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The International Comparative Legal Guide to:
Litigation & Dispute Resolution 2010

A practical cross-border insight into litigation & dispute resolution

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Aivar Pilv Law Office
Anderson Mori & Tomotsune
Arias & Muñoz
Anastasios Antoniou LLC
BINDER GRÖSSWANG
Bizlink Lawyers & Consultants
Borislav Boyanov & Co.
Bredin Prat
Čechová & Partners
CMS Cameron McKenna LLC
Coronel & Pérez
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Lloreda Camacho & Co.
Lovells
M. & M. Bomchil
Marque Lawyers
Mifsud & Mifsud Advocates
MOLITOR Avocats à la Cour
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Szecskay Attorneys at Law
Villaraza Cruz Marcelo & Angangco
Vukmir & Associates
Yoon & Yang LLC
Yukov, Khrenov & Partners

CDR

Commercial Dispute Resolution

Australia

Damian Sturzaker

Marque Lawyers

Kim Middleton

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Australia got? Are there any rules that govern civil procedure in Australia?

The common law system forms the basis of Australian jurisprudence. Australian courts are bound by the rule of precedent. Australia has nine legal systems - the eight state and territory systems and one federal system. Each court has its own civil procedure rules. As an example, the Uniform Civil Procedure Rules (New South Wales) (**UCPR**) are directed towards the just, quick and cheap resolution of disputes, and are accessible online at www.legislation.nsw.gov.au.

The Australian legal profession is divided between solicitors and barristers. Solicitors primarily have case management functions and deal with giving legal advice, checking and preparing legal documents, negotiating on behalf of clients, and preparing cases for hearing. Barristers are usually instructed by solicitors for advocacy before the higher courts.

1.2 How is the civil court system in Australia structured? What are the various levels of appeal and are there any specialist courts?

There are two streams in the Australian civil system, the federal stream and the state and territory stream.

The High Court is the highest court in Australia and has appellate jurisdiction over all other courts. It also has some original jurisdiction, and has the power of constitutional review.

Appeals to the High Court are by special leave only, which is granted only in relation to questions of law. Therefore in most cases, the appellate divisions of the Supreme Courts of each state and territory and the Federal Court are the ultimate appellate courts.

The Federal Court of Australia has responsibility for federal law and hears appeals from the Federal Magistrates Court (except for family law matters, which go to the Family Court of Australia). The Federal Court primarily hears matters relating to corporations, trade practices, industrial relations, bankruptcy, customs, immigration and other areas of federal law. The Court has original jurisdiction in these areas, and also has the power to hear appeals from a number of tribunals and other bodies.

Within the state and territory court system, the highest court is the Supreme Court. The Supreme Court also has an 'appellate' level (for hearing appeals). The Supreme Court has two Divisions: the Common Law Division; and the Equity Division. In its civil jurisdiction, the Supreme Court of New South Wales may deal with claims above $750,000. The District Court can consider civil matters above $60,000 to a maximum amount of $750,000. The Local Court has civil jurisdiction in matters up to $60,000. There are a variety of specialist courts including the Land & Environment Court as well as courts that deal with labour disputes.

1.3 What are the main stages in civil proceedings in Australia? What is their underlying timeframe?

The main stages in civil proceedings before Australian courts are:

- filing and service of a statement of claim;
- filing and service of a defence;
- discovery;
- exchange of witness and expert evidence;
- oral hearing;
- judgment; and
- enforcement proceedings.

Although the timeframe for litigation in Australia will vary according to the complexity of the case, the overall average duration of civil proceedings before the lower courts varies between one and three years. Appeal proceedings will be a further six months to one year on average.

1.4 What is Australia's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are generally enforceable provided that they are clear and unambiguous when read in light of the contract as a whole.

1.5 What are the costs of civil court proceedings in Australia? Who bears these costs?

Costs are divided into two categories – costs as between solicitor and client and costs as between the parties to the dispute, known as party/party costs.

Costs in civil proceedings will therefore vary considerably depending on the size and complexity of the matter and the level of fees charged by the instructed solicitors and counsel.

Although costs orders are in the discretion of the court, there is a rebuttable presumption that the costs will "follow the event": *Laguillo v Haden Engineering Pty Ltd* [1978] 1 NSWLR 306. The

rule reflects the general law position that a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72.

