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Contact
Juliet Fay, General Manager – Flex
T +61 2 9921 8940
juliet.fay@minterellison.com

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FEATURES

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ACC Australia
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Editorial
Editor: Andrew McCallum
T: (61) 3 9248 5548
E: a.mccallum@acc.com

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Andrew McCallum
T: (61) 3 9248 5548
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Ingrid Segota
T: (61) 3 9248 5511
E: i.segota@accglobal.com

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If you have an article you would like to submit for publication, please contact:
Andrew McCallum
T: (61) 3 9248 5548
E: a.mccallum@acc.com
Contributions are included at ACC Australia's discretion and may be edited.

General Enquiries
T: (61) 3 9248 5500
E: ausmembership@acc.com
W: acla.acc.com

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ACC Association of Corporate Counsel AUSTRALIA

PRESIDENT'S **REPORT**

Karen Grumley
National President

It is with great pleasure that I write my first report for Australian Corporate Lawyer magazine, as the newly elected president of ACC Australia. I was honoured to take the helm in November last year during the National Conference and In-house Lawyer Awards. I am privileged to be following on from Gillian Wong, and her passionate and purposeful presidency. Thank you Gillian, for your commitment and enthusiasm for the advancement of our profession—you have helped lay sturdy foundations for the ongoing success of our incredible association.

It is also appropriate that my first report appears in this issue, the theme of which is ethics and compliance. In recent months, I've been quoted in the media as noting that in-house lawyers are no longer just lawyers. Increasingly, our members are becoming an integral part of the senior management team. And why do I believe this is so important?

In-house teams have the ability to influence the compliance culture of our organisations. This stems from our unique position: holding an insider understanding of the business and its frontline operations, and having an external commitment to the law. With a seat at the leadership table, we are empowered to advocate for processes and systems that encourage ethical behaviour and support company performance without compromising legal and regulatory compliance.

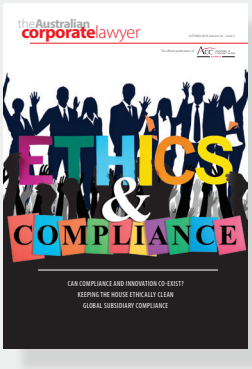
As the recent ACC White Paper ***Leveraging Legal Leadership: The General Counsel as a Corporate Culture Influencer*** observes:

> ***When the general counsel has a seat at the chief executive's leadership table, it sends a signal to the company's stakeholders (internal and external) that ethics, compliance, and other legal risk considerations are a top priority of the company.***

Our recent in-house lawyer awards highlight the growing influence of our profession within corporate and government legal departments throughout Australia. In-house lawyers constitute approximately 30% of the total Australian legal profession, or about 14 000 practitioners. That is a large number of lawyers, across a great breadth of corporations and government departments throughout Australia. And that makes the role of ACC Australia vital—we need to ensure that each of you have the skills and resources necessary to thrive on the frontline of your organisation.

It is a time of great change in the wider business community. Many of us work in corporations whose businesses are under relentless assault from new or existing competitors. As such, in-house lawyers understand the need for re-invention, and to stay relevant as our roles grow and our influence expands. ACC Australia will continue to advocate for those things which are paramount to your success and enable you to be more effective at what you do in this ever-evolving environment, whether that is through the introduction of our Chief Legal Officer (CLO) Club, access to technology solutions through our partners, the ever-expanding digital resources at your fingertips on our website, or the connections you make and people you meet at our events.

Benjamin Franklin famously advised fire-threatened Philadelphians in 1736 that "An ounce of prevention is worth a pound of cure". Clearly, preventing fires is better than fighting them, as is preparing for and protecting against legal risks. I hope that this year your ACC Australia membership will provide you with the tools you need to stay ahead of those fires you need to protect against. No doubt this issue of the Australian Corporate Lawyer will go some way to providing you with some great resources and information on ethics and compliance to help shield against the challenges of 2018.



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PERSPECTIVES

MIKE MADDEN

Mike Madden

A highly experienced in-house lawyer, Mike has served as General Counsel at For The Record (FTR) and iSeek Communications. In both roles, as the first in-house counsel, he was charged with establishing in-house legal functions. Mike brings a range of experience across the legal spectrum with specific expertise in commercial litigation, employment and industrial relations and services agreements.'

Mike is the current President of the Queensland Division of ACC Australia. He also sits on the board of ACC Australia and is a board member of ACC.

Each month ACC Australia invites our in-house industry leaders to share their experiences and perspectives on the theme of the current issue of the Australian Corporate Lawyer.

Recently I was fortunate enough to attend the ACC General Counsel summit in Paris. The summit brought together esteemed general counsel who shared their insights on issues that impacted their organisations and legal departments in a global context. A consistently strong theme throughout the summit was the ever-evolving and strategic role of general counsel as business leaders within the corporate world.

As more general counsel assume their seats at the C-Suite, or as core members of the top management teams, they contribute to discussion and debate about company strategy. This isn't merely limited to legal and related matters, but also issues such as resource allocation, innovation, use of technology, capital resources, market trends, threats and opportunities. Therefore, in order to 'take their seat at the table', general counsel must establish trust and influence. Further, they must demonstrate value not only as legal experts but as leaders, statesmen and as 'mini-chief executives' on corporate issues such as business strategy, culture, compliance, ethics, risk and governance.

It therefore follows that, in order to influence and be effective, general counsel must have the trust of not only the chief executive officer (CEO) and the board, but also the wider management group and business. In order to build trust and influence, general counsel must deliver value by providing legal expertise through a business imperative framework. They must also strive to demonstrate that the legal department is committed to meeting business objectives and is a strategic partner closely aligned with corporate strategy.

General counsel must offer a deep understanding of the corporate strategy and must be able to communicate that strategy effectively, build an effective legal team and function through a collection of people, technology, outside counsel and measurable key performance indicators. Achieving this fundamental mix of talent, technology and processes allows the alignment of legal team operations and service delivery models with a corporate strategy that promotes business integrity and diversity. Importantly, a culture of inclusion that creates an environment that supports and rewards diversity and inclusion, both internally and externally, will attract broader talent, experience and perspectives to enable a more effective and high-performing legal function.

General counsel must operate as mini CEOs to combine the required resources to establish a team and culture that promotes integrity through the common values and practices of the company. To do so requires general counsel to establish a framework that combines the company's formal policy requirements and ethical rules into its business operations.

The challenge in managing risk and ensuring compliance is to identify each business process, as it applies to the various business units. From there, the challenge turns to articulating where various business needs intersect so that the appropriate risk-mitigation systems are effectively integrated into the business processes. Accordingly, general counsel are required to have an understanding of the ever-increasing and complex web of laws and regulations, generally and specifically, as they apply to the company locally, nationally and globally within those jurisdictions in which the business operates.

We live in a time of exponential change, and the role of general counsel is becoming more complex, intense and challenging. Increasingly, organisations are looking to the leadership of general counsel not only as legal experts to navigate the risks that come with change, but as business leaders to capitalise on the opportunities brought about by that change.

A DAY IN THE LIFE

GRAHAM WLADIMIROFF

Assistant General Counsel and VP RBIS, Avery Dennison Corporation

Graham Wladimiroff

Based in Hong Kong, Graham is Vice President and Assistant General Counsel for the Retail Branding Information Solutions (RBIS) group of Avery Dennison Corporation; a global manufacturer and distributor of adhesive materials, apparel branding labels and tags and specialty medical products. Prior to joining Avery Dennison in August 2017, Graham held various positions at AkzoNobel, one of the world's largest coatings and specialty chemicals manufacturers and distributors. His eighteen year career at AkzoNobel included the role of Board Secretary between 2006 and 2011 and the role of Director Legal Asia Pacific between 2011 and 2016.

6 am **Ahead of my first call at 7 am, I need to check emails in case there are developments that have an impact on that first call.** The call relates to a dispute where developments are following each other up in quick succession and across multiple time zones. I also need to have breakfast before the call as I will need to rush off straight after.

7 am **A call with a number of colleagues, including our GC.** With a head office in LA and a 15–16 hour time difference, calls are often scheduled either early in the morning or late in the evening. We go through the latest developments on the dispute, as well as the different options on how to proceed. Fortunately the call is not so early that I disturb the family. Apartments in Hong Kong are small.

8 am **Rush off to the office as I have in-person meetings starting at 9.15 am and it takes me an hour to get to the office.** As I take public transport I can continue to check emails on my way to work. I spot a few developments on the same dispute which will require a response later in the day when the colleagues in Europe are online again. I also spot an email on a trademark issue which will also require attention later in the day.

9 am **Arrive at the office.** Grab a cup of tea and my notes, and straight through to the meeting.

10.30 am **I always try to plan 15 minutes between meetings to allow for practical matters, attending to urgent matters and possibly preparation for the next meeting.** In this case, I use my time to drop by my team in the office to see how they are and to give some quick instructions. I work with a booklet in which I keep lists of actions and then update the lists from time to time. We have some temporary support at present and I am still in the process of recruiting an assistant. Delegating tasks therefore requires a bit more attention than usual. I try to have a meeting with the team every Monday afternoon to go through what everyone is working on and what is scheduled for the week. It also provides an opportunity to indicate what the priorities are and where the bottlenecks are in terms of legal support.

10.45 am **My next meeting lasts until 12.30.** As I am still going through my emails from the previous night and now the morning, I decide to continue to after 1 pm and then grab a quick lunch downstairs. I typically try to step outside the office for at least 10 minutes, but it doesn't always happen. Hong Kong weather is rarely a hindrance and often encouraging in that respect.

1.10 pm **A quick bite to eat, check up on the latest news and back up to the office.**

1.30 pm **I need to prepare for my next meeting.** Fortunately the office is still relatively quiet as it is still lunch break for many and I have the option to close the door. Besides, the US and Europe is not yet up. One of the challenges of the job is the relentless requests coming in by email, as well as the high degree of involvement of legal in many aspects of the business, not just Legal. This makes it necessary at times to, for instance, pick a meeting to attend in a cycle which will give you all the insights you need without having to attend a number of previous, preparatory meetings.

2 pm **I go into my next meeting, which is using Hang outs to speak to someone in China.** The company I work for operates in a Google environment. This requires some adjustment when coming from an Outlook and Word environment. Fortunately I have some very helpful IT colleagues to help out from time to time. However, connectivity can still sometimes be a challenge, as is the case in this meeting.

3.30 pm Done with in-person meetings for the day. **Now for some calls to set up meetings for the next week and to get input on some of the files I am working on.** I also find a moment to discuss the trademark matter, which surfaced in my emails in the morning, with a colleague in the office. I am a strong believer in benchmarking and getting input from third parties which may have gone through similar challenges in the past. It can be a great way to both check on the right approach as well as potentially speed up a process. In giving advice it can also be powerful if one can refer to how other renowned multinationals tackled an issue.

6.30 pm **Head off home in order to arrive by 7.30 pm.** As happens often, I unfortunately arrive a little late for dinner. However, I still manage to catch up a bit with the family before going into my evening call with the US.

9 pm **The last call of the day with one of the business partners who is traveling in the US**. We finish at 10 pm. I check the last emails of the day and then spend some time with my wife.

PERCEIVED ETHICAL DUTIES OF CORPORATE AND IN-HOUSE LAWYERS

Perspectives from law students and early career practitioners.

We have conducted qualitative research since 2014 involving LLB/JD students, practical legal training (PLT) students and early career commercial lawyers. We have researched, amongst other things, the role of legal ethics in commercial and corporate practice, and the research participants' attitudes and perceptions of this role. We found the participant responses insightful, challenging and even provocative.

Our research is embedded in a corporate/commercial context, as the researchers have a commercial legal practice background. During 2014–15 the research volunteers chose to participate in a semi-structured interview or a focus group of their peers. Nearly half of the early career commercial lawyers in our research were at the time working in-house in government bodies, with the rest practising in law firms. A smaller percentage of the students had experience as paralegals or legal assistants in commercial law firms or government bodies.

> ***Who will save your soul***
> Jewel, 1995

The comment of one of our research participants is representative of the perception of tensions between a lawyer's ethical duties and their responsibilities to their employer: 'corporate lawyers would have challenging times if they work to a board or they're in-house lawyers' needing to exercise vigilance to avoid being 'sucked down the tube' when managing areas of conflict. Another participant, who worked in a government in-house legal team, emphasised the ethical dimension of protecting her department, but also 'keeping an eye on the broader community context that we operate in.' Another significant theme emerging from our research was the polemical suggestion that legal ethics should be more important for corporate and in-house lawyers because of the significant impact of commercial interests on society generally, and the high stakes of ethical lapses in the corporate and commercial space.

> ***'Everybody needs money! That's why they call it money!'***
> Mickey Bergman (Danny DeVito) in *Heist*, 2001

We can gain a better understanding of our participants' attitudes by identifying their impressions of commercial/corporate law and lawyers. It's hardly revelatory that a predominant theme from the LLB students was their association of 'money' and 'wealth building' with commercial and corporate law. However, their linkage of riches with this practice area provided a springboard for their nascent, and even cynical, view of corporate practice, with references made to: 'corporate greed', 'corrupt[tion]', 'doing anything for clients who have lots of money', 'working for rich people', 'parasites and money grabbing', 'finding loopholes' and 'capitalist killer instinct'. A couple of LLB students admitted their opinions probably didn't match reality, with one acknowledging the naive Hollywood superficial image of corporate lawyers facilitating 'dodgy behaviour' and being 'fast and loose with the rules'. These views softened considerably amongst the PLT students, with only one of this cohort expressing negative views by thinking that corporate lawyers have less integrity than commercial lawyers, and that they are under pressure to craft tax avoidance or minimisation schemes. One PLT student admired *The Good Wife's* Alicia Florrick as 'ethical' and being the complete opposite to *Suits'* Harvey Specter, who personified the 'really corporate, flashy experience' and, by implication, someone not as ethical as his *Good Wife* counterpart.

Duty to the court (even if the court is less visible)

Anybody who has watched *Changing Lanes*, a 2002 US legal movie depicting corporate ethics, can recall a New York law firm partner contemptuously dismissing his junior lawyer's legitimate ethical concerns with 'to hell with what you think about your high school ethics class'. A law student's ethics course will highlight the lawyer's paramount duty to the court, as embodied in the *Australian Solicitors' Conduct Rules* (ASCR). Two LLB students in our research emphatically stated that commercial and corporate lawyers have a duty to the court, with one observing that, as officers of the court, they should still be held to the same standard as legal practitioners everywhere. The other student identified the difficulty of executing this duty, as the client's preference 'can take up the largest sphere' because the court's role is less visible.

Lest in the very unlikely event a corporate lawyer is tempted to emulate the caustic attitude of the law partner in *Changing Lanes* by displaying even a slight disregard of his or her duty to the court amidst high-pressure responsibilities, a 2009 conference speech 'The duty to the court – sometimes forgotten' by the then Chief Justice of Victoria, Marilyn Warren, refocuses this duty, especially in a commercial context. The Chief Justice commented that a lawyer representing blue chip companies on ASX compliance has the same duty to the court as a legal practitioner defending the criminally accused. Her Honour observed that in an increasingly commercialised and global world, some lawyers choose a career path that doesn't involve court work, yet the lack of court room participation doesn't in any way reduce a practitioner's duty owed to the court, even if the duty comes into conflict with their duty to their client.

The client dichotomy

Susan Hackett, the erstwhile Vice-President and General Counsel of the Association of Corporate Counsel, wrote in 2012 that whilst in-house lawyers know who employs them, some admit they cannot answer the question 'who's your client?' with much certainty or precision, especially when legal problems unfold in the company. The ASCR requires lawyers to perform their duties ethically by acting 'in the best interests of a client'. However, our research indicates a perceived dichotomy between 'people clients' and 'big business clients', which possibly underplays the lawyer's duties in a corporate or in-house environment.

A PLT student in our research stated that a lawyer 'deals with clients or deals with big business' and to accentuate a difference between the two, she asserted a curious and seemingly moralistic belief that it's either 'criminal lawyers who are doing the right thing for the people and standing up for justice' or 'big corporations and lawyers who work all day and make lots of money and have no soul.' Another PLT student underscored his view of the diminishing significance of corporate ethics with his comment that, in a sense, corporate lawyers 'don't interact with real people so ethics doesn't matter as much'. However, a fellow PLT student posited a more sanguine view that 'commercial clients are still clients' whether they're a company or a company director that's providing instructions, and 'it doesn't change the fact they actually have a problem and you're there to fix it'.

All the things I could do if I had a little money
ABBA, 1976

One of the authors of this piece will never forget an introductory exchange with a lawyer nearly 25 years ago. The author had just started working as the in-house lawyer for a large Australian regional university and upon introducing himself to the local lawyers at a private practitioners' lunch, one lawyer unabashedly proclaimed, 'so your job is to do the bidding of the university', implying that in-house counsel lacked the ability to act independently. The ASCR requires a lawyer to 'be honest' in all legal practice dealings and to 'avoid any compromise to their integrity and professional independence'.

Judging from our data, our research participants view corporate and in-house counsel confronting numerous challenges to their independence and integrity that challenge their ability to fully exercise their ethical duties.

An LLB student stated a belief that commercial lawyers are tempted to 'bend the law' for clients with lots of money. A PLT student sensed that because business is 'potentially a little bit of a cut-throat industry, some people feel they have to act unethically in order to represent their client'. One of our participants, a government in-house lawyer, starkly observed that if a client's whole motivation is to make money, it's 'quite challenging to remove yourself from their interest and their motivations and step back and remember you're a lawyer'. The comments from our participants suggest there is a perception (perhaps unfairly) that in-house counsel face pressure to breach their ethical duties by succumbing to the temptations that flow from their clients' pursuit of profits.

In contrast, two practising lawyers in our research asserted the importance of their ethical duties in the corporate world. One of them, a global firm lawyer, noted that 'sometimes what is the best course of action commercially is not the best course of action ethically and sometimes it's important for us to remind out clients of that'. Another, a top tier lawyer, indicated that practitioners are 'sort of the ethical gatekeepers for clients'. This notion of a gatekeeper was reflected by a PLT student who believed that a lawyer in a commercial or corporate context 'is the protector of ethics and sometimes the policeman who says, no this isn't okay, and calls their clients on stepping over the mark'.

The edge of reality: Is a higher ethical standard required?

Does gatekeeping represent an expansion of ethical duties for a corporate or in-house lawyer? Interestingly, a cross-section of all of our participants suggested the ethical responsibilities of these lawyers should be elevated above that of other lawyers because of their client's impact on stakeholders and society generally. Whilst the ASCR does not require a lawyer to act in the best interests of a third party (except, of course, in the overriding duty to the court), a PLT student opined that corporate lawyers need to contend with the ethical issue of the 'nexus between acting in the best interests of the stakeholders versus the best interests of the community'. However, one logical extension of this view is that corporate and in-house lawyers should be expected to exercise a higher duty, an idea espoused by some students and early career lawyers in our research. Even though this proposition raises its own complexities and is even inequitable in its application, it points to the power of corporations in society and the trust placed in their in-house lawyers to execute their duties ethically in the face of dominant commercial interests. One government in-house lawyer expressed that 'ethics should even be more important for corporate/commercial lawyers' as a 'lot of relationships are at stake with business relationships' where the 'bigger picture view is important', as opposed to a 'win for the client'. This view was reflected by the students, with one commenting that corporate lawyers, who are often driven by commercial interests, 'need to act responsibly so there is no injustice to individuals as well as society as a whole' and another commenting that a corporate lawyer's unethical conduct can be of greater consequence because 'companies can affect many people due to their conduct'.

