at the discretion of the court, having regard to the just and efficient resolution of the issues in dispute between the parties.

Law stated - 14 July 2025

POST-TRIAL

Costs

How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

The general rule is that costs follow the event. This means the court will generally order the unsuccessful party to pay the litigation costs of the successful party.

Unless otherwise specified, costs are assessed on a standard basis. The amount is calculated by taking into account only those costs actually incurred by the party that were necessary or proper for the attainment of justice or for enforcement or defence of rights. On a standard assessment, parties may only recover approximately 60 per cent to 75 per cent of their actual costs incurred. In limited circumstances, the court may decide to award costs on an indemnity basis, taking into account all costs reasonably incurred and of a reasonable amount, allowing parties to recover up to 90 per cent to 95 per cent of actual costs incurred. Such costs are only awarded in exceptional circumstances, for example where a party has acted unreasonably or instituted proceedings with no legal basis.

The structure and length of complex commercial judgments vary greatly depending on the breadth of the evidence, number of legal issues in dispute and the particular judge responsible for drafting. A 50 page judgment would not be uncommon.

The principle of open justice dictates that all judgments in commercial cases should be made publicly available. For this reason, judgments delivered in all Australian courts and most tribunals are available online.

Law stated - 14 July 2025

Appeals

When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

Judgments are appealable either as of right or, in some circumstances, may first require the leave of the court. Even if leave is required, the leave application is generally heard at the same time as the actual appeal.

The exception to this is appeals to the High Court of Australia, which generally require 'special leave' to be heard and determined by a single justice of the High Court of Australia, with the appeal subsequently being heard by the Full Bench.

Commercial cases heard by the Federal Court are appealed to the Full Federal Court and then to the High Court of Australia. Commercial cases heard by a state Supreme Court are appealed to the Supreme Court of Appeal and then to the High Court of Australia. Appeals are generally heard within approximately six to nine months of the final judgment. The length of the hearing itself is usually set down for a time frame of between half a day to two days.

Law stated - 14 July 2025

Enforceability

How enforceable internationally are judgments from the courts in your jurisdiction?

Australian judgments can be registered and enforced in foreign jurisdictions through the Foreign Judgments Act 1991 (Cth). Recognition of Australian judgments is only available in those jurisdictions that are recognised in the Foreign Judgments Regulations 1992 (Cth) (Regulations). Some of the jurisdictions recognised under the Regulations include the United Kingdom, Singapore, Hong Kong and Israel. The laws of the foreign jurisdiction will ultimately govern whether the Australian judgment will be recognised in the relevant jurisdiction.

Judgments in Australian courts may be enforced through various compulsory processes in each state or federal jurisdiction. For example, an enforcement warrant may be issued by the court that allows the judgment creditor to obtain information about the assets and liabilities of the judgment debtor. Enforcement warrants may also be available, for example, for the seizure and sale of property (land or chattels) or garnishing of bank debts.

Law stated - 14 July 2025

Enforceability

How do the courts in your jurisdiction support the process of enforcing foreign judgments?

A foreign judgment can be registered and enforced in Australia under the Foreign Judgments Act 1991 (Cth). Where judgment was obtained in a country not specified under the Foreign Judgments Regulations 1992 (Cth), the judgment may instead be registered and enforced under the common law. In both instances, an application is required to be made to the Federal Court or a State Supreme Court for the foreign judgment to be recognised. The UNCITRAL Model Law on Cross-Border Insolvency has also been incorporated into Australian law by statute. This allows foreign insolvency proceedings to be registered in Australia following application to a competent Australian court.

Law stated - 14 July 2025

OTHER CONSIDERATIONS

Interesting features
Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Alternative dispute resolution mechanisms such as arbitration and mediation are becoming increasingly popular in commercial matters. It is common for courts to order parties to attend mediation prior to a matter being set down for trial. Most state and territory civil procedure legislation require parties to take reasonable steps to resolve a dispute by alternative dispute resolution mechanisms before commencing litigation.

Australian courts have broad case management powers, that are generally defined by the relevant court rules, and state and territory civil procedure legislation. Judges have a wide discretion in managing cases to ensure that the real issues in dispute are identified early and costs are minimised. The case management principles applied in the fast-track list are innovative to progress appropriate matters swiftly through the court lists, limiting delay and wasted costs.

Australian courts have permanently adopted changes in relation to conducting proceedings remotely, including some trials. These changes were initially introduced as a result of the covid-19 pandemic. Short mentions and case management hearings are now commonly heard remotely; overseas witnesses may be permitted to give evidence remotely; and electronic court books are now common practice.

Law stated - 14 July 2025

Jurisdictional disadvantages
Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

The main disadvantages to litigation in Australia are that it can be expensive and time-consuming. Court cases may take years to resolve, which can be stressful for all parties involved and result in increased legal fees. Further, where a party is successful in litigation and a costs order is made in their favour, the successful party is highly likely to still be left out

of pocket for a proportion of incurred legal costs. These particular disadvantages discussed are not specific to Australia, they are a common occurrence in legal systems around the world and are generally accepted as the cost of justice.