The presumption will only be displaced where there has been some sort of disentitling conduct on the part of the successful party: *Oshlack*, above. The disentitling conduct does not necessarily need to amount to misconduct, and may simply be any conduct "calculated to occasion unnecessary expense": *Lollis v Loulatzis* (No 2) [2008] VSC 35.

Generally courts will award only party/party costs and only in very rare circumstances are costs awarded on an indemnity basis which allows a party to claim solicitor and client costs.

1.6 Are there any particular rules about funding litigation in Australia? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency fee arrangements are prohibited in Australia. Conditional fee arrangements are permitted whereby payment of all or some of the legal costs is conditional on the successful outcome of the matter.

In the jurisdictions which have abolished the crimes and torts of maintenance and champerty (NSW, Victoria, South Australia and the ACT), parties may bring proceedings using third party funding. The practice, known as litigation funding, involves the funding of litigation costs by a person who is not a party to the litigation and who has no direct interest in its outcome. In a recent High Court decision, *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* [2006] HCA41, litigation funding did not render the proceedings an abuse of process or contrary to public policy, despite the litigation funder exercising considerable control over the conduct of the trial.

The litigation funder may take a share of the proceeds of the claim as set out by the funding agreement.

In New South Wales, the *Legal Profession Act 1987* (NSW) (**LPA**) provides for costs agreements, including conditional costs agreements. However, a conditional costs agreement must not relate to a matter involving criminal proceedings or proceedings under the *Family Law Act 1975* (Cth).

A valid conditional costs agreement must:

- set out the circumstances that constitute the successful outcome of the matter;
- be in writing, in clear plain language, and signed by the client;
- contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement; and
- contain a cooling-off period of not less than 5 business days.

A defendant may apply for security for costs against a plaintiff if there are grounds for believing that they would be unable to pay the defendant's costs if ordered to do so.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no particular formalities required prior to initiating proceedings, except for those established by contract between the parties.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In Australia, limitation periods are treated as a procedural rather than substantive issue and are governed by State and Territory legislation. The New South Wales *Limitation Act 1969* provides that a cause of action founded on contract or tort is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he or she claims. The limitation period for a claim under a deed (a document under seal) is 12 years from the date of breach. Personal injury claims generally must be brought within three years. However, there is no limitation period for a cause of action seeking equitable relief except so far as the provisions giving rise to a limitation period may be applied by analogy.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Australia? What various means of service are there? What is the deemed date of service? How is service effected outside Australia? Is there a preferred method of service of foreign proceedings in Australia?

Civil proceedings are commenced by filing an originating process with a court of competent jurisdiction. An originating process is required to be personally served, however for most other documents, service may be effected by post or facsimile. Further, in New South Wales, the UCPR provide that electronic mail can be used to serve a document on any other party to the proceedings, but only with the consent of the other party. A party must serve copies of the document on each other active party as soon as practicable.

In New South Wales, an order for substituted service may be granted where a document cannot practicably be served on the person, in which case the court may direct that such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned. A document to be served outside Australia need not be personally served on a person so long as it is served on the person in accordance with the law of the country in which service is effected. When proceedings are served outside the jurisdiction, the party effecting service must either obtain leave of the court prior to service or have service endorsed by the court before continuing the matter. Proceedings can be served either via a diplomatic channel or by a private agent.

3.2 Are any pre-action interim remedies available in Australia? How do you apply for them? What are the main criteria for obtaining these?

A court may grant an asset preservation order (Mareva injunction) where it is of the view that there is a real and not merely fanciful risk that in the absence of an injunction any assets wherever located which the defendant may have, will be dissipated or dealt with in some fashion such that the plaintiff will not be able to have the judgment satisfied.

Similarly, a court may grant a search order (Anton Piller order) in circumstances where the applicant shows that there is a *prima-facie* case and a reasonable and probable cause to believe that evidence would otherwise be destroyed. Applications for both types of orders are usually made without notice to the other party when there is a need for secrecy or in cases of overwhelming urgency and

courts have wide discretion in determining whether to grant such orders.

3.3 What are the main elements of the claimant's pleadings?

In Australia, the claimant's pleadings must clearly set out the following elements:

- the names and addresses of the parties;
- the relief sought;
- the facts giving rise to the dispute;
- the essential elements of the underlying causes of action;
- sufficient reasoning for the defendant to know the case they have to meet;
- certification of legal practitioner (if legally represented) stating that there are reasonable prospects of success; and
- in most claims, an affidavit verifying that the allegations of fact in the pleadings are true sworn or affirmed by the claimant or an authorised officer.

