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FEATURES

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ACC Association of Corporate Counsel AUSTRALIA

PRESIDENT'S **REPORT**

Karen Grumley
National President

As I sat down to write this report, I asked myself what I could possibly have to say to our readers when it was only the first quarter of 2019. And then I started thinking about what 2019 has already thrown up, and what this year has still to offer.

My inbox is currently filling with updates and rundowns on the recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, released only days ago. The Royal Commission dominated domestic news coverage in 2018, but that has been dwarfed by the impact of the final report, and the rippling effects we are seeing and will continue to see on matters of policy and legislative approaches, governance and culture, and leadership — not only in the banking and finance industries, but across corporate Australia.

This time last year, I wrote about in-house counsel having a seat at the leadership table and being empowered to advocate for processes and systems that encourage ethical behaviour and support company performance without compromising legal and regulatory compliance. As in-house lawyers the necessity for us to influence the compliance culture of our organisations is more apparent considering this Royal Commission and what may follow. I expect that this will be an ongoing talking point through the ACC Australia Chief Legal Officer events and in the whitepapers and research publications this year. Please ensure your voice is heard and respond to our survey requests when they reach you.

This year we usher in the tenth anniversary of the introduction of the *Personal Property Securities Act 2009* (Cth) (PPSA). After a decade, what is the practical impact of that system on the finance, restructuring and insolvency sectors — has it achieved what it set out to achieve? The first day of 2019 saw the Modern Slavery Act coming into force, requiring certain entities to report on the actions they have taken to address modern slavery in their businesses and supply chains. In 2029, will we look back on this scheme with the same judgement we currently have of PPSA, or will we expect more? In 10 years we have moved from securing property to protecting freedom, a considerable change in the focus of corporate culture and leading practices for in-house teams. As I was feeling some anxiety about how to find the time to stay abreast of the ever-changing landscape of corporate Australia, I joined several ACC interest groups to work with my peers across the globe to find solutions for common challenges, including addressing the impact of new legislation. I'm sure that more challenges will arise throughout 2019 and it is good to know that I am well armed with friends to find the answers.

Another big focus of ACC Australia for 2019 has commenced — planning for our In-house Counsel Days throughout the country. We start 2019 with the In-house Counsel Day for South Australia taking place at the iconic Adelaide Oval on Friday 1 March. This is followed by the Victorian In-house Counsel Day on 14 March in Melbourne, the Western Australian In-house Counsel Day on 9 May in Perth, the NSW In-house Counsel Day on 30 May in Sydney, and the Queensland In-house Counsel Day on 13 June in Brisbane. We then go back to the Adelaide Oval in November to finish 2019 with the National Conference. These sensational conferences do attract the leading voices of the in-house legal sector to share best practices and discuss the challenges we face in a sector that is undergoing profound change. I encourage you to attend these events, as the opportunities for connection, learning and leadership that they offer are priceless, and I'd challenge you to find the same experience elsewhere.

As always, the member services we provide you with would not be possible without the ongoing support of our Corporate Alliance Partners and other major sponsors of ACC Australia. Again, I thank them all for their continued commitment to the success of the in-house sector and for recognising the value in investing in our futures. With the support of these partners, and other alliances, ACC Australia will continue throughout 2019 to improve and advance the services we provide to our members through education, resources, research and connection. If there is something you believe is missing from our offering, please share your feedback and ideas with **ausmembership@acc.com**. Of most importance is our maxim: *by in-house, for in-house.*

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LEGAL VOICES

Sharyn Cowley

An experienced financial services lawyer with extensive private practice and in-house experience, Sharyn's key areas of legal expertise are superannuation, managed investments and financial planning. Sharyn is also a qualified Company Secretary and serves as a director of an unlisted public company which operates a Bendigo and Adelaide community bank.

Sharyn is a member of the ACC Australia Mentoring Committee

SHARYN COWLEY

Each month ACC Australia invites our in-house industry leaders to share their experiences and perspectives on areas of importance to the Australian in-house community.

I have worked as an in-house counsel in the financial services sector since 2003 and became a member of ACC Australia over 10 years ago.

A particular interest of mine is mentoring, ever since first discovering it when I participated in the mentor program as a mentee soon after joining ACC Australia.

My mentor was an experienced General Counsel. She generously shared her wisdom, insights and time to help me gain perspective on my career goals and work out where I wanted to go next on my career journey. She was a gifted mentor, becoming my independent, experienced and trusted advisor. We formed a strong connection, sharing ideas, viewpoints and challenges and our relationship continued long after the formal program finished.

My mentoring experience was momentous because it was instrumental in all decisions I have made about my career since that time.

My mentor helped me recognise that becoming a general counsel was not the career path I wanted. She guided me to discover what my career passions were and helped me reshape my career goals. She saw more talent and ability within me than I saw in myself and helped bring it out of me. With her guidance I realised that I wanted to get into corporate governance and to become a company director.

Armed with clarity and confidence, I started out on a new path on my career journey. Since then, I have completed corporate governance qualifications, undertaken a 12-month advanced leadership program and become a company secretary and a company director. Mentoring gave me the road map for the next 10 years of my career.

As my mentoring experience was so empowering, I was inspired to become a mentor with ACC Australia and have been one for the past seven years. I am passionate about the value mentoring provides to both the mentee and mentor. I love guiding other in-house lawyers to identify and develop their personal and professional strengths, being a sounding board to explore options and challenges, and assisting them to set and achieve their career goals so they can reach their full potential.

Having a mentor allows you to tap into the experience of someone who has faced some of the challenges that you're currently facing and who can share their wisdom or help you come up with a strategy for dealing successfully with those problems.

Another benefit of mentoring is that you build up a network of people that you can continue to connect with after the formal program is finished. I remain in close contact with many former mentees because of the strong relationships we formed. A chat over coffee or lunch is a great way to continue to give insight and support.

My desire to become more actively involved in being an advocate for in-house lawyers led to my becoming a member of the Victorian Division Committee three years ago. Naturally I became a member of the Mentoring sub-committee, which gives me the opportunity to have a more direct role in developing and promoting the ACC Australia Mentoring Program.

My enthusiasm for mentoring is unbridled.

I am very proud of the fact that I have recruited many in-house colleagues, including six team members, to become mentors or mentees for the ACC Australia Mentoring Program. It is wonderful when others see the value of what you do and decide to join in.

My mentoring activities extend outside of ACC Australia as well. I have been involved as a mentor and mentee in the TelstraSuper Mentoring Program over the past few years. This initiative provides all staff with the opportunity to reap the benefits of mentoring.

I also have a number of informal mentoring relationships at work and with former colleagues. They seek me out when they need to bounce off ideas or gain insight or support.

Last year I met a young lawyer at my gym. We both have a passion for travel, but as she is just starting her legal career, she asked me if we could catch up to talk about that as well.

Mentoring has had such a huge influence on me. Taking the opportunity to guide and inspire others is a way of passing on the wisdom of those who have encouraged, advised and guided me.

Finally, a quote to inspire you.

"The greatest good you can do for another is not just to share your riches but to reveal to him his own." Benjamin Disraeli.

Or

"If your actions inspire others to dream more, learn more, do more and become more, you are a leader." John Quincy Adams.

A DAY IN THE LIFE

JANE BOWD

Group Company Secretary & Corporate Counsel at Coca-Cola Amatil

Jane Bowd

As Group Company Secretary & Corporate Counsel role at Coca Cola Amatil, Jane applies her extensive governance and legal executive experience gained across a range of industries and top tier organisations. She also serves as an Executive Director of the Coca-Cola Australia Foundation, a Non-Executive Director of Playgroup NSWand holds the current rank of Major in the Australian Army Reserve.

4:00 am **Roll over in bed, and half wake-up, thanks to the dulcet tones of my husband snoring (sorry honey!).** Check my phone (bad habit). Then, try to go back to sleep … but it's hard as my mind has already started to run through various to-do lists for the day … which includes writing this piece for *Australian Corporate Lawyer* mag.

5:59 am **Like a Jedi, I stretch out my arm to check the time on my phone and, just as my fingers touch the phone, my 6.00 am alarm literally goes off.** Sit up straightaway and say "Honey, let's go!" (if there is a moment's hesitation, I risk backing out). We do a 5 km run (or walk) religiously every day with our fourth baby, Daisy … she's a massive American Staffy cross Rhodesian Ridgeback. I say I'm walking her, but it's probably the reverse as she drags me around.

6:00 am **Try to keep up with Daisy as we tear around one of our local running tracks, and enjoy some precious "us" time with my hubby — great time together sans kids to talk.** This morning-time reminds me of when we were younger and pre-kids, and actually had time to talk to each other without 1,000 interruptions! Pause down by the water to take a photo of four cockatoos sitting on a bench looking regal as the sun rises behind them. Think 'how cool', and also how lucky I am to get out and see some nature before the world gets busy and I'm in a skyrise at work all day.

6:40 am **Pit stop at the coffee shop near home to pick up a small double shot soy flat white extra hot, but not so hot you curdle the soy milk and with no froth please (yes, feel free to roll your eyes).**

6:45 am **Ring home — remind my three human babies that Mummy and Daddy are nearly home and the rule is that they need to be dressed in school uniforms with shoes on when we get there (let's see how that goes).**

6:50 am **Arrive home … tell Grandma she can now clock-off as we're back.** Sometimes we win the lottery and the kids are dressed and being angels, other days it's a hot mess and I arrive home to various states of nakedness and civil disputes/tears/chaos.

