Litigation avoidance, risks and tips for corporate counsel

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Disputes are an unavoidable fact of commercial and corporate life. However, when they become litigious, considerable resources are diverted away from other operational business. In many cases litigation is prohibitively expensive, of financially crippling for those involved by the time they get to trial at best. In some cases the survival of the parties involved depends on the outcome.

In this article, I provide my personal tip tips for in-house counsel to help their clients avoid litigation. For cases where it can't be avoided, I flag some common traps to avoid and how to best position your client to 'win'*.

* Nobody 'wins' in litigation except lawyers. By 'win', I mean achieve the best commercial outcome in the circumstances. This usually means a commercially negotiated settlement.

My tips are provided based on my experience of almost 20 years litigating in various jurisdictions around the world in a variety of corporate and commercial disputes. Although corporate counsel will be familiar with the subject matters I address, and some tips may seem obvious, they address the most common areas I still see companies consistently failing to address – from a risk or tactical perspective – to gain an advantage when in a dispute.

Avoidance Tips

1. ALTERNATIVE DISPUTE RESOLUTION (ADR) CLAUSES

Alternative Dispute Resolution or 'ADR' describes a suite of processes that help parties resolve a dispute other than by way of a judicial determination.

Examples of ADR processes include:

Facilitative
- Mediation
- Facilitation

Advisory
- Case appraisal
- Neutral evaluation

Determinative
- Adjudication
- Arbitration
- Expert determination

Hybrid
- Conciliation

ADR is significantly underutilised by companies to avoid litigation, as they often use their standard or boiler-plate ADR clauses without sufficient regard to how ADR clauses can and should be crafted in a bespoke manner for the particular contract in question.

I often find ADR clauses are ineffectual for their intended purpose, being the resolution of a dispute in an efficient and effective manner. This happens for various reasons, which include:

- the ADR clause is generic or drafted in a manner that fails to adequately consider the subject matter of the contract and the interests of all parties, including their interests at a the point in time of the dispute (Inevitably, later than when the clause was drafted or considered);
- the ADR clause is mandatory, but a non-binding ADR process, which can result in wasted time and cost, and the parties still litigating;
- a binding ADR process that is time consuming and expensive as litigation, and gives rise to appeals and satellite disputes;
- the ADR clause is drafted in a manner that is vague or otherwise gives rise to litigation regarding the enforceability and scope of the clause or is unenforceable.

A. ADR tips

1. Review your client's boilerplate ADR clause(s)

2. Consider ADR early in the contract negotiation stage (not when the dispute arises – it's too late then)

3. Tailor ADR clauses for specific contracts / contract categories – one size does not fit all. The question you should ask yourself is not 'should I draft a bespoke ADR clause'; it is 'why should I not draft a bespoke ADR clause'

4. Consider disputes are likely to arise and what really matters to the client – then tailor the ADR clause accordingly:

   (a) Relationship

   (b) Reputation

   (c) Time and cost

5. You are not confined to one ADR clause or process per contract. If different types of disputes lend themselves to different resolution methods – prescribe different methods

6. Think flexibly when drafting – what process will actually work in practice, effectively and efficiently, for the specific parties, having regard to the likely disputes that may eventuate, to resolve those disputes.

1. Understand risk and reward

Some common risks / rewards in commercial litigation are:

REWARD

- You win / successfully defend the claim
- Stakeholder satisfaction, market approval, market cap increase

RISK

- You lose
- Reputational damage - stakeholder dissatisfaction, market disproval, market cap decrease, loss of future revenue…the list goes on
- The company / directors / officers / employees are sued
- Regulator attention
- Insolvency
- You win … but the opponent can't pay, or the net outcome is a net deficit (circle back to the above bullet points)

B. Tips for assessing risk and reward

When assessing risk and reward, have you adequately considered:

- Unknown or forgotten about documents
- Witness credibility and performance at trial
- Internal costs and resources
- Impact on cash flow for intensive periods
- Budget for unanticipated interlocutory battles
- Realistic timeframes
- What winning or losing will *actually* cost?

RISK AND REWARD CANNOT BE PROPERLY ASSESSED WITHOUT GENUINE ESTIMATES AND AN INFORMED UNDERSTANDING OF POTENTIAL LIABILITY.

While this may all seem obvious, in most instances, parties to a dispute often not to give **adequate or realistic** consideration to the actual cost and implications of litigating - even experienced litigators. The most common reasons for this are unrealistic cost estimates given by lawyers, a Board's lack of engagement with the dispute - or, conversely, being over-zealous or too emotionally invested in the dispute - and a failure to have adequate regard to the internal and operational cost of litigating.

The reason I include this as a litigation avoidance consideration, is because the underestimation of the true cost of litigation means a Board cannot make rational, properly informed strategic or commercial decisions on the terms of an appropriate settlement.

In most instances, all parties to litigation usually think they are 'right', and that they will 'win' and get their 'costs back'. However, in almost any litigation:

- there is an inherent degree of risk – no matter how strong you think your case is (forgotten about or unknown damning documents come out in discovery, an may expert give unanticipated evidence that is unhelpful, a lay witness may crumble during examination); and
- you will likely not get all of your costs back. In many cases, you the risk of unrecoverable costs, even If successful, Is high.