Under the UCPR, generally the form of pleading must be divided into paragraphs, contain facts, not evidence and be brief.

3.4 Can the pleadings be amended? If so, are there any restrictions?

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, but may not amend it after a date has been fixed for trial unless the court otherwise orders. If a plaintiff amends their statement of claim in such a way after the defendant has filed a defence, the defendant may amend their defence at any time within 14 days after service of the amended statement of claim. A recent case of *AON Risk Services v Australian National University* [2009] HCA27 has held that late amendment of pleadings will be dealt with in a strict manner and that courts must look carefully at the impact on costs and delay caused by the amendment.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In Australia, the defence must address:

- which allegations pleaded in the statement of claim the defendant denies;
- which allegations the defendant admits;
- which allegations the defendant is unable to admit or deny, but on which he puts the claimant to proof; and
- any alternative versions of the facts underlying the dispute.

Any allegations not addressed in the defence will be taken as admitted.

If there are mutual debts between a plaintiff and a defendant, the defendant may, by way of defence, set off any debt that was owed by the plaintiff to the defendant and was due and payable at the time the defence of set off was filed. It does not matter whether the mutual debts are of a different nature. Further, the Supreme Court has inherent power to order that one judgment be set off against another whether there be one or more proceedings: *Ryan v South Sydney Junior Rugby League Club* [1975] 2 NSWLR 660.

A defendant may bring a cross-claim against a plaintiff and a cross-claim involving third parties provided that, as to third parties, the relief sought relates to the subject of the proceedings brought by the plaintiff.

4.2 What is the time-limit within which the statement of defence has to be served?

In most States and Territories, the statement of defence must be filed within 28 days after service of the statement of claim, unless otherwise ordered by the court.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

Under Part 9 of the UCPR, a defendant may bring a cross-claim for contribution or indemnity in respect of a claim made against them in the proceedings, rather than commencing separate proceedings against that party. Furthermore, a defendant can join a third party to the proceedings, alleging that the party is liable to the defendant for all or part of the claim against them (see question 5.1 below).

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, a default judgment may be entered against them. In New South Wales, under Part 16 of the UCPR if the defendant fails to file a defence within 28 days after service of the statement of claim or within such further time as the court allows then judgment may be given for the plaintiff against the defendant on a liquidated claim for:

- a sum not greater than the amount claimed;
- interest up to judgment; and
- costs.

If the plaintiff's claim against a defendant in default is for unliquidated damages only, judgment may be given for the plaintiff against the defendant for damages to be assessed and for costs.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction by filing an application with an affidavit in support. The motion would typically seek orders that the court does not have jurisdiction or that the claim was not properly served. Such a notice contesting court's jurisdiction can be made without submitting to the court's jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Under the UCPR, in any proceedings in which a defendant is one of a number of persons who are jointly, but not severally, liable in contract or tort, or under an Act or statutory instrument, the court may order that the other persons be joined as defendants and that the proceedings be stayed until those other persons have been so joined. Further, if the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.

A person cannot be joined as a plaintiff in any proceedings except with their consent. Further, a person who is not a party may apply to the court to be joined as a party, either as a plaintiff or defendant. However, if the court considers that the joinder of parties may embarrass, inconvenience or delay the conduct of the proceedings, the court may order separate trials or make any other order as it thinks fit.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Under the UCPR, two sets of proceedings may be consolidated where common questions of law or fact are involved. If several proceedings are pending in the court and it appears to the court:

- that they involve a common question;
- that the rights to relief claimed in them are in respect of, or arise out of, the same transaction or series of transactions; or
- that for some other reason it is desirable to make an order under this rule,

the court may order those proceedings to be consolidated, or to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

5.3 Do you have split trials/bifurcation of proceedings?

A court will make orders for split hearing, for example liability/quantum providing a party can demonstrate that it is in the interests of justice to do so.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Australia? How are cases allocated?

Different courts in Australia adopt different approaches to the application of case allocation although they share the common objective to facilitate the "just, quick and cheap" resolution of the real issues in dispute.

