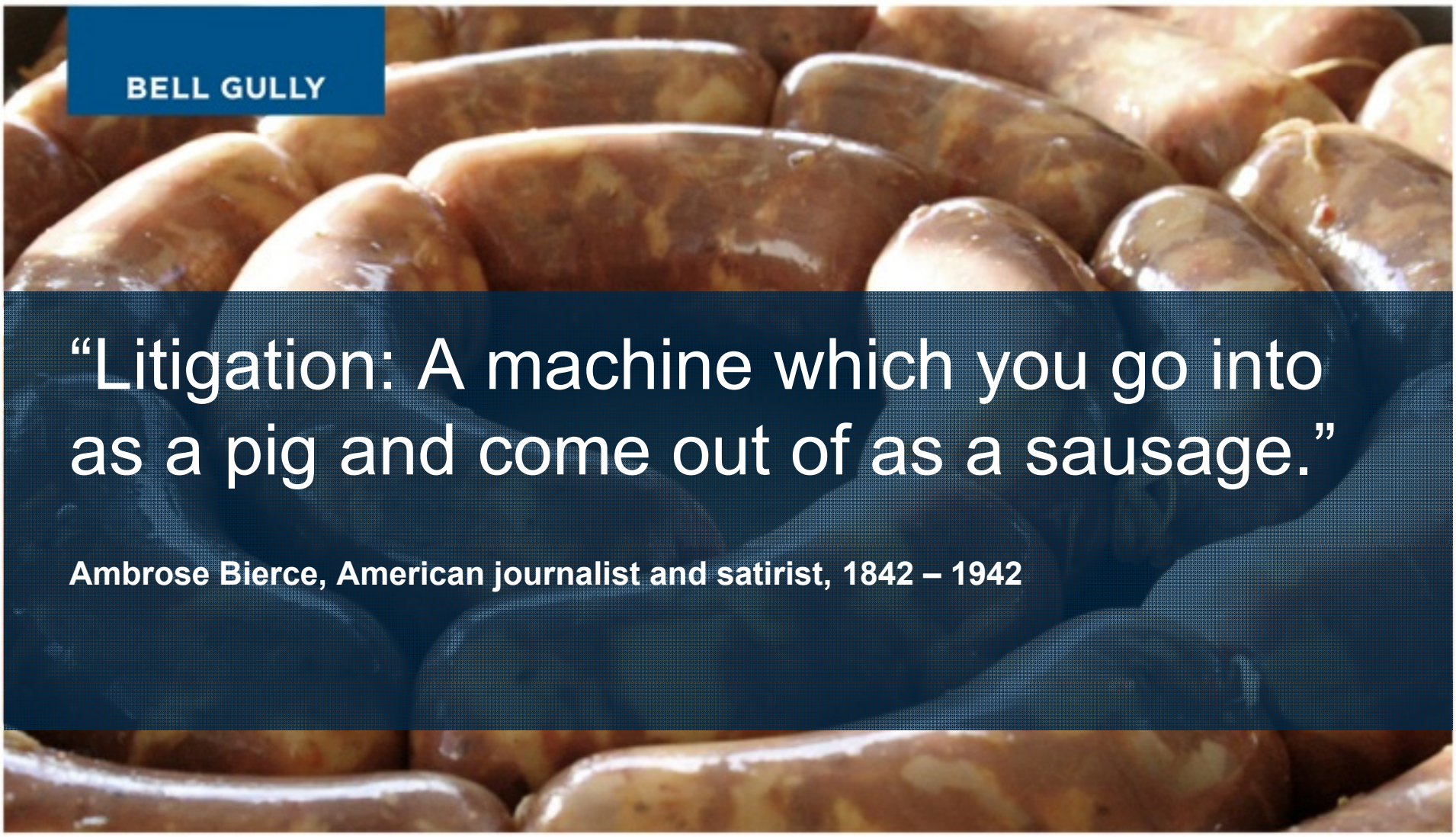


The background of the slide features a large, semi-transparent image of a coat of arms, likely the coat of arms of the Commonwealth of Australia, which includes a shield with a kangaroo and an emu, a crown on top, and two female figures holding a shield and a flag. The text 'BELL GULLY' is positioned in the top left corner within a blue rectangular box.

