

# COMMERCIAL LITIGATION

## CAPABILITY STATEMENT

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### Dispute Resolution & achieving commercial outcomes

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#### OUR FOCUS



MBP Legal can provide legal and strategic advice on all forms of commercial and business litigation including contractual disputes, debt recovery, property, building and construction disputes, corporate and business disputes including shareholder disagreements, trade practice breaches and disputes, tax litigation and estate litigation.

We have the added advantage of being able to recommend strategic and tax-effective solutions through working closely

with our commercial and tax division.

It is our policy to caution clients to carefully consider the downside of litigation before they embark on any major litigation. Commercial litigation is often complex and this complexity often results in unexpected expense as well as commercial and personal uncertainty.

We advise our clients that entering into adversarial litigation is not always the most appropriate manner to resolve a dispute. We approach litigation in a pragmatic and commercial manner and encourage our clients to do likewise and to focus on sensible and achievable outcomes.

By not losing sight of the bigger picture, we make our clients aware of the alternatives to litigation and advise them to factor into their decision making the impact that costly and protracted litigation would have on their business and personal life.

We have featured in complex and large scale litigation and through this experience, we have developed a commitment to confidentiality, accountability, flexibility and the ability to work to tight deadlines.

Our goal is to achieve the best commercial outcome for our client – and not to litigate for the sake of litigation. Our team is focused on identifying our clients' commercial objectives at an early stage and striving to achieve them.

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Our commercial litigation group operates in many different courts nationally and our areas of expertise include:

- Avoiding litigation
- Making litigation outcomes tax functional
- Contractual Disputes
- Insolvency Litigation
- Company, Trust and Partnership disputes
- Corporate governance and directors duties
- Employment Law
- Deceased Estate Claims
- Intellectual Property
- Trade Practices Disputes
- Financial Services Disputes
- Building and Construction Disputes
- Taxation Disputes
- Dispute Resolution.

## **AVOIDING LITIGATION**

***We advise clients that avoiding unnecessary litigation is as important as litigating a dispute when it arises.***

Our experienced commercial lawyers provide strategic commercial, legal and business advice to a wide range of business and individual clients including advice on how to avoid disputes and if a dispute has arisen, then on how to avoid or minimize the prospect and cost of litigation.

The cost of litigation can be substantial and the legal outcome of complex litigation is often uncertain. Many clients want to avoid this unnecessary cost and uncertainty – especially if such clients have experienced it before.

We recommend to our clients that they focus on their longer term commercial objectives and goals and in so doing, decide whether the cost and uncertainty of any proposed litigation is consistent with such objectives and goals.

## **MAKING LITIGATION AND DISPUTE RESOLUTION OUTCOMES TAX FUNCTIONAL**

All too often, the resolution of commercial disputes by negotiation, some other form of dispute resolution process or by litigation should only be undertaken after all relevant tax ramifications are considered.

The tax ramifications of a settled dispute are often totally overlooked by the party's legal representatives. MBP Legal can assist in resolving a dispute in a manner which minimises any dysfunctional income tax, capital gains tax, stamp duty or GST consequences.

When resolving disputes for our clients, we examine the tax implications of any such resolution very carefully before recommending that a client settle on the terms proposed.

## **CONTRACTUAL DISPUTES**

Almost every business and commercial transaction involves a written or verbal contract. We are often involved in dealing with contractual disputes of all types involving drafting demands and claims, conducting negotiations, instituting and conducting recovery proceedings and providing representation in litigation, arbitration and mediation proceedings.

MBP Legal has a thorough understanding of the law of contract and surrounding legislation and is proficient in analysing whether the basic elements for an enforceable agreement are present..

We have expertise in acting for plaintiffs and defendants on a broad range of contractual disputes involving the application of the following areas of law:

- Rectification of contractual terms
- Avoiding agreements on the grounds of uncertainty, failure of consideration, lack of authority, illegality, failure to comply with strict legislative requirements, undue influence, and unconscionable conduct
- Admissibility of evidence of contractual terms under the parole evidence rule
- Specific performance
- Declarations of proper termination
- Contracts Review Act (unfair tactics and unequal bargaining power)
- Trade Practices Act and the NSW Fair Trading Act (misleading and deceptive conduct and unconscionable conduct)
- Damages for breach

## **INSOLVENCY LITIGATION**

Please refer to the insolvency section of our website and the separate capability statement concerning our insolvency expertise.

## **COMPANY, TRUST & PARTNERSHIP DISPUTES**

Business persons commonly 'co-venture' to carry on a business or commercial enterprise. For various tax and asset protection purposes, various business structures are often used for such activities.

Whilst MBP encourages its clients to ensure that they have clear written contractual arrangements in place which are designed to both minimise and regulate disputes that may arise, disagreements often arise when co-venturers disagree or have different objectives and goals.

These disputes can occur at a shareholder, unit holder or partner level.

MBP Legal has considerable experience in dealing and resolving such disputes. The dispute is often resolved by a sale or buy back transaction on agreed terms and this often gives rise to numerous commercial and taxation considerations that also need to be considered.

In circumstances where commercial dispute resolution is rejected and the parties take their dispute to court, then MBP legal will represent their client's interests in a manner that best promotes the commercial and financial objectives of the client.

## **EMPLOYMENT DISPUTES**

We have experience in all forms of industrial/employment related litigation disputes and litigation. Our legal team is experienced in considering employment law issues from both the employers and employees point of view. Issues such as remuneration, termination payment, employment policies and human resources management impact everybody in the employment sphere.

It is important, whether you are employer or employee, that you make the right decisions throughout your employment whether it be at interview, in contract negotiations to managing performance or termination. Our highly experienced lawyers realise the importance in not only understanding employment law but also possess the necessary skills to cover these issues whether commercial, industrial or individual.