Tips for assessing litigation cost for early case assessment and strategic settlement

1. Know your client's rights regarding costs disclosure (Including the obligations of private practice lawyers briefed to act for your client to disclose realistic estimates of total costs liability and risk)

2. Demand a detailed cost estimate to a contested trial

3. Understand the obligations to provide costs advice for settlement: A law practice—

   (a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and

   (b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client…

   Uniform Law s 174

4. Understand the litigation process

5. Understand the assumptions, variables and exclusions that underpin a costs estimate

6. Prepare a realistic risk spectrum, including likely actual recoverable costs, and actual risk in the event of a loss or partial success

7. Consider the potential availability and effect of special cost orders early

8. Don't forget the cost of your client's time – cost to business – the hours that will need to be Invested and detraction from business operations and objectives

9. Assess commerciality based on a realistic estimates and risk assessment

10. There are different drivers for 'bet the company' litigation

2. CAPITAL RAISING AND PUBLIC ANNOUNCEMENTS

SOME RELEVANT LAW:

1. A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive

ACL s. 18(1)

2. A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive

ASIC Act s. 12DA(1)

3. A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services…

ASIC Act s. 12DB(1)

4. A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive

Corporations Act s. 1041H(1)

Representations to consumers, the market and investors must be truthful, represent the whole story, have a reasonable basis and not lead the recipient into error.

However, it is not uncommon for trading and listed companies to test the boundaries of these requirement, particularly in advertising materials, on their website, in marketing materials, in media releases, speeches, and at conferences.

Market predictions, financial projections, profit forecasts or representations as to diversity or ESG status are common culprits.

Two of the most common documents I encounter in litigation involving claims based on misleading or false representations are investor packs / presentations and market updates for listed companies (especially resources companies during the exploration phase).

What type of conduct may be captured? Some examples of conduct the Courts have found to be unlawful misleading include:

- An announcement to the stock exchange re the value of company's shares on the exchange falls within s1041H(1): *McKerlie v Drillsearch Energy Ltd* (2009) 72 ACSR 288
- Announcements at press conferences have been "in relation to a financial product" when concerning ASX listed shares: *ASIC v Fortescure Metals Group Ltd (No 5)* [2009] FCA 1586
- Providing false information to company auditors of listed public company falls under s1041H: *ASIC v Sino Australia Oil and Gas Ltd (In Liq)* [2016] FCA 934

C. Tips for capital raising and public announcements

3. Don't 'litigate' via the ASX (or any other market) – keep market updates reasonable, factual and unemotive
4. Use disclaimers
5. Be careful with language

Don't only draft market announcements or prepare investor materials with shareholders, the ASX and investors in mind.

CONSIDER:

- Would you be happy with a regulator or a judge scrutinising the content?
- Is my statement / message consistent, provable or reasonable?

Accuracy	Consider at the time of making the statement. Will the statement be 're-used'? Will it need to be updated or revised?
Interpretation	Is the statement open to interpretation? How will the consumer / recipient interpret the statement?
Clarity	Do not "hide" key information (i.e in fine print, small font, end of deck disclaimers, footnotes and click to terms).
Completeness	Include all necessary or relevant information.

Reasonableness	Can you prove the reasonable grounds for making the statement? Document this.
Method	Is the method communication appropriate?

3. UNFAIR CONTRACT TERMS

I consider claims for unfair contract terms as greatest risk for many companies. The law on contract in Australia changed fundamentally In November 2023, and the Implication of the changes has gone unnoticed by many of the companies It affects.

A company that uses standard form contracts captured by the relevant legislation that Include unfair terms now face maximum penalties of $50,000,000 or more per contravention.

Further information can be found here.

If your client uses standard form contracts, and has not reviewed them to see If they are captured by the relevant unfair contract terms legislative regimes and, If so, amended them, since November 2023 It Is at considerable risk.

D. Unfair contract terms tips

1. review your company's standard form contract to determine if the UCT law applies;

2. if the UCT law applies, standard form contracts that are captured must be reviewed for compliance;

3. the UCT regime now provides a powerful bargaining chip against contractors trying to impose unfair terms on sub-contractors, or 'smaller' or less powerful contracting parties

Risks

4. DOCUMENT CREATION

The inadvertent, ignorant or even negligent creation of unhelpful but discoverable documents by parties is risk that is avoidable, or at least manageable. However such documents still commonly arise in litigation. Not only does this pose a merit risk; legal counsel and / or directors may breach their duties by creating such documents, or taking appropriate steps to prevent their creation.

The risk primarily arises from:

- Ignorance of what constitutes a document: Many clients fail to appreciate the enormous scope of what constitutes a discoverable document - event when advised.
- Failing to take precautions early enough in the dispute: A common trap that companies fall into is producing internal documents and communications that are not privileged which address the substance of the dispute.

