

*How to save time, minimise cost  
and protect corporate reputation  
in your next large scale litigation.*



*Litigation Management Consulting*

[newstrategicadvice.com.au](http://newstrategicadvice.com.au)

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## LITIGATION IS AN UNAVOIDABLE RISK OF DOING BUSINESS IN AUSTRALIA

Litigation is an unavoidable risk of doing business, particularly in today's economic climate. It now represents a commercial strategy deployed by competitors, regulators and litigation funders.

Large scale litigation can flow from a commercial relationship that has soured, a failed product (including financial) or a rapid fall in share price (and possibly a combination of all three). Shareholder class actions are currently the most common form of representative proceedings before the courts in Australia.

Opportunist law firms and litigation funders have developed a profitable business model where revenue is generated solely on the back of class action litigation against corporate Australia. Often, this funding is drawn from cashed-up institutional investors such as superannuation funds.

## LITIGATION IS NEVER A GOOD NEWS STORY

You are focussed on growing the business and cannot afford to be distracted by litigation which is confrontational, costly and a drain on already stretched resources. Litigation is never a good news story and only serves to increase pressure on your legal team, management, stakeholders, board of directors and reputation in the market. Most likely, your team has limited, if any, litigation experience – certainly, not in relation to class actions or large complex claims.

## SO WHAT DO I NEED TO KEEP IN MIND?

You cannot predict when and how litigation might arise or how it will play out. The circumstances in each case are different. However, the general principles of litigation remain the same. In defending any litigation, you will need to address the stages and issues set out below. With forethought and planning you can be better prepared and more effective if and when the litigation lands.

# 5 KEY FACTORS

YOU WILL NEED TO CONSIDER IN ORDER TO ENSURE THAT YOUR ORGANISATION EFFECTIVELY AND STRATEGICALLY MANAGES ITS LITIGATION

## 1 PROJECT MANAGEMENT

You will need to identify a project manager to ensure that your litigation strategy remains consistent with your organisation's commercial strategy. The project manager will need to take instructions from your external lawyers but also manage their costs and focus. Not every available legal battle needs to be fought! Navigating through discovery and evidence can be a time consuming process. There are plenty of traps for non-litigators, even those experienced in other areas of the law. The stakes are high and this is not the time for on-the-job learning.

If you do not have a dedicated in-house litigator, you should consider retaining a litigation consultant who can project manage your litigation, control external costs and free yourself and team to focus on core business.

Litigation ebbs and flows so you would not need to retain the consultant on a full time basis – but utilise them on an as-needs basis during the course of the litigation. This is an efficiency model which is proving popular in the United States legal market.

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## 2 DOCUMENT MANAGEMENT

All large scale litigation involves a significant document retrieve and review component. Likewise, for regulatory investigations. You may need to produce documents by reason of a Court rule, order or a statutory request from a regulator.

Most of these documents will be in electronic form and stored in various locations (geographically and electronically). You will need to make some of these documents available to the other party, the Court or a regulator, while at the same time understanding how the documents could be used to strengthen or

weaken your case. There may also be potential claims for privilege associated with all or some of these documents. This will need to be carefully considered to avoid any inadvertent waiver which could cause serious repercussions down the track.

The time frames for producing these documents are typically very tight while the parameters of documents to be produced is usually very broad. What's more, you will need to be able to justify and defend the process undertaken to produce these documents, many of which will need to be collated from your servers and data storage systems.

The likelihood is that you could not currently identify with any precision or clarity where and how your documents are stored and who has responsibility for them. This can be a steep learning curve, made more difficult given the IT issues involved and the pressure being brought to bear.

Traditionally, your external lawyers would have driven document management from start to finish – including supplying and hosting the database which both enables document classification and evidence preparation. This can be very costly and leaves you with very little, if any, control.

Today, by taking proactive steps to anticipate and control the process, you can be more strategic and cost-effective about document management. This can include negotiating your own licence for a document collation database, utilising powerful data analytics tools and taking a lead on setting the parameters for document review. This requires some forethought and planning as well as deploying the right personnel and systems. However, if done correctly, you may not need to deploy a large teams of expensive lawyers to trawl through your documents for months on end. Appropriately managed by someone like a litigation consultant, the process can be curtailed and controlled and possibly even used to your advantage. The knowledge gained through this phase can then be leveraged to bolster the rest of your case.

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## 3 EVIDENCE GATHERING AND BUILDING

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Your position is only as strong as your evidence and your understanding of it – both in terms of proving your case and negating your opponent.

Mostly, your lay evidence (i.e. the story you will tell) will rest with a few key employees or ex-employees. Identifying these custodians and working with them to understand the factual matrix and the implications for your case strategy as well as preserving the evidence – can be a complex, time-consuming and delicate process. You will need to hear, record and assess their recollection of events to determine how it gels with your documentary evidence and case theory. How strong or weak is the evidence and what does this mean for

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your overall litigation strategy and commercial objectives. For example, you may identify very strong evidence but which could only be presented in a way which may introduce or carry significant reputation risk. How important is it to adduce that evidence when measured against the harm it may cause? Conversely, the evidence or your story may not be as forensically

strong but, for commercial reasons, important to tell in any event. These issues will need to be workshopped, tested against the other side's case and approach. This is something which you can only do with a well-developed and honed understanding of the litigation process and with one eye always focused on commercial and strategic objectives and outcomes.