Become the Usain Bolt of mothers and:

- fly through breakfast orders like a MasterChef (yes, they each like certain things and it's never the same — one wants scrambled eggs, one wants cereal with yoghurt (no milk) and another wants toast with avocado and fried egg and pepper (no salt) (… sigh)
- wrangle with hair
- throw lunchboxes and water bottles into school bags and check for any notes from the school (you just never know what surprises you are going to find in their bags).

Definitely another double shot coffee is consumed in this time, courtesy of my mother (BTW, Mum, you're a saint — God knows why you've agreed to live with us, but I'm glad you did as we couldn't do it all without you!)
Six times out of 10 I don't get brekkie, but if I do, it's stir-fried broccoli and cauliflower with maybe some bacon (#keto). Today, I got brekkie — we are off to a good start! Nine times out of 10 I have my laptop open in the kitchen whilst whirl-winding around and I manage to action some work thing … here's to multi-tasking!

7:25 am **Retreat upstairs, shower, change.**

8:00 am **Bundle all of us into the 4WD … drop the kids off to school by pushing the eject button at the school gate (after having done a quick impromptu spelling quiz whilst driving in lieu of actually doing homework properly with them at home, feeling pangs of guilt and wondering how other mums seem to be able to do homework with their kids at home) … drive to the train station and park.**

8:45 am **Arrive in North Sydney at Coca-Cola Place after having caught two trains and enjoying (not) the luxury of peak hour commuting**

on public transport with all the wonderful people that Sydney likes to jam into confined moving spaces together … Putting aside my dislike of public transport, the day is already feeling like a success as I managed to get a seat on both trains so was able to pull out the laptop and get about half an hour of work done (#glasshalffull).

8:50 am **Dock my laptop at one of the standing desks wherever my team is located.** Coca-Cola Amatil has gone "agile" in head office, so that means you can be sitting anywhere at any time (#hmmmm).

9:00 am **Action some urgent emails and requests, none of which are on my to-do list (from 4 am!) … we're about three weeks out from full-year results, so most things that hit my inbox tend to be urgent at this time of year.**

Find at least a few minutes to get back to reading the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Note to self: this is going to need to be targeted reading — it's over 500 pages long! Book into a couple of law firm sessions this week offering a debrief on the Royal Commission Report.

10:00 am **Hold my weekly team meeting with my amazing team — we all tend to walk out of those with pretty big to-do lists.** Today is no different. Think of ways and tasks during the meeting that will stretch and grow each of them as they're at different stages in their Company Secretarial careers.

11:00 am **Field some urgent requests and changes from our Board Chairman and People Committee Chairman — provide some governance advice, and then juggle a few things impacted that day as a result.**

12:00 pm **Dial into an Audit & Risk Committee Meeting for the external Board that I am an Independent Non-Executive Director of (Financial Planning Association of Australia).** It wraps in just under an hour, giving me some time to get ready for my next meeting. No lunch today unfortunately, but I'll be okay as I did manage to get brekkie in the morning. Grab a handful of macadamia nuts from my 'locker' (again, no office anymore! Sigh, the good old days).

1:00 pm **Meet with my Group Managing Director, and literally continue that meeting as we walk together towards the boardroom (never enough time!)**

2:00 pm **Attend a Board Committee Meeting, which included juggling the joys of new technology in the boardroom that doesn't seem to want to play ball and do what IT says it should do.** None of the directors is impressed, particularly the director dialling in from India who suffered the worst from the static interruptions. And, that is why I am a lawyer, not IT Support!

4:00 pm **Shuffle the directors and executives out of the boardroom at the end of the preceding meeting, and then shuffle another set of executives in so we can hold a pre-meeting with our Chairman of the Risk & Sustainability Committee to talk through the agenda and papers for our upcoming Committee Meeting in February.**

4:15 pm **Hold the meeting with the Chairman of the Risk & Sustainability Committee (pump out various emails with actions arising from the meeting), and then shuffle that set of executives out of the boardroom at the end.**

5:15 pm **Have a further meeting alone with the Risk & Sustainability Committee Chairman and my deputy about our Board and Committee Charters and proposed revisions.** (A little bit of a dry topic to be starting at 5.00 pm.)

6:00 pm **Again, channel Usain Bolt as I 'bolt' for the train. Travel home. Nothing remarkable — but, I don't get my laptop out.** Am too tired. So, I bounce between my work inbox and my Instagram.

7.00 pm **Arrive home. Apologise to my mum for being late … I like to be home for the kids by 6.30 pm, and tonight is a particularly bad night to be late as my husband (also a lawyer) goes to Army Reserves straight after work on a Tuesday evening. So, I'm flying solo.**

Decide that the kids can go to bed without a shower tonight, as long as their teeth are brushed and the girls' hair is plaited (the latter is crucial for my hairdressing duties the next morning, as they seem to come down with birds' nests for hair if they go to bed without their hair being tied back).

7.30 pm **Pick up my eldest from her ballet class, a few minutes from home.** Brush three sets of teeth. I'm not going to win any mum awards tonight, but they do each get told that I love them (and I do) and they get their bedtime prayers. My son tells me 'I love you to the moon and back, Mummy' (heart melts).

8.00 pm **Cook dinner for my mother and me, and leave some on the bench for my hubby.**

8.30 pm **Sit on the couch with my laptop open, and work on minutes from that day's Board Committee Meeting.**

8.45 pm **My 9-year old appears downstairs and sidles up to me on the couch …** This is a bit of a no no in our house as I'm quite firm on bedtime (i.e. stay in bed!). But, I hold back from ordering her back upstairs as she didn't really get any time to unwind after ballet. Enjoy a little chat with her on the couch.

I'm so glad I did as she shared with me her aspiration to be the Sustainability Representative for her class (referred to as 'Bugs'), and the campaigning she was doing to garner votes. She then said quite excitedly 'And Mummy, then I will get to go to meetings just like you!', her eyes shining with excitement as she clutched my hand. I sat there looking at my beautiful and talented little spark of a girl, and thought what a compliment that someone so amazing wants to be like me. I am truly blessed, and I recognise how precious that little moment is. I then order her up to bed!

9.30 pm **Put the laptop away.** Indulge in some trashy Foxtel fodder (Real Housewives of something or other) for about an hour to unwind. Feel guilty when I get up to go to bed at the sight of my latest novel untouched on the kitchen bench.

10.30 pm **Asleep. Hubby not home yet.**

12:00 am **Express my dissatisfaction (probably not that politely) with my husband accidentally waking me up when he comes in from Army Reserves.** Immediately back to sleep, though (with no to-do lists running through my mind (#success).

LEGAL LEADERSHIP

Richard Dammery

In his most recent in-house role, Richard served as the Chief Legal Officer and Company Secretary of Woolworths Limited. This followed previous roles as a Partner of Minter Ellison Lawyers in the Mergers and Acquisitions Group and senior legal roles with Coles Group Limited, Telstra and Telecom New Zealand. Richard holds degrees in Arts (English) and Law from Monash University, an MBA from the University of Melbourne, and a PhD in history from the University of Cambridge.

LEADING FOR IMPACT: A PERSONAL PERSPECTIVE

When I was asked to write a short piece on legal leadership, I was initially hesitant. So much has been written on this topic and from so many angles. Business schools teach a range of leadership-related subjects. Leadership has even become a field of psychology in its own right. I asked myself, "Is legal leadership a separate and distinct thing from leadership per se?" and "Is there anything new or original that can be said about leadership in this context?"

You, as the reader, will need to judge the answers to these questions for yourself. All I can offer is a personal perspective, with the upfront acknowledgement that we learn more from our mistakes than our successes. I should also disclose that I'm generally wary of people who describe themselves as leaders — or, worse, as 'thought leaders' — or, even worse, as 'thought leaders on leadership'! Like beauty, this should be left for others to behold! So, I lay claim to none of these things. All I have sought to do in the leadership roles I have been fortunate to occupy is to get clear about what success looks like, work hard, surround myself with good people who have strong values, support them, take responsibility for their welfare, seek to remove barriers to their success, give them the resources they need, keep things simple, and try not to 'boil the ocean'.

Having just stepped down from a senior executive role, I'm clear about one thing. *Positional leadership* — by which I mean the occupation of an office or position — should not be confused with the act of leadership. Holding a role, or having a title, does not make you a leader. We all know this intuitively, but in corporate life it is sometimes easy to forget. To illustrate the point, the highest formal position that Martin Luther King held was President of the Southern Christian Leadership Conference. (This is not what we remember him for!)

It may sound a little high-minded or idealistic, but I do genuinely believe that those aspiring to leadership roles should do so for the difference they intend to make in them: firstly, for society as a whole; secondly, for the people we serve as leaders (in a corporate context, usually our teams and our customers/clients); and lastly, for our families and ourselves. What is the counterfactual? That we seek leadership positions for personal gain and self-aggrandisement? If that's the motivation, then it's not leadership you want; it's power and/or privilege.

There's an old saying that 'leaders need followers.' I would express it a bit differently. If people aren't bringing you their problems, you're not leading. If you have been given, or have assumed, a position of leadership, and, when you turn around, there's no-one there with you — literally or metaphorically — something is wrong. This can be somewhat paradoxical. Sometimes a leader's role is to strike a new course, and the more radical the change of direction, the more unsettling and divisive it can be. Leading is not a popularity contest. But equally, being able to articulate the reasons for change, and to help people feel positive and optimistic about the future, is one of the great challenges for leaders. It's tough. I know, at times, I have fallen into the trap of being too impatient to get going, and sometimes too caught up in my own ideas. This can be disengaging. Luckily, my best teams have been willing to tell me this, usually nicely and occasionally very directly. Looking back, I am extremely grateful for this. It's the best support a leader can ask for, because it gives you a chance to learn from your mistakes, and change.