A number of courts have specialist lists which deal with particular kinds of cases in a manner specifically adapted to the requirements of the particular sphere of disputation. The Supreme Court has commercial judges and corporation judges who are usually responsible for the case management of defined categories of commercial cases with a view to those cases being heard only by certain nominated judges. In the Federal Court of Australia, the American style of "docket system" has been adopted since 1997, but judges do specialise to a certain degree by self-nominating to serve on a panel of judges to whom a case of the particular character will be referred.

6.2 Do the courts in Australia have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Australian courts have very broad case management powers. The UCPR provides general case management principles for New South Wales courts. Judges are empowered to require the parties to identify the real issues in dispute at an early stage and, thereafter, give directions to ensure speedy and efficient determination of those issues. These basic principles apply not only to individual cases but also to the body of commercial cases considered as a whole.

Parties can apply for a variety of orders including, for discovery, subpoenas even for the matter to be referred to mediation. The courts can make interim costs orders against a party, and in special circumstances, against the party's lawyer.

6.3 What sanctions are the courts in Australia empowered to impose on a party that disobeys the court's orders or directions?

Australian courts have wide discretion to sanction a party that disobeys the court's orders. For example, Rule 33.12 of the UCPR provides that failure to comply with a subpoena without lawful excuse is a contempt of court and the addressee may be dealt with accordingly.

6.4 Do the courts in Australia have the power to strike out part of a statement of case? If so, in what circumstances?

In some circumstances, Australian courts have the power to strike out part of a pleading. For example, under Rule 14.28 of the UCPR the court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:

- discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading;
- has a tendency to cause prejudice, embarrassment or delay in the proceedings; or
- is otherwise an abuse of the process of the court.

6.5 Can the civil courts in Australia enter summary judgment?

Australian courts exercising civil or equitable jurisdiction may enter summary judgment. In New South Wales, under Part 13 of the UCPR the court may enter summary judgment if:

- there is reasonable evidence that the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed;
- there is no attendance by a plaintiff at a hearing of which the plaintiff has had due notice;
- the proceedings are frivolous or vexatious;
- no reasonable cause of action is disclosed; or
- the proceedings are an abuse of the process of the court.

6.6 Do the courts in Australia have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Under the UCPR, the court may stay proceedings in the following circumstances:

- if the court gives summary judgment against a party, and that party has made a cross-claim against the party obtaining the judgment, enforcement of the judgment may be stayed until determination of the cross-claim;
- stay of further similar proceedings to secure costs of discontinued proceedings;
- stay of further similar proceedings to secure costs of proceedings dismissed; or
- stay of execution of judgment pending determination of application for instalment order.

Courts may discontinue proceedings by application of the plaintiff.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Australia? Are there any classes of documents that do not require disclosure?

In Australia, the disclosure process is referred to as "discovery". In New South Wales, the UCPR provides for preliminary discovery of certain material, including:

- discovery to ascertain prospective defendant's identity or whereabouts;
- discovery of documents from prospective defendant; and
- discovery of documents from other persons not party to proceedings where it appears to the court that they may have or had possession of a document that relates to any question in the proceedings.

Under the UCPR, once a statement of claim is filed, parties may request additional information from each other, as long as the information requested is relevant to a fact in issue in the proceedings. The court may order that Party A give discovery to Party B of documents within a class of documents as long as the class is not specified in more general terms than justified in the circumstances.

The following categories of documents are not required to be produced:

- legally privileged documents;
- any document filed in the proceedings;
- any document served on party A after the commencement of the proceedings; and
- any document that wholly came into existence after the commencement of the proceedings.

7.2 What are the rules on privilege in civil proceedings in Australia?

In New South Wales, client legal privilege is governed by the *Evidence Act 1995* (NSW). Section 118 provides privilege for documents containing legal advice. For a document to be privileged on this basis, it must have been prepared "for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client". The meaning of "dominant purpose" alone has been the source of substantial judicial debate. The communication's purpose, the authority by which it was procured, and the surrounding facts and history of the parties may be necessary to determine its application.

Section 119 provides for litigation privilege, which encompasses communications between lawyers acting for their clients and third parties, as well as clients and third parties. This section protects confidential communications when they are made for the dominant purpose of providing the client with professional legal services relating to a current or pending Australian or overseas proceeding where the client is, may, or might have been a party.