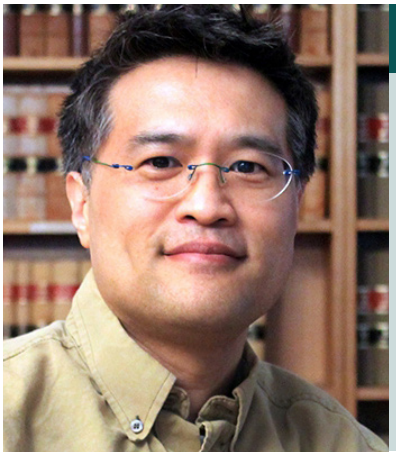
In contrast, legal ethics experts such as Christine Parker and Adrian Evans have commented that in-house counterparts are not necessarily less independent than external lawyers, as external lawyers can identify with their clients just as closely as their in-house counterparts can with their employers. Suzanne Le Mire highlights evidence pointing to how in-house counsel closely supervise and monitor the activities of their client's external lawyers to ensure they fulfil their ethical responsibilities, akin to a gatekeeper. However, our research points to the perception that even if in-house counsel maintain their ethical responsibilities, they still need to constantly exercise vigilance to not only avoid succumbing to the commercial interests of their clients, but in an ideal world, to elevate their role to 'ethical gatekeeper', even if it's above and beyond the current ASCR ethical duties. A global firm lawyer in our research offered an affirming and uplifting view of the current position, stating that while ethics is the same standard for commercial lawyers and lawyers generally, professional conduct rules 'serve to inspire confidence in the legal profession', especially in light of the 2007–2008 global financial crisis.

Concluding thoughts

Our opinion is that while the views of some of the student research participants about higher ethical standards for corporate and in-house counsel are noble, they put a disproportionate focus on the potential negative impact corporations have on society. These views raise greater and even intricate responsibilities for corporate and in-house counsel above those of other legal practitioners, which would be quite challenging to justify in its practical application and does not fully recognise the benefits that many corporations contribute to wider society. As part of our ongoing research, we would like to explore whether these students' views shift once they have been in practice for a number of years, and to also examine whether our participant lawyers' perceptions have changed as they grow in practice.

David Catanzariti

Having worked in a mid-tier commercial firm in Canberra and in a legal practice in regional NSW, David is now a lecturer at the ANU School of Legal Practice and has also convened the Commercial Practice subject in the Graduate Diploma of Legal Practice.



Barry Yau

Currently a lecturer at the ANU School of Legal Practice, Barry teaches and researches in commercial law in the Graduate Diploma of Legal Practice. Barry's legal background includes working as an in-house lawyer for two Australian universities and in government at both Commonwealth and Territory levels.

CAN COMPLIANCE AND INNOVATION CO-EXIST?

Emma Press, Director, Legal and Compliance ANZ at Medtronic Australasia Pty Ltd explores how a culture of compliance can in turn drive sustainable innovation.

If you had asked me this question ten years ago I would have struggled to see a connection, particularly given that compliance is the act of following the rules. I would have found it difficult to imagine that creativity and innovation—often regarded as involving some level of risk taking—entrepreneurial traits and thinking outside the box (and, potentially, the rules) could be embraced by a compliance function. In the past, I had even heard the phrase "compliance kills innovation". However, working for ethics-based organisations, in a highly regulated industry, more recently I have found that compliance actually provides the framework in which sustainable innovation can occur.[1]

'Innovation' has been thrown around as such a buzz word during the past decade. But all it really means is doing something new which adds value. Historically, innovation has been left to the domain of marketers or research and development teams. However, more progressive compliance functions have been innovating for some time. This is particularly evident in organisations where compliance management has evolved into a strategic element of business operations involved in everything from corporate governance to comprehensive risk-management. Where innovation is used to enhance compliance management, the function can be promoted as providing a business benefit rather than a burden.

In many ways, innovation is the means by which an organisation can align the rules (external and internal) with compliance management (being the means by which a business can ensure compliance with those rules).

Operating in the current dynamic environment where businesses are striving to be agile, risks are expanding, and the complex laws and regulations which govern our industries are continuously evolving, adding more bodies to the compliance function is not necessarily the answer. Organisations need to think more creatively about the way to tackle compliance management in order to keep pace with this rapid change. Like any cost function within a business, compliance teams must also transform their capabilities to increase efficiency and performance. Introducing innovation can help achieve cost savings while maintaining or improving the effectiveness of the compliance program.

Introducing innovation (particularly in relation to compliance training) also has enormous potential to help improve the culture of compliance, increase employee engagement and retention, and save time and costs related to operating other aspects of a compliance management system.

Culture

Building a culture based on trust and integrity is critical to ensuring that an organisation's climate is one in which people are free to innovate generally.[2] In order for compliance management to provide a strategic advantage, a positive culture with respect to compliance must be established throughout an organisation. In my experience, culture will either enhance or impede the success of a compliance program.

Culture must be led by example from the senior leaders through their actions and words. As these leaders establish the ethical tone of a company, it is essential for them to actively support an innovative approach to the compliance program. This includes investing in new technological solutions, tools and educational programs. Leaders must also communicate regularly and authentically about the positive connection between innovation and compliance, and the benefits of any innovation introduced by the compliance function. Role modelling within an organisation is critical, not just in relation to ethics but also innovation generally. Whilst employees look to their leaders in this regard, people also value the opinions of their peers[3], so it is essential to ensure there is a balance between the leader, compliance function and peer messaging in relation to innovation, ethics and compliance.

Resources and roles

Innovation is unlikely to happen without dedicated resources. It is essential that compliance leaders provide employees with the time and money to experiment with and implement new ideas in order for innovation to occur. It takes time to explore new ideas and brainstorm creative solutions to problems. A budget is then needed to implement these ideas. If you are committed to introducing innovation into your compliance management system, it is important to have realistic deadlines and an innovation budget, which you should protect at all costs. Also, consider updating the compliance team's position descriptions and/or objectives to include innovation as a formalised part of their roles, and provide training on how to innovate and solve problems. Finally, ensure you recognise and reward innovative ideas and behaviour.

Strategy and objectives

Innovation does not necessarily need to be revolutionary. The right innovation strategy for your organisation may well be implementing incremental change, given that even small improvements can make a big difference. The key things to be aware of before you create an innovation strategy are: what is important to your business, how to work with this, and how to keep the momentum and commitment to innovative compliance top of mind.

When preparing the strategic innovation plan, make sure you agree on 'SMART' objectives as to how you are going to implement gradual improvements and, if appropriate, tackle more groundbreaking or complex innovation. This will not only provide clarity to compliance employees as to the importance and purpose of innovation and their role in this regard, but will also support a business case for a dedicated innovation budget. During the development of the innovation strategy, the compliance function should collaborate with and seek feedback from business colleagues and leaders. Ideally, the innovation strategy will align with the business strategy and objectives. Where an organisation has a corporate innovation strategy this can also be leveraged by the compliance function. Once finalised, the innovation strategy should be shared with the business and published on any compliance intranet or SharePoint Site.

Communication

Given the volume and breadth of information an organisation distributes every day, it can be challenging to ensure that ethical messaging is kept top of mind and relevant to every employee. Innovative communication initiatives can cut through the clutter of corporate messages and engage employees on the topic of ethics and compliance, which has traditionally been viewed as restricting and thereby limiting the space in which the business can operate.

An innovative communications strategy focused on providing realistic and relevant examples of scenarios will assist to change the way colleagues think about ethics and compliance. Communications designed to encourage open dialogue and reduce any perceived or real concerns regarding retaliation in response to issues being raised must also be a priority. A new, fresh and open communications campaign will also improve the profile and perception of the compliance team, and promote a work environment that fosters mutual respect and integrity. Creating a positive culture in relation to compliance helps to ensure employees are comfortable to raise any ethical issues directly with the compliance team.

Another priority is to recognise and communicate when an innovative initiative is rolled out or introduced into some aspect of the compliance management system and describe it as 'innovation' in order to ensure that it is recognised as such. This will raise awareness around the importance of compliance innovation, help to justify the investment to date and support a future innovation budget.

Mindset

A key strategic priority for compliance professionals must be to maintain or develop an innovative mindset.

1. Take off your compliance hat and have an open mindset	Act as a member of a team invested in the successful outcome of the project and consider not just the risks, but also the opportunities, and how to achieve them. Ensure you are embedded in the strategic and creative planning process at the same time as navigating the risk.
2. Provide the 'Why'	Never just say no. Provide the context and rationale behind a decision as this may pave the way to new ideas and solutions. Take the next step and offer an alternative approach.
3. Prioritise 'Thinking Time' and be bold	Innovation doesn't happen instantly for most of us. Allow yourself the space to be creative. Be courageous and challenge group think with a positive tone and open-minded approach.
4. Build trust	Be collaborative with colleagues and look for opportunities to build trust, break down barriers and overcome the perception that compliance professionals are the 'internal police'. Creativity thrives in teams built on trust and respect.
5. Put yourself in the shoes of the business and its customers	Go out with a sales representative, sit with the customer service team or participate in a marketing strategy day. Speak their language and show your passion for their business. Actively listen to their challenges, opportunities and objectives.
6. Feedback is a gift	Ask for, listen to and encourage feedback about your compliance program and acknowledge your colleagues for their suggestions. Having diversity of thought is a huge advantage which should be used by the compliance function. Speak with your colleagues in sales and marketing, customer service and IT. The feedback you receive will be invaluable.
7. Engage a coach[4] or DIY	There are many excellent innovation coaches who can facilitate innovation workshops with compliance teams designed to introduce innovation into all or part of a compliance management system. Alternatively, reach out to any innovation experts within your organisation. Many companies have employees trained as innovation coaches or design-thinking experts who could collaborate with the compliance function to develop an innovation strategy or initiative. There are also many fantastic books available on how you can implement innovation at work.[5]
8. Not all risk is negative	Sometimes, not taking a risk will in itself create more risk for a business. Ask yourself what the outcome will be if a documented and well considered business risk is not embraced.

Training and education

Learner fatigue, disengagement and lack of retention are real challenges with traditional ethics and compliance training programs. The last resort of a compliance team should be to use traditional training methods, such as a PowerPoint presentation, given how many third party providers[6] of innovative and cost-effective compliance training solutions exist in the market today.

Better still, get creative and innovate your own standard training programs in order to energise the compliance team and the broader organisation in relation to ethical and compliance topics. Depending on your training budget, this could include:

- **Gamification:** interactive education requiring employees to compete in a game while learning about customised ethical and compliance topics. It could be as complex as an online Xbox-type compliance game or as simple as a game of snakes and ladders, where the ethical challenge results in either taking the right path and proceeding up the ladder or exercising the wrong judgment, which leads the player down the snake.
- **Videos:** have real employees experiencing fictional compliance issues.
- **Workshop role plays:** have employees act out some common ethical scenarios.
- **Hypotheticals:** run an ethical dilemma discussion where panel members consider ethical issues assuming imagined identities in hypothetical situations.

Improving employee engagement in relation to compliance training will also lead to increased attendance and engagement in subsequent training initiatives.

Monitoring, measuring and reporting

Despite the increasing cost and risks associated with failure to adhere to compliance processes, many compliance functions have yet to embrace the potential of technology to innovate compliance practices.

As business risks become more dispersed and complex, compliance departments should seek to leverage advances in technology in order to assist in the identification and monitoring of risks and controls.

Given the vast amount of data organisations collect, there is a huge opportunity to harness this information and apply data analytics software and Artificial Intelligence to help to identify potential issues and risk patterns earlier than if, for example, information is manually reviewed during routine monitoring or the annual audit.

This data could also be utilised in a way to determine your employees understanding of ethics and compliance in order to tailor compliance training and communications to suit an individual's knowledge and potential risk areas. Not only will personalising communications and educational activities drive compliance, but it will also foster innovation in a way that is valuable to the individual by ensuring it is 'meaningful to me - not the masses'.

Technological innovation can obviously improve efficiencies and compliance levels, particularly given the growth of business automation and the acceleration of transaction processing. Examples of enabling technology include robotic process automation, intelligent business process management suites, workflow tools, cognitive technologies, integrated online platforms, flexible advisory arrangements, real-time controls, pop up instructions and apps.[7] By ensuring compliance policy is integral to the business process, time and cost savings can be optimised and complaints from business colleagues about complexity and the added time burden of compliance minimised.

Finally, the effectiveness of any new innovation should be measured. There are plenty of innovative reporting tools available which can provide metric and data analysis reports on an individual compliance process, campaign or the entire compliance management system, including benchmarking the system against industry peers. These reports can be used to support the continued investment in a dedicated innovation budget.

Preparing for the future

Einstein supposedly said that the definition of insanity is doing the same thing over and over again and expecting different results. Whilst it is clear that innovative technology remains a top priority for many compliance teams, if we are to tackle the obstacles to innovation we cannot continue to tread carefully around change and new ideas. Compliance professionals must stop being complacent in relation to innovation and show leadership by role modelling an innovative mindset, and encouraging their teams and colleagues to introduce innovation across all aspects of their compliance program. Only once this transformation takes place can the compliance function truly be regarded as the bridge between innovation being embraced throughout an organisation and the law, thereby ensuring that businesses evolve, develop and grow in a legal, ethical and sustainable manner.

Emma Press

With over 15 years' experience in the healthcare industry, gained across both major law firms and the corporate environment. Combining a strategic legal and compliance approach, along with an underlying passion for innovation, Emma currently serves as Director, Legal and Compliance ANZ at Medtronic Australasia Pty Ltd.

The views expressed in this Article are my own. They have not been reviewed or approved by Medtronic.

Footnotes

1. Systematic Inventive Thinking® "SIT" is an innovation methodology which advocates that innovation can be achieved by applying a series of creative restraints that lead you to think and act differently thereby innovating "inside the box". Adopting this theory, the Compliance system can actually act as the restraint.
2. Indeed the Australian Securities and Investment Commission (ASIC) considers that culture is at the core of how an organisation and its employees think and behave: *Managing Culture – A good practice guide*, First Edition, December 2017, published in partnership between The Institute of Internal Auditors, The Ethics Centre, Governance Institute of Australia and Chartered Accountants; https://www.governanceinstitute.com.au/knowledge-resources/guidance-tools/managing-culture-a-good-practice-guide/.
3. Edelman Trust Barometer @ https://www.edelman.com/trust2017/
4. For example; Dr Amantha Imber, Inventium, the wonderful Mo Fox who can help you solve the stickiest problems and Rachel Audige (who specialises as an SIT coach).
5. *Sticky Wisdom – How to start a Creative Revolution at Work*, by Dave Allan, Published by Capstone Publishing Limited, *Wicked Wisdom – Creative approaches to the problems that drive us crazy* by Mo Fox, Published by Wicked Press 2016 and *Design Thinking for Strategic Innovation* by Idris Mottee, Published by John Wiley & Sons Inc, to name a few.
6. Explore examples of LRN Corporation's compliance education videos at http://lrn.com/ethics-compliance/education/ and online training at https://www.youtube.com/watch?v=nPPxsDgkopE. GRC Solutions, a leading Australian provider of compliance e-learning, will provide demonstrations of their courses upon request: https://grcsolutions.com.au.
7. For some examples of apps download Gilbert and Tobin's "Smart Counsel" and Baker McKenzie's "MapApp".

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CREATE A COMPLIANCE AND ETHICS PROGRAM FROM SCRATCH

We have to start somewhere... Nirupama Pillai, corporate counsel at Infosys Limited, provides a starting point for creating a company-wide compliance and ethics program.

Congratulations! Your organisation has recognised the need for a dedicated compliance and ethics function and you have been chosen to lead it. You have three months to present a plan of implementation to the company's audit committee. You marshal resources, order a review of company policies, investigate just under what terms your foreign intermediary was on-boarded, pay top dollar to several technology providers to provide you with compliance tools, and start off the compliance and ethics function. At the end of the second month, you realise that each action item you undertook has opened a Pandora 's Box and that you are at a loss as to what to report to the audit committee.

Back up.

No matter how big or small a company is, for a new compliance and ethics program to succeed, a thoughtful, structured program that will reap rewards, not only in the form of appreciation from the board, but acceptance from regulatory bodies, clients and the supply chain, is needed.

So let's start at the very beginning.

What is a compliance and ethics program?

Modern compliance and ethics programs are policies, procedures and systems established by companies to attempt to prevent, detect and respond to violations of law, company policy and ethical standards by employees and others. The modern form of the compliance and ethics program may have originated in the United States, with several corporate scandals leading to a rethink of how compliance programs should be implemented. Beginning in the mid-1970s, many government agencies noted a lack of holistic programs that would ensure that a company had adequate policies and procedures to enable compliance with the laws that it was subject to. Ultimately, the US Federal Sentencing Guidelines in 1991, through the introduction of incentives for compliance with the law, led to the framing of the hallmarks of the modern compliance and ethics program. However, this does not spell out what a compliance program should consist of. It is a guideline that tells you, if you were to follow these rules, that there is a good chance that any potential penalties would be mitigated in the event of an investigation.

It is not just in the United States; the UK Bribery Act, for example, requires companies to demonstrate appropriate procedures to ensure compliance with the law. Once upon a time, it may have been adequate for companies to provide a tracker with compliance statistics, but no longer. From recent FCPA enforcement actions, to the much-debated DOJ Evaluation of Corporate Compliance Programs, there is much to be said for setting up a thoughtful, values-based compliance and ethics program that goes beyond tick-the-box compliance and utilises the tenets of the modern compliance and ethics program.

Tenets of a compliance and ethics program

Released in 1991, the United States Sentencing Guidelines provide a formula for calculating an organisation's criminal fine based on the seriousness of the offence, and the presence of mitigating and aggravating factors. The mitigating factor that received the most attention was whether an organisation had "an effective program to prevent and detect violations of law". While the guidelines have slightly evolved since 1991 — notably to expand the scope to a compliance and ethics program — the key principles that a company's compliance and ethics program should contain are:

1. Written standards – A company must have compliance standards in the form of a code of conduct and underlying policies.
2. Tone from the top – The board of directors must be knowledgeable about the content and operation of the ethics and compliance program, and must exercise reasonable oversight of that program. The management should assign "high-level personnel" in the compliance and ethics department to oversee compliance with such standards and procedures.
3. Risk assessment – Any compliance and ethics program must be tailored to the specific risks that a particular company faces owing to its business, strategy and location of operation, to name a few.
4. Due care – The company must take care to ensure that adequate due diligence is conducted on senior employees to ensure unethical conduct is detected, and that only employees of high integrity are recruited, especially to senior roles.
5. Training and communication – The company must undertake planned and targeted training for employees focused on identified compliance risk areas.
6. Monitoring and auditing – The company should have a benchmarked process for reporting violations and review of the compliance and ethics program.
7. Enforcement and discipline – There should be uniform consequences for violations by employees and concurrent policy changes.

