

General counsel as strategic advisers to leadership

Many corporate decisions made in recent years were designed to better manage disruption or improve innovation capabilities. However, the release of the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Service Industry has shifted the focus to corporate and compliance culture.

All organisations – not just those in the financial services sector – are under pressure to ‘hold up a mirror’ to their institutional structure, to identify problems with culture and governance, and continually deal with them. Along with increased scrutiny from regulators, the new Banking Executive Accountability Regime (BEAR) legislation means that senior leaders and board members can now be held personally accountable for the misconduct of their organisations.

In this new climate, general counsel have an important role to play as custodians of culture. However, lack of access to the CEO and the board can hamper their ability to offer strategic advice above and beyond their legal function, and help guide change.

To explore the role of the general counsel as a strategic adviser, MinterEllison and the Association of Corporate Counsel Australia sought the views of some of the nation’s top in-house lawyers. Their opinions are presented in the latest round of MinterEllison’s General Counsel Insights Series. Maria Polczynski, General Counsel at oOh!media, led roundtable sessions in Sydney on 6 August, Melbourne on 8 August and Brisbane on 21 August. A former chief legal officer for Bendigo and Adelaide Bank, Polczynski advocates reinventing the delivery of legal services within organisations by aligning incentives with preferred behaviours through value pricing and making the best use of resources, both legal and non-legal.

Participants in the roundtables included a cross-section of general counsel from leading private sector organisations and public sector groups, across industries as diverse as banking, property, manufacturing and the media as well as not-for-profits. Their contributions are republished here on a non-attributed basis.

Securing a seat at the table

For many general counsel, achieving a ‘seat’ at their organisation’s board or executive table is the holy grail. It gives them access to senior leadership and the opportunity to help shape strategy. It’s even more important in today’s environment. “In the current climate, having the general counsel in the C-suite sends a clear signal about an organisation’s corporate culture,” one participant noted.

Another said: “If the general counsel has a seat at the table, it demonstrates that an organisation has a compliance culture. If management is willing to have their most senior lawyer present when their strategic decisions are being made, I think there is an understanding that they have something to contribute both as a lawyer and a leader. However, it is paramount that we’re not there just saying ‘no’; we’re adding value outside of our swim lane.”

For many general counsel, the opportunity to help shape strategy is one of the most satisfying parts of their role. “We don’t separate our legal function from our strategy,” said one participant. “We try to partner with the business in the creation as well as the execution of the strategy across the business. It is increasingly difficult to maintain that seat, but that’s the really exciting part of my role.” Another added: “I would only work at an organisation where the general counsel has a seat at the table. I like it when lawyers are involved in every

decision.”

Finding paths to influence

Having a lawyer in the room as issues arise can be incredibly helpful because they can “pre-empt a lot of issues very quickly, rather than let them drift”.

As one general counsel said: “Lawyers tend to have a finely turned radar for moral and ethical dilemmas. In the current climate, where there is so much focus on things like prudential risk, we’re uniquely placed to pick up on those issues and talk to them, or at least alert people to potential problems by saying ‘have you thought about this?’.”

However, not only was a seat at the table not assured, but general counsel’s access to the C-suite varied wildly. While some general counsels spoke with their organisation’s CEO several times a week, a general counsel in a large government department said she found it very hard to get access to her boss. “This situation has become worse over time. And I think the organisation is poorer for it. There is no appreciation for the strategic advice the legal team can provide. We’re only brought in when it all goes to hell.”

However, many participants felt that a formal role in the C-suite wasn’t necessary for general counsel looking to exert strategic influence if they proactively developed strong relationships with senior leaders throughout their organisations. By doing so, these leaders will be more likely to think of the general counsel when they need advice or a different perspective. “If people get to know you, they’ll realise they can call you, and not just for legal advice, but for your clear thinking and different perspective,” said one participant.

Others agreed that demonstrating your value in a crisis can help build authority with leadership. One general counsel shared her experiences of being part of a team put together to handle a major international incident. “Even though I didn’t contribute a lot of legal skills, I think my calm, sensible, pragmatic views gave me an enormous amount of credibility with the CEO and the board,” she said. “It was a horrible experience and I wouldn’t want to go through it again, but it proved to a lot of people that I was good at what I do.”

For general counsel in regulated industries, engaging in activities relating to regulatory change, such as lobbying, can be a shortcut to establishing credibility. “If you position yourself at the centre of the debate about those change activities you become a central part of the conversation about what’s going to happen, not only in the business but across the whole industry and ecosystem,” said one.

Another added that overall, “if you are seen to be useful you will always get a ticket, no matter what the policies say. If you’re seen as not useful and annoying, you won’t”.

Weighing up the costs

While there is no question that being part of the executive team gives you a degree of credibility and opportunities that can be hard for general counsel to achieve otherwise, it can come at a cost.