Further, sections 120 and 122 deal with the loss of legal privilege, including by consent and waiver.

7.3 What are the rules in Australia with respect to disclosure by third parties?

The UCPR allows parties to seek discovery from third parties by way of subpoena. A subpoena may be issued directly without court assistance if the party at whose request the subpoena is to be issued is represented by a solicitor in the proceedings. The only exception is in relation to proceedings in the Small Claims Division of the Local Court, where a subpoena may not be issued except by leave of the court, in any circumstances.

A subpoena must be in the approved form and cannot be addressed to more than one person. The subpoena has the power of a court order and therefore failure to comply without lawful excuse is a contempt of court.

7.4 What is the court's role in disclosure in civil proceedings in Australia?

Australian courts are not directly involved in the discovery process, but can make discovery orders to direct a party to produce or deliver up requested information, and can decide on any challenges made to requested discovery. However, the courts are involved in a more general way by exercising its wide case management powers, to set timetables for the completion of the discovery process.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Australia?

Under the UCPR, discovered documents are not to be disclosed or used otherwise than for the purposes of the conduct of the proceedings, except by leave of the court, unless the document has been received into evidence in open court. However, the court has the power to make an order restricting the disclosure or use of any document, whether or not received into evidence.

8 Evidence

8.1 What are the basic rules of evidence in Australia?

The *Evidence Act 1995* (Cth) applies to all proceedings in federal courts, i.e. the High Court, Federal Court etc. Rules of evidence for proceedings in lower courts are established by legislation enacted in the corresponding State or Territory. By way of example, the *Evidence Act 1995* (NSW) applies to all proceedings in a NSW court, such as the NSW Supreme, District and Local Courts.

The Evidence Acts 1995 are the most comprehensive statements of the law of evidence in Australian legislation to date. The Acts include rules of evidence on matters such as: relevance of evidence; hearsay evidence; opinion evidence; admissions; tendency and coincidence evidence; credibility evidence; evidence about character of accused; identification evidence; privileges; and proof.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The general rule is that relevant evidence is admissible. Evidence is relevant if it is relevant to the assessment of the probability of the existence of a fact in issue in the proceeding. Evidence may be excluded if it is evidence of hearsay, opinion, admission, tendency, coincidence, credibility, character or identification. However, certain exceptions to the exclusionary rules may apply.

The admission of expert evidence is an important exception to the general rule, found in section 76 of the Commonwealth and New South Wales *Evidence Act 1995*, excluding the admission of opinion evidence. The current rules for the admissibility of expert evidence under those Acts requires that it be relevant and have sufficient probative value. Critically, expert evidence must also be given by a person with specialised knowledge based on their training, study or experience, and their opinion must be wholly or substantially based on that knowledge.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Written witness statements (usually in the form of an affidavit) for each witness of fact are normally exchanged by the parties before hearing and stand as evidence-in-chief of the witnesses to be called. Witnesses presenting evidence at hearing are usually cross-examined and then re-examined before the court. Reluctant witnesses may be compelled by the court to attend and be examined by the parties.

In cross-examination and re-examination of a witness, leading questions must not be asked unless the court gives leave. An unfavourable or hostile witness may be questioned by the party who called the witness as though they were cross-examining the witness with the leave of the court. On re-examination, a witness may only be questioned about matters arising out of evidence given by the witness in cross-examination unless the court gives leave to ask other questions.

8.4 What is the court's role in the parties' provision of evidence in civil proceedings in Australia?

Australian courts have the power to make various orders in relation to the discovery process. The courts also have some discretion when ruling on issues regarding the adducing and admissibility of evidence. Further, the courts also have a general discretion to exclude or limit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- be unfairly prejudicial to a party;
- be misleading or confusing; or
- cause or result in undue waste of time.

Finally, the courts may make such orders as it considers just in relation to:

- the way in which witnesses are to be questioned;
- the production and use of documents and things in connection with the questioning of witnesses;
- the order in which parties may question a witness; and
- the presence of any person in connection with the questioning of witnesses.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Australia empowered to issue and in what circumstances?