## **DEBT RECOVERY**

We are able to assist in the recovery of business and other debts. Where a debt is owed by a company and the debt is not disputed by the debtor company, then recovery of this debt can often be expedited for a very reasonable cost by commencing proceedings to wind up the debtor company. Where debts are disputed then an order for judgment will need to be obtained which requires the debtor to be sued. When an order for judgment is obtained then there are numerous methods available for collecting the debt owed including

- Bankrupting the debtor,
- Garnishing their wages
- Seizing the unencumbered assets owned by the debtor and selling them at auction,
- Forcing the debtors to attend a public examination at court where they are questioned on their assets and liabilities,
- The attachment of the judgment debt to real estate and the subsequent enforcement of the debt by the sale of such real estate.

## DECEASED ESTATE CLAIMS

If you expected to be a beneficiary of a will but have not been provided for, you can make a claim against the distribution of any estate under the Succession Act (2006) (formerly the Family Provision Act 1982), provided you can clearly set out reasons as to why you should be considered a beneficiary of the deceased estate. We have successfully run a number of contested claims and are well versed on the law in this area.

We are also able to provide complete estate support advice including preparing applications for probate / letters of administration and all litigation issues surrounding the administration of an estate including recovery / realisation of assets, priorities amongst creditors and beneficiaries and trustee duties.

## TRADE PRACTICES DISPUTES

Whenever money changes hands in exchange for goods or services - whether real estate bought at auction or a shirt bought over the shop counter, insurance sold over the telephone or an overseas holiday bought online - every transaction is bound by the laws of the *Trade Practices Act* or various state *Fair Trading Acts*. There are serious penalties for breaches of these laws, both of which set out the rights and responsibilities of anyone who trades in the Australian economy - large corporations, small businesses or individuals - and seek to protect all who transact with them.

Our firm has successfully represented clients in matters involving unfair or unconscionable conduct, misleading or deceptive conduct and various other breaches and potential breaches of the *Trade Practices Act* and the *Fair Trading Acts*

## INTELLECTUAL PROPERTY

The intellectual property strategy for any business must take into account trademarks, processes and methods of business, domain names and countless other assets that are critical to the operation of the business. Quite often, disputes may arise over the use of the improper use trademarks or conflicts may arise in respect to the intellectual property belonging to your company/business.

Our firm has extensive experience in prosecuting and defending intellectual property claims on behalf of clients, often resolving disputes on an informal and commercial basis. MBP Legal has a team of experienced negotiators and litigators readily able to advise business on the most cost effective means of resolving intellectual property disputes to the benefit of our clients.

## FINANCIAL SERVICES DISPUTES

Sometimes financial services providers do not provide appropriate advice or information to their customers and that can result in inappropriate investments and loss of savings. The law can and does protect those who have been taken advantage of or suffered financial loss as a consequence of misconduct by a financial service provider. MBP Legal has successfully represented clients in disputes involving accountants, shareholder claims, share trading, fund managers, financial advisers and planners as well as promoters of managed investment schemes.

Our clients are often unaware that the advice of their accountants may have led to losses being suffered and that they can take action to recover those losses, including circumstances where authority is given to an accountant to manage superannuation and other investment funds, advice given regarding tax investment schemes, and other investment advice.

Similarly, the management your superannuation is governed by a range of laws designed to protect you and your investment. Trustees of your fund have duties to fund members, which can be complex and difficult for you to understand. You may be able to recover losses as a result of breaches of those obligations. Investors in large scale schemes are protected by a range of laws.

## **BUILDING AND CONSTRUCTION DISPUTES**

Building your own home, extending or renovating can be an exciting time but, even with the best intentions, construction projects can and do go wrong. To reduce the risk of becoming involved in a dispute – it's important that you act quickly to seek legal advice before you prepare or sign any building contract. While seeking advice at the outset can minimise the risk of a dispute occurring, building disputes can and do occur.

If you are a builder or a property owner and you feel that a dispute is emerging then it's important that you act quickly to seek legal advice to reduce the risk of becoming involved in a protracted dispute. With the right advice and guidance you can resolve the dispute in a timely and cost effective manner. We will work with you to thoroughly assess the relevant issues and advise you frankly of the legal options and avenues available to bring the dispute to an end.

MBP Legal has experience in acting for builders, sub-contractors and property owners to achieve successful resolution of disputes and routinely handle issues which can occur in domestic, residential and commercial projects.

## **TAXATION DISPUTES**

MBP Legal can assist you in respect of dispute involving direct and indirect taxes, superannuation, GST classification and interpretation, Land Tax and Stamp Duty reviews. Please refer to the taxation section of our website for further information.

## **DISPUTE RESOLUTION**

Dispute resolution refers to all processes that are used to resolve disputes, whether within or outside court proceedings. This may include a process such as mediation, arbitration or ultimately, litigation. Our legal team is highly experienced in all areas of dispute resolution and will work with you to ensure you are fully advised, developing strategies to best achieve a successful outcome to your dispute. We can assist you resolving your disputes outside of Court via Mediation, Negotiation, Conciliation or Arbitration. Our lawyers have experience in resolving a wide variety of matters ranging from modest disputes through to complex Court litigation.

## **OUR POINTS OF DIFFERENCE**

We are a practice that focuses on insolvency law from a commercial/tax advisory and dispute resolution basis.

- Some of our team members are also trained in commerce, accounting and tax and have practical experience in these areas. This promotes quality of advice, strategy and evidence.
- We strive to save clients unnecessary costs and disbursements and to improve recoverability of costs.

**Commercial Litigation  
Capability Statement**

- Our firm is solution-based. Client site visits enhance our understanding of who you are and how we can best service your needs.

**Please contact us if you wish to discuss litigation or dispute resolution concerns that you may have.**