If a leader's purpose is to serve, then lawyers should make good leaders because the law is a service business. We have a responsibility to uphold principles of justice and procedural fairness, to serve our clients' interests, and to support ethical behaviour and decision-making. As corporate lawyers, we also serve our organisations; the company being, of course, our superordinate client. Differentiating our client from the demands of individuals within the organisation — who may see our role as serving their particular needs — is not always easy. But the distinction is critical.

We hope that these different aspects of our service, and professional responsibilities, do not come into conflict. When they do, it's a clear sign that something is wrong. As a lawyer, being a servant-leader does not imply being subservient. Senior lawyers, and General Counsel in particular, need to be willing to 'speak truth to power', even when doing so is especially challenging and organisationally risky. But who said that being a leader — particularly in the complex modern corporate world we inhabit — is easy and risk-free? And anyway, what choice do we have than to hold ourselves to high standards and act with integrity?

If I'm right that holding a leadership position, and being a leader, are two different things, then all corporate counsel — irrespective of their roles — have the capacity, and can make the opportunity, to lead. What do you stand for? What do you want to change? What are you prepared to do to make it so?

I have found that many young lawyers understand this almost intuitively. For them, having a career with purpose — effecting positive change — is central to their work and sense of self. If their employers don't give them an outlet for this, they will find other ways to lead change. Personally, I find this inspiring, as well as a leadership responsibility; to harness this energy and intention and create good uses for it.

If we aspire to be leaders, it's helpful to be clear about what leadership means to us, individually and authentically. For me, it starts with service. The act of leadership implies developing a sense of shared purpose with those around you, then committing and working together to achieve it. The leader is like the conductor of an orchestra: coordinating and coaching the individual players to get the best out of the whole ... and, periodically, making decisions and giving clear directions. Leaders also strive to remove ambiguity and create a sense of progress. Complex corporate systems are inherently ambiguous. Leaders should seek to simplify this by clarity and decisiveness. Assigning multiple people to undertake the same or related tasks, having an inner and outer circle, playing one team member off against another, failing to articulate expectations clearly (the list goes on) these are not the acts of a leader.

If you are asked to lead a team, a function or an organisation, here's a simple piece of advice. Don't say yes until you have examined yourself, are clear about your purpose, and have assessed whether the opportunity is something you can genuinely add value to for others' benefit. If it is, then move forward boldly, genuinely caring about the people around you and remembering that what you have been given is the chance to make a positive difference. And for those of you not so lucky, don't wait to be put in charge. Define what matters to you, surround yourself with people who share your intention (preferably a diverse group with different attributes and perspectives), then go and make it happen. a

Footnotes

1. See the 'Leadership Primer' of the former Chairman of the US Joint Chiefs of Staff, General Colin Powell. As Powell noted, when this happens 'they have either lost confidence that you can help them or concluded you do not care'. I would add: 'or they have stopped trusting you'. That will usually be because the gap between what you say and what you do is too great.

LEGAL TECH

Verity White

Currently at Telstra in the Consumer and Small Business team, Verity is an enthusiastic member of Telstra's Legal Innovation Forum in the Automation team. Verity is an Executive Director with the Communication Research Institute and Secretary at Melbourne social enterprise STREAT Ltd.

*Find Verity on Instagram **@checklistlegal** or her blog **www.checklistlegal.com** where she explores using digital thinking to revamp and simplify contract processes and documents.*

BUILD A POWERFUL LEGAL TECH SHOPPING LIST WITH FUNCTIONAL AND NON-FUNCTIONAL REQUIREMENTS

In the market for shiny new legal tech? Before you book flashy demos from eager tech providers, you need to build a shopping list.

Imagine you're about to host an amazing dinner party. There are lots of fun things to plan and think about, like pre-dinner cocktails and the tasty dishes you'll serve. Then there are also the more practical aspects to consider, like how big is your budget and the food allergies or preferences of guests.

When you are planning on a new piece of legal tech, there's a fun side and a practical side too.

- **Functional requirements** are a chance to get excited about your project and dream big about what you want the legal tech to do (FUN LIST).
- **Non-functional requirements** can bring you back down to earth with a thud (the 'non-fun' gives you a clue!) but these are critical guardrails for the project (NON-FUN LIST).

Why bother with functional requirements and non-functional requirements?

It took me a while to get used to writing requirements lists, but now I see that finely tuned and regularly updated lists of functional and non-functional requirements are important for many reasons. Here are a few:

- They keep you focused on solving the real problem (and away from chasing shiny new features).
- They become a negotiation asset when talking with vendors. Knowing what you want and articulating it clearly allows you to spot value and compare apples with apples.
- They save time, money, and frustration from testing (or implementing!) sub-par tech to your team.
- The legal tech companies ask you for requirements anyway. Instead of making them up on the spot during a demo, why not take your time to fully develop them with your team and organisation so you're prepared?

Let's start dreaming big and outline the different things we want legal tech to do that will help solve our specific problem.

FUN LIST (FUNCTIONAL REQUIREMENTS)

You can dream as big as … your budget allows! Questions to consider when building your legal tech features wish list:

- Who is this legal tech for — lawyers, clients, or customers— and what do those users want to do with the tech?
- What are the key features you need to solve your problem?
- What is a 'must-have' and what is a 'nice-to-have'?
- What outputs do you want?

Example of some basic Functional Requirements for document assembly legal tech
Integrates with word-processor software so that a neatly formatted document in accordance with style templates is generated (restricted to mark-ups only) for negotiation.
User-inititated webform interview (with the logic and conditionaility requirements listed at Annexure A) where responses build a base document with different commercial positions and schedules attached to a Word document or PDF (at user choice).
Integration with customer relationship management tool so user can initiate self-interview form. Data from CRM pre-populated into the base document.
If user interview responses and commercial terms meet specified 'no legal review' thresholds (which administrators can adjust), direct pass through to Electronic Signature platform for automated workflow of execution.

NON-FUN LIST (NON-FUNCTIONAL REQUIREMENTS)

A solid NFR list is a savvy investment of time. Non-functional requirements will be similar across different legal tech projects at the same organisation, so you can reuse your non-fun list on different projects. Some basic considerations are:

DATA	Where does your organisation (or where do your customers) need legal tech providers to store and process data?
SECURITY	What testing and systems do your security team require?
BUDGET	What is your target price for the solution? Consider hard costs (charges upfront and/or ongoing) as well as other resource drains, such as change management meetings and training.
INTEGRATION	Are there specific technical applications or software solutions the legal tech must interact with (for example, must accept payment via Pay Pal, must work with Office 365).
TIME	When do you need this legal tech implemented and functional? Is there future legislation or business need that requires the legal tech by a certain date? Do you have enough time in your team and the business to build, learn, train, and implement legal tech yourself or will you need extra hands?
VALUES	How does this legal tech support your organisation's values and key goals?
ATTITUDE	What is the attitude towards technology in your team and the organisation generally? If staff are not technologically adept, this could mean an easy user interface becomes a must-have, not a nice-to-have.

Let's go shopping!

For lawyers and legal teams, budget and security concerns are likely to be the most influential requirements on most legal tech shopping lists. If you are getting stuck on requirements lists, remember to:

1. Make friends with IT to get clear on exactly the requirements for applications and systems at your organisation.
2. Develop a legal tech business case to show the benefit (and, if possible, hard dollar savings) of implementing the new tech.
3. Stay focused on the problem you set out to fix and go with the options that move you closer to solving the problem.

LEGAL THINKING

Anna Lozynski

An executive general counsel and author, Anna started her legal career at a major Australian law firm and has since spent the majority of her legal career in-house. Described as a change agent, Anna is a sought-after commentator and speaker both domestically and internationally – seeking to shift the dialogue in order to propel the profession forward.

"IF YOU ALWAYS DO WHAT YOU ALWAYS DID, YOU WILL ALWAYS GET WHAT YOU ALWAYS GOT."

ALBERT EINSTEIN

And just like that, we are well into 2019. A New Year is of course ripe for resolutions. Making them. Breaking them. And perhaps, remaking them. A clean slate with 365 blank pages to write. And all the other similar posts that have dominated our social media feeds as we transition from one year to the next.

So even if you've used January and maybe even February as free trial months for any resolutions, how are you preserving your New Year vibes, including perhaps being committed to doing things differently this year?

That brings me to the alphabet.

Not the A, B, Cs, but the all-important U and X. That is, User Experience.

Alexa, can you tell us more?

The transformation of the legal industry is happening magnificently slowly, despite our constant discussion about it. There isn't enough data being collected to dazzle our business colleagues about our productivity and value, or to understand the legal function's blind spots and/or areas for improvement. There needs to be a greater willingness and tolerance to give legal innovation a chance. We need to nurture and recruit more innovation mavens to spread the legal innovation yuletide.

We also need to get out of auto pilot to focus more on our UX as lawyers. This involves adopting a spirit of continuous improvement by reference to what I believe is the new critical suite of intelligences required for the lawyer of the future who is relevant - TQ (technical), EQ (emotional) and IQ2.0 (innovation).

In the digital landscape, which includes the legal profession, UX defines one's reputation. There's no ability to sandwich less than ideal bedside manner with a conversation about the weekend, the weather or the news of a mutual friend. Or indeed a good legal outcome for the business. In other words, technology cannot sweet talk its way out of a #CustomerExperienceFail.