BELL GULLY

Successful strategies for resolving disputes/litigation

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BELL GULLY

**“Litigation: A machine which you go into
as a pig and come out of as a sausage.”**

Ambrose Bierce, American journalist and satirist, 1842 – 1942

A hard grind ...

- Litigation can seem like a machine (process) into which you put a dispute and, sometime later, and after much (and sometimes painful) grinding, you end up with a result
- However, consciously or unconsciously, choices are being made along the way which affect the final outcome
- The key is to be aware of the choices that are being made and to understand how they help you achieve your goal
- Like the sausage, what you put into the process affects whether you end up with a result you can digest

Law suits consume time, and money, and rest, and friends

Sir John Patrick Herbert, English author and law reform activist, 1890 - 1971

Long and costly?

- Litigation seems to take longer and cost more than anyone anticipated
- This reflects the fact that there are variables in the process, a number of which are not within the parties' direct control
- This can put a premium on the consideration given to a dispute upfront. Three fundamental questions are:
 - what is the organisation's position – the facts and the law?
 - what does the organisation want to achieve?
 - what approach will best achieve the desired result?

What is the position?

- Need to obtain the fullest possible picture of the situation as early as possible
- Need to properly record information (memories fade, people leave) and gather key documents
- Position (facts and law) has to be carefully analysed e.g. do we have a legal basis for a claim, can we establish the claim, what will we get, will we be able to collect?
- There is an increasing emphasis on understanding cases at an earlier stage; this helps parties reach an intelligent decision

“Litigation is the pursuit of practical ends,
not a game of chess.”

Felix Frankfurter, American jurist and Supreme Court Judge, 1882 – 1965

What is the objective?

- To develop and implement any strategy, you first need to know where you are going – what are the practical ends or the objectives that the organisation wants to achieve?
- Sometimes this is straightforward – it is all about the money (e.g. A wants it; B doesn't want to pay) – but it can be more complex (e.g. setting a precedent, preserving business relationships, preserving public image, vindication etc)

How will we get there?

- There are a range of other options for resolving disputes:
 - various agencies (e.g. Ombudsmen, professional bodies (Law Society), Advertising Standards Authority, Commerce Commission etc)
 - alternate dispute resolution processes (negotiation, arbitration, mediation, expert determination, conciliation and variations thereon)
 - commercial options (buyouts, mergers, publicity campaigns, lobbying for a law change etc)
- Litigation should not be a knee jerk reaction, given that other options may be available and the time and cost involved
- However, the range of options does not make litigation an option of last resort or one to be afraid of – there are valid reasons why litigation may be sensible

The claim and defence

- The plaintiff's statement of claim shapes the litigation
- Who is being sued (one or multiple parties), for what (the causes of action) and what you ask for (the remedies sought) will all affect the litigation (time, cost, chances of success, recovery)
- The defendant's statement of defence is an opportunity for the defendant to recast the dispute
- Consequently, these are key documents and, where possible the thought and effort put into them should reflect that
- They are also a valuable opportunity to persuade (the court, the other side)

A preemptive attack...

- There are a number of preemptive steps that can be taken to quickly dispose of a claim or to gain a strategic advantage
- Options to dispose of (in full or in part) a dispute or claim include statutory demands, summary judgment applications and applications to strike out a claim or defence
- Advantage is that they allow a plaintiff or defendant to obtain judgment quickly at significantly reduced cost.
- However, if the application is unsuccessful, it will add to the cost and it may be perceived as a major set back (e.g. the failure rate for strike out applications is high)

A preemptive attack...

- Pre-emptive attacks for a plaintiff include
 - regarding a defendant's documents and information – pre-action discovery, preservation orders and anton pillar orders
 - regarding a defendant's assets – freezing order (mareva) or charging order
 - regarding the defendant's actions – an interim injunction
- There are substantial rewards (success can effectively decide some matters) and risks (costs, undertakings as to damages, seizing the initiative) associated with these applications
- Both plaintiffs and defendants need to think carefully whether these are battles worth fighting given their position and objectives or whether they should leave their gunpowder dry

“Strategy without tactics is the slowest route to victory.
Tactics without strategy is the noise before defeat.”