Document creation

Consider what may be discoverable and ensure your client understands:

> For proceedings in the Supreme Court of Western Australia, ***document*** means <u>any record of information</u>: RSC O 26 r 1A. Common examples include:

- Emails
- Board minutes
- Project plans
- Text messages
- Social media posts
- Investor decks
- Drafts of documents
- Metadata
- Confidential information
- Subsidiary documents
- Third party documents
- Deleted documents
- Personal communications and documents

An associated risk is document destruction - where a prospective party to litigation (including by its officers or employees) destroys relevant or potentially relevant documents.

This commonly occurs by process of automated data deletion and hard copy document destruction. In many of the cases I have litigated to trial, officers and employees have been cross examined on the existence and content hand written notes they have prepared, often contemporaneously in relation to key evidential matters, which have been destroyed or lost.

Many corporate clients fail to appreciate the *existence* of all relevant documents must still be disclosed – and where they have been destroyed or lost, what has become of them must also be disclosed, which Is a point they may be 'grilled on' during cross examination at trial.

Destruction of relevant documents can, at best, result in an adverse inference being drawn by the Court in relation to the evidence, and at worst be contempt of court.

E. Document creation (and destruction) tip

1. Issue a document control order or notice as soon as the threat of a dispute is identified addressing document creation and destruction
2. Be mindful of what you create or record – by *any* means! – it may become evidence in public proceedings

5. DEALING WITH STAKEHOLDERS

Dealing with stakeholders when the client is engaged in a dispute, litigious or not, can be a challenge and create risk. The is, to some degree, amplified for public companies.

In corporate disputes key shareholders and other stakeholders often want to know 'what is going on' and the most common question asked of the company and its lawyers is usually “are we going to win?”.

This is entirely understandable and justified. That doesn’t mean you should answer the question.

Key issues when dealing with stakeholders:

- Wants to know *vs* needs to know *vs* has a right to know
- Managing expectations and relationships

In any dispute or litigation, there will only by certain information that a lawyer (and client) can or should provide to stakeholders without waiving privilege or risking waiving privilege.

Some stakeholders will understand this. For those that don’t, I tend to find that they are placated if this is explained – they are told that disclosing certain information, even positive information, could be detrimental to the company’s position.

In appropriate circumstances, I may be appropriate to explain that litigation is inherently uncertain and say the company doesn’t want to provide information that may change over the course of the proceedings and therefore risk inadvertently misleading the enquirer.

While this may be frustrating vague or caveated for some stakeholders, the risk to the company of waiving privilege or misleading them far outweighs that frustration.

F. Tips for dealing with stakeholders:

1. Don't share information that doesn’t need to be shared
2. Don’t be afraid to say: “I can’t tell you”; or “I can only tell you...”
3. If appropriate, rely on the need to maintain privilege
4. Don’t give definitive statements re merit / outcome
5. Be wary of waiving privilege - don’t refer to advice or the substance of It

6. 5A. CONTINUOUS DISCLOSURE OBLIGATIONS

As mentioned, public companies face additional risks and challenges. Some common issues that arise are:

- What are the implications if information relating to court proceedings is not readily available to the market, or available at all (as of right)?
- Does a listed entity have a higher onus to comply with its continuous disclosure obligations?
- Must the listed entity disclose not only the existence of court proceedings but also matters such as:
    - the potential impact the court proceedings may have on the entity;
    - the value of its securities where that is material;
    - the quantum of potential fines or penalties that might become payable?
- What are the risks of class action or regulator attention for failure to provide adequate disclosure relating to litigation?

These can be complex questions and the confines of this article mean I cannot give justice to answering them here. However, it is important for corporate counsel be aware of these issues, and aware that these are questions that may need to be answered when any litigation is pending or on foot.

The limited right to certain court documents – particularly in the WA Supreme Court - may require a listed entity to give careful consideration to what it needs to disclose - and when - in public announcements in order for the company to comply with its continuous disclosure obligation.

In the context of pending or actual litigation, the key questions are a) what inforamtion is publicly available and (b) what information that is not publicly available, that must company disclose?

As noted above, this may include matters such as:

- the potential impact the court proceedings may have on the listed entity;
- the value of its securities where that information is material; and
- the quantum of potential liability, fines or penalties that might become payable.

The continuous disclosure obligation may therefore create a "disclosure dilemma" for a listed entity, as its public announcements may need to contain information that may negatively affect the share price and reduce investor confidence in the listed entity, which it may prefer to avoid for obvious commercial reasons.

However, failure by a listed entity to make requisite disclosures will undoubtedly increase the risk of a class action or action by a regulator.

E.1 Tips for continuous disclosure obligations

1. Consider potential jurisdictional implications for continuous disclosure obligations (what knowledge about the litigation / court documents Is publicly available depending on the court being litigated In and what public inforamtion must be therefore be supplemented by announcements)

2. Generic statements such as the claim will be “vigorously pursued / defended” may be inadequate to meet continuous disclosure obligations, but if offering more be wary of waiving privilege

3. *Continuously* consider if:

    a) advice should be given / sought on what needs to be disclosed

    b) a disclosure needs to be made

4. Assess on a case-by-case basis for each litigious claim

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