We are less forgiving when technology is not working when and how we want it to. Our patience runs thinner because our expectations are a little higher, especially as lawyers. We want it all, we want it to be robust, and we want it instantly. I mean who has time to wait for software upgrades, really? It may also turn us off further innovating if we don't have a particularly great first experience. Or if it takes too much time to get the ball rolling. Or if the product demo creates a level of expectation that is not exactly matched on implementation. Just as senior practitioners hold space for juniors to learn their individual lawyering style (which doesn't happen overnight), the same level of time and space needs to be held for your legal innovation journey, but with a greater sense of urgency.

So here are some tips on UX in the context of adopting legal tech:

1. Don't wait for the technology to be perfect before you adopt it. The best part about being an early adopter is your ability to influence and shape the technology. It may also mean that your courage is rewarded in the form of better rates. Remember, we are all part of the same eco system. Take a leadership position here.
2. Use UX together with functionality as a primary barometer. The first impression counts. Each step counts. It should be smooth. It should be simple. Intuitive. In today's brand-centric existence, it should also look good.
3. Be prepared to give your current process a total makeover, before you switch to a tech version. There's absolutely no point automating an inefficient and clunky process — a good legal tech provider shouldn't allow it!
4. Like any fitness regime, make UX core to your innovation evaluation and implementation. (But critique with an open mind!) This is especially pertinent if the aim of the innovation is to eliminate legal touch from the process.
5. If it's too tricky or not engaging enough for you as a lawyer, then save your business from it. There's nothing worse than investing time, money and effort into an innovation that the legal team and/or the business can't stand using. Trust your gut instinct here.
6. Give feedback — even to the legal tech provider that didn't win your business. Tech is designed to be continuously improved. And once you've selected your provider, don't hold back providing regular constructive feedback. Be invested enough to be an engaged consumer by contributing to a product's evolution. If you can see room for improvement, then adopt an open line of communication. You are critical to the continuous improvement cycle.
7. Be patient. Find the beauty in transitions. Like with any new supplier, new process or new way of working, it can feel frustrating because it's unfamiliar. Know that the more you use your chosen product, the more frustration will turn into appreciation of your new-found capabilities. One just needs to be committed to the cause.

By consciously focusing on the UX when building and implementing legal innovation forces us as lawyers to think more about the human experience of receiving legal advice and guidance from the stakeholder side. How can you transform the existing process? How can you make it more user friendly? How you can reduce the number of steps involved in a process? How can you make it as efficient as possible? How can you eliminate the level of legal touch involved?

In this way, championing the change about the way the legal team delivers its services becomes a collaborative effort. It becomes a joint expedition to deliver a business improvement. Or indeed valuable learning, and empathy for what it is like to walk in each others' shoes.

It's certainly not always as simple as 1, 2, 3 or do-rei-mi but once you learn and adopt a progressive mindset, it makes for a magical foundation for new age lawyering.

So, find a standing desk (they say sitting is the new smoking), step away from your inbox, and let's get down to the business of being *legally innovative*.

This is a modified extract from my new ebook ***Legally Innovative***. With a foreword by Professor Scott Westfahl of Harvard Law School, it's a call to action to do law differently. It's practical, deliberately provocative and cuts to the chase. There are exercises (aka W.O.W. Goals) at the end of each of the three sections to help you maximise your ways of working.

Until April 30 2019, ACC Australia members can access ***Legally Innovative*** for a special price of USD39.95 (RRP is USD49.95). Subscribe via Stay in the Know at https://annalozynski.com, to recieve a redemption link.

For visual innovation inspiration, follow @legallyinnovative on Instagram.

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LEARNINGS FROM THE ROYAL COMMISSION: THE MISSING QUESTIONS

The outcomes of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) and the evidence given by the most senior officers of the organisations in question have left us (again) outraged and speechless. Were boards and directors complicit in the process or simply standing by, seemingly powerless and overwhelmed by the sheer magnitude of the tasks they were facing?

Whilst the Royal Commission itself, as well as some commentators have suggested that greed and badly designed incentive regimes drive already highly paid CEOs and executives to allow or even establish cultures of non-compliance. What is a reasonable explanation for why boards were found to have obviously and systematically failed in discharging their core duty to hold the executive accountable? The common excuse of short-term financial pressure seems too easy and is not convincing (ACCC Chairman Rod Sims called it 'pathetic'). It appears that the answers can only be found in the inner sanctum of the boardrooms.

What do directors say?

Chairs of the biggest organisations in the country gave evidence to the effect that they did and do not know to whom boards are accountable, boards were too trusting of management, and board minutes did not reflect the substantial challenges of the executive in board meetings. Some members of the 'director population' subsequently commented that the personal bar many directors set for themselves (by not allocating enough time to the role or treating it as a retirement job) does not enable them to be high-performing and contributing directors. Others complain about 'governance overload' or concede defeat by resigning from boards (due to considerable legal and reputational risk) or by simply accepting that one has to be a very brave chair or director to substantially challenge a CEO and executive who often have the best qualifications possible.

Chairs and directors at the big end of town appear to be at a loss as to what (in general) their duties really are and (in particular) how to efficiently supervise an executive, how to diligently challenge the reports and assurances provided by the executive, and how to document (in minutes or otherwise) those challenges and subsequent outcomes and actions. If the boards of the biggest organisations struggle so fundamentally, what chances do boards of private companies or not-for-profit and government organisations have?

Tip of the iceberg?

The sheer magnitude and intensive media coverage of the Royal Commission may have led members of the public to believe that the roots of the discovered misconduct are unique and specific to the financial services industry. However, the governance shortcomings and poor cultures identified by the Royal Commission indicate that we are only dealing with one of the most recent additions to the large number of cases reported over the past years involving corruption, fraud, cartel and misleading and deceptive conduct, bullying and sexual harassment and abuse, or simple incompetence of boards and leadership teams (in a variety of industries across the private, public and not-for-profit sectors), and must lead to a different conclusion: it is more likely than not that any similar investigation into any sector or industry would lead to similar outcomes, in particular as far as board performance is concerned.

Do directors have the necessary skills, energy, capacity and resources to discharge their duties?

Based on the findings of the Royal Commission and the evidence given before it, the short answer seems to be: apparently not. So, what are the key factors enabling directors to meet expectations?

FIRST, it is necessary that directors fully and in detail understand what their duties are. It is encouraging that more and more commentators appear to agree and point out that the best interests of a corporation may not be identical to the best interests of its shareholders, that the doctrine of shareholder primacy may be outmoded, and that the core of the duties to act in the best interests of the corporation and for a proper purpose may require directors to do their best to ensure that the corporation remains sustainable and prospers in the short, mid and long term. Directors of subsidiaries would also need to be aware of the implications of s187 of the Corporations Act.

As directors' duties are personal duties and the skill levels of individual directors often vary greatly, it is only logical that directors need to undertake personalised training and participate in developing and mentoring programs that are tailored to their individual needs. Directors should also not shy away from seeking independent legal advice in relation to their duties and insist that their organisation bears the costs. It is unlikely that the interests of the organisation and the interests of an individual director are fully aligned when personal liabilities and even criminal prosecution of individual directors are on the table.

SECOND, most people would agree that in order to be able to act in the best interests of the relevant corporation, boards and directors must not only be on top of the financial numbers and risks but also have full oversight and take full ownership of the management of non-financial risks. However, this seems to be where theory and practice are far apart. Meaningful risk management requires detailed knowledge of the organisation's business, its current and future markets, and relevant regulatory frameworks, as well as superior understanding of governance tools and their potential impacts. Too many organisations of all

shapes and sizes seem to struggle with even getting minutes of board and committee meetings right. How likely is it that they are on top of the rest? Technological risks are expected to become the most worrying risk category for many organisations in the future. What percentage of Australian directors have the necessary skill and knowledge (or the ability to acquire those in the short term) to efficiently manage those risks?

THIRD, even superior knowledge may not be sufficient to successfully challenge senior management. Challenging means asking robust questions and the right questions; anticipating the answers by having the right follow-up questions ready; being persistent; and being a pain (whilst not crossing the line to bullying, which I have occasionally experienced in boardrooms) by sometimes testing the patience of the executive, the chair and fellow directors. Challenging is an art, to some extent comparable to questioning witnesses (some friendly, some not so friendly) in a courtroom and clearly requires investigative skills, including the ability to 'smell a rat'.

Does this mean that every board now needs a counsel assisting? Not necessarily, although I have heard anecdotes of boards appointing experienced lawyers with a background in investigations or litigation to sub-committees with the brief to get to the bottom of specific issues or systemic shortcomings or both. However, it appears to be almost inevitable that boards use (and in many cases strengthen) the one statutory function that is already available and reporting directly to them: the company secretary (who should also be the general counsel/head lawyer of the organisation).

Wherever I experienced a good and robust challenging by boards, this was owed to all board members regularly spending significant one-on-one time with all members of the executive (including the company secretary) and the chair and the committee chairs having specific and substantial one-on-one conversations with the company secretary between the issuing of board/committee papers and the relevant board/committee meeting including questions to the company secretary to the effect: 'What, in your view, are the most critical issues for this meeting? What questions do you think we should ask the CEO/CFO/Head of Compliance etc. in the meeting?'

FOURTH, we need to be fully honest about the workload and the energy that is required from non-executive directors and particularly non-executive chairs. It is true that any director (chair or otherwise) who tries to become a shadow (chief) executive by giving advice to management that is neither solicited nor covered by a clear board mandate will soon find the executive becoming defensive and potentially be confronted with allegations of acting outside of their authority or even bullying or other misconduct (see the most recent ABC saga leading to the sacking of the CEO and the resignation of the chair). Nonetheless, a proper discharge of a board's supervisory duties is unthinkable without directors gathering and absorbing a large amount of information through constant communication with the executive and a lot of reading. Board papers (in particular financial, risk and compliance reports) need to be read fully and comprehensively and checked for gaps, inconsistencies and overly generic language. Sophisticated executives know exactly how to hide facts and critical issues in board papers. Boards will need to provide ongoing guidance and training to executives (which cannot be outsourced) as to what information the board wishes to have included and highlighted in board papers and how information is to be presented. More often than not it may be necessary for directors to become involved in the recruitment of executives and internal investigations (in particular when there is a suspicion that cultural factors may have contributed to an alleged wrongdoing). In many organisations directors are also involved in lobbying and public relations. Personal training and development activities are also very time-consuming.