Law stated - 14 July 2025

Special considerations

Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

Although civil procedure legislation varies depending on the Australian state or territory, there is a consistent requirement when defending a claim for parties to act honestly, cooperate and make a genuine attempt to resolve the dispute. In the State of Victoria, there is an additional requirement under its civil procedure legislation for parties to complete an 'Overarching Obligations Certification' form, which contains a set of rules by which parties to civil proceedings must conduct themselves. Parties must also complete a 'Proper Basis Certification' confirming the case or defence has a proper basis and is not frivolous, vexatious or an abuse of process.

Law stated - 14 July 2025

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In November 2023, reforms to both the Competition and Consumer Act 2010 and the Australian Securities and Investments Commission (ASIC) Act 2001 will make unfair contract terms (UCT) illegal, with each unfair term constituting a separate contravention and attracting substantial penalties. The reforms also broaden the definition of small businesses eligible for UCT protections to those with fewer than 100 employees or a turnover of less than A$10 million annually. Under the amended ASIC Act, UCT protections now apply to small business contracts with an upfront price of A$5 million or less, and the UCT protections provided by the amended Australian Consumer Law now apply to all small business contracts, regardless of their value. Furthermore, the reforms clarify the definition of a standard form contract, indicating that minor negotiated changes may not exclude an agreement from being considered a standard form. The test for determining whether a term is unfair is unchanged.

The Treasury Laws Amendments (Delivering Better Financial Outcomes and Other Measures) Act 2024 (DBFO Act) has received Royal Assent, advancing significant reforms to financial advice regulation as part of the Commonwealth Government's response to the Quality of Advice Review. Key reforms include clarifying the legal basis for superannuation trustees to charge for financial advice, streamlining ongoing fee renewal and consent requirements, providing flexibility in Financial Services Guide requirements, simplifying conflicted remuneration provisions, and introducing standardised consent requirements

for various insurance commissions. The industry must update systems and processes accordingly. The ASIC Act has amended relevant instruments to reflect these changes and will update regulatory guidance impacted by the DBFO Act.

The Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024, which received Royal Assent on 26 February 2024, introduces several significant changes. Key changes included the right to disconnect for non-small business employers which commenced on 26 August 2024, along with new definitions for 'employee', 'employer' and 'casual employee', and a new process allowing casual employees to switch to permanent employment. Regulated labour hire arrangement orders began on 1 November 2024.

The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) filed an application in the Fair Work Commission for a single interest employer authorisation, testing a crucial element of the new multi-enterprise bargaining regime from the Secure Jobs, Better Pay reforms. This case could significantly influence the future of enterprise bargaining by clarifying the likelihood of multi-employer bargaining for many employers. The Commission will examine if employers have 'clearly identifiable common interests', if the authorisation is 'not contrary to the public interest' and if employers' operations are 'reasonably comparable'. The handling of confidential and commercially sensitive information will also be critical. This case, involving four mining employers, with interventions from the Australian Council of Trade Unions (ACTU) and the Minerals Council of Australia, will set a significant precedent for interpreting these new provisions.

Two recent cases have highlighted the serious consequences for employers and individuals who fail to comply with record-keeping obligations under the Fair Work Act 2009 and Fair Work Regulations 2009. In ***Fair Work Ombudsman v JD Chapel Nominees Pty Ltd (in liq)*** [2024] FedCFamC2G 85, the owner and director of a group of bars was fined A$41,368 for not maintaining employee records detailing hours worked by casual or irregular part-time employees and their entitlements to loadings, allowances, or penalty rates. The general manager, responsible for day-to-day management, was also fined A$26,893 for his role in this failure. The Fair Work Ombudsman emphasised that record-keeping is fundamental to compliance, as inadequate records can obscure other violations and hinder investigations. In another case, ***Scarati v Republic of Italy (No 3)*** [2024] FCA 55, the importance of keeping employee records in English and making them available upon request was reiterated. Non-compliance with these requirements can lead to significant financial penalties for employers. These cases serve as a stark reminder that all aspects of record-keeping obligations must be diligently observed to avoid substantial penalties and ensure compliance with workplace regulations.

The Commonwealth government has launched a new framework for Commonwealth corruption control, effective from 1 July 2024, targeting public servants. The framework, designed to enhance counter-fraud and anti-corruption capabilities, expands its application to include corruption as well as fraud, aligning with the National Anti-Corruption Commission Act 2022 and updates to related policies and standards. Key elements include governance and oversight, rigorous risk assessments, control plans, and mechanisms for prevention, detection, investigation, referral and reporting. The framework aims to help entities meet Public Governance, Performance and Accountability Rule 2014 section 10 standards in a proportionate way, considering the size and complexity of each entity's fraud and corruption risks. Entities are required to identify high-risk activities, develop and periodically review fraud and corruption control plans, and focus resources on critical controls for the highest risk activities.

On 6 July 2023, the National Anti-Corruption Commission (NACC) received referrals concerning six public officials from the Robodebt Royal Commission. After reviewing the material, the NACC determined that further investigation was unlikely to yield significant new evidence, given the thorough examination already conducted by the Royal Commission. Consequently, the NACC decided not to commence a corruption investigation, as it would not add public value and could lead to inconsistent outcomes and repeated investigations. Instead, the NACC will focus on addressing the integrity issues highlighted in the Royal Commission's final report, to enhance public sector accountability and ethical decision-making. The decision was delegated to a Deputy Commissioner to avoid any conflict of interest.

References

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