Understanding the lay of the land

In short, risk assessment means that different companies have different compliance needs and their programs need to be tailored based on the business they follow. Spend some time understanding how compliance is currently managed in the company, for example, does the company operate in a regulated industry like healthcare or financial services? Use the company's organisation chart and latest annual report to map out key risks associated with the business and who takes care of each risk. Does the company have dedicated compliance experts for various functions? How do these compliance experts stay abreast of the applicable laws and regulations? Do they need any additional resources? Undertake a survey and based on this, make an assessment of the areas which need additional focus.

You could follow this structured method of risk assessment, taking the assistance of your colleagues in the risk management team:

1.	Assemble multi-functional team (legal, finance, internal audit, risk management) to kick-off the process.
2.	Obtain the most recent company risk assessment or risk factors published in SEC filings.
3.	Obtain the current year's internal audit plan.
4.	Identify a compliance coordinator for each business unit, subsidiary and country/geographical area. This will form the overall compliance committee. It is key that compliance not be limited to legal/finance, as business is where risks are on the ground—where the people are. Similarly, risks need to be localised for additional buy-in.
5.	Prepare a questionnaire with risk scoring to be circulated to business and subsidiaries to identify additional risks.
6.	Review the questionnaires and review risk scores. Discuss risk factors and categorise risks.
7.	Identify mitigating measures and convey to the compliance coordinators for implementation.
8.	These risks must be discussed during quarterly compliance reviews. Emerging risks also need to be identified.
9.	Prepare a plan on the basis of risk categorisation.

The outcome of this activity, which should be done on an annual basis, is that the compliance and ethics team is able to identify the key risks associated with the business, which can help you to tailor the compliance and ethics program accordingly.

Enlist board and management support

A compliance and ethics program cannot exist in a silo, to be the sole responsibility of the compliance and ethics team. It must be an organisation-wide effort, and must be absorbed by everyone – from the chairperson of the board, to employees. For example, the board of directors or any supervisory body must be trained on the company's compliance and ethics program. The US Sentencing Guidelines require that an organisation's board be knowledgeable about the content and operation of the ethics and compliance program, and that it exercises reasonable oversight of that program. The 1996 *Caremark*[1] decision was seminal in ascribing to corporate directors an affirmative duty to establish, and exercise oversight over, some form of internal compliance activity (e.g. an organisational corporate compliance program) that is subsumed under their core duty of care:

> ***Boards must assure themselves that information and reporting systems exist in the organisation that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.***

This oversight obligation is subsumed under the core duty of care. The standard for breach of this oversight obligation is bad faith (i.e. that the directors knew that they were not discharging their fiduciary obligations). Subsequent decisions have drawn a distinction between an inadequate or flawed effort to effect fiduciary obligations, and a conscious disregard for those duties.

Until recently, there was very little guidance under US law as to what steps the board was expected to take. However, the publication of the DOJ's *Effectiveness Questions* implies the following questions will be asked of the board and senior management in the event of an investigation:

- What compliance expertise is available on the board of directors? Are there board members who have experience in overseeing or managing the compliance and ethics portfolio?
- Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors?
- What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis?
- How often does the compliance officer meet with the board of directors, and is management present?
- How have the board and management followed up?

You should, therefore, work to ensure that regular meetings with the board are scheduled for the compliance and ethics function, including time with the independent directors, if any. In the beginning, share a risk assessment with a mitigation plan and then report on the progress made on implementing the program. Meet the directors once a quarter and schedule an annual training for the board on compliance and ethics aspects.

Check, double-check

While every employer undertakes background checks on new employees, until recently, it was none too common for additional checks to be done as employees moved to senior positions within the company. If it is not the practice to conduct background checks on senior personnel upon promotion, it is prudent to initiate the process. Prior to this, put your house in order. Initiate a background review into the compliance and ethics team. The compliance and ethics team requires professionals whose integrity and ethics cannot be questioned. Additionally, review whether the compliance and ethics team includes sufficiently experienced professionals. Having team members who have some amount of background and experience in the company will always come in handy. Balance this with new hires in specialised areas of focus for the company.

The company should, as a part of the compliance and ethics program, take due care to ensure that individuals with substantial authority have not engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program. Clearly drafted and disseminated corporate policies can serve as a record of the company's diligence in selecting employees holding sensitive positions. Support these policies by building in a process of due diligence on employees who are promoted to senior positions. Annual conflict of interest certifications also help detect any situation of conflict. A positive screening may not always lead to the outcome that the employee must be let go – for example, an employee may be identified as a Politically Exposed Person (PEP)[2] and certain steps may have to be taken, including recusing the employee from certain projects to stay within the boundaries of the law. Ensure that employee policies also detail a requirement to self-report criminal offences.

Manage base policies

The code of conduct is the underlying policy for any compliance and ethics program. Chances are that if the company is listed or otherwise regulated, it would already have a simple code of conduct in place. In many companies, the code is a document that is seen rarely and read even less frequently. Chances are that it was drafted by a lawyer and is excessively legalistic as well.

Footnotes

1. In Re Caremark International Inc. Derivative Litigation 698 A.2d 959, 1996 Del. Ch. LEXIS 125 (Del. Sept. 25, 1996) {960}.
2. A politically exposed person (PEP) is defined by the Financial Action Task Force (FATF) as an individual who is or has been entrusted with a prominent public function. Due to their position and influence, it is recognised that many PEPs are in positions that can potentially be abused for the purpose of committing money laundering (ML) offences and related predicate offences, including corruption and bribery, as well as conducting activity related to terrorist financing (TF).

However, this is the one document that is the motherlode for all the steps you will take in your program. Hence, it is imperative that it conveys the basis for your compliance and ethics program, lays out the regulations applicable to the company and provides guidance to employees on navigating tricky situations. Remember that unlike a risk assessment, the code of conduct would be available to the employees of the company. It may very well be through the code of conduct that employees are introduced to the compliance and ethics program. Hence, undertaking a review of the code of conduct and ethics should be a priority for the compliance and ethics program.

Spend some time reading the code and understanding how it appears to the average employee. You can use the code to convey the company's value systems. Some companies choose to intersperse the code with snippets describing company values. An introduction from the CEO is often perceived to set the tone. Intersperse the text with FAQs and pointers. Highlight the options available to employees to raise concerns. Have a page devoted to the expectations that the company has of each employee, manager or officer of the company. Avoid the paper copies and opt for an online portal that employees can click-through. If the workforce consists of employees on the go, consider having a mobile application as well. Remember that if the company is in a regulated sector, there may be some specific regulatory requirements to be incorporated in the code of conduct. The code should convey the company's position on key regulatory matters and indicate what options are available to employees to raise concerns in case of any violations.

Training and communication

Much of a good compliance and ethics program consists of educating employees about the things they should and should not do. While we churn out innumerable policies and create the perfect compliance structure, it is essential that employees are trained on the policies that apply the most to them. Some of the key trainings that employees should undergo are on the code of conduct and ethics, anti-bribery policy, discrimination, anti-sexual harassment, etc. Some jurisdictions may also require you to have employees of certain seniority undergo training in certain areas. If your company is in a highly regulated industry, such as healthcare or insurance, it may require specific training as well. So how do you make sure that you are educating the right people? After all, the first question in the training and communications section of the DOJ *Effectiveness Questions* is on risk-based training.

Creating a plan:

1.	Identify the key risk areas, based on the company risk assessment.
2.	Identify all the risk areas where training is presently carried out in the company, including the frequency and the target audience for the trainings. This is important because it is not only the compliance and ethics team conducting training. While it is likely that the compliance and ethics team may conduct training on the code of conduct or on anti-bribery, training on discrimination and sexual harassment is probably conducted by the human resources team, and training on information security and data privacy by the subject matter experts in these departments. All these areas are key to the compliance and ethics program. Utilise the resources already present in the company to bolster the training and communication plan.
3.	Create a multi-year training and communication plan which should cover risk areas, recipients of training, mode of training, frequency of training and who maintains the records.
4.	Publish a copy of the training and communication plan to the compliance committee and prepare a report consisting of training numbers for employee, feedback from employees and next steps.
5.	Either have the chief compliance officer or an external consultant train the board of directors on key company policies.

Creating the training

Compliance and ethics training is only as good as the policies on which it is based. This starts from the time a policy is created. Policies may be created for multiple reasons: to comply with new regulations, to showcase the company's values or to reduce the company's exposure to risks. However, policies should be comprehensible to the average employee. Have a standard format. Include comprehension aids, such as FAQs, Quick Links, etc. Have policies available on a company portal. While a full-blown review of policies should be on the charts, start off with the areas that you want to train employees on and review the current policies around it. Make sure the policies are in sync with the concepts that you are trying to teach your employees. If there are any inconsistencies, resolve them through dialogue with other teams. Now you are ready with the base material for the training.

Work with your internal communications team if the company has one. A common communication tool is mailers. These can be used to launch policies, provide snippets of information and more. Targeted live training is arguably the most effective means of training, but the length and content of the sessions need to be carefully considered. Video-based training can be used for larger audiences. Quizzes can help in testing the knowledge of the employee. Try to include redacted versions of actual misconduct that happened in your company and what the company did about it.

Recording the training

Keep records of all the training and communication material disseminated by the compliance and ethics team. Some companies create an intranet portal to upload past communication mailers, links to policies, helpline service, etc. Additionally, ensure that the compliance and ethics team maintains a record of the employees who attended the training session. At an early stage, it may be as basic as a physical copy of the attendance sheet.

Reviewing the training

Review company policies and update the training material on an annual basis. This is because laws change very frequently and enforcement actions may necessitate reviews to policies and procedures. Feedback forms and other information about the training already provided can strengthen the review process.

Monitoring and auditing

Preventing violations involves constant monitoring of activities that have the potential to violate legal obligations. For example, including appropriate system controls, providing options for stakeholders to raise issues, annual audits of the compliance activities for the year, analysing patterns of whistleblower complaints, and undertaking appropriate policy and process improvements. Here, we review some of these key aspects.

While is it important to have a strong code of conduct, and effective processes underlying it, it is crucial to have a multitude of ways by which employees can raise concerns of violations of the code in a confidential and anonymous manner. While third party whistleblower hotlines may be commonly used in any compliance and ethics program, do not discard the facility to raise issues through email, or even a hand-written letter. Some jurisdictions are not comfortable with overseas hotlines and for those, it may be better to provide other options. It is important to review the whistleblower policy so that employees know what they can report and what happens once they do. Institute a process whereby all violations of the code of conduct and ethics are brought up to the compliance and ethics team so that you have complete oversight. Ensure governance by instituting a report to the audit committee of the key matters and any trends. These trends are later fed into the risk assessment cycle along with associated process improvements. If you outsource your whistleblower hotline, ensure that a senior member of your team has ownership over the process and manages the issues raised on a day-to-day basis. Remember that the company whistleblower policy is only as good as the company's stand on anti-retaliation, and you must work with local human resources teams to ensure that there is no retaliation and employees are comfortable speaking up.

Also, while a compliance officer approves policies, it is important to also check what the underlying controls, payment systems and certification under the policies say. It is especially important to train employees who interface with employees at the time of payments. Create a recurring plan to have an internal audit team review the underlying controls and see if anything additional needs to be added.

Enforcement and discipline

For employees to have faith in the compliance and ethics program, and for regulators to believe in it, it is essential that the company have a reasoned and rational procedure for enforcement and discipline. This includes, for instance, having a robust and structured internal investigations process, consistent disciplinary action and a focus on apt reward of ethical behaviour.

How do you demonstrate to employees and to regulators that the company is interested and invested in reviewing and correcting lapses? Undoubtedly, by having a robust, empowered, internal investigation function. To start off, have one person from the compliance and ethics team responsible for internal investigations. The compliance and ethics team will be working closely with the human resources function as they are likely to be dealing with employee concerns on a regular basis. It is worth having them report trends to you for onward reporting to the audit committee. An uptick in the number of wage-related queries might lead to a rework of your compensation policies, for instance.

The DOJ's *Effectiveness Questions* also stress the aspect of appropriate and consistently applied disciplinary actions. Of course, the *Effectiveness Questions* are in the context of an enforcement action. However, the questions that they ask range from the number of times such incidents occurred and what disciplinary action was undertaken, to whether the company held a manager accountable for what his team member did and what were the disciplinary actions undertaken. Hence, it is important to review the disciplinary action matrix that your HR team applies and ensure that you have visibility over the disciplinary actions taken in the context of code of conduct violations.

Additionally, it is worth reviewing incentive structures in place. Highly skewed incentive structures can cause ethical issues. On the other hand, having an incentive for acting in an ethical manner may also be a concern – you want to reward those who go above and beyond to assist the company in the compliance and ethics sphere. Rewarding those who sign up to be a compliance liaison or including ethical behaviour in the performance evaluation are efforts that can be considered.

Summary

No matter what is said, it is impossible to create a compliance and ethics program from scratch in ninety days – or even a year – or to apply for an ISO 37001 certification for your anti-corruption compliance program. What can be done, however, is to understand what your company's program lacks, and then commence work on fixing and improving the highest risk items. Remember, no matter if you're working on an anti-corruption compliance program or an anti-money laundering compliance program, the tenets explained here often hold good. Indeed, the learnings from one program can often be utilised for the next, and your job will be made a bit easier. Keep in mind that while there is a tool for everything these days, your expertise and knowledge of the business cannot be outsourced to an entity. Identify where technology can really help you, as in the case of repetitive tasks, and identify where it is only an enabler.

Nirupama Pillai

Based in Bangalore, India and serving as a corporate counsel at the Office of Integrity & Compliance at Infosys Limited; drawing on her experience working across multiple jurisdictions in compliance and ethics, securities compliance and mergers and acquisitions, Nirupama focusses on developing and implementing compliance and ethics program for the Infosys Group.

YOUR PROFESSIONAL ROLE AND ETHICS

In this third article in the series, Richard Dammery writes about ethics and challenges facing General Counsel.

One of the most popular undergraduate courses at Harvard University is Professor Michael Sandel's 'Justice'. Interestingly, this course was also the first Harvard subject to be made freely available online. If you haven't done so already, you can view it at www.justiceharvard.org; or, if you prefer to read, Professor Sandel's book *Justice: What's the right thing to do?* (2009) is readily available.

Putting aside the hordes of Harvard undergraduates who seek to take this course, why would over 10 million people globally choose to watch these lectures online? I guess, because most people want to do the right thing, in the same way they hope others will do the right thing to them. But how do they know what this is, or how to do it? I'm sure that most experienced in-house lawyers have learned that while almost every corporate executive will say that they value their integrity above all else, there's no standard measure of integrity, and people's ability to rationalise behaviour knows no bounds!

Even as an individual, doing the 'right thing' often involves tough choices. Translate that into a complex system, like a major corporation, with collective decision-making and diverse views, and the challenges are obvious. No one person's individual sense of right and wrong will be enough to navigate these waters. For us, as lawyers, this can be especially challenging when we are called on to give advice that goes beyond 'the law' to encompass 'what is the best (right) thing to do in this situation?'.

Professor Sandel begins his book by outlining a modern moral dilemma. In the aftermath of Hurricane Charley in 2004, a storm which claimed 22 lives and caused $11 billion in damage, some traders raised prices for everyday goods and services. A petrol station sold two-dollar bags of ice for ten dollars. Small generators were being sold for $2000, not $250. A seventy-seven-year-old woman fleeing the hurricane with her elderly husband and disabled child was charged $160 for a motel room, normally available for $40. In Florida, and around the USA, there was an outcry, and allegations of price gouging quickly followed.

Ethics and Justice

Professor Sandel uses Hurricane Charley's aftermath to highlight some of the hard (not easy) questions of morality and law. As he points out, these are not simply questions about how individuals should treat one another, but also questions about what the law should be and how society should be organised. In other words, questions of ethics and justice.

With ever-increasing pressure on boards and executives of major corporations to take a broader view of their companies' impacts on society, all in-house lawyers are going to need to develop their skills in ethical reflection and dialogue. Already, institutional shareholders and other stakeholders (e.g. proxy advisers, unions and NFPs) expect active engagement from major corporations, and evidence of clear progress against their CSR strategies. As the OECD has argued[1]:

> ***Corporations are increasingly looked to as agents of change in a world facing mounting environmental and social problems, where policy-makers sometimes struggle to garner the support necessary for bold policies. As part of their strategy and in response to stakeholder pressure, more and more businesses now go beyond strict compliance with environmental and other local regulations.***

Corporate Reporting

Integrated reporting is another emerging trend. The International Integrated Reporting Council (IIRC) has said that: "In the wake of the [global financial] crisis, the desire to promote financial stability and sustainable development by better linking investment decisions, corporate behaviour and reporting has become a global need".[2] It is far from impossible that, in time, integrated reporting could become mandatory, responding to the view that "corporate reporting need[s] to evolve to provide information beyond financial performance to greater insights into the long-term sustainability of an organisation".

In this fast-changing landscape, the view expressed by Milton Friedman, a Nobel prize-winning economist, seems increasingly dated: "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game …."[3]

As corporate in-house lawyers, we will be challenged to respond to changes in the law and suggestions of regulatory reform spurred by these trends. We will be asked by boards and executives to provide guidance on how directors' and managers' responsibilities are impacted. When advising on specific matters, we will be expected to give regard to these broader contextual issues. And, perhaps most importantly, we will be expected to take a leadership role in the organisations we serve to ensure their reputation and standing is maintained and enhanced. Government lawyers will of course be challenged to initiate reforms, so will face equivalent challenges from the policy writers' perspective.

The moral conscience of the company

A couple of years ago I was asked by the Law Society of NSW to speak at an ethics seminar around the topic of the general counsel as the moral conscience of the company. Strong arguments had been made in favour of this proposition. For example, the (then) President of the Australian Human Rights Commission, Professor Gillian Triggs, spoke at the 2015 ACC Australian conference and said that corporate and in-house counsel "have become the moral conscience of the company in promoting good governance, beyond the black letter of the law, … sitting at the 'right hand' of their CEOs and play[ing] a strong and necessarily independent role—like a moral compass—guiding the company towards ethical behaviour along with wealth creation for shareholders".[4]

Professor Triggs noted that in-house counsel can be asked questions "that are not usually asked of management", e.g.:

- Just because an act is legal, should it be allowed in this company?
- How is the public interest best served by this company's behaviour?
- What are the reputational risks to the company if it insists on its technical legal rights?

It is undoubtedly true that general counsel may be asked these questions. That is one reason why Professor Sandel's book is so helpful and relevant to us: it provides support to "reason our way through the contested terrain of justice and injustice, equality and inequality, individual rights and the common good" by reference to modern moral dilemmas.[5]

Personally, I have reservations about describing general counsel as the moral conscience of a company. This implies an enhanced responsibility above other executives to consider the wider consequences of a company's actions. If so, I contend that lawyers are no more skilled, and we are no better trained, to assess these complex wider considerations than our colleagues. From time to time, like all other senior executives, we are faced

with difficult choices, balancing pragmatism and principle. It is surely every senior leaders' responsibility in making decisions and setting strategies to keep in step with community expectations, and the duties implied by a company's 'social licence'.