For example, one general counsel discovered that the amount of time spent on technology at her company’s frequent executive meetings meant the opportunity cost of preparing for and attending them was greater than the incremental value she could bring to the discussions or get from them. Others confessed to taking their laptops into meetings and working through

discussions that weren't relevant to them. However, not everyone found the 'irrelevant content' to be a negative.

"I would prefer to sit through the irrelevant content," one said. "It gives me more context about why they might be talking about something and why they might be heading down a particular path. Other times I might be able to add value."

"I sit through a lot of meetings I probably shouldn't," added another general counsel. "I try to learn one new thing in every meeting, but it's also about branding. By being there, I'm putting the name of the legal team in front of people who need to know we exist."

Acknowledging high-stakes competition

Another potential 'cost' cited was that of other professionals who might miss out on a place in the C-suite in favour of the general counsel. Acknowledging that "you can't have an unlimited number of people on an effective executive team", Polczynski asked the roundtable whether other roles, such as chief technology officer or chief people officer, might have a stronger claim. "If you only have three or four seats available, why should the lawyer have one of them?"

It was a tricky question for many participants, who were torn between arguing for the importance of having a lawyer involved in strategic decision-making and conceding that other professionals also have a valid claim.

"It depends what your organisation's priorities are and what its exposure is," said one. "If there is the potential for some sort of nasty disaster to happen, it's going to end up in the lawyer's lap at some stage. I think it is important for them to have an opportunity to steer the ship away from the disaster. If you're not somewhere near the table, that's hard."

Some participants conceded that it often comes down to the type of organisation. "If you're a very tech-based enterprise, then you need people who can talk about that," argued one participant. "If, like us, you have a lot of employees, then your chief people officer needs to be there because industrial relations issues can grind you to a halt. We also have our chief safety officer in the C-suite, because safety is paramount for us to continue to operate."

"Part of it is the nature of your organisation, but looking past that, what do you personally bring to the table?" said another. "If all you bring is 'I'm a lawyer', then it's a pretty narrow skill set. You need to bring something else."

Contributing beyond your skill set

With so much competition to be part of strategic decision-making, the question of what lawyers contribute in addition to their legal expertise came up several times during the roundtables. Answers ranged from "analytical thinking" to "a different perspective" and "the ability to be calm under pressure".

"As lawyers we've been trained to think in a particular way. That's the value we bring to strategic discussions," said one general counsel. "Ultimately, we're problem solvers but we think about problem-solving very differently to the way someone in a technical role might think about it."

"I often find myself playing devil's advocate," added another. "Just thinking outside the box and asking what could go wrong. I don't necessarily need an answer, but I'll throw the question

at the chief financial officer or chief operations officer to see if they've thought about it. You can be certain the regulator has thought about it."

Challenging the C-suite

For many general counsel, one of the most important skills they bring to the table is willingness to challenge the CEO or board with 'uncomfortable truths'. This is something other professionals called upon to advise the leadership may not be as comfortable doing.

Polczynski went further, asking whether leaders – including general counsel – have a "duty to challenge" so that the real discussion happens in the room meant for it. "Many people think of challenging as undermining or not supporting leadership," she said. "But if leaders see challenging in that light, that is a much bigger cultural piece that we need to deal with."

Fortunately, most senior leaders and board members are open to being challenged – if the person doing so goes about it the right way. "My experience is that executives appreciate being told what they need to hear, even if it's not what they want to hear," said one general counsel. "The problem is how we communicate with them. Lawyers tend to have a habit of speaking like lawyers. When leaders have experience dealing with lawyers who communicate in that way, the wall goes up."

Having 'skin in the game'

At the Sydney roundtable, participants discussed the implications of the Royal Commission's recommendations for general counsel who sit on a board and therefore have 'skin in the game'.

"It has real bite", said one general counsel who is a director on several boards. "On the one hand, you're providing independent advice to the other directors on those boards. At the same time, there might be an incident that could have repercussions in a criminal sense, and you can't help thinking 'hang on, I'm a director of that entity'. The way I approach it is that if I focus on my responsibility to the company to provide the best possible outcome to reduce risk, I'm mitigating my own personal risk as well. It elevates the level of awareness, but I see it in a positive way."

Some participants suggested that the ramifications of BEAR and other, similar corporate accountability regimes will be something that they will all have to grapple with in the not too distant future. "We're going to have executives coming to us, saying 'I have personal liability here'," said one participant. "And we're going to have to say, 'I can't help you – I don't advise you; I advise the company'. When that starts to happen some of those executives are going to start to feel exposed."

Others said it's necessary to constantly think about your role as general counsel as issues emerge. "You need to be thinking 'is this appropriate or not appropriate'," said one. Another argued that as a general counsel sitting on a board, it's possible to create more effective alignment and manage risk, while still balancing the requirement to facilitate the board.

"I don't think there are many roles better placed to see around corners and anticipate problems," he said.