Australian courts have the power to make summary and default judgments. A court's judgment can be for liquidated, unliquidated or a mix of both liquidated and unliquidated damages. Other types of relief that can be awarded by the court include:

- exemplary damages and aggravated compensatory damages;
- order for interest up to judgment;
- specific performance;
- declaratory relief;
- injunctive relief; and
- account of profits.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The Local Court of NSW has two Divisions – the Small Claims Division and the General Division. The Small Claims Division deals with claims that are less than $10,000. Generally, the Local Court sitting in its Small Claims Division has no power to award costs but can make rulings on damages and interest. The Local Court sitting in its General Division may award costs at its discretion and make rulings on damages and interest. Further, the Court may order costs to be assessed on an indemnity basis.

9.3 How can a domestic/foreign judgment be enforced?

A domestic judgment can be enforced through the relevant court registry either by:

(a) writ of execution;

(b) garnishee order; or

(c) examination order.

Certain foreign judgments may be enforced in Australia through the established statutory scheme for registration of foreign judgments established by the *Foreign Judgments Act 1991* (Cth) (**FJA**), which primarily applies to the registration of money judgments. Usually the appropriate court to apply for registration is the Supreme Court. In NSW, the UCPR governs this registration process.

Judgments from countries that do not appear in the schedule to the FJA may be enforced under the common law.

9.4 What are the rules of appeal against a judgment of a civil court of Australia?

In NSW, Part 50 of the UCPR provides the following rules of appeal:

- a summons commencing an appeal must be filed within 28 days after the decision is given;
- the summons must be in the approved form and must state what part of the decision of the court below it relates to and what decision is sought in its place; and
- the summons must contain a statement of grounds relied on in support of the appeal including any error of law.

II. DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of dispute resolution are available and frequently used in Australia? Arbitration/Mediation/Tribunals/Ombudsman? (Please provide a brief overview of each available method.)

Australian courts encourage the use of alternative dispute resolution (**ADR**) mechanisms before and during proceedings, the most commonly used forms being arbitration and mediation. Most courts have the power to order compulsory mediation and to refer the matter to arbitration in certain circumstances.

1.2 What are the laws or rules governing the different methods of dispute resolution?

In Australia, arbitration is governed by both state and federal legislation. International arbitrations are governed by the *International Arbitration Act 1974* (Cth) (**IAA**). Domestic arbitrations are governed by the relevant state or territory *Commercial Arbitration Act* (**CAA**), which are largely uniform. Section 14 of the CAA states that the arbitral tribunal may conduct

proceedings in such manner as it thinks fit. The CAA also provides that the arbitral tribunal shall make decisions based on law. However, the CAA goes further to say that where the parties agree in writing the arbitral tribunal is able to make decisions based on considerations of general justice and fairness.

1.3 Are there any areas of law in Australia that cannot use arbitration/mediation/tribunals/Ombudsman as a means of dispute resolution?

Most commercial matters in Australia can be settled by way of arbitration. However, certain categories of legal proceedings cannot be subject to arbitration, including criminal and family law matters. Mediation is commonly used in family law cases and is actively encouraged by the Family Court of Australia.

2 Dispute Resolution Institutions

2.1 What are the major dispute resolution institutions in Australia?

The most prominent professional arbitration and mediation institutions in Australia include the following bodies:

- Australian Centre for International Commercial Arbitration (**ACICA**);
- The Chartered Institute of Arbitrators;
- Institute of Arbitrators and Mediators (**IAMA**); and
- Australian Commercial Disputes Centre.

2.2 Do any of the mentioned dispute resolution mechanisms provide binding and enforceable solutions?

An arbitration award is binding on the parties unless the courts overturn the award. The grounds to overturn are very limited and are set out in the Commercial Arbitration Acts (domestic).

A mediated agreement is binding only in so far as the agreement is formalised by the parties. If there is a breach of the agreement the parties must sue on the contract.

3 Trends & Developments

3.1 Are there any trends in the use of the different dispute resolution methods?

The past few years has seen a growth in international arbitration.

Amendments to the International Arbitration Act and the Commercial Arbitration Acts are currently being introduced to bring the arbitration legislation in line with current trends worldwide.

The objects of the amendments are to provide:

- a comprehensive and clear framework governing international arbitration in Australia;
- improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration; and
- to adopt 'best practice' developments in national arbitral law from overseas worldwide.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those dispute resolution methods in Australia?

The past few years has seen a growth in the use of ADR. The Federal Government has introduced a range of initiatives for promoting greater use of ADR in the civil justice system including amending the Federal Court Act 1976 to ensure that ADR is taken seriously by parties, lawyers and judges.