If lawyers have one advantage in this area, it is that our professional obligations require us to act independently of our client's wishes and preferences. Then Chief Justice Marilyn Warren has expressed it this way:[6]

> ***In most commercial circumstances, the paying client's interests trump all others. That is not the case when it comes to the legal profession and their clients. (p. 4) The [professional] rules or code of conduct provide a clear understanding of what is required of a member of the profession. They serve to identify to a practitioner features of the profession which are essential to proper and ethical behaviour. (p. 2)***

This does not make lawyers experts in dealing with social and moral dilemmas—legal professional duties have a narrower focus. However, the fact that, implicit in our role, there is a responsibility to think more broadly than just our client's (bosses') wishes means that, potentially, we have a "head-start" compared to other executives when it comes to identifying and working through, ethical dilemmas. We should not be the company's moral conscience, but we can—and must—play an active role in helping our clients lead well by taking account of wider ethical and social issues in their decisions. Doing this, we can add greatly to our organisations' successes, and to their durability.

Richard Dammery

As the Chief Legal Officer and Company Secretary of Woolworths Limited, Richard brings a wealth of legal and business experience to the role. Richard previously served as a Partner of Minter Ellison Lawyers in the Mergers and Acquisitions Group and this followed senior legal and commercial roles in the retail and telecommunications industries. Richard holds degrees in Arts (English) and Law from Monash University, an MBA from the University of Melbourne, and a Ph.D in history from the University of Cambridge, where he was a Senior Rouse Ball scholar at Trinity College.

Richard holds a position on the Executive Committee of the ACC Australia GC100

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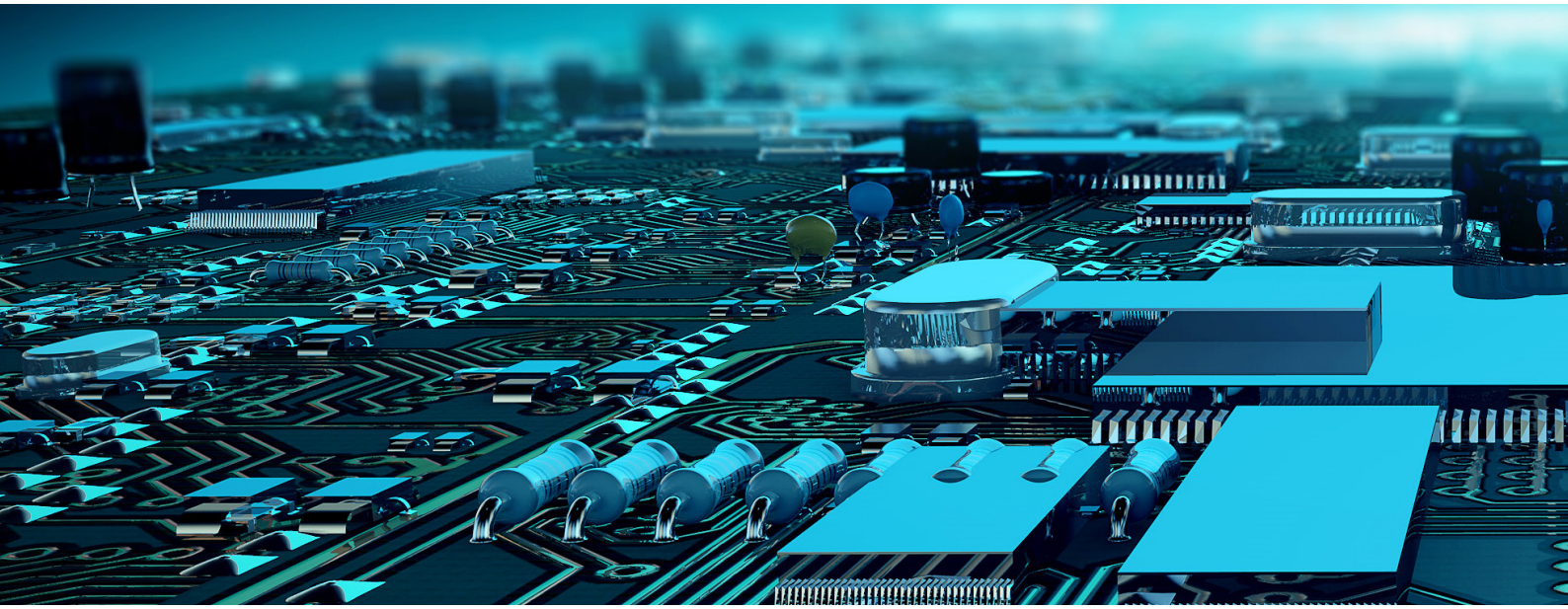
DO LAWYERS NEED TO RETHINK ETHICS IN AN INCREASINGLY DIGITAL WORLD?

Claire Bibby ponders the ethical implications of the ever-growing impact of digital technology.



Many moons ago, as a fresh-faced undergraduate embarking on my journey of the study of law, my first-year class of 1989 saw itself as modern and groundbreaking. We thought this of ourselves because we were one of the first cohorts of students to sit our final exams on a computer. But even in those early days, some were already pushing the boundaries of what technology could do, starting, no less, with the sound of a disk, containing a year's worth of course notes, being inserted into a Macintosh SE floppy disk drive as the examiner's clock began to tick.

Four years later, when I started to put my recently learned legal theory into practice, I soon discovered the power of the WP pool. Those in said pool wielded enormous power, for they were the ones who controlled the speed with which your work transformed from mere words on a dictaphone to the typed form.

By the mid-1990s, computers moved onto the desks of most lawyers. And in the blink of an eye, the World Wide Web moved into mainstream legal firms, no longer the exclusive domain of university-based scientific departments and physics laboratories.

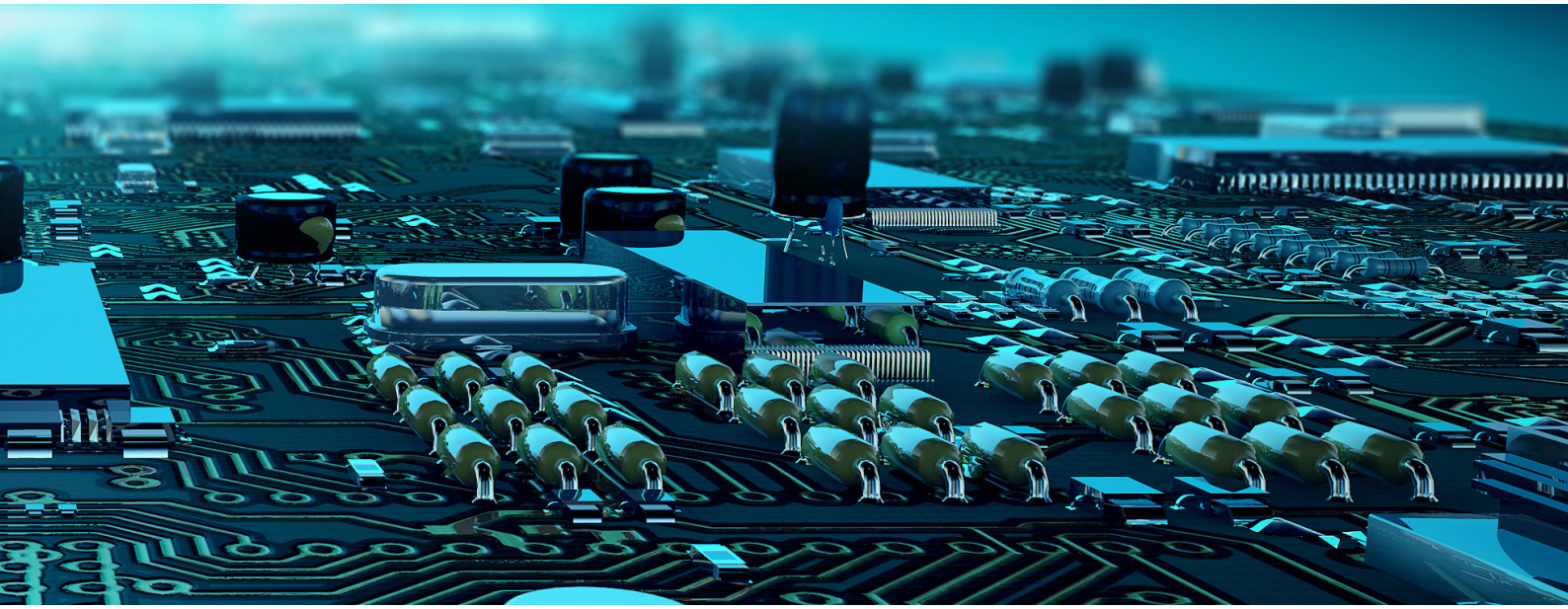
Gone are those carefree days of learning and practicing law, for now we are living, interacting and working in a dramatically different environment. We associate, both at work and at play, within a world driven by smart technologies, the internet of things, intelligent automation, ever increasing avenues of connectivity and the idea (or threat, depending on how you look at it) that one day soon, robot lawyers will be replacing some, if not most, of us. In-house lawyers are now being viewed by commentators as one of the greatest forces for change in this increasingly digitised world. New models of providing legal services are popping up all around us, and Professor Susskind is writing of "Tomorrow's Lawyers", whom will be neither Grisham nor Rumpole-like.

As more smart machines report to work, many commentators anticipate that technological change will increase rapidly, perhaps even at an unprecedented rate, over the next couple of years. As a result, by 2020, many workforces will have changed as these technologies become even more widely used. So, let me ask you this, if I may: What will our moral, ethical and human dilemmas look like as AI interactions expand? Will our concept of right and wrong need rethinking? What will our system of values and principles look like for the conduct of digital communications between businesses, people and things? Are we now, as research firm Gartner says, at a stage where we sit at the nexus of what is legally required, what can be made possible by digital technology and what is ethically desirable? Do we need a new ethical framework for the practice of law in this grey area of the digital age?

Banks are already using our spending patterns to predict the likelihood that a transaction may be fraudulent and then taking proactive steps to alert us when a purchase doesn't pass the smell test. Websites use our online shopping habits to bring similar products to our digital awareness. And companies like Facebook, Pinterest and Google gather data every moment of every day to make advertising algorithms smarter and more tailored to our individual preferences.

Earlier this year, the University of New South Wales announced that it was "preparing law students for a digital world". UNSW Professor of Law, Michael Legg, reported that law is one of a growing list of industries being disrupted by technology. In his words, lawyers need to understand what that means both for the legal profession and for the administration of justice. Professor Legg is alive to the question of what ethical changes may be coming upon us and has suggested that new electives, such as "Start-up Law" (where students learn how to advise start-up entities or entrepreneurs) and "Legal Practice, Ethics, and Technology" be offered to the next generation of lawyers coming through the ranks.

The external legal community already uses the internet for client development, cloud-based outsourcing, new online methods of advertising and concepts of "virtual presence". Overseas, new university courses are beginning to focus on a lawyer's duties to prospective clients when



interacting online, how to determine issues of competency online, how to ethically handle billing and collections procedures with third-party practice management systems, how to work with clients through online branded networks, as well as how to handle UPL issues in delivering services online and if in a multijurisdictional law firm.

At a more practical everyday level, I invite you to consider:

- the growing use of "live chats" and free 15-minute online advice.
- whether your social media might ever be said to bring the profession into disrepute.
- whether an unintended lawyer/client relationship could develop through a social media exchange.
- if the risk of the disclosure of confidential information might be heightened through online communications.

This is not the first time in human history that laws have not kept pace with the many ethical implications of today's rapid technological developments. However, should we by now be questioning the ethics of automatic systems designed to collect data on us on masse, algorithms developed to predict and profile us, technologies used to keep an eye on us and business models profiting from the most private details on individuals?

The digital world we now live in will continue to change the way that we work, live and play. In my view, it is incumbent upon us as lawyers to never forget our overarching duties and to never ignore the potential legal, ethical and moral issues raised by technological advances.

And while the leader of the free world has been referred to more than once as the "Tweeter in Chief", he is neither faceless nor unaccountable (although I accept that some readers may be raising their eyebrows at this juncture), despite operating from behind a digital platform. He is also not a barometer of achieving results ethically in a digital world. In my view, in an increasingly digitised world, the question of ethics gets down not to whether machines are doing the thinking, but whether we still are.

Technology is nothing. What's important is that you have faith in people, that they're basically good and smart, and if you give them tools, they'll do wonderful things with them.
Steve Jobs

Claire E Bibby

A well-known innovator and disruptor in the in-house legal sector, whose strengths rest in working at both strategic and operational levels for her clients. Claire is a non-executive director of Marist180, an Entrepreneur Ambassador for Opportunity International and a committee member of Soroptimist International, the NSW Law Society Futures Committee and the Resolution Institute.

Claire is a member of the ACC Australia NSW Divisional Committee and the ACC Australia Mentoring Committee

STEPS TO ACHIEVING POSITIVE COMPLIANCE

General Counsel and Company Secretary for Curves and Jenny Craig in Oceania, Courtenay Zajicek outlines the principals of 'positive compliance' within organisations.

Every business needs to manage some form of compliance, and this often becomes a primary focus for in-house legal teams to manage and report on. Unfortunately, just using the word "compliance" in business is often met with negativity and resentment, and there is a strong belief that compliance is just a concept and process invented by lawyers to create meaningless 'red tape'.

In my view, compliance management is critical to business success, and best achieved by those who embrace 'positive compliance'. At its core, positive compliance requires a business, and its employees, to collectively shift their mindset from negative to positive, and embrace the reasons why compliance is so fundamental. Whilst this can be difficult at an employee level, it can be even more challenging for external third parties, for example suppliers, contractors and franchisees. They can often fail to see the relevance of our businesses' compliance approaches and processes to their personal or business situation. However, bringing them on the positive compliance journey is just as crucial for the businesses' success as engaging its employees!

In my own experience, I have been able to help achieve this attitudinal switch for businesses, their employees, and other key internal and external stakeholders by following three key steps:

1. Defining and Identifying Compliance

If you ask a group of people to define compliance, chances are that they will all have a different view and interpretation based on their own experiences, and the reality is that there are so many different compliance types, often with strong overlaps (i.e. legal, business and regulatory compliance). Often, words like conformance, obedience, audits and legislation are used, however, I have found it useful to define compliance within the context of the specific business itself, to help give a clearer picture of what this means and how it applies, rather than it just becoming a word used on its own.

For example, because Jenny Craig and Curves have multiple sites globally, part of the businesses success will be measured by its ability to deliver its products and services consistently to its customers, which is an important way to help strengthen its market position. Every single one of the businesses' employees agree that a seamless, consistent and positive customer experience is crucial to business success, but not many then link this to the fact that to achieve this business objective, compliance is needed! Ultimately, all sites must comply (conform and obey) with the established policies and procedures in place that make the brands so attractive to its customer base; without these, the businesses would likely start to lose customers and market share quickly. With that understanding, employees can then link audit and compliance approaches and processes, which are normally viewed quite negatively, with a key business need to continue attracting and retaining customers and achieving business profit.

A slightly varied approach may be needed for external suppliers, contractors and franchisees though, as they are more focused on satisfying their own customers and business needs, rather than ours. I find it important to bring these external stakeholders on our journey as well, and to encourage them to understand our 'why', which helps them to quickly realise that we actually have very similar goals and objectives in this area.

For example, Curves is a franchise network with a number of franchisees running their own independent businesses, but operating under the Curves brand using Curves' intellectual property. I've found the best way to achieve positive compliance from this group is right from the initial on-boarding process. I run an information session during our franchisee training program, which is all about compliance, but doesn't use the word 'compliance' until the very end of the presentation. It focuses instead on the strengths and weaknesses of brands that the attendees are familiar with, and draws on their own experiences with these brands. They are asked to answer and explore questions like "what is your favourite brand?" What would you do if you had a terrible experience with that brand?" And, "if you had a negative experience with that brand, would you still buy the product or service from another outlet?" Each question is designed to be inward focused, to improve performance in their own businesses. Generally, the responses are, of course, that an individual would not continue to use a brand if they had a terrible experience, nor would they want to purchase their products or services from another outlet. It is at this point that they have achieved the first step of positive compliance, without even realising it, because they can appreciate that without compliance, if another franchisee in the network has unapproved products or services, fails to provide great customer service or otherwise provides something outside of the Curves system and model, they have lost a potential customer for their own business, without having ever engaged with that potential customer at all. In essence, Curves' responsibility as a franchisor is therefore to manage 'compliance' (there's that word) to make sure that it doesn't have a negative and detrimental impact on their own business.

In relation to business suppliers and contractors, Curves and Jenny Craig approach this definition and the identification stage of compliance through clear supplier contracts, which incorporate a number of key performance indicators, targets and goals. Often, business contractual engagements only require suppliers and contractors to 'comply with applicable laws and regulations', which is of course necessary, as that supplier or contractor is an expert in their field and should be responsible for their own legislative compliance regimes, without the intervention of our business. However, from a compliance perspective with our own business needs, what must be completely clear is what the expectations of our business are—especially in relation to performance—delivery and service levels. In my experience this is best documented through clear and measurable goals and metrics, similar to a performance plan that might be used for an employee. These goals and objectives are then tracked and measured frequently, and are crucial in the first step of defining and identifying compliance for external suppliers and contractors.

2. Education and Training

The second key step in achieving positive compliance relates primarily to internal stakeholders, and any franchisees or licensees within our business: to educate and train them on the compliance requirements for the business, once they have been clearly defined and identified, so that the parties therefore have an understanding of why these requirements are so crucial. Essentially, this is about understanding the cause and effect—most people don't want to just be told to do something; more frequently, they need to understand the 'why' before they will become engaged and buy into the business' requests.

This step is an important part of my role as the in-house general counsel: to provide education and training to our team focused on ensuring compliance in a wide range of areas. Importantly, I focus first on the key legal and regulatory compliance areas for the business, and take the

relevant employees through a training program designed to make sure they remain legally compliant, but which is delivered in a way that is clear to understand and directly relates to the business (no lengthy case citations or judgements in sight, purely real-life plain English descriptions and requirements—it is my job to manage the legalities of a situation later!).

In my experience, the extra effort taken to tailor education methodologies (including written manuals, online webinars and face-to-face learning) to ensure all individual learning types and preferences are covered and real business examples and situations are presented, rather than far-fetched and fanciful notions in 'legalese' that are not relatable for the individuals, are the main differences between these employees really understanding the 'why' and embracing the positive compliance culture within the business and their position (thus reducing business risk), versus just 'going through the motions' of ticking off the education module and moving on with their positions without making any changes (resulting in no risk profile change for the business at all).