Although the individual workload of directors may differ depending on personal expertise and experience, the industry, and the business of the relevant organisation, it is, in my view, hardly conceivable that non-executive directors of any sizable organisation are able to fully and constantly discharge their duties if they are spending substantially less time in their role than a 0.5 FTE executive in normal times and do not have the capacity to increase their load to 1.0 FTE (full-time) from one minute to the next in times of crisis.

Being a director who takes his or her duties seriously is mentally extremely challenging. Directors need to regularly question, interrogate and judge the executive. This creates a permanent and inherent tension with those who are being judged and who can easily become defensive. In addition, each director is only one member of a collective of individuals who often have their own ideas and strong egos. The discharge of a director's personal duties requires constant personal judgement. Directors may, from time to time or more regularly, need to overcome substantial resistance when pursuing questions and ensuring that the answers and their own comments are minuted properly. All in all, this is unlikely to be any less stressful than being a CEO or a senior executive and, by and large, requires similar commitment and energy levels. Being in retirement or semi-retirement mode will rarely be consistent with the requirements a director needs to meet.

However, if we substantially raise the bar for directors, we will have to accept that they need to be remunerated accordingly. Prima facie there is no reason why directors should not be compensated at the same level as senior executives in their organisation and are also subject to a properly designed (preferably long-term) incentive regime. This will be particularly challenging for the not-for-profit sector where directors often work pro bono whilst their duties and personal exposure are very similar to the commercial sector.

What options do organisations and their boards now have?

I have no doubt that a not insignificant number of organisations will form the (some may say cynical) view that the Royal Commission, like many other major investigations before it, has been a one-off storm that may lead to no more than some legislative changes around the fringes or (as some hope) even an overall reform of the Corporations Act lowering the bar for non-executive directors (possibly even adopting a German two-tier board model with an executive management board and a separate non-executive supervisory board, as ANZ chairman David Gonski proposed). They may assume that it will take regulators some time to get their act together and, even if their organisation is prosecuted (the prosecution of some organisations has been recommended by the Royal Commission), they will be able to rely on their superior resources to secure an acceptable outcome. Individual directors in the financial services industry and beyond may reassess their personal risks but come to the conclusion that (even in the unlikely event of criminal prosecutions against directors) the worst possible outcomes for them will be bearable fines, pressure to resign from their position, and a ban from future directorships, and therefore their personal risks remain manageable, if not negligible.

However, we may be forgiven for hoping that there is also a large number of organisations in all sectors and industries that will take the findings of the Royal Commission seriously. They will not want to wait for actions by legislators and/or regulators but will afford themselves a robust and honest (almost brutal) review of their structures, processes and practices, as well as their senior personnel, both at executive and board level.

What could be an immediate action plan?

Although any action plan needs to be tailored to the individual organisation, its business and markets and the skill sets of its decision-makers, there are a few immediate steps that are likely to have the effect of improving the governance of most organisations.

1. Review the company secretariat

Every sizable organisation should have an efficient and well-resourced company secretariat, which reports directly to the board (through the chair) and operates with a high degree of independence. It is clearly best practice that the (head) company secretary is a lawyer and also the general counsel.

In his or her capacity as general counsel, the officeholder needs to report directly to the CEO and be a member of the executive. From the perspective of good governance, this is a must. Commentators suggest more and more that the general counsel's absence from executive management is a red flag in itself that law, ethics and compliance are insufficiently prioritised in an organisation. For example, the change of the reporting line of the General Counsel at Danske Bank of Denmark away from the CEO to the CFO has been identified as one of the contributing factors to the recent compliance breakdown at the bank, allegedly leading to the laundering of €200 billion in illegal monies.

In the structure proposed here, the general counsel and company secretary has a dual reporting line to the CEO and the board and a permanent seat at both the executive and board tables, allowing him or her to become the guardian of the conscience of the organisation. In many organisations there will also be a case for appointing the general counsel and company secretary as chief compliance and/or chief risk officer.

2. Conduct an independent, in-depth gap analysis regarding existing and required skill sets, capacities and attitudes of directors

Part one of such analysis would map out not only the skill sets required but also realistic availability requirements for the chair, the committee chairs and ordinary directors. Looking at the expected duration of board and committee meetings and the time required to carefully read, digest and prepare questions in relation to the board and committee papers is the obvious starting point. Substantial time for regular (one-on-one) meetings between individual board members and members of the executive needs to be added. Sufficient time should also be reserved for annual general meetings (AGMs), regular board–executive workshops (on the strategic plan, risk and compliance management, financial performance etc.), external board activities, stakeholder management, and board-development programs.

Part two would consist of a detailed personalised profile of each sitting director. This profile needs to identify the time the individual director is able and willing to spend (routinely and in extraordinary circumstances) on affairs relating to the organisation. Directors would be asked how many other commitments they have (other work, other directorships, private

commitments), what their yearly holiday/leave requirements are, and what they envisage as their next career move after their tenure with the organisation. It may be inevitable to (re)test directors on their financial astuteness, risk and compliance management skills, and their experience in managing crises. In addition, testing of their individual investigation and questioning or interrogation skills is critical.

The result of the gap analysis will inform decisions with regard to the future size and composition of the board, the replacement of individual directors, and the content of personalised training and development programs for directors.

3. Make the quality of board and committee agendas, papers, the meetings themselves and minutes an absolute priority

It all starts with the agenda. Boards need to analyse constantly whether items on an agenda can be covered meaningfully and diligently. Standing items have their place, but only if there is enough time and material for an in-depth discussion. Boards and committees need to be prepared to schedule additional and extraordinary meetings. Time constraints or other commitments of individual directors must not be a hindrance.

Board reports need to be written for the reader. Executives will always be tempted to hide controversial or alarming information by using generic and meaningless language, by attaching unfiltered and uncommented-on documentation, or by simply leaving it out. Boards, individual directors and the company secretary all need to give constant feedback on the quality of board papers and provide guidance and training to the executive regarding length and quality of board reports. Board papers that are so voluminous that any reasonable and dedicated person would struggle to read and diligently digest them in the time available between receipt of the papers and the meeting raise a red flag and are a very good indication that supervision by the board is not efficient. It is standard practice that the CEO report is the key report in board papers and boards should insist that the CEO personally writes his or her report. Boards should also ensure that regular and independent reports from the CFO, the general counsel and the chief compliance and chief risk officers are included in the papers and the relevant officeholders are present and questioned directly in the meeting. The expression of different views by members of the executive in a board meeting can be an invaluable source for boards to get to the bottom of issues and the simple question (on record) to CFO, general counsel or others 'what is your view on this?' may well uncover systematic non-compliance or a poor culture.

The Royal Commission has taught us again that any suggestion/defence by the board or individual directors that the executive had been diligently challenged lacks credibility if the details of the challenge are not reflected in the minutes. The quality test for minutes is not only that they are a true and accurate record of a meeting but also that all participants at the meeting can, even after a long time and without consulting any other document except those referenced in the minutes, give evidence that the minutes contain all resolutions passed in the meeting, as well as precise summaries of all discussions of substance and all advice provided by members of the executive (in addition to the papers) or attending third parties (e.g. auditors). It is critical that minutes capture the questions and challenges by all contributing directors, the intensity (and potentially the duration) of a discussion and, of course, reflect all different views of directors (and potentially other participants) in relation to a topic, and record dissenting votes. Whilst the finalisation and eventual approval of the minutes require close consultation between the chair and the company secretary, an astute chair would not recommend any minutes for approval that the company secretary was not fully comfortable with. Who wants to risk the company secretary giving evidence down the track that he or she does not consider the approved minutes a true and accurate record of the meeting?

Conclusion

Any organisation that takes the findings and lessons from the Royal Commission and other examples of governance breakdowns seriously will need to find the courage to not only review its structures, processes and practices but also the skill sets and capacities of its directors. Some organisations will come to the conclusion that a strong personalised training and development program for all directors will be sufficient, others will see no other option than restructuring their boards by replacing some or even all directors. The latter scenario would then also deliver the unprecedented opportunity to forcefully address any diversity shortcomings. Smaller, younger and more diverse boards, selected in more competitive, transparent and genuine recruitment processes with directors who are willing and able to fully commit to an organisation (in return for a much more appropriate remuneration) may well be the outcome.

Hajo Duken

An admitted lawyer in Australia and Germany, Hajo has held senior in-house positions across the retail, pharmaceutical, waste and health industries. As company secretary in the private and public sectors, Hajo has acted as principal governance advisor to a range of boards and executive teams.

NAVIGATING THE PRIVACY CHALLENGES OF BIOMETRIC AND OTHER PERSONAL HEALTH DATA

The past 12 months have generated heightened public consciousness about the management and security of 'big data.' Driven by a perception that in a world where personal data has become currency, the sanctity of such information is under threat.