Sun Tzu, Chinese General and Author, 500BC

Interlocutory steps

- There are an array of interlocutory steps that can be pursued between the claim being filed and it going to trial
- That gives a party a range of tactics that it can pursue, depending on what a party's objectives and strategy are
- The key is not to get locked into the process – of thinking this is the next step in the process that ought to be followed – but to see interlocutory steps in the context of your overall strategy and to only deploy them tactically in support of that strategy
- The question to ask is: how will this interlocutory step help us achieve our objective?

“Litigation is the basic legal right that guarantees every corporation its decade in Court.”

David Porter, US Admiral, 1813 – 1891

Case management?

- The perception of litigation is that it takes forever
- There is an active case management regime (and other changes have been made) to try to make it more efficient
- Like the sausage, case management is very much a case of you get out of the process what you put into it
- If two parties want to get a dispute resolved quickly that can be accommodated
- If only one wants to resolve it quickly then, while there are opportunities for the other side to hold the matter up, a party that keeps pushing hard can move a claim along quickly
- If no one is pushing it, then even with case management cases can drift and take years to resolve

Discovery

- Discovery is a key part of the process and can also be a substantial and expensive part
- The discovery obligations (on parties and solicitors) are onerous
- Commercial litigation is usually fought on the basis of documents (often a small bundle will be key although many will be discovered)
- Thought needs to be given upfront as to how the discovery process is to be managed, both to ensure compliance with discovery obligations and to get the most out of it (e.g. use of litigation support software, how do you organise lists, key issues list)

Other interlocutory steps

- There are a wide range of other interlocutory steps that can be taken
- Some of the more common ones are requests for further particulars and applications for further or third party discovery
- Depending on the circumstances and the final objective they can be invaluable or they can just add to the litigation's time and cost
- For example, a request for further particulars can highlight a key weakness in the other side's case or narrow the dispute, helping to resolve it. On the other hand, it may just help the other side properly develop its case.

Settlement / ADR

- Most commercial litigation settles – this simply reflects the time, cost and risks involved in taking any claim to trial
- Alternate dispute resolution or ADR needs to be seen in this context – it is not a separate process which gets tacked onto the litigation process at some stage but is an integral part of it
- A party's litigation strategy should reflect this

Timing and content of settlement discussions

- Care needs to be taken as regards the content and timing of settlement discussions
- It can be too early to settle a dispute. Parties are more open to settling at certain stages (e.g. post discovery, before drafting their evidence, immediately pre trial)
- An early offer by a plaintiff may be unlikely to be accepted and may set a benchmark for future discussions (the defendant will always want to settle for less and never more)
- Parties need to think about whether the timing is right and what can realistically be achieved.

How to get to yes

- There are number of processes to help parties get to yes
- Three main ones are direct negotiation, mediation and judicial settlement conferences
- Each has their advantages and disadvantages and suit certain disputes better (e.g. direct negotiation works well with two commercial parties in a dispute over money; mediations tend to be better for multiparty disputes; JSC's suit simple disputes where there is an issue preventing settlement by direct negotiation)
- Which process to use and how to approach the discussion will depend on the circumstances

“Examinations are formidable to even the best prepared, for the greatest fool may ask more than the wisest man may answer”

Charles Caleb Colton, English sportsman and writer, 1780 – 1832

Trial

- Trials are a daunting experience
- If the litigation does not settle and is going to trial there is really only one thing that can help (aside from having implemented whatever strategy and tactics you devised in the earlier stages of the litigation to help set you up for success)
- Preparation, preparation, preparation (the documents, the evidence, the cross examination, the closing, the witnesses)

“When you are prepared, you’re more confident. When you have a strategy, you’re more comfortable.”

Unknown author

Summary

- There is no one strategy for successfully resolving litigation
- However, if you have a strategy and consider how each step you take in the litigation promotes that strategy, you will help put yourself in the position to get the desired outcome
- The strategy does not need to be the equivalent of a grand military plan with all stages mapped out – it can be more intuitive or straightforward – and nor does or should it remain fixed in place – it may need to be adapted along the way
- It comes back to the fact that choices are being made at every stage in the process – quality choices give the best bang(er) for your buck



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THE END