Some of the recent education and training the business has provided to employees includes elements of Australian Consumer Law (in particular sales practices, pricing methodologies, product and service fault requirements, credit card surcharges, and misleading and deceptive conduct in advertising and representations), the Privacy Act and Australian Privacy Principles (including recent data-breach legislative changes) and the Fair Work Act (including the recent vulnerable workers changes). Importantly, the purpose of the education is not to give our employees legal training, but instead to give them the tools and knowledge needed to spot potential issues, and provide an environment and avenue for them to feel comfortable asking questions and raising potential issues with me.

Conversely, without this education, not only would the business be carrying a significantly higher risk level, as employees simply wouldn't realise the potential consequences of compliance matters, there would be potential for resentment and disengagement of the employee at a later date if a compliance issue were to occur in their department or functional area, resulting in a strong level of negative compliance.

Importantly, when managed appropriately, at this stage employees have an ability to clearly define and identify compliance matters for the businesses, and have received education and training on how to spot these issues and address them if they arise. This helps to make them feel more empowered and capable in their role—key requirements to achieving that vital positive compliance—and leads into the final important step of positive reinforcement.

3. Positive Reinforcement

This final step, like the others, is an ongoing step, and must be fully embraced by businesses from the top level down, with the management team consistently leading by example.

Like any strong change management process, this step involves continuous reinforcement of the business' commitment to achieving its compliance objectives (which were clearly identified, defined and communicated in step 1) in the ways that were demonstrated during the training and education process (step 2), and positively reinforcing and rewarding those that demonstrate this behaviour and commitment.

With all of these steps in place, our businesses have been able to build a strong culture of compliance, assisting with reducing business risk, without needing to enforce a strict "legal compliance process" or really even using the word 'compliance'! Our key stakeholders understand the goals and objectives of the businesses, have received the information they need to understand our 'why' and are committed to helping the businesses to achieve their goals—all thorough 'positive compliance'!

Above all, I see my role as the general counsel as a primary support function to the businesses and the person who needs to manage business risk and compliance. I have found that the best way to do this is by following the above positive compliance steps, being available and approachable, and not presenting myself as the stereotypical lawyer focused only on 'red tape' purely for the sake of it, in everything I do and every request I make clearly explaining the 'why' and how it relates back to the business and its needs.

Courtenay Zajicek

As the General Counsel and Company Secretary for Curves and Jenny Craig in Oceania, Courtenay provides broad legal advice and risk mitigation strategies to the management team, with a particular focus on franchising, property and leasing, industrial relations and consumer law. Courtenay holds an MBA and serves as a committee member for the Franchise Council and Women in Franchising groups.

KEEPING THE HOUSE ETHICALLY CLEAN

The importance of courage as a pre-requisite for in-house lawyers.

It is a truth universally acknowledged (in the writer's home, at any rate) that keeping a house clean or tidy is not numbered high amongst the writer's accomplishments. So it is with some trepidation that I set out upon this exploration of the challenges confronting an in-house lawyer in keeping the in-house environment ethically clean, in the hope that in this sphere my credentials are better.

As lawyers, we all understand from a very early stage the broad ethical obligations we have. High amongst them is our duty to our client, which includes a duty to provide independent advice. When we are in-house, our employer is also our client. This increases the pressure when we are obliged to tell them things they do not want to hear or act on.

> ***I don't want any yes-men around me. I want everybody to tell me the truth even if it costs them their jobs.***
> Samuel Goldwyn

It is usually easier for an external lawyer—while losing a client after providing unpopular advice is never a good outcome, there are other clients. Losing one's client is probably not the end of the world.

The pressure is intensified for in-house lawyers. There is an inherent conflict between our own personal interests (in staying employed, meeting the mortgage payment, supporting those who may depend upon us and 'being part of the team') and our professional obligation to the client, particularly if we are under pressure to give advice that may not be in the organisation's interest. For in-house lawyers, losing this one client and employer is to lose our only client.

But the pressures in an organisational environment are often subtle, and can arise in a variety of ways. It is important to recognise the variety of challenges and influences to which an in-house lawyer may be subject, if only because there are different ways of managing and responding to them—though all will require fortitude!

At one level, there is the obvious pressure that can be applied to persuade us to give the advice that the client/employer wants—or not to give unwanted, but necessary, advice. Several aspects of this need to be considered: Is the person who gives you your instructions the client? Who is the client? Is it not the organisation as a whole? It is one thing to be given instructions by the CEO of an organisation. It is quite another to be given instructions by a middle-manager. Often, the interests of a middle-manager may be different to those of the CEO or of the organisation itself. So in these circumstances, we may need to take the question further up the line. This may not be popular with a middle-manager who wants to instruct you, and who may pressure you to give the advice they want. But you will usually find that your CEO wants to know the real facts, and the real position. Sensible CEOs know that understanding a problem properly is an essential prerequisite to managing the problem … Though it never hurts to explain this gently.

Hard challenges

But sometimes it will be a CEO who is making it clear that they do not want to hear your full and frank advice. If you were to go along with this, then a risk transfer has occurred: some or much of the risk has been transferred from the CEO to you. The CEO can always claim subsequently that you did not provide him or her with the advice, and since providing advice is your job, you are exposed to criticism.

In these circumstances, you will need to be brave in confronting the need to give advice, and to give or confirm it in writing. However, you will have the consolation that not only have you done your job ethically, but you have avoided taking on the risk that properly belongs to the CEO (and for which the CEO is paid!).

Of course, it is important to note that while your obligation is to give frank and independent advice, the organisation is not obliged to take it. It is for senior executives or the CEO to decide the level of risk with which they are comfortable, and what steps they wish to take to manage or mitigate that risk.[1]

Throughout a long career in-house (initially with an insurance company, subsequently with the Commonwealth government), I have only had to confront these challenges infrequently. But there are some strategies that I have found useful to help manage these situations.

First, if you are not the organisation's senior lawyer or general counsel, you can take the issue up the line to the general counsel. It is up to the general counsel to take up the cudgels on the issue—if that is what is required, that is his or her job.

Second, you can seek out allies to help you to persuade the CEO (or whoever needs to be persuaded). It will be much easier to do what you have to do if you can enlist the help of senior, respected people who understand the problem and the need to communicate it to the CEO.

Third, it is important to understand that, where confrontation may be fruitless, persuasion may serve. You need to be persuasive in putting forth your arguments and you need to suggest solutions to the risks you identify. You can quite properly point to the risks to which the CEO may be exposed if he or she does not take or follow your advice, and express concern about that risk being run without amelioration. The further the extent to which you can cast the problem as one faced in common, and needing to be jointly confronted and dealt with, the more effective your argument will be. CEOs respond better, in my experience, to conversations about risk involving the pronoun "we" rather than "you". But once advice is given, it is the CEO's choice how to respond.

Fourth, it is important to understand when the problem has moved beyond your solution. If criminal or illegal conduct is involved, you are not going to be able to fix it. You may need to consider whether you have an obligation to blow the whistle, taking into consideration the client's legal professional privilege, or even to resign. Either way, you cannot ethically be party to criminal or illegal conduct.

In all of these things, call upon your peers for advice and support. Most law societies will provide counsellors for ethical issues. You don't have to sweat it out alone. And it is always prudent, before giving controversial advice, to seek some peer assurance that your view is right.

Soft challenges

Sometimes, the challenges with which we are confronted come in a softer, more seductive guise. This is not a challenge unique to lawyers, and CS Lewis[2] described it as follows:

To nine out of ten of you the choice which could lead to scoundrelism will come, when it does come, in no very dramatic colours. Obviously bad men, obviously threatening or bribing, will almost certainly not appear. Over a drink, or a cup of coffee, disguised as triviality and sandwiched between two jokes, from the lips of a man, or woman, whom you have recently been getting to know rather better and whom you hope to know better still—just at the moment when you are most anxious not to appear crude, or naïf or a prig—the hint will come. It will be the hint of something which the public, the ignorant, romantic public, would never understand: something which even the outsiders in your own profession are apt to make a fuss about: but something, says your new friend, which "we"—and at the word "we" you try not to blush for mere pleasure—something "we always do."

And you will be drawn in, if you are drawn in, not by desire for gain or ease, but simply because at that moment, when the cup was so near your lips, you cannot bear to be thrust back again into the cold outer world. … And then, if you are drawn in, next week it will be something a little further from the rules, and next year something further still, but all in the jolliest, friendliest spirit. It may end in a crash, a scandal, and penal servitude; it may end in millions, a peerage and giving the prizes at your old school. But you will be a scoundrel. … Of all the passions, the passion for the Inner Ring is most skillful in making a man who is not yet a very bad man do very bad things.

The language is a bit archaic, but the observations are as true now as then. One of the frightening aspects of large organisations is their capacity to socialise those who work for them to a commonly accepted (if unarticulated) view that we will all continue on harmoniously together to ignore the 'Emperor's New Clothes'. This is evident when we look at the insolvencies of large companies which (we understand only after the event) traded insolvently and deceptively for months or years before crashing. In Australia, they include FAI Insurance Ltd and HIH Insurance; in the USA, Enron is an example. In each case, subsequent enquiries suggest that many people in senior management had known for a long time that there was a problem and that the company was insolvent or close to it. In each case, no-one blew the whistle and in a number of cases senior managers conspired to hide the facts.

As lawyers, we have a particular responsibility to avoid being drawn into the ranks of those who cosily conspire to admire the Emperor's New Clothes. That means having the courage to avoid the comfortable consensus and to ask the difficult questions—because once you have been drawn in just a little bit, it will become more and more difficult to escape. It also means refusing little gifts and favours, let alone large ones, because they carry with them a sense of obligation. That sense of obligation will make it more difficult for you to do what you are professionally obliged to do when the occasion arises.

It may help to realise that our obligation to give good advice and point out problems, even when that is unwelcome, is more than just an ethical imperative:

Telling the truth to the boss is the first responsibility of an ethical subordinate. We're hired for our brains and for the ability to use them. We're paid to give our best effort, which includes our best thinking.

Speaking the truth isn't just a matter of personal integrity; it's crucial for organisational success. Only about half of executives' decisions turn out well. Even the best bosses don't average much better. Their success depends largely on correcting mistakes quickly. Therefore, when the boss gives a faulty instruction or behaves poorly, an ethical subordinate must point out the error.[3]

Failing to point out problems or risks, or to give good legal advice when it is required, is conducive to organisational failure. Acknowledging the problems and risks, and devising solutions to address them, helps an organisation on the path to success. If the Emperor is not told he has no clothes, he will carry on without them—good CEOs and senior managers understand that. And if they do not, ultimately your obligations are to the organisation and its wellbeing.

Conclusions

As in-house lawyers, we have an overriding obligation to give frank and fearless advice, often unsought, if we have found a governance or other problem. The influences we may experience to deter us may be strong or subtle, coercive or seductive. But all will require courage to enable us to do what needs to be done.

Chris Reid

Now a Special Counsel in Maddock's Canberra office, since his admission as a solicitor in NSW in 1980, Chris has worked primarily in-house, initially for an insurance company, then for 32 years in Commonwealth government. Before joining Maddocks, Chris spent 8 years as the Department of Health and Ageing's General Counsel. Chris primarily advises Government clients and practices across public law advice, legislation and statutory interpretation, administrative law, and regulatory law.

Footnotes

1. However, obviously, if it were proposed that the organisation contravene the criminal law, or court orders or rules or the like, that would raise different issues and different obligations.
2. CS Lewis's Memorial Lecture at King's College, University of London, 1944.
3. From Bob Stone, *Telling truth to power—speaking the truth isn't just a matter of personal integrity, it's crucial for organisational success.* Governing, January 9, 2008.

ESTABLISHING EFFECTIVE COMPLIANCE FRAMEWORKS USING DATA ANALYTICS

How Carlton & United Breweries (CUB) are using data analytics to add value and remove risk.

We at Carlton & United Breweries (CUB) proudly brew beer – Victoria Bitter, Carlton Draught, Wild Yak, and the list goes on. While we might not be the first brand that comes to mind when it comes to data analytics and compliance regimes, we have begun using algorithms and automation in our compliance routines as we build up our capacity toward more advanced AI techniques. We view this as the future of compliance and we have embraced the use of data analytics to proactively identify risk areas before problems occur and to develop tighter standards of control and accountability within our operations. Given the increase in regulator activity and the potential for instantaneous and widespread reputational damage with the prevalence of social media, we view this as a sound business practice and one that can reinforce a strong culture of compliance.

What does a beer company have to do with data analytics?

At CUB, our in-house Legal and Corporate Affairs team regularly looks for innovative ways to add value to the business – it is part of our DNA and our mandate. We took this approach to compliance in connection with the recent combination of our parent company with AB InBev, the world's largest brewer. We had been using data analysis and algorithms in connection with mergers & acquisitions transactions in the past.

With compliance, we decided that a similar approach could be used to create long-term value for the business. Large sets of data, looking for patterns and looking for areas of concern --- conceptually, the approaches were similar.

We made the decision to invest in the technology and capabilities to build a platform that would allow us to identify higher-risk areas of compliance concern. This allowed us to focus our lean internal resources on those areas that the data analysis showed were more likely to generate issues in the future.

The process involved developing a data aggregation and analytics program that could handle vast quantities of data across the recently integrated multinational businesses with inputs from various different data sources. We use algorithms and predictive data analytics to spot risky transactions more quickly and efficiently. This in turn achieves significant cost savings as compared with having several lawyers and auditors scour through vast numbers of documents in response to a compulsory notice or investigation.

The Financial Times reviewed this project and awarded it the Standout Award 'Innovative lawyers 2017: Data, knowledge and intelligence – in-house legal teams.' Already we have been able to focus our training and expertise on higher-risk parts of the business.

We anticipate that this accuracy will only improve as we refine the algorithms based on prior results, removing false positive data and learning how our data speaks between systems. Eventually, we want machine learning to be able to assist significantly in refining these algorithms but we have many steps to go before that phase.

What are 'data analytics'?

Essentially, data analytics is the process of extracting and categorising data, and then using qualitative and quantitative techniques to analyse underlying behavioural patterns, in order to enhance business productivity and operations. Importantly, our data analytics project features a centralised and standardised repository that draws upon data from sales, finance and other business systems to identify transactions and parties that pose a high risk of antitrust non-compliance, fraud or corruption. The test results and high-risk transactions are then presented in interactive dashboard suites. Fortunately for us, you don't need to know the difference between a paired T-test and independent T-test to read and interpret the user-friendly dashboards!

Although most of our models involve machine learning, automation and algorithms, it is useful for in-house lawyers to understand some of the underlying techniques. A key technique is regression analysis, which involves measuring the statistical relationship between certain variables. This enables us to test the relationships and levels of risks between particular variables.

Predictive coding is a particularly useful tool for e-discovery document review processes. It undertakes keyword searches, then filters and samples relevant documents. This reduces the number of non-responsive and irrelevant documents that need to be manually reviewed by lawyers, whilst bringing potentially relevant material to the forefront for legal review. This is more accurate and cost-effective than having a large team of lawyers manually review thousands of documents.

What are the benefits of using data analytics?

Proactive compliance and regulatory risk management

In contrast to concerns raised by the Australian Competition and Consumer Commission about companies that use machine learning and artificial intelligence to fix prices, collude with competitors or mislead consumers, we strive to use data analytics proactively in compliance, and eliminate compliance concerns where they may appear. Our data analytics project allows us to identify high-risk areas and establish controls in those areas to mitigate risks before they become problematic. For example, our project facilitates a holistic review of our vendors to protect against certain issues and unusual transactions. Our program also illuminates fraud, graft and leakage, allowing us to proactively resolve and prevent these issues.
For example, we proactively manage compliance with antitrust laws by regularly monitoring and reviewing various conversations with competitors and stakeholders for any potential concerted practices, cartel conduct or other antitrust issues. We also create firewalls to mitigate the risk of cross border non-compliance.

We continually review and improve our compliance framework. This means that our lawyers are always looking for ways to prevent issues before they occur, rather than being too occupied putting out fires.

Leader in compliance mentality

We choose to be proactive rather than reactive and to broadcast our strong compliance culture internally. Having the best-in-class compliance system improves our business processes and people know that we are more likely to find irregular patterns or odd behaviours. When you're likely to be caught, people tend to think twice before stepping across the line.

That mentality supports our company principle of 'No Shortcuts' and helps reinforce the strong 'Tone from the Top' that is a strong part of our company culture. We believe that in the long run this reduces risk and the costs of investigating external requests.

Meaningful impacts on business operations

As our systems are pulled more closely together, we are able to access larger, more aggregated and more detailed data about various aspects of the business. This means that we can track the change of processes proactively, rather than self-reporting reactively and retrospectively. We can detect and assess anomalies across the business. This enables us to flag higher-risk payments for further scrutiny before they are made, such as duplicate transactions or payments involving a government organisation.

Efficient and cost effective

We can more quickly identify trends and risk areas, reducing the time spent on investigations and litigation. This project has helped us identify inefficiencies, cost savings and business performance improvement opportunities across a wide range of business activities. This also saves us the significant costs by external parties reviewing large volumes of our documents.

How can in-house lawyers use data analytics to add value to their companies?

In-house lawyers are in a unique position to identify efficiencies, ideas and gaps between and across various business units. With the benefits listed above, we have been able to proactively identify potential red flags and early warning signs.

Here at CUB, we work closely with business units and project teams to understand how key information, issues and transactions are described, stored and labelled. We apply particular search terms, establish a consistent data model and identify areas for improvement within business processes. Specifically, we undertake the following important steps:

1. Detect – continuously monitor transactions and establish alerts to identify unusual or suspicious patterns, trends or anomalies on an aggregate basis;
2. Discover – perform a thorough assessment to substantiate the identified higher-risk area;
3. Investigate – investigate the risk as appropriate and track the process using various compliance tools and programs;
4. Resolve issues – escalate potentially high-risk actions, payments, counterparties, etc. and take steps to remediate issues, including through tailored training programs and better reporting and auditing mechanisms. At CUB, we train all relevant staff (across all levels) on compliance matters on an annual basis to ensure that our processes are consistent and legally compliant across the business. We have also been able to tailor our training and advice to meet critical business questions and needs identified through the data analytics process.

But what's the catch?

Of course, the use of data analytics does not alleviate the need for regular manual review. In fact, in the short-term, it can create more work. The accuracy of data analytics relies upon data collection, validation, harmonisation and testing. Data errors and pollution may be caused by people inputting and categorising data inconsistently.

This means that someone needs to regularly check, evaluate and interrogate the data for errors, pollution and issues. Lawyers work with systems teams to develop a feedback loop for computer-assisted learning and regression analysis. Naturally this will involve more work in the short-term in order to achieve longer-term gains and ROIs.

What's next for in-house lawyers?

We view the role of in-house lawyers as changing, often in unpredictable ways. This data analytics project is one example among many of how in-house lawyers can become drivers of change and reinforce company culture in an increasingly automated and digitalised world.

We in-house lawyers should take advantage of the unique position we have working with and across several business units to continually identify compliance risk areas and opportunities for business improvement and investment. This gives lawyers a role in building a strong compliance framework and company culture across our companies.