In 2018 alone, social media giant Facebook admitted to multiple data security breaches, the largest of which affected 87 million users.[1] The personal information of 261,948 Nova Entertainment consumers was compromised[2] and the Australian parliament experienced its first serious cyberattack.[3] A total of 262 notifications were made to the Office of Australian Information Commissioner (OAIC) for the quarter ending December 2018 under the recently introduced mandatory data breach notification scheme — 168 of which were attributed to malicious or criminal attacks — and each quarter surpassed the previous.[4] It is little wonder, then, that the management and security of personal health information has been the subject of public debate. By September 2018, 900,000 Australians had opted out of the My Health Record digital-record system[5] under which healthcare providers have access to patients' medical records, while corporate and government intended use of biometric and other personal health data has been met with concern.[6]

Access to and use of personal health information is a comparatively well-trodden track in professional sport. Professional teams have long gathered health data about their athletes for the purpose of tracking and improving performance, with basic information filtered publicly. But with stakeholders seeking deeper insights from sports data, teams and leagues have been broadening the spectrum of personal health data collected as part of a narrative to transform their sports 'from a fact-based consumer product to a fact-based drama,'[7] and athlete biometric data (ABD) fits the bill. Professional sport has consequently found itself at the forefront in navigating the legal and ethical quagmires of collecting and using sensitive personal data, and its experiences so far provide food for thought.

Biometric data refers to physiological or behavioural characteristics that can be used to identify individuals,[8] such as heart rate, blood pressure, skin temperature, anaerobic and aerobic capacity and sleep patterns,[9] as well as fingerprints, eye retina and DNA data. The term is also often extended to include biomechanical data — the measurement and analysis of human movement — such as load, speed, acceleration, reaction time, distance and fatigue levels.[10] The relatively recent development and adoption of wearable technology devices has resulted in greater types, volume and accuracy of ABD being collected, analysed and disseminated in professional sport. Although, the increasing sophistication of personal fitness devices means that the general fitness industry is not far behind. According to some providers, wearables are now capable of gathering up to 1,000 data points per second per athlete.[11] At the time of writing, more than 1,500 teams across 35 professional sports globally were using some form of wearable technology, with US leagues leading the charge.[12]

The potential applications and ambitions for this data — particularly when synthesized to draw conclusions about an athlete's health, capabilities and prospects — are numerous and lucrative. Limited ABD metrics like sprint efforts, maximum speed, distance and heart rate have already been incorporated into AFL and NRL broadcasts, as has the US National Football League's (NFL's) 'Next Gen Stats' model, which have the potential to extend to the broader media, fantasy leagues, sponsors, merchandisers and sports betting organisations. Outside the bubble of sports marketing, however, the enthusiasm for wearable technology has been more tempered, partly as a result of doubts about the utility of the data it provides and partly over privacy concerns about the management and security of that data. Those concerns reflect those currently under discussion among the general public: Should the individuals whose sensitive data are being collected have a say in how their data is used? Is such 'surveillance' appropriate or necessary? How can individuals be assured that their data is protected from unauthorised access, use and disclosure?

Australian laws go further than those in the US towards addressing these concerns. While Australian intellectual property laws do not recognise individuals as 'owning' their data, the Privacy Act 1998 (Cth) (Privacy Act) recognises biometric and other personal health data — both the raw data itself and the conclusions drawn from it[13] — within the definition of 'personal information'[14] and in some cases 'sensitive information'.[15] Given the broad definition of 'APP entities' to which the Privacy Act applies, the 13 Australian Privacy Principles (APPs) apply to sports teams and leagues, government departments and corporate organisations alike. Key obligations under the APPs include to:

1. take reasonable steps to implement practices, procedures and systems to comply with the APPs;[16]
2. have a clear privacy policy[17] specifying the kinds of personal information collected and held and how, the purposes of collection, holding, use and disclosure;[18]
3. not collect sensitive information about an individual unless they consent and the information is reasonably necessary for the entity's functions or activities;[19]
4. provide an individual with a separate privacy collection notice when actually collecting their personal information;[20]
5. use and disclose personal information only for the purpose for which it was collected, unless the individual consents or they would reasonably expect the information to be used for another purpose directly related to the primary purpose;[21]
6. take reasonable steps to ensure that any overseas recipient to whom personal information is disclosed does not breach the APPs;[22] and
7. take reasonable steps to protect personal information 'from misuse, interference and loss, and from unauthorised access, modification or disclosure'.[23] Steps include the mandatory data breach notification scheme under Part IIIC of the Privacy Act where unauthorised access or disclosure of personal information is likely to result in serious harm to the individual[24] considering (among other things) the sensitivity of the information and the nature of the harm.[25]

The Privacy Act falls short, however, in the employment context. Private sector organisations are excluded from the scope of the Act where their acts or practices directly relate to both an employment relationship and an 'employee record'[26] (including information about an employee's health, performance or conduct).[27] Professional sports teams and leagues are therefore likely exempt from these APPs in applying ABD for performance, injury and training purposes, given the direct nexus to the employment relationship, as are other private employers that use their employees' biometric or other health data for identity verification or work surveillance (even if invasive). The nuances of this exemption are, however, still being considered. The OAIC has acknowledged that the exemption does not apply to acts and practices outside the scope of the employment relationship, 'to ensure that employers cannot use employee records for

commercial purposes unrelated to the employment context'.[28] What is inside versus outside the scope of the modern employment relationship is open to question but commercialising an employee's biometric data at least appears to be caught by the APPs. The recent case of *Lee v Superior Wood*[29] raises further questions. The Fair Work Commission confirmed that biometric information collected from employees using fingerprint scanners constituted sensitive information, and despite the employment exemption, Superior Wood was obliged to comply with the APP requirement to provide a collection notice to Mr Wood at that time as the employee record to which the exemption related had not yet been created.[30] Despite having failed to comply with the APPs, the Commission ultimately held that Superior Wood had not unfairly dismissed Mr Wood for refusing to use its fingerprint scanners. The case is currently on appeal.

Outside the Privacy Act, alternative privacy protections for athletes and other employees vary. Workplace surveillance legislation is inconsistent (currently just NSW, Victoria and the ACT) and only prohibits employers monitoring their employees through covert surveillance.[31] Despite the High Court leaving open the possibility in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[32] there is still no common law tort for invasion of privacy in Australia and subsequent cases suggest that will not change in the foreseeable future.[33] The equitable doctrine of breach of confidence could be relied upon for misuse or unauthorised disclosure of personal health data where it is not already publicly known and the employee can demonstrate that the disclosing party knew or ought to have known the information was confidential,[34] but if the information has already been leaked, then an injunction (as awarded *AFL v The Age*[35] concerning players' positive drug test results) would be futile and equitable compensation may be difficult to quantify.[36]

Professional sports teams and leagues in the US and Australia have taken the initiative to address shortcomings in the law through their collective bargaining arrangements (CBAs) with player representative unions — and their approaches are instructive for other organisations considering their own employment and consumer policies and practices. The CBA for the US Major League Baseball (MLB) sets a high benchmark, requiring the collection of ABD from wearable devices to be strictly voluntary, and restricting teams from any use of wearable devices until 1) the device has been approved through a joint committee comprising the Office of the Commissioner and players' union representatives and 2) the team has provided to each player a written explanation of the device and a list of team representatives who will have access to the data.[37] Players are entitled to access their own ABD and, critically, teams must not disclose ABD to any third party without the written consent of both the player and the players' association.[38] Commercial use of ABD is strictly prohibited, as is its use for salary arbitration.[39] The CBA for the National Basketball Association (NBA) follows a similar approach, additionally providing for a joint committee to establish cybersecurity standards for the storage of ABD with which each team must confirm that it complies.[40] The recently agreed Australian CBAs for the AFL and the NRL are less robust, providing for mandatory collection of ABD through GPS devices (with other wearable devices to be approved by joint committee or by the players' association).[41] The AFL's CBA permits limited ABD to be used in authorised broadcasts without accompanying physiological data,[42] whereas the NRL's CBA establishes a licensing scheme under which ABD may only be used in authorised broadcasts in a manner favourable to players and for a fee payable to the players' union (similar to the NFL in the US).[43] Both the AFL and NRL, and their teams, may use ABD for research, trend analysis and injury purposes, but any other use is subject to players' association consent.[44] AFL teams must take 'all necessary steps' to keep ABD within their control confidential and may be sanctioned for confidentiality breaches.[45]

Across all these leagues, however, ABD from wearable devices is distinguished from a player's general medical records, with the latter exposed to much broader use. The absence under the Australian CBAs of a requirement for written explanations to be provided to players about wearable devices and use of their ABD also raises doubts about whether consent to the collection, use and disclosure on CBA terms is in fact informed, voluntary, current and specific as outlined by the OAIC,[46] particularly as GPS devices are still effectively mandatory. Moreover, the lack of transparency in any of the CBAs or otherwise published about team and league data protection practices and data breach response plans demonstrates that professional sport is still some way from robust management and security of biometric and other personal health data.

No examination of this topic is complete without acknowledging the recently introduced European Union's General Data Protection Regulation (GDPR).[47] Although the application of the GDPR in Australia is limited to organisations with European consumers, its higher standards expose shortcomings in the APPs themselves and showcase what best privacy practice looks like. In terms of impact, the GDPR clarifies APP 1 by requiring organisations to undertake a privacy impact assessment before processing personal data that is likely to result in a high risk to rights and freedoms (such as through new technologies).[48] In terms of consent, the GDPR strengthens APP 3 by requiring not only express consent to process biometric and other personal health data[49] but demonstration that a person is given 'real choice' about whether to participate — in line with the MLB and NBA CBAs — and the ability to withdraw consent.[50] In terms of notice, it goes beyond APP 5 and 6 by requiring fair and transparent notice to a person including all the purposes to which their personal data will be applied,[51] the period for which the data will be stored,[52] and the fact that the person has a right to access, request rectification or erasure of the data, a right to data portability and a right to object to processing irrespective of their original consent.[53] Perhaps most critically, the GDPR challenges the standards of APP 11 and builds on language of the NBA CBA by requiring implementation of 'appropriate technical and organisational measures to ensure a level of security appropriate to the risk', highlighting by example pseudonymisation and encryption of data; measures to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services; and data breach response plans and processes for regularly testing, assessing and evaluating the effectiveness of those measures. Ultimately, the GDPR mandates a privacy-by-design approach that, while encouraged by the OAIC, is lacking in the APPs and in Australian practice. It may simply be a matter of time before the GDPR finds its way into our legal landscape, so Australian organisations using personal health data, particularly employers, should get cracking.