Working from inside your organisation and driven solely by your commercial goals, a litigation consultant is well placed to undertake much of the leg work, navigate the strategic issues and maximise efficiency as the trial team prepares for hearing.

Expert evidence will play an important role in any complex litigation. You will need to identify suitably qualified people with the right level of expertise, experience and gravitas who can work with your legal team to present complex technical issues and educate the Court.

In working with experts, there is a fine line between having them support your technical position while ensuring that they can remain independent advisors to the Court. Increasingly, parties may now retain two sets of experts – one to assist you “inside the tent” to develop your case theory from a technical perspective and the other to present these complex technical issues to the Court.

A litigation consultant will also assist to navigate expert witness issues to ensure that the expert evidence is the best and most appropriate for your organisation, its case and reputation.

## 4 ALTERNATIVE DISPUTE RESOLUTION - MEDIATION

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Inevitably, you will need to participate in mediation or some other form of alternative dispute resolution.

Mediation is a critical phase in any litigation. It provides an opportunity to explore cost effective commercial outcomes. It is often the pathway to shutting down expensive, complex and potentially reputation crippling litigation.

Additionally, the exchange of relatively developed case theories means that mediation can also represent your best (and possibly only) pre-trial opportunity to measure the relative strengths and weaknesses of your case against those of your opponents. There is also room for muscle flexing and posturing which, commercially, can provide strategic advantages which could extend beyond the current litigation.

You need to be thoroughly prepared for mediation and across all the intricacies of your factual and legal case. Your prospects at mediation will only be as good as your preparation. Knowing your weaknesses and their implications is just as important as promoting your strengths.

Beyond the facts but no less importantly, you will need to be in a position to make strategic and commercial recommendations to your stakeholders to enable you to take advantage of the opportunities presented by mediation. You will need to drive a cost: benefit analysis which would necessarily extend beyond a standard risk analysis to incorporate less tangible (but equally significant) commercial variables such as reputation, market position and susceptibility to future claims. This can be a significant exercise, requires a focused approach and cannot be done on the run.

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There are other forms of alternative dispute resolution which can also be utilised to navigate aspects or all of any given litigation. It is important to be alive to and across these to know when and how to best leverage them to advance your commercial objectives. This calls for experience, strategic analysis and agile thinking.

This is where a litigation consultant with an intimate knowledge of the case and your business can add real value. They can prepare briefing papers/ presentations/ costs-benefit analyses as may prove necessary in order to ensure that you have strategic and robust instructions ahead of mediation. This is a difficult ask for your external lawyers who are at least one step removed from the process.

# 5 REPORTING

It goes without saying that you will need to keep the board, senior management, and other stakeholders apprised of the state of the litigation. This may be for board reports, insurance renewals, ASX reporting requirements, annual reports, investor presentations or AGMs. This is particularly important where, as they invariably are, reputation issues are at play.

Your reports will need to be informative, succinct, strategic, advisory and robust – not an easy combination, particularly as the litigation becomes more complex and can draw you further away from core business. Given various different management hats which you may wear (particularly if you are both general counsel and a member of the senior management team), you will also need to have carefully considered privilege issues.

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A litigation consultant is well placed to cost effectively prepare any such reports or presentations. Beyond their experience, in the course of managing the litigation they will develop and hold the best and most comprehensive understanding of the facts, law, costs, risks and potential outcomes which will be critical for any reporting regime.

Having immersed themselves as a member of your team, the consultant will have also developed a real appreciation for your organisation's commercial drivers as well as the appropriate tone or wording required for stakeholder reporting and management. This may include preparing core documents which can be tailored for various reporting structures and requirements and may even be as simple as matters

of form or style – all of which can be critically important for achieving successful stakeholder buy-in and managing external lawyers and overall legal strategy. ■

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## CALL US FOR A NO-COST CONSULTATION

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Litigation consulting is about protecting your organisation's corporate value and reputation. It is about introducing efficiencies and staying focused on strategic and commercial objectives without getting distracted from core business. It draws from significant litigation experience but is adapted and honed to your specific circumstances. It is about seamlessly complementing your legal function without burdening it.

We can help you to project manage your litigation, enabling you to save costs, remain focused on core business and navigate agilely and strategically to protect your reputation and bottom line.



Yudi is a highly regarded litigator with a keen strategic eye for achieving commercial outcomes. He is passionate about providing innovative legal solutions in an evolving legal market.

Yudi has 15 years acting for multi-national corporations in "bet the company" class actions and remediation programs relating to financial institutions, pharmaceutical products, the automotive industry, allegedly defective products, toxic waste and agribusiness.

Yudi has been an embedded team member with the Commonwealth Bank of Australia; Victorian Government and the Australian Securities and Investments Commission.

Outside of the law, Yudi is committed to spending quality time with his wonderful family. He is also a Board Member of the Melbourne Jewish Charity Fund and a mad test cricket fan.

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