To obtain optimum value from data analytics, we recommend that lawyers regularly check that data is inputted and categorised consistently across the business, and work with the business to understand any changes, trends and anomalies.

Lawyers should use data analytics on an ongoing, proactive basis, rather than retrospectively in order to maximise the impact of compliance practices and protect the company from reputational and regulatory issues. This in turn leads to stronger company culture and stronger reputation– and less ghastly external hourly invoices to review!

Craig Katerberg

As Vice President of Legal & Corporate Affairs, Asia-Pacific South Zone for Anheuser-Busch InBev, Craig is responsible for the zone's government and corporate relations and stakeholder transactions. Since joining Ab InBev in 2012, Craig has held a number of positions in New York, Shanghai and Melbourne where he has led teams of increasing breadth and geographic scope.

Felicity Lee

As Legal Manager, Corporate & Compliance at Carlton & United Breweries, Felicity provides legal support on various corporate and compliance projects, including CUB's overall antitrust and anti-corruption compliance program. Felicity specialises in antitrust law and compliance, and has previously worked as a competition and consumer law at Woolworths, Herbert Smith Freehills and the Australian Competition and Consumer Commission.

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HARNESSING THE MILLENNIAL MINDSET

Loren Blumgart, property and commercial lawyer at Brookfield Property Partners explores the nuances of the millenial workforce.

Millennials have a bad rep. We are either considered lazy and entitled narcissists, or naïve optimists, hell-bent on saving the world. As a card-carrying millennial myself, who has previously spoken on this very topic to both millennial and non-millennial audiences, believe me—I've read and heard it all. In the past decade, a plethora of research studies and reports have been published on millennials in the workplace and all seem to have one common theme: that Millennials are completely different to their predecessors. This perceived difference has made some generation X and baby boomers struggle to understand what millennials represent and what they might bring to the table. Also, many Gen-X and baby boomers see little commonality between themselves and millennials, leading to a misunderstanding of what makes us tick. However, given millennials will represent over 50% of the workforce by 2020, gen-Xers and baby boomers have no choice but to actively 'get to know' millennials, and both the differences and similarities between themselves and the younger generation. Gen-Xers and baby boomers need to investigate and implement ways and measures to get the best out of their millennial workforce which can be done by looking at the types of work environments that enhance millennials' engagement, and by looking internally into how they themselves can harness the millennial mindset, regardless of the generation they were born into.

Who are millennials and what is the millennial mindset?

Millennials are the demographic cohort following Gen-X and are typically defined as those born between the years 1981 and 2001. Millennials are also known as 'Generation Y' or 'Generation Why' because of their inquisitive nature, and are the largest and most highly educated generation in history. Forbes has stated that by 2025, millennials will represent 75% of the global workforce, so by sheer numbers alone, millennials have become a catalyst for accelerated change in the workplace.

In order to understand the mentality of millennials as a demographic cohort, we need to consider the environment that they grew up in. Millennials are the first generation to grow up immersed in a digital world by virtue of growing up with the mobile and internet revolution. Millennials are digital natives. And as the first wave of digital natives to enter the workforce, millennials come with a different set of behaviours, experiences and expectations. This allows millennials to look at the workplace through a different lens to previous generations, which is very valuable for an organisation trying to stay relevant and ahead of the curve in the midst of this digital and technological revolution. Millennials also came of age during the 2008 economic downturn and global financial crisis, resulting in their decreased faith in traditional business models and rigid systems and processes.

Despite this (albeit important) difference (i.e. the fact that millennials are digital natives), millennials are not so dissimilar from their predecessors, and the mindset that millennials innately possess due to having grown up surrounded by technology can be, in some ways, harnessed by all. The millennial mindset is not about being tech savvy—it's about being agile and open to adapting to new situations, it's about being inquisitive and challenging the status quo if you believe something is not working well, and it's about not being afraid to drive necessary change.

In the throws of technological and economic disruption in the workplace, in order for organisations to maintain a competitive advantage, they need to make sure that they have people who want to stay ahead of emerging trends and who have a strong yearning for continuous development and improvement, so the most valuable employees will be the ones with mental agility—those who are willing to learn and harness the millennial mindset.

How to get the most out of your millennial workforce

Companies need to consider their culture and psychology and how those align (or do not align) with millennials and the millennial mindset, and adjust accordingly. Surprisingly, this is not such a big task. Millennials want a more collaborative and cohesive workplace; well-chosen, strategically deployed technology; and a better quality of life—to make an impact with less input. Research suggests a refreshing consistency in that gen-Xers and baby boomers want these things as well, and will therefore also appreciate this welcome change in the workplace. Millennials' desires for a better workplace are known to increase productivity and employee engagement, which no doubt benefits the whole business and the bottom line.

Engagement

Studies show that hiring managers report difficulty in finding and retaining millennial talent and it's not, as some pessimistic older generations express, because millenials lack the motivation required for career progression. It's quite the opposite. Millennials are actually more motivated, however, if millennials do not feel engaged, they are more likely to leave an organisation for another that better engages the millennial and more successfully harnesses the millennial mindset.

Millennials possess a wealth of valuable skills and resources that can assist organisations in responding to the current technological and economic climate of disruption. The key to getting the most out of your millennial workforce is to conceptualise the millennial's skillset outside of its negative stereotypes and generalisations. For example, millennials are not 'naïve', but optimistic; not 'lazy', but efficient; not 'entitled', but assertive; not 'cheaters', but life-hackers; and not 'digitally brain-washed', but technologically proficient. Adopting this way of looking at millennials will allow for the successful integration of millennials into your workplace. Millennials are not afraid of, and actually embrace, the transformative impact of digitisation in the workplace, so it is imperative to engage, and keep engaged, your millennial workforce.

Engaging millennials is as simple as listening to them and seeking out their feedback through open dialogues and interactive discussions. Also, encourage productive suggestions and respectful critique from all employees, regardless of seniority. Millennials, arguably more so than previous generations, desire purpose and meaning in their careers and will not settle for a career that doesn't fulfil them. Organisations need to explain to the millennial exactly *how* the millennial is helping to achieve the organisation's overarching goals—millennials do not want to feel like mere cogs in the machine. In return, if organisations engage millennials in areas like reverse mentoring, which allows millennials to channel their skillset of digital proficiency towards educating other employees and modernising processes, millennials will feel valued and appreciated for what they have to offer.

Team-oriented work environments and innovation

Millennials are team players and have grown up hyper-connected, wired by a communication imperative and surrounded by (and contributing to) social media. Because of this, other people's and professionals' opinions and inputs are valued by millennials, as they recognise that different and

diverse perspectives cultivate the best business decisions and outcomes. It is therefore imperative for organisations to embrace the culture of the 'sharing' economy through collaboration, crowdsourcing and networking, in order to harness the millennial mindset. Improving communication to allow for real collaboration between a multi-generational workforce will ultimately determine the success of many organisations over the next decade.

One way organisations can cultivate a more collaborative work culture is to remodel workspaces to facilitate collective group work and encourage management transparency. Open and collaborative workspaces encourage diversity and open dialogue, which circumvents the groupthink mentality by championing the best idea over the loudest or most well-established one.

Organisations should also create a safe, open and accepting environment where millennials are encouraged to express their ideas for innovation. One way to encourage innovation is through mentoring millennials and encouraging them to feel comfortable voicing their observations and concerns if a process or system isn't working well and allowing them to express their ideas for improvement. Studies show that millennials don't just want to be competent—they want to be innovative. If managers can coach, mentor and guide millennials beyond task proficiency and into the realm of high performance, millennials can then release their creativity to innovate. And innovation is the crux of all competitive advantage.

Millennials love conceptualising and implementing innovative ideas that better social interaction, shared learning and access to information and organisations should develop initiatives to encourage the generation of ideas. For example, Google developed a program known as '20% Time' which actively empowers its employees to be creative and invent by allocating 20% of employees' time to working on projects and ideas that are of interest to them. This initiative has significantly benefitted Google, both in terms of its employee engagement and in terms of its bottom line, and '20% Time' has produced innovations such as Google News and Gmail.

Millennials were also born into the age of instant communication technologies, are completely connected globally and are highly-literate across social media networks and platforms (e.g. Facebook, Twitter, Instagram, Pinterest etc.). Millennials have essentially grown up 'online' and have curated content on social media platforms from a very young age, making them a great asset for organisations' communication campaigns when it comes to 'spreading the word'. Collectively, millennials have taken on the role of unofficial digital marketers for causes and issues they believe in, and organisations should take advantage of this and look at ways they can encourage millennials to utilise this skill to the organisations' benefit.

Technology and flexibility

There is no doubt about it—technology is transforming the business world and it is an important enabler of most successful and significant workplace transformations. Millennials recognise and embrace the need to digitise the workplace in order to align working environments with desired organisational objectives. Therefore, in order to attract millenials and those with the millennial mindset, who can help an organisation achieve their objectives and goals, the digital workplace must reflect the millenials' values and career aspirations, implement less rigid hierachies, showcase transparency and encourage a holistic approach to doing business.

One of the most valuable traits that millennials have is their adaptability in terms of adopting new technologies. Having said this, the totally tech-savvy millennial is largely a myth—particularly the total tech-savvy millennial lawyer. Millennials are however digital natives, regardless of whether they are tech-savvy or not, and as digital natives they have grown up immersed in and surrounded by technology and are therefore not afraid of it, and have an openness and willingness to experiment with technological solutions and adopt the ones that work. Millennials, however, are not interested in tech for tech's sake. If something works, something works, regardless of whether it's high-tech, low-tech or no-tech. Millennials want to adopt and integrate technological solutions into the workplace, but only if they increase efficiencies and enhance global mobility, and allow them to "get out of the weeds" of work that can be automated relatively easily.

One of the biggest changes that technology has created for all is the ability to work anywhere, anytime, which creates almost limitless flexibility, and what I see in millennials is a desire to use this flexibility to their advantage and in a way that works for them. So it is very important for an organisation to deliver flexibility to the millennial, and to any employee for that matter. Research suggests that millennials are not dissimilar from previous generations in this respect—we all want more flexible working environments. In order to appeal to millennials, it is imperative to get rid of out-dated and anachronistic policies such as rigid office hours, and allow your millennial workforce to work remotely, from home or at a client's office. Ultimately, millennials know that whether or not an organisation encourages working remotely largely comes down to trust: whether the employer trusts its employees and trusts that its employees will do the work, regardless of where in the world they are sitting. However, if an employer trusts their employee, the employee will trust them back and be more loyal to their employer as a result.

Corporate social responsibility

Another way to get the most out of your millennial workforce is by instilling a philanthropic organisational ethos through corporate social responsibility. Corporate social responsibility is not just a 'nice-to-have' program nowadays, but an essential offering that inspires a connection to people and community, and links directly to employees' engagement with their employer as an internal motivator. Millennials have a higher respect for, and higher engagements with, organisations that give back to their communities, with research showing that 66% of millennials would be more likely to seek employment from an organisation that supports a cause they care about.

Conclusion

Ultimately, retaining a millennial workforce in your workplace is vital in the midst of this digital, technological and economic revolution. Given that millennials not only represent your current and future employees (and potentially bosses), but also your current and future clients, it is crucial for gen-Xers and baby boomers to appreciate millennials and harness the millennial mindset in order to survive, let alone succeed, in tomorrow's (and even today's) workplace. If organisations are willing to work to attract, harness and communicate with millennials, they will have an abundance of energy and innovation that, when guided correctly, will literally change their workplace, and the world.

Loren Blumgart

As a passionate property and commercial lawyer in the award-winning legal team at Brookfield Property Partners, Loren advises on all legal matters relating to Brookfield's Australian commercial property operations. A strong advocate of utilising millennials to their full potential and encouraging millennials and non-millennials alike to harness the millennial mindset, Loren is also passionate about mentoring and is a participant in both the NSW Young Lawyers Graduate Mentorship Program and ACC Australia's Mentorship Program.

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ETHICAL DECISION-MAKING

Three questions can help make you more effective in managing ethical issues in your organisation.

The role of in-house counsel brings with it an expectation of a high level of professional capability, conduct and integrity. We all have to make ethical decisions at work, which at times can be difficult or challenging. Having a straightforward, practical tool can support you to make the best decision under, at times, difficult circumstances.

In June 2016, the Integrity Commission released its "Three questions for ethical decision-making" tool with the aim of building confidence in the Tasmanian Public Sector for ethical decision-making.

The Integrity Commission commenced in October 2010. Its objectives are to:

- Improve the standard of conduct, propriety and ethics in the public authorities in Tasmania
- Enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with, and
- Enhance the quality of, and commitment to, ethical conduct by adopting a strong educative, preventative and advisory role
- The Commission's jurisdiction includes all public sector authorities, such as state service agencies, health, government businesses, boards and authorities, local government, as well as the University of Tasmania. This amounts to over 40 000 public sector employees.

What is the "Three questions for ethical decision-making" tool ("the tool")?

The tool allows an individual, team or organisation to ask three questions when faced with an ethical issue to support them to make the best decision under the circumstances; they are:

Is it legal?

Is it right?

What if it was news?

A scenario:

You are part of a selection panel which will be awarding a high value contract to a company for the implementation of an enterprise-wide software platform. It will be a major change initiative in your organisation. You happen to know the bid manager from one of the companies bidding for the contract. You were great friends at uni and have kept in touch over the years. Your initial thoughts are to declare this interest and stay on the panel.

When applying the tool, if you are satisfied with the answer to each of the three questions, then you can feel confident to proceed with your decision. You will have a higher degree of confidence that you are acting with the level of integrity expected of you.

Working through each question, *Is it legal?* It sounds obvious. The law provides society with minimum standards, which we are expected to meet. The emphasis here is on "minimum". Additionally, each organisation has its own 'laws' in the form of a governance framework. This is seen through its code of conduct, values, policies, standards, procedures, guidelines and the like. In more mature frameworks, these governance documents reflect the organisation's risk appetite, as determined by its board or equivalent.

This first question seeks to determine if the decision being considered will be compliant with these 'laws' within your organisation. The in-house lawyer is one of the principal compliance officers in an organisation. You play an influential role, not just in flagging worst-case scenarios and applying a proactive, empowering approach but as an ethics champion. As such, you need to lead by example.

It's important for there to be alignment with employee perceptions of the ethical integrity of your decision making. In contemplating whether your decision is legal, consider:

- How well does your organisation identify the legal obligations it must comply with?
- As part of the ethical decision making process, how well does it reflect the organisation's legal compliance obligations?
- How well do the ethical decisions you make reflect compliance with your organisation's governance framework?

You don't have to look too far in other organisations to find disconnects between the law and that organisation's values. Arguably, your organisation's culture will be the single most important indicator of its ethical health. It will be reflected in how well it manages its ethical risks and deals with realised events.

Now, back to the scenario. If your organisation has a conflicts of interest policy, it's likely to require you to disclose your interest. Having considered that you would be meeting your organisation's policy requirement by declaring your interest, it's time to consider the next question.

Is it right?

As an in-house lawyer, you are expected to exhibit sound professional judgement in undertaking your role. In some cases, your decision will be in a highly visible one. To determine if your decision 'is right', you may ask yourself:

- Will your decision align with or conflict with your personal values? This question asks you to apply your own values to see if your decision "sits right" with you. This assumes, of course, that you operate with a sound set of personal values.
- A challenge may arise if your personal judgement negatively influences the decision you are being required to make. There could be a misalignment between your own and your organisation's values. If you can't put aside your personal judgement in a conflicting situation, you should consider excluding yourself from the decision-making process.
- It's worth asking, what would a trusted associate think of your decision? Obtaining an objective perspective from a trusted mentor or colleague is a valuable exercise. This is an important step in your self-assessment.

In your current situation, how will you manage conflict? It's surprisingly common for people to only 'self-consult', going so far as to be offended if they're questioned about not consulting with others. Remember the saying, representing yourself may be seen as having a 'fool for a client'. Be conscious of the importance of having an objective person you can call on—it's a sound approach.

- Is there any self-interest in this decision? Are you biased in any way? Be honest with yourself. If you stand to benefit personally from the decision, it would be wise to remove yourself from the process to ensure transparency and accountability.
- What if everybody in your organisation did this? What would be the consequences?
- The resources you use are scarce. An in-house lawyer faces the challenge of being seen as a cost-centre compared to the benefit derived from the important role of managing the legal and other risks of an organisation. How you use these resource can be open to scrutiny, so use them wisely. Consider the impact of your actions if others followed your lead.

If, at this point, you feel that your decision is right to declare your interest and stay on the selection panel, then it's time to consider the final question, where outside perspectives have the potential to change your approach.

What if it was news?

This question challenges you to apply the reasonable, informed person test to your decision making. Public perception is the public's reality and it's powerful. Knowing your decision may be subject to scrutiny means you need to be confident that you can justify your decision. It would help to ask yourself:

- What would a member of the public, properly informed, think of your decision or action? This differs significantly from "the pub test", where consideration is unlikely to be by someone properly informed and reasonable.
- What would be the perception of others outside your organisation, including potential suppliers, colleagues and clients? Could there be any negative short or long-term consequences?
- Could there be reputational consequences if your decision failed to meet the expectations of the public, suppliers and others?

Now, our final look at the scenario. It's important for you to be mindful of the fact that perceptions of bias or conflicts of interest can be just as damaging to your organisation's reputation as actual conflicts.

Would there be an issue if you did stay on the panel? Considering the closeness of the relationship between you and the bid manager, would it be wise to stay on the panel? If your friend's organisation were the successful bidder, could you be seen by a properly informed person to have influenced the outcome in his favour? How would your organisation manage this perception?

The public's perception of a conflict can be further compounded by their ability to report and speak-up about something they think is wrong. Social media and portable technology have enhanced the visibility of the behaviour of organisations and the speed with which information can flow. In light of these possible perceptions, you may wish to reconsider your place on the panel. Removing yourself still enables you to fulfil your legal advisor role and would address this perception of a conflict.

Why it works

The Commission uses the tool extensively throughout its range of educational offerings, including explainer video, support materials, online content and face-to-face education sessions. We work through scenarios as a way of facilitating confidence in public sector employees when faced with ethical issues. We consistently receive positive feedback about how effective the tool is in supporting the decision-making process. The key reasons why the tool works as a support include:

- The steps capture key elements that need to be considered when faced with making an ethical decision.
- It can be used by an individual, team or organisation to consider any ethical scenario.
- The process can be as detailed or simple as required, and
- It supports an objective assessment and can be used as a checking mechanism in the decision-making process.

We hope you find the tool complements your existing skill set and helps you as an in-house lawyer to be more effective in your role.

Tassie Strafkos

With a background in private legal practice and government business enterprise as a lawyer, contract manager and corporation compliance officer, Tassie currently serves as a Senior Education Officer at the Tasmanian Integrity Commission. There he applies his passion for supporting ethical governance in the public sector.

CLASS ACTIONS AND FUNDED LITIGATION

An expanding landscape, with a federal inquiry on the horizon.

In December 2017 the Federal Court made orders approving the settlement of a securities class action in *Caason Investments Pty Ltd & Anor v Cao & Others*. Those orders included orders for recoveries by the third party litigation funder, which confirmed that common fund orders are here to stay.