Footnotes

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14. *Privacy Act* 1988 (Cth) s 6(1).
15. As biometric templates, biometric information used for automated biometric verification or identification or 'health information' if the metrics concern an illness, injury or disability — see Privacy Act s 6.
16. Privacy Act, above n 14, APP 1.2.
17. Ibid, APP 1.3.
18. Ibid, APP 1.4.
19. Ibid, APP 3.3.
20. Ibid, APP 5.2.
21. Ibid, APPs 6.1 and 6.2.
22. Ibid, APP 8.1.
23. Ibid, APP 11.1.
24. Ibid, s 26WE(2).
25. Ibid, s 26WG.
26. Ibid, s 7B(3).
27. Ibid, s 6(1).
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39. Ibid, art VI, Part E.
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42. AFL Collective Bargaining Agreement, above n 41, art 45.2.
43. Interview with Adrian Turner, above n 41.
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45. AFL Collective Bargaining Agreement, above n 41, art 45.5.
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47. *General Data Protection Regulation* (EU) 2016/679.
48. Ibid, art 35.
49. Ibid, arts 6, 9.
50. Ibid, art 7(3).
51. Ibid, art 13(1)(c).
52. Ibid, art 13(2)(a).
53. Ibid, art 13(2)(b) — referring to arts 15, 16, 17, 20 and 21.

Nicole Choolun

Prior to joining SBS as a Legal Counsel in 2016, Nicole worked primarily in corporate transactions at McCullough Robertson Lawyers and Simpsons Solicitors. As a former competitive track and field athlete, her passion for broadcasting and sport dates back to the 1992 Barcelona Olympics and continues through her involvement in SBS's coverage of football and cycling.

YOUR BRAND IN THE CONSUMER'S HANDS

User-generated content and influencer marketing allow organisations to engage more closely with consumers. However, both carry legal and reputational risk. In-house legal teams are uniquely placed to add value to their organisations by recognising and responding to these risks.

In February 2019, Edelman's Trust Barometer, which measures consumer trust levels globally, found that Australians now trust business more than government and media, but trust in traditional media is higher than trust in search engines and social media.[1] Following the leadership spills, Royal Commissions and #MeToo movement that unfolded in 2018, Australians trust their employers overwhelmingly more so than other institutions.[2] In this context, advertising campaigns including those by Puma, Lacoste, Nike and Gillette have increasingly focused on social justice issues and activism.

Advertisers are incorporating 'authentic', distinctive content (increasingly video) that is engaging, bold, and 'shareable'. Fiat Chrysler Automobiles' video campaign for its Jeep brand in January 2019, released online, was reportedly viewed over 106 million times, reaching a larger audience than the television broadcast of the Super Bowl.[3] But while engaging and provocative online content drives clicks, it also carries legal and reputational risk.

The brand in customer hands

All organisations that have an online presence are content publishers and may be liable for any content broadcast, communicated or posted (or shared or reposted) that is defamatory. In addition, legal, regulatory and reputational risk may arise where third parties such as customers or audience are involved in content creation for brands. Key examples include:

- **User-generated content.** Where a campaign includes content contributed voluntarily by consumers that is uploaded to or posted on an organisation's managed social media or online platforms.
- **User-generated comments.** Where an organisation publishes content on their managed social media or online platforms where comments can be made by third parties.

Legal learnings

The law on a company's liability for defamatory Facebook posts made on their managed platforms by third parties is yet to be decided by Australian courts. At the time of writing, this issue was being tested in the Supreme Court of NSW.[4] In this case, the media defendants allege they were not responsible for the publication of the third-party comments that they were not alerted to. Once decided, this case may provide further clarity as to when a publisher will be liable for user-generated comments and whether knowledge is necessary. Previously, *Google Inc v Duffy*[5] decided that secondary publishers (like Google) may be liable for defamation once they know of, or ought reasonably to know of, defamatory material on their platforms and fail to take reasonable steps to remove the content. In any case, potential risk of liability for third-party contributions means that, if they have not done so already, companies should consider their own approaches to moderation and removal of content where necessary.

While it may be impractical and labour-intensive to moderate social platforms closely, there are many non-legal reasons for why organisations may choose to do so. These include ensuring customer complaints are responded to, engaging closely with customers, ensuring that content posted is consistent with a brand's values, and any negative consumer sentiment or backlash is monitored. To this end, terms and conditions often apply to guide discussion and comments — for example, reminding participants 'to treat each other with tolerance, courtesy and respect'.[6]

From a consumer law perspective, the Australian Competition and Consumer Commission (ACCC) holds organisations responsible for posts or public comments made by others on their social media pages that are false or likely to mislead or deceive consumers — for example, false or misleading product reviews. The ACCC suggests moderation of social media pages and removal of any posts that may be false, misleading or deceptive as soon as an organisation becomes aware of them. Interestingly, the ACCC takes into account the size of the business when assessing an organisation's response to this issue.[7]

Copyright infringement is another legal issue to consider where customers are contributing their own content to a campaign. For example, campaigns that allow consumers to post video or photo content to a company's social media platforms risk including third-party materials to which neither the company nor the customer has intellectual property rights.

From a regulatory perspective, user-generated content is at risk of falling foul of the Code of Ethics of the Australian Association of National Advertisers (AANA).[8] Complaints regarding code breaches are dealt with by Ad Standards, under an industry based self-regulatory system. In 2016, Ad Standards investigated a complaint in relation to Carlton & United Breweries' posts to Facebook and Instagram that featured a user-generated photo of a beer near a kangaroo's head with the words 'Kangabrew'. Ad Standards ruled that the complaint breached AANA clauses 2.3 and 2.6, which provide that 'Advertising or Marketing Communication shall not depict material contrary to Prevailing Community Standards on health and safety'. Ad Standards considered 'the advertiser's response that the advertisement contains user-generated content but considered that its placement on the advertiser's Instagram page means that the advertiser is responsible for all content on that page'.[9]

Aside from legal and regulatory risk, campaigns reliant on user-generated content make it more difficult to control the message, so reputational risk can be high. The Victorian Taxi Association learned this lesson the hard way in 2015, when their twitter campaign asking people to tell their 'taxi story' resulted in their #YourTaxi hashtag being bombarded with consumer stories of poor service and outright harassment by taxi drivers.[10] Similarly, in February 2019, Bonds removed the public voting component from its famous Bonds Baby Search, an annual campaign featuring user-generated content where customers entered the competition using their children's baby photos. The change was made to make the competition more inclusive and because derogatory and bullying comments about children's appearances had been posted to Bonds' social media platforms.[11]

Influencer issues

Industry focus on authenticity, gaining brand awareness, audience reach and targeting Generation Z and Millennials, have all contributed to the fast rise of influencer advertising. Essentially, an influencer is an individual with a large and loyal following on social media platforms, particularly in a niche area of expertise, for example, the beauty industry. An influencer may strike a commercial partnership to produce content featuring or endorsing a brand in

exchange for payment and/or free product. Marc Jacobs recently announced their commercial partnership with a make-up artist with more than 11 million followers on YouTube and Instagram who will be involved in their product development and create and share content via her social media platforms and official Marc Jacobs channels.[12]

Since the influencer space has developed quickly, it is unsurprising that there have been issues with fraudulent practices such as influencers buying followers, misrepresenting the amount of page views of their content, and failure by influencers to disclose that their posts or content are in fact sponsored. Despite these pitfalls, the World Federation of Advertisers released global research in 2018 which found that 65% of multinational companies surveyed planned to increase their influencer spending in the next 12 months.[13] The key risks highlighted in the survey included consumer trust, legal and financial risks, reputational risks and brand safety.[14]

A matter of distinction — endorsement and enforcement

In Australia, influencer advertising is subject to Australian Consumer Law, which precludes engagement in misleading or deceptive conduct via advertising. This includes not making unsubstantiated claims about a product or service or using false celebrity endorsements. The AANA Code of Ethics also regulates this space and at clause 2.7 provides:

> ***Advertising or Marketing Communication must be clearly distinguishable as such to the relevant audience.***

To assess whether content may be regulated by the Code, two criteria must be met by asking:

1. Does the marketer have a reasonable degree of control over the material?
2. Does the material draw the attention of the public in a manner calculated to promote a product or service?

Complaints under the Code are made to Ad Standards, whose Community Panel determines whether complaints are upheld or dismissed, and, if upheld, material may need to be altered or removed from circulation. The panel recently determined that the existence of a commercial agreement (regardless of whether money is exchanged) and an advertiser's ability to remove posts met the 'reasonable degree of control' test above. The next step is to determine whether the material is distinguishable to the relevant audience, being followers of that influencer.[15] The key is that it is must be clear to the audience, considering the content as a whole, that it is commercial in nature. There is no strict requirement to label posts as sponsored content per se, so marketers have latitude as to how best to do this while maintaining brand integrity.