In November 2009 the Access to Justice (Civil Litigation Reforms) Amendment Bill passed the Parliament and created a new overarching obligation on the Federal Court that requires the Court, litigants and legal practitioners to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

This provision will enable judges to employ a number of case management powers, including:

- referring parties to ADR;
- requiring parties to narrow the issues in dispute;
- limiting the length of submissions or the number of witnesses; or
- setting time limits for the completion of part of a proceeding.

Damian Sturzaker

Marque Lawyers
Level 4, 343 George Street
Sydney NSW 2000
Australia

Tel: *+61 2 8216 3066*
Fax: *+61 2 8216 3001*
Email: *damians@marquelawyers.com.au*
URL: *www.marquelawyers.com.au*

Damian is a partner in the Dispute Resolution team at Marque Lawyers specialising in international arbitration. Damian has over 20 years' experience as a commercial litigator with specialist expertise in the areas of international arbitration and cross border dispute resolution. He has run international arbitrations in London, New Zealand, Hong Kong and Singapore.

Damian was selected by his peers for inclusion in Best Lawyers of Australia 2009 in the categories of litigation and ADR. He is recognised as one of Australia's leading lawyers by the World Guide to Leading Experts in Commercial Arbitration and he was identified as an expert in Commercial Arbitration in the most recent Legal Media Group Guide and a leader in the field of Dispute Resolution in the Chambers Global Guide 2007 and 2009.

Damian has worked for major law firms in Australia, United Kingdom, Sweden, Denmark and Finland. Damian was awarded the Diploma of Private International Law by the Hague Academy of International Law in 1998. This honour has been obtained by only five other Australians.

Damian is the President of the Australian branch of the International Law Association and is the branch's representative on the international committee on International Arbitration. He is also is an Australian representative for the World Bank Doing Business survey.

He is a visiting fellow in international arbitration at UNSW law school and has lectured at the CIArb Diploma Course since its inception. He is a committee member of CIArb and is the Director of Education.

Kim Middleton

Marque Lawyers
Level 4, 343 George Street
Sydney NSW 2000
Australia

Tel: *+61 2 8216 3016*
Fax: *+61 2 8216 3001*
Email: *kimm@marquelawyers.com.au*
URL: *www.marquelawyers.com.au*

Kim is a Partner at Marque Lawyers specialising in international arbitration. Kim has extensive experience in cross-border disputes both in Sydney with Gadens Lawyers and in London with Clifford Chance LLP.

Kim has worked on a wide range of contentious matters involving international projects, and in particular oil and gas projects. She has extensive experience of numerous arbitrations under ICC, LCIA and UNCITRAL rules. Kim regularly acts for clients in court, including stay and enforcement applications pursuant to the *International Arbitration Act*, and has experience at all levels of dispute resolution.

Kim has a LLM (International Law) from the University of New South Wales, Graduate Diploma of International Arbitration from the Chartered Institute of Arbitrators and is a Fellow of the Chartered Institute of Arbitrators. Kim is an adjunct lecturer of International Commercial Arbitration at the University of New South Wales and is the New South Wales representative of the Australasian Forum for International Arbitration (AFIA).

MARQUE

Marque Lawyers was established in August 2008 – with the singular vision of revolutionising the way law is practised in Australia. All of the partners of the firm have significant in house and top tier experience.

Marque delivers the top quality legal services expected of a premier law firm. Our seven partners and team of lawyers specialise in:

- Dispute resolution including international arbitration.
- Corporate advisory.
- Commercial advisory and compliance.
- Intellectual property and trade practices.
- Employment and industrial relations.

Our clients include Westpac Banking Group, Newcrest Mining, Nokia, Babcock & Brown, Thiess, United Airlines, Jones Lang LaSalle, Sumitomo, Ensign Energy Services, Environmental Resources Management, Booz & Company, PayPal, Allegro Capital, QANTAS Staff Credit Union, Star City, Carl Zeiss, Southern Cross Exploration, Dyno Nobel Asia Pacific, various Virgin companies and the Kaman Aerospace Corporation.

The firm is recognised for its niche expertise in mining, new media and telco industries. We act for clients in most states throughout Australia. We have one of Australia's leading international arbitration practices and regularly act in matters around the world.