Although the Court has not yet published its Reasons for Judgment, the orders reflect a growing jurisprudence of the need for commercially appropriate but reasonable financial recoveries by the funder in a successful class action as compensation for the risks that are borne by the litigation funder. These include the risk of an unsuccessful action, adverse costs orders, the payment of money into Court as security for the potential costs of the defendants, and bearing the legal costs during the progress of the action.

In recent years, courts have increasingly been required to consider whether some method of sharing costs should be employed in the context of class actions. This is a very important consideration when the legal costs can be very expensive and incurred over a long period, and where those costs (and the payment of any security for costs) are met by the litigation funder at the behest of the plaintiff(s) and the funded group members, but which are ultimately for the benefit of all group members to the class action. The principal ways in which the costs can be shared are by a funding equalisation order and a common fund order.

A funding equalisation order has the effect that the legal costs and funding commission, otherwise payable by funded group members under their funding agreements with the litigation funder, will be shared by all group members, whether funded or unfunded.

A common fund order still shares the legal costs across the entire class of group members, but also applies the percentage commission that funded group members agreed to pay (under their funding agreements), or a lower percentage that is set by the court, to all funded and unfunded group members. It means that all funded and unfunded group members who will benefit from the settlement or the judgment must share equally in the costs of the action and the litigation funding costs.

It has only really been since late 2016, with the Full Federal Court's decision in *Money Max Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 that the Courts have recognised that there may be appropriate cases for the making of a common fund order, but that the Court should supervise the funding charges "*to approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias*" ([81]).

Since the Full Court's decision, Beach J in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgrs apt)(in liq)*(No 3)[2017] FCA 330 (Allco decision) approved a settlement of the class action which provided the litigation funder with a 30% return on the net settlement sum, which equated to 22% of the gross settlement sum. Also, in *Pearson v State of Queensland* [2017] FCA 1096, the Applicant applied to the Federal Court for orders opening the class and making a common fund order at a funding commission rate of 20%, or such lower percentage as the Court considers reasonable at a later time when the Court has more complete information. The Honourable Justice Murphy observed that funding charges have become a standard cost in class actions and, without the order, the class would not be open and it would not be possible for new group members to have the option of participating in the proceedings.

The orders in *Caason Investments* further extend this jurisprudence by virtue of the Court's order that 30% of the gross Settlement Sum (before deduction for the Applicants' legal costs of the proceedings) be paid to the litigation funder. This is a significant development, and pending the publication of the Court's Reasons for Judgment, it can only be assumed that this is further recognition of the costs and risks that litigation funders incur and are exposed to during protracted class action proceedings. It may mean that litigation funders will increasingly secure a funding commission applicable to all class members, without first having to bookbuild the class.

In *Caason*, the Applicants were ultimately able to secure a settlement that was approved by the Federal Court, which will result in some return to shareholders of the failed Australian publicly listed company, Arasor International Limited. But for the involvement of the litigation funder in funding the class action, it is unlikely that any of the shareholders would have recovered any of the losses they incurred in investing in the company's securities under the circumstances of the alleged misleading and deceptive conduct by the directors in the Initial Public Offering prospectus, and by the alleged misleading and deceptive conduct of the directors and auditors in the company's further prospectus and financial statements.

Class action exposure

Class actions have been steadily increasing. From 2010 to 2016, an average of 29 claims were commenced each year, compared with 19.4 claims being commenced each year between 1992 to 2016 (per Prof Vince Morabito, *An Empirical Study of Australia's Class Action Regimes*, Fourth Report). This development is likely to see even more open class actions being filed, particularly in the areas of shareholder and investor claims, and claims against financial advisors and other professional service providers. One only has to consider that from 1992 to 2016, 76% of the funded class actions filed in the Federal Court were brought on behalf of shareholders or investors. Indeed, many institutional investors are now participating as group members in class actions to secure some recovery of their losses as significant investors in failed enterprises or schemes, or as significant shareholders of companies that very often have breached their ongoing disclosure obligations of price-sensitive information.

It is therefore incumbent on insurers, banks, and other lending and financial institutions and companies to continue to closely scrutinise and monitor their operational practices, as well as their compliance with continuous disclosure requirements, and the extent to which they are exposed to class action litigation that is now readily being funded by third party funders.

Funded litigation—a potential resource for asset recovery

Does good corporate governance now require the assessment of litigation funding to minimise losses to shareholder value? The answer must be "Yes".

The expanding landscape of class actions and funded litigation also creates an opportunity for businesses with valuable litigation claims that can be pursued to realise their value. Those claims may include recalcitrant debtors, supply contracts that have been breached, or failed partnerships and joint ventures.

Given the increasingly large claims, and the significant resources that are required to be devoted to pursuing those claims through the courts, it is important that businesses are able to continue their operations and revenue streams whilst they are involved in what may be protracted litigation. Third party litigation funding enables those claims to be realised whilst the business gets on with doing what it does best. It also means that the business can apply its own financial resources to the business of the company, rather than funding the litigation.

It is therefore incumbent on companies and businesses to assess their own risk appetites to self-fund litigation and the costs of doing so (to realise those choses of action against third parties), and in so doing, to consider the possible options of engaging a litigation funder to fund such litigation. Of course, the litigation funder will bear the associated risks of the litigation, but based on recent caselaw, litigation funders may be confident that they could do so in the expectation of a commensurate return if the litigation is ultimately successful.

The shifting horizon

On 15 December 2017 the Attorney-General announced a reference to the *Australian Law Reform Commission* (ALRC) to inquire into class action proceedings and third party litigation funders. The concern of the Turnbull Government has been expressed as wanting to ensure that the costs of such litigation are "appropriate and proportionate and that the interests of plaintiffs and group members are protected". The Attorney-General has expressed the view that there is a significant risk that members of plaintiff groups may "be required to pay lawyers' fees which are exorbitant and unjustifiable".

The Commission is required to consider whether and to what extent class action proceedings and third party litigation funders should be subject to Commonwealth regulation, with reference to "specific matters that have arisen, including the proportionality of lawyers' costs and the lack of ethical constraints" on the operation of litigation funders, such as those which bind lawyers.

Currently, litigation funders are not subject to any comprehensive regulation in relation to their operations in Australia.

This announcement follows the Federal Productivity Commission's report in 2014 on *Access to Justice Arrangements*, in which the Commission's recommendations included a licensing system for funders to ensure that they hold adequate capital relative to their financial obligations, that they properly disclose to clients their relevant obligations, and that they have systems for managing risks and conflicts of interest. These recommendations have not yet been adopted into legislation or other resulting regulation of the litigation funding market.

At a state level, in January 2017, the Victorian Government asked the Victorian Law Reform Commission to review litigation funding practices in the state and to report on areas for reform. The Commission will report by March 2018. The Commission's report will be followed by the report of the ALRC to the Attorney-General, which is in December 2018.

The increase in class actions in Australia under both Federal and State regimes has seen a significant increase in the number of litigation funders in Australia. It is an expanding class action landscape that may well see further regulation as a result of the reviews and potential reform on the horizon.

Whilst the outcome may result in further regulation of class actions and their third party funding, any such reform is, of course, also likely to impact on the operations of litigation funders generally in the Australian litigation market, and is very much a "watch this space" as we head into 2018.

Amanda Banton

Serving as Partner at Squire Patton Boggs, Amanda's practice encompasses a broad range of corporate and commercial litigation matters with a particular emphasis on matters relating to the corporations legislation, bankruptcy, State and Federal trade practices legislation, negligence and contractual disputes. She's also led a number of high profile insolvencies such as the administration and liquidation of Lehman Brothers Australia Limited.

Lisa Gallate

Currently Of Counsel at Squire Patton Boggs, throughout her extensive legal career, Lisa has acted on some of Australia's largest corporate insolvencies advising insolvency practitioners, banks, directors and creditors. She has extensive experience across a range of commercial litigation matters and regularly appears in the Federal Court of Australia and in the Supreme Courts of New South Wales and Queensland.

THE WEAKEST LINK

Supply chain security – the role of compliance in cybersecurity.

Cybersecurity, like money, is one of those things that become screamingly important when there is a lack of it. Compliance is widely recognised to be a critical component of cybersecurity. This article considers how an in-house counsel and other legal practitioners can support a corporate client in pursuit of better compliance in cybersecurity.

A number of large, well-publicised data breaches were reported in 2016–17. Some were the result of non-malicious employee error (for example the Commonwealth Department of Health's publication of confidential information on its public portal), whilst others were the result of organised cyber espionage. An IT contract should provide for all eventualities.

Technology contracts often deal with cybersecurity by imposing obligations and liabilities to keep networks, software and digital assets secure. The scale and significance of more recent data breaches has led to a new focus on supply chain security. Risks and vulnerabilities are more likely than ever to be introduced into your client's technology by a malicious act, impacting not only their operations but those of their contractors, subcontracts, third party suppliers and so on.

In April 2017, security researchers published a report[1] into a long-term international cyberespionage campaign. The security threat was dubbed 'APT10' and researchers released the report in order to raise awareness so that prevention and detection capabilities could be put in place. As commercial lawyers advising in technology deals, we should be aware of vulnerabilities such as APT10, and recognise that to some extent back-to-back agreements and contractual visibility of primary service providers and their main subcontractors may not adequately deal with today's risks and the complex liability issues that arise.

APT10 impacted managed service providers in Australia, the UK, the USA, a number of north European nations, South Africa, India, Thailand and South Korea. However, Managed Service Providers (MSPs) were not the intended victims. MSPs were compromised in order to infiltrate the networks of their clients, covering a diverse field, including: engineering, manufacturing, retail, energy, pharmaceuticals, telecoms and government agencies. Interestingly, APT10 did not initially target mission critical technology. Malware was installed on non-critical machines, which were then used to move laterally into the targeted technology. Remote desktop protocols were used to steal data, which was then collated, compressed and sent from the MSP's network to infrastructure controlled by APT10. It is worth noting that the security researchers indicated that they had observed APT10 since 2013. The report does not disclose how much data or the types of data that were compromised by APT10.

From a commercial lawyer's perspective, at a basic level, cybersecurity is about trying to maintain confidentiality. At a more sophisticated level, a commercial lawyer can assist clients by fully understanding the commercial arrangement and helping the client to protect itself against a known cybersecurity risk.

If your client is involved in a data breach it is not only commercially sensitive information that will be compromised; they are likely to face the disclosure of personal information affecting hundreds of thousands—if not millions—of people. In the face of high reputational risk and other liabilities, a well-constructed commercial deal containing a clear framework with agreed rights, roles and liabilities can go a long way towards (ideally) preventing as far as possible a cyberattack, and minimising its impact should one occur. While transfer of risk is a valid risk minimisation strategy, it is not possible to contract out of regulatory data protection and data compliance obligations.

Issues for consideration when drafting or negotiating contracts:

Definition of confidential information

- It would be prudent for a customer to insist on a detailed and 'including but not limited to' list in the definition of confidential information, for example:
  - data
  - personal information (including sensitive information)
  - medical information
  - financial information.
- An IT supplier would be better served if the customer accepted a more traditional definition of confidential information, limited to material that the customer clearly communicates to be confidential, and expressly not including any material made by the IT supplier or its subcontractors.
- Definitions for personal and sensitive information can be tied to the *Privacy Act 1988* (Cth) and its attendant *Australian Privacy Principles*.
- It is good practice to separately define confidential information for both the parties, as each party will share a different type of information during the performance of the contract, and each party will have a different role for data transmission, data storage and data ownership. If there is only a one-way flow of information, only one party's information should be protected.

Contractual obligation to maintain confidentiality

- Agreements should contain obligations not to disclose and not to misuse information. It is common for a confidentiality obligation to survive expiry or termination for a set period of time. Perpetual protection of confidentiality should be drafted carefully, noting there is case law that suggests that such clauses will be read down to apply only until the confidential information has entered the public domain.[2]
- The clause should describe what should happen to the confidential information at the expiry or early termination of the contract. For example, is the provider permitted to retain a copy? Must all confidential information be returned or destroyed (and at the election of which party)?
- A separate positive obligation should also be included to stipulate that no information/data is released either to a third party or to the world at large.

Notification obligation

- A contract should include a separate positive obligation to promptly report any security breach affecting the customer's data to the other party. Without such an obligation, there may be a long delay in responding to the data breach and a party becoming aware that their information has been compromised.
- A customer might wish to include an obligation to be informed upon any data breach (i.e. even a data breach not affecting the customer's data).
- Ideally, the contract should raise an obligation to notify the other party of any actual or suspected data breach within two business days, remembering that time is of the essence in addressing commercial, operational, reputational and regulatory issues that arise. From 22 February 2018 obligations pursuant to the new Notifiable Data Breaches regime must also be factored in.

Service levels

- A contract should contain service levels that bring metrics to a failure to perform cybersecurity measures.
- Service levels could support obligations to comply with a customer's security standards and data security obligations pertaining to personal information that arise pursuant to regulatory provisions.

Note that if a data breach is the supplier's fault, the customer may have a common law action for breach of confidence available. Such an action could lead to an award of damages, an accounting of profits, a constructive trust, injunctive relief or restitution, for example.

Both parties should conduct due diligence on how data will flow from one party to another

- It should be possible to identify the main risks of how a data breach can occur. You should encourage your client to identify what information is at risk and the pathways of information flow (not only between the parties, but if you are advising the IT supplier, the pathways through which the customer's information flows within their organisation and also to subcontractors).
- An IT supplier should have in place internal measures and controls to track information flows and their compliance with confidentiality and regulatory obligations.
- Information storage issues should be considered, for both storage in software and storage in equipment.
- If you are advising a customer and your client is concerned about data breach, you should consider negotiating bespoke contractual provisions describing what is permitted and what is not permitted in relation to data storage, use and transmission.

Liability

Should your organisation or client then be affected by a data breach (either as a victim, as an organisation targeted by a hacker or as an organisation that has subcontracted where the subcontractor is the target of a cyber attack) the contractual framework should be clear. Most importantly, the contractual framework should clearly describe each party's obligations in relation to a data breach, notification steps, timelines, which party is responsible, liability and the handling of claims by third parties.

Indirect/consequential loss

Loss of data is becoming an increasingly contested negotiation point in the context of indirect/consequential loss. While it is not uncommon for indirect/consequential loss to be excluded from an agreement, we recommend close consideration be given to treatment of data (and loss of data). Where relevant, loss of data should be expressly acknowledged to be a direct loss, so as not to be captured in any exclusion of indirect/consequential loss. There is always middle ground which can be negotiated, such as treating loss of data as a direct loss only if agreed security measures and data back-up systems are implemented to limit the risk of loss to data.

Subcontractors

From a customer perspective, consider negotiating a limitation on the supplier's ability to subcontract and require prior written approval. If a customer has the right to give their approval prior to subcontracting, there is an opportunity for the customer to vet subcontractors from a cybersecurity perspective.

Additional provisions for consideration

- Require individual contractor and subcontractor's personnel to execute undertakings in respect of security or access to customer premises
- Obligation for personnel (contractor and subcontractor personnel) to undergo security assessment
- Obligation for personnel (contractor and subcontractor personnel) to attend your security training.

Rights to access and audit

Even if a technology contract does not give a third party the right to access your client's information, many practitioners also look to include an unfettered contractual right for the owner of the data to conduct independent checks of the security measures in place. You should also consider the terms of technology contract to ensure that your client will not be in breach of contract if they decide in the future to engage a third party to monitor the technology to ensure a supplier's staff or a third party are not stealing or making unauthorised modifications to your data.

Insurance

Cyber insurance will afford an additional level of protection should an adverse event arise. Once again though, the agreement should identify who is responsible for taking out insurance and for what, also considering whether the interests of other parties should be noted.

At the end of the day, compliance is a level of protection but not a guarantee of security. Compliance as a line of defence will only be as strong as your weakest link. In that context, the supply chain and procurement practices represent risks often not identified when the compliance focus is inward facing. Cyberspace represents a clear and ever present danger to organisations of all types and sizes, so don't let your client's weakest link be their downfall.

Shaun Creighton

As Partner Director at Moulis Legal, Shaun leads Moulis Legal's intellectual property and government procurement practice. Over the course of his legal career Shaun has acted for some of Australia's best-known brands by assisting them identify, protect and commercialise their valuable intellectual property rights in Australia and internationally. Shaun formerly held in-house roles with the Australian Sports Commission and the Melbourne 2006 Commonwealth Games Corporation.

Jeannette Scott

Boasting over fifteen years' experience across the regulatory environment, Jeanette assists both NFP and for-profit organisations meet their legal and regulatory obligations. Jeannette has undertaken senior in-house counsel roles with the National Heart Foundation, and the Association for Data-Driven Marketing and Advertising and was one of the inaugural recipients of the designation CCP (Certified Compliance Professional) from the Australasian Compliance Institute (as it then was) in 2006.

Dorothy Terwiel

With extensive experience in both private and government practice, Dorothy advises clients in information technology and procurement transactions. While previously on secondment with the Department on Defence, she she was a key member of the commercial tender evaluation working group that reviewed and reported on the procurement of a fleet of offshore patrol vessels.

Footnotes

1. *Operation Cloud Hopper—exposing a systematic hacking operation with an unprecedented web of global victims*, April 2017, www.pwc.co.uk/cyber.
2. Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181.

GLOBAL SUBSIDIARY COMPLIANCE

A Key Priority for Directors and Executives of Multinational Corporations

With the liberalisation of trade barriers in recent decades, companies have expanded their international footprint and the world has become increasingly interconnected. Executives and boards of directors overseeing multinational corporations (MNCs) have been introduced to a unique challenge in the process—corporate governance on a truly global scale. Investors and other stakeholders expect MNCs to manage business and related risks effectively at all times and to adhere to best practices around the world to properly protect the corporation.

A typical global organisation would have offices and staff around the world, and the set-up combines a significant level of focus given to corporate governance, human resources and taxation, usually funneling heavy cost and significant staff time solely on the activity. Risk management has thus become a tier one issue and a subset of this exercise is to ensure that the business risk and regulatory compliance of all subsidiaries across the world are managed effectively. This usually requires building complex structures around the business processes, ensuring that the responsibilities and deliverables of the various internal (finance, legal, tax departments etc.) and external (outside counsel, auditors etc.) stakeholders are organised in the most efficient way.

In many cases, the first step of such a process is to select and implement a software solution for entity management and compliance (of which there are a number of options). Legacy data from various internal stakeholders are then uploaded, hopefully with measures to ensure that the data integrity of this system is assured. Throughout this process, compliance and status reports are continuously generated to keep track of critical data for all subsidiaries in the global network. These reports can then become the basis for more detailed internal risk and compliance reporting that internal stakeholders at MNCs provide to their executive committees and boards of directors.

This can certainly be a burdensome process, because internal stakeholders who are equipped to perform the tasks involved usually have other focus areas as well. Therefore, in many cases MNCs will establish an internal team to manage this project and have this team work with an external specialist like Citco Global Subsidiary Governance Services (Citco GSGS) to ensure that it is completed within the required time frame.

Corporate governance - A key focus

Legal or company secretarial departments have a professional duty to act in the best interests of their organisation. With increasing regulation in the global market, the traditional preconception of such a function has evolved well beyond the administration of documents related to requirements and obligations. These departments now function as an important gatekeeper for good global corporate governance. The expectation now involves strategic advice to board members or senior management to prevent fines as well as to avoid uncertainties and regulatory breaches. Therefore, a failure in meeting compliance requirements should not only be seen as a routine operational matter—rightfully, it carries the big red flag of financial and reputational risk, as well as personal professional risks for a director.

Introducing effective systems and smart processes are crucial; we have seen many global MNCs pay a high price for compliance failures.

A case for the effective management of global subsidiaries

Citco created its GSGS offering specifically to address the issues mentioned above. We have worked with multiple multinational corporations with global footprints to develop our services and capabilities in this space, and through this the objective has always been to assist our clients in maintaining a good corporate standing.

Our value proposition revolves around providing a single point of contact and a service delivery team that is 100% dedicated to our clients. In order to keep their subsidiaries compliant across the global portfolio, this efficiency goes well beyond the initial collection of records and documents—it extends, more importantly, to the continuing upkeep of these obligations.

Corporate and entity data always need to be kept up to date, and from our clients' collective experience this has increasingly become more intricate, usually involving intellectual property agreements subsidiaries enter into, as well as data that is relevant for tax reporting (tax returns of subsidiaries, information that is required to satisfy compliance with the Foreign Account Tax Compliance Act or Common Reporting Standard). Depending on the scale or the case, outsourcing this coordination role to a service provider significantly reduces administrative burden and cost, and in the end plays a key role in minimising risk.

Compliance health check

It is also worth mentioning the importance of a regular compliance health check (CHC), which should not happen only after a burst of M&A activity. Remember, the authorities are now actively going out and conducting random checks; any MNC—particularly listed companies—could be contacted by authorities in any particular jurisdiction requesting further information for audits.

The CHC procedure is designed to identify the status of annual obligations and any remedial actions necessary in order to ensure that all the legal changes of acquired companies are carried out properly. Being an extension of our clients' legal team, Citco GSGS also sees that a few months after large acquisitions whereby multiple subsidiaries have been on-boarded, legal entity rationalisation projects necessarily need to kick off. These projects involve the complex coordination of input from lawyers, accountants and tax advisors, and Citco GSGS has regularly been asked to assist and play a leading role in this process to reduce clients' administrative burden.

Relevance and importance of global subsidiary Governance

Although many of the best practices that MNCs use for global subsidiary compliance have been developed in North America and Europe, these principles are universally applicable not just to MNCs but also to private equity or real estate funds, as well as other privately held organisations with a global footprint.

Let us review and summarise the steps that MNCs can take to build an effective subsidiary compliance program:

1	Align all internal and external stakeholders and develop a process whereby all relevant data is centralised in a software system that functions as single source of information and data for all subsidiaries
2	Select a software system that matches the needs or your organisation and ensure that all legacy subsidiary data is uploaded accurately within a specific time frame. This will typically involve the help of an external expert firm (e.g. there are a number of systems in the market and Citco GSGS is fluent in all of these but it has also developed a unique Client Service Portal to support clients)
3	Ensure that protocols and processes are established to safeguard the integrity of this database and keep it up to date at all times. Again, an outside expert can help to provide a single point of contact and delivery for subsidiary compliance to achieve this goal (e.g. choose your providers wisely to ensure efficiency and better cost estimation—there is certainly no point to having many providers if you could have just one for all jurisdictions—think about the time spent on checking each invoice and settling in different currencies)
4	Test this system periodically by doing corporate compliance health checks on entities of groups or subsidiaries (certainly before a critical transaction or after an M&A event)
5	When acquiring another business and group of subsidiaries, make sure that all entity data is reviewed and validated before adding it to the existing database, and
6	Run periodic entity-specific or organisation-wide reports from the system to ensure that information is aligned with the general risk management strategy of the MNC.

In a world of increasing risk, regulation and diminishing budget, the latest corporate governance landscape puts a new emphasis on the effective management of subsidiaries. To stay on top of the game, integrating risk management into the decision-making process is the key focus. The legal sector has always been rather traditional and hesitates to adopt different methods for processing. We do indeed need to think of technology and innovation as an opportunity, and establish a best practice for global subsidiary compliance before it is too late.

Case Study: Legacy data cleansing and sorting

Citco GSGS helped one MNC client resolve a historical document backlog. This MNC had recently implemented advanced subsidiary management software and wanted historical documents to be maintained therein, but scanned legacy documents pertaining to foreign subsidiaries had to be organised. Apart from the organisational challenge to catalogue these documents, most were in foreign languages. Citco GSGS was able to assist this MNC because of its expertise in working with multiple languages and document types, as well as its experience with various entity management systems.

The project was completed within a very short timeframe after the MNC gave Citco GSGS access to the extensive collection of unsorted documents; these were sorted in foreign languages, named according to global English naming conventions and posted to appropriate document holders next to a specific subsidiary. Citco GSGS also delivered the sorted documents to a back-up drive.

Robert-Jan Kokshoorn

Since joining the Citco Group of Companies in 2000, Robert has had various positions with several group subsidiaries in Curacao, Geneva, San Francisco and Miami. He was instrumental in the setup and development of what is called Citco Global Subsidiary Governance Services (GSGS) today and he remains a member of the GSGS management team.

THREE TRENDS IN ETHICS AND COMPLIANCE IN 2018

The role of the legal function in ethics and compliance includes, among other things, shielding the organisation from internal and external harm. Legal departments are usually responsible for a suite of ethics and compliance programs, especially around staff training, policy and procedure management, and third-party risk management. However, in-house lawyers are also becoming critical operatives for organisations battling twenty-first century ethical and compliance-related risks. Here's a look at three ethics and compliance trends organisations will likely need to monitor and address in 2018.

Trend #1: Victims have a found a new outlet

Traditional methods of recourse for victims of harassment in the workplace are changing. In the past, victims would make an internal report, file a charge of harassment or pursue other legal options. Such methods required courage and effort on the part of the victim. Today, victims are voicing their concerns louder than ever, thanks to social media and other digital platforms. The internet and social media have swung the balance of power. Sexual harassment and sexual assault allegations have surfaced against an increasing number of influential people—Harvey Weinstein, Charlie Rose, Kevin Spacey, Matt Lauer and Bill Cosby are but a few names that have been revealed. The internet and social media is raising the stakes for organisations to have, foster and continuously review robust incident management programs.

Social media is powerful. Unlike traditional forms of media, such as television, radio and print media, column inches and expensive airtime are not a concern. This means that an individual writing or voicing a concern can be more expansive and thorough.

Employers will need to make sure that employees are properly trained and reminded about what is and is not permissible. Employers will need to foster an environment where employees feel comfortable raising their voices and enforce policies that make people accountable for things they say and do. The legal function will, no doubt, need to continuously play a key role in this arena.

Trend #2: Cybersecurity and incident reporting

Cybersecurity continues to be a major concern. From a compliance perspective, rulemaking—as well as data protection, incident reporting and third-party risk—will continue to rise. In Australia, businesses can no longer keep quiet about cyber security breaches, as Parliament passed laws mandating their disclosure. The *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth) amends the *Privacy Act 1988* (Cth) (Privacy Act) to introduce mandatory "eligible data breach" notification provisions for entities regulated by the Privacy Act. This brings Australia into line with other countries globally. The new rules will take effect in 2018, giving businesses limited time during which to prepare for compliance with the new legislation.

In the EU, implementation of the General Data Protection Regulation (GDPR)[1] will be enforceable in May 2018. The scope of GDPR is broad and its extraterritorial reach is extensive. The penalties for non-compliance are high. Both the US and the UK are focusing supervisory efforts on third party risk—a significant element of cybersecurity. Because of the proliferation of technology and increased use of mobile and tablet devices the legal function needs to undertake more compliance-related work and provide advice on specialised privacy issues. The role of the legal function will evolve to include security, risk, compliance and privacy responsibilities.

Trend #3: Continuous disclosure and class action lawsuits

2017 marked twenty-five years of the class action (representative proceedings) regime in the Federal Court of Australia. In recent years, class actions have become the main instrument through which investors seek to recover compensation. The 2006 High Court ruling *(Campbells Cash and Carry Pty Limited v Fostif Pty Limited [2006] HCA 41)* that third party litigation is permissible is one of the main factors that has influenced the growth of class actions in Australia.

The causes of action for most shareholder class actions in Australia are misleading or deceptive conduct relating to inaccurate or incomplete statements and/or failure to disclose or correct information, and contravention of a listed company's continuous disclosure obligations. It has been reported that class actions have tripled in the last five years.[2] As a result, insurance premiums for directors and officers have surged following a sharp rise in the number of class actions launched against Australian companies.

A 2016 study of nearly 1400 securities class actions targeted against US-listed companies concluded that executive overconfidence increases the likelihood of securities class actions and that improved governance and reduction in risk-taking incentives reduces this likelihood.[3]

It is common to find that most company secretaries also act as their corporation's general counsel or have legal qualifications. The importance of the company secretary's role has and will continue to evolve to include advising the board and fostering good governance practices. The High Court, in *Shafron v ASIC* (2012) HCA 18, made it clear that a person with twin roles is expected to raise issues such as potential misleading statements and disclosure obligations with the board.

Gordon Owili

*A Certified Finance and Treasury Professional, a Fellow of Finsia and a Certified Insurance Professional. Gordon has several years' experience in law, finance and risk management. Gordon is the author of **Disruption: Game Changing Startups**. Currently the Commercial and Risk Manager at ATCO Australia, Gordon has previously worked at EY, BHP Billiton, Honeywell and Veolia.*

Footnotes

1. General Data Protection Regulation https://www.eugdpr.org/>.
2. A. Uribe, J. Frost, *'Companies pay more for directors and officers insurance on class action spike,'* Australian Financial Review, http://www.afr.com/business/banking-and-finance/financial-services/companies-pay-more-for-directors-and-officers-insurance-on-class-action-spike-20180103-h0cvne>.
3. Banerjee, Suman and Humphery-Jenner, Mark and Nanda, Vikram K. and Tham, T. Mandy, *'Executive Overconfidence and Securities Class Actions.'* Journal of Financial and Quantitative Analysis, (December 31, 2016).

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CONNECT AND INFLUENCE THROUGH THE POWER OF YOUR STORY

When Oprah Winfrey accepted an award at this year's Golden Globes for her contribution to the entertainment world, she kicked off her speech with a childhood memory.

The year was 1964, and Winfrey was "a little girl sitting on the linoleum floor of her mother's house in Milwaukee", watching the 36th Golden Globes on TV. She recalls witnessing, in awe, as Sidney Poitier became the first African American in history to win the Best Actor award: "I had never seen a black man being celebrated like that".

Winfrey's words—which brought the crowd to its feet and sparked growing calls for a 2020 White House run—made one thing abundantly clear: personal stories are powerful.

Told well, your stories can help you forge stronger bonds with your listener, build influence, get your ideas over the line—even motivate large numbers of people to act. Brain studies show that we're primed to feel connected to the characters we meet in person and online, provided they have a compelling tale to tell. It's why telling purposeful stories in the workplace has become so popular today. Walt Disney's Vice President, Alan Kay, said it best: "Scratch the surface in a typical boardroom and we're all just cavemen with briefcases, hungry for a wise person to tell us stories".

I've written this article to help you become that wise storyteller, by focusing on the most important story you'll likely ever tell: the career narrative.

> ***Put simply, a career narrative is an "About Me" style story that's focused on your life's work. Think of it as your Swiss Army knife of personal stories; an ever-shifting narrative that evolves as you carve out your career, and that can be shared to serve many purposes.***

You might tell a two-minute version in an interview to help you land a plum role, or publish a two-paragraph version on your LinkedIn profile to build your industry influence. You might share a two-line version at a networking event to attract fresh business. A good career narrative will position you credibly in the minds of your colleagues, clients and industry leaders. And if you don't have a good career narrative, people will create it themselves—often by Googling you. If you don't fancy the idea of having other people define you, give them something authentic and compelling to go on.

Here are five tips for creating a career narrative that gains attention, builds connection and helps drive professional success.

Serve your audience

Frequently, in my business, during storytelling workshops someone will say: "I know I need to tell my story, but I feel really uncomfortable talking about myself. I'm afraid I'll come across as a shameless self-promoter".

By focusing your story on how you can help your audience solve their issues, or realise their goals, you'll be providing genuine value.

Is your audience an executive team seeking to appoint an in-house counsel in volatile times? Feature an anecdote of how—with your legal expertise—you've helped another team to steer their company to safety.

Silicon Valley's go-to communications expert, Nancy Duarte, puts it like this: "You are not the hero who will save the audience; the audience is your hero". Framing your story in the context of serving others is anything but shameless.

Invest in your first sentence

When someone at a professional networking event or weekend barbeque asks the question, "so, what do you do?", how do you respond? Most people reply with something like "I'm a lawyer" or "I work for ANZ", and they're probably missing a trick.

I believe the best lead sentences—the ones that really capture attention—fall under two categories: the pitch and the hook.

The pitch cuts straight to the chase, outlining exactly who you serve, and the specific value you provide. Consider this powerful sentence from divorce lawyer, Clarissa Rayward: "Clarissa specialises in helping separated families stay out of the Family Courts and stay friends, as she believes that a divorce can be a positive end to a marriage".

With the hook sentence, the aim is to capture intrigue. "I keep company directors out of prison" is one of the more amusing hook leads I've heard from an in-house counsel.

If you do lead with a hook sentence, follow quickly with a pitch sentence to give your audience the context they need.

Try out a few different versions to see what lands. You'll know.

Flavour your story with action + purpose

From the writers of Pixar to the most-viewed TED Talk presenters today, the world's greatest storytellers use the "narrative arc" storyline to draw us in and appeal to our emotions. It goes something like this: a relatable character embarks on a mission, faces many struggles along the way, triumphs, and returns home with a lesson to share.

Your career narrative won't be this action-packed or neatly resolved, as your career is still unfolding. There are still plenty of people to serve and plenty of path to tread.

However, your story will come to life when you pepper your list of accolades (degrees, awards and the like) with a bit of scenery and action to spark the imagination. Like a major career pivot, a remarkable business win in the face of adversity, or like thought leader Simon Sinek, an unwavering purpose:

> ***With a bold goal to help build a world in which the vast majority of people go home every day feeling fulfilled by their work, Simon is leading a movement to inspire people to do the things that inspire them.***
> Simen Sinek

Sinek himself puts it perfectly: "People don't buy what you do, they buy why you do it".

Reveal yo'self

Recently, a general counsel attending my workshop crafted a refreshingly personal career narrative. She chose to include her appreciation of her husband for "taking charge of the domestic chaos each morning so she can enjoy her bicycle ride to work … without having vegemite on her shirt".

People want the story behind the story—even in the corporate world. Just look to LinkedIn, where professionals of all persuasions are sharing their non-work highs and lows on video and tagging them with #letsgethonest.

Rupturing the divide between work and life requires courage. But it's the surest path to greater connection. It's not about being spectacularly fascinating outside the office. It's about sharing what you're comfortable sharing and being relatable to others.

Make it short, simple and shareable

Someone, somewhere, once said: "The more famous the person, the shorter the bio". I'll add that a punchy narrative is a smart move for the non-famous too. People simply don't have the time or bandwidth to read personal essays full of flowery language and jargon.

Simple is memorable.

Once you've created your first draft career narrative – weaving your accolades with your future aspirations, your professional purpose in the context of others, and a touch of your non-work self – it's time to prune the redundant words and sentences. Ask friends and colleagues to repeat the process with fresh eyes.

Next, run your story through an online readability tool (there are many) to discover how digestible it is and make the suggested changes.

Finally, be brave and share it. Consider all the places where your story would be useful. The Golden Globes might be a bit of a stretch, but you never know who you might meet at a weekend barbeque.

Gretel Hunnerup

Drawing on her fifteen plus years of journalism and communications experience, Gretel helps business leaders across Australia become better storytellers by delivering in-house workshops and talks on storytelling for innovation, team-building, business development and transformation.

Head to www.gretelhunnerup.com.au for more information and resources.

On behalf of design thinking agency, Naked Ambition and ACC Australia, Gretel will be facilitating her popular half-day workshop—Connect and Influence Through the Power of Your Story—in Melbourne on May 2, Brisbane on May 9, and Sydney on May 16.

Visit the ACC Australia site for more information.

ACC GLOBAL UPDATE

ACC Chief Legal Officers (CLO) 2018 Survey Finds Geopolitical Change and Regulatory Climate Driving Age of the Chief Legal Officer

Regulatory or government changes are the most concerning issue keeping CLOs and general counsel up at night around the world. The proportion of CLOs who rank "proactively addressing legal and regulatory trends" as a top area where they add value has increased by 38% since 2013, the Association of Corporate Counsel (ACC) CLO 2018 Survey reported.

Taking the pulse of more than 1275 CLOs and GCs in 48 countries, the survey spotlighted how the professional stature and influence of the CLO's position has grown in light of the prevalence of geopolitical events and heightened regulatory landscape. The CLO reporting structure is an important indicator of influence on the company and the CLO's role in creating a corporate culture that reinforces ethics and integrity.

Among CLOs who report directly to the CEO, 61% work with the CEO, executive team, and board of directors on strategic initiatives—nearly double the percentage of those who do not report to the CEO. Sixty-five per cent of CLOs who report to the CEO stated the executive team "almost always" seeks their input on business decisions, and 81% regularly attend board meetings, signifying a greater likelihood that business plans take into account legal and regulatory risks.

Other notable findings in the ACC CLO 2018 Survey include:

- Data breaches and the protection of corporate data is the fastest growing area of concern, as 36% of those surveyed rated it extremely important in the year ahead, compared with 19% in 2014. Respondents in the United States, Canada, and the Asia-Pacific region were more likely to report that a patent troll targeted their company.
- The majority of CLOs globally (56%) expect an increase to their department's overall budget, compared with 43% last year.

ACC Legal Operations Launches Maturity Model, Toolkit and Webinar Series

Consisting of 14 different areas, the ACC Legal Operations Maturity Model, Toolkit and Webinar Series provides law department leaders with the ability to benchmark maturity, gain alignment on department priorities and enhance the operations of a legal department.

The new reference tool further supports the advancement of the legal function by helping in-house counsel and legal operations professionals move from early to intermediate and advanced stages in any of these key functions, such as financial management, legal technology, vendor management, knowledge management, compliance, contract management and information governance, among others.

ACC Legal Operations members are collaborating on the foundational toolkit with leading legal service providers, including Consilio, Contoural, HBR Consulting, Integreon, NAVEX Global, QuisLex, Thompson Hine and UnitedLex. These tools will be presented in a series of monthly webinars throughout the year, led by seasoned legal operations professionals who will offer real-life experiences on how to implement improvements to the legal department.

For more information on the ACC Legal Operations Maturity Model, Toolkit and Webinar Series, visit www.acc.com/maturity.

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