The AANA's Industry Practice Note provides that:

> ***the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, the use of brand names or logos as well as the relevant audience in the context of the medium used' are relevant in making the assessment.[16]***

The Ad Standards Community Panel has so far dismissed two influencer-related complaints since clause 2.7's inception in 2017. Most recently, an Instagram post by Pip Edwards featuring an image of a Mercedes Benz, and a reference to '@mercedesbenzau' was found to constitute advertising, but was distinguishable to the audience.[17] Ad Standards said the influencer had a commercial agreement with Mercedes Benz which gave the company the right to remove images and required her to post a prescribed number of images. While the company did not direct the post or exercise control over it, the overarching commercial partnership, the placement of the loaned car with logo showing and inclusion of '@mercedesbenzau' meant the company had reasonable control over the posts. However, the Board found this influencer's post was distinguishable as advertising, because the influencer's Instagram followers would have seen a series of posts, including one that said: 'Thank you to @mercedesbenzau for welcoming us into their stable, as Friends of the Brand!'.

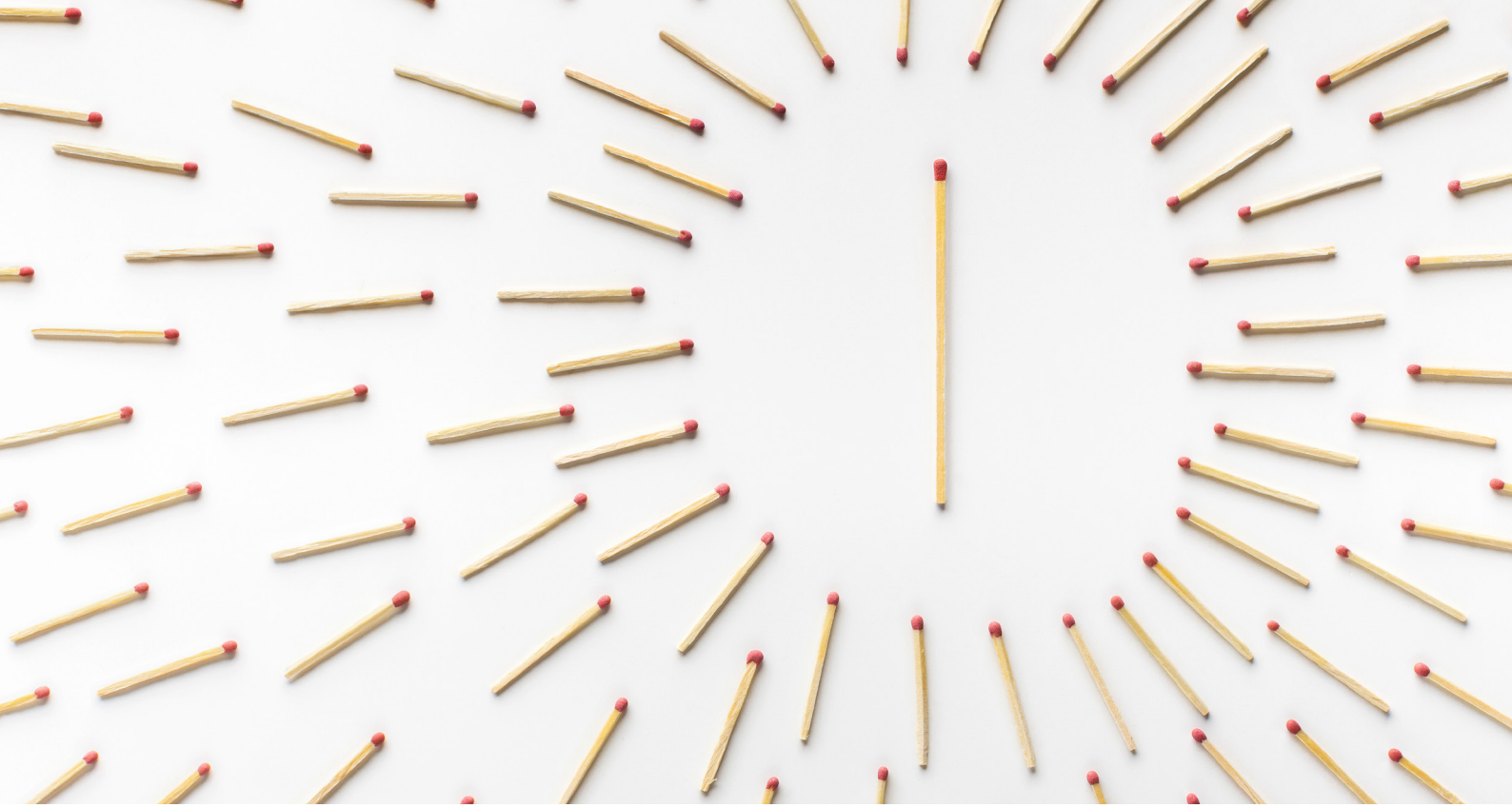
Ultimately, while a non-prescriptive approach to labelling material as 'sponsored' prevails in Australia, the risk of breaching consumer trust by failing to disclose a sponsored endorsement is likely to be a greater risk to a brand than having a complaint upheld by the AANA. Erring on the side of transparency by using popular conventions to signpost when content is sponsored (such as #ad, #sponcon) may help preserve audience trust and avoid assaults to brand integrity. Platforms like Instagram and Facebook have developed their own systems to assist with distinguishing paid sponsorship material.

Legal learnings

When engaging influencers, defining the relationship between organisation and influencer and/or their agency, including setting expectations, via a comprehensive contract is crucial. While there is no 'one size fits all' approach, focusing on negotiating intellectual property rights and content to be created from the outset, may help manage expectations. Contemplating licence terms, territory and any additional usage fees that may apply to future uses — as well as the type of content being created, where the content will appear, and on whose social media platforms — may minimise surprises.

Ensuring deliverables are clear and the content of posts, as well as their frequency and timing, is canvassed prescriptively is wise, but considering management of reputational impacts is also vital. Conducting due diligence by reviewing an influencer's social media feeds over time may reduce the likelihood that an influencer's values or any previous endorsements or social stances conflict with the brand's. This issue faced Australia's Federal Health Department in 2018 when some fitness influencers engaged for its #girlsmakeyourmove campaign were alleged to have been previously associated with alcohol companies and extreme dieting, contrary to the campaign's focus.[18] From a contractual standpoint, considering exclusivity obligations preventing influencers from endorsing competing products or services during and after their engagement for a set period may assist.

As influencers wield great power with a brand's target audience, companies should consider how best to deal with an influencer going rogue or a Twitterati backlash that reflects poorly on the brand. Extremely broad immediate termination rights, which allow a company to sever ties quickly to limit fallout if things turn toxic, are crucial. The ability to remove content and ensure that the company can distance itself from the influencer also assists in this regard, but by this stage, the damage is done, and mitigation is the focus. The steps above around due diligence and managing expectations from the outset should help minimise a bitter brand breakup.



Practical points

In-house counsel may consider the following to assess potential exposure:

- **Consider the types of content created by your organisation, including third parties, and who engages with it.**
- **Consider whether your organisation has a social media moderation strategy and take-down policy for user-generated comments or other third-party content.**
- **Consider whether clear terms of conditions or rules of engagement are in place for the organisation's social media communities and whether these are effective.**
- **Before instigating a campaign reliant on user-generated content, consider what checks and balances are in place to minimise reputational risk to your brand (and implement them if none exists).**
- **When engaging influencers, consider steps taken to ensure their social media posts will be clearly distinguishable as advertising.**
- **Review any existing influencer contracts to assess which provisions minimise reputational risk and do your due diligence to find the right fit.**

Footnotes

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With thanks to Carlie Smart for her assistance.

THE 'WITHOUT PREJUDICE' PRIVILEGE – A RECENT CAUTIONARY TALE

The scope of the 'without prejudice' privilege is an issue that can cause consternation amongst the most experienced lawyers. The privilege has developed to enable litigants to explore settlement of their dispute without affecting their legal rights; it does not, however, extend to all statements or communications made in furtherance of a compromise in the litigation.

In early February, the Supreme Court of New South Wales was called upon to decide, amongst other things, whether communications between parties to a design and construct contract were admissible in the proceedings or whether the communications were subject to the 'without prejudice' privilege (*Hera Resources Pty Ltd v Gekko Systems Pty Ltd* [2019] NSWSC 37).

The application for ruling

The application for ruling was made in advance of trial and under s 192A of the Evidence Act 1995 (NSW) (Evidence Act). Section 192A provides:

> ***Where a question arises in any proceedings, being a question about:***
> ***(a) the admissibility or use of evidence proposed to be adduced, or***
> ***(b) …***
> ***(c) …***
> ***the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.***

The documents over which the dispute arose were a letter from the defendant to the plaintiff dated 26 October 2016 and an expert report prepared for the defendant and provided with the letter. The defendant submitted that the letter was privileged from production under s 131 of the Evidence Act and that the report was privileged under either s 131 or under s 118 or s 119.

Section 131 codifies the 'without prejudice' privilege. It provides that evidence is not to be adduced of:

> ***(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or***
> ***(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.***

Sections 118 and 119 codify client legal privilege (advice and litigation privilege, respectively).

Background to the dispute

The design and construct contract between the parties contained a dispute procedure which commenced by service of a notice of dispute. The escalation clause then provided for a conference between the parties' managing directors, mediation, and then a choice of arbitration or litigation.

The plaintiff had identified a number of defects in the plant, which was the subject of the contract, in a letter to the plaintiff in early May 2015. The defendant's response was marked 'without prejudice' and sought further information and a site visit. The plaintiff provided some information in an 'open' letter. The defendant responded in a document called a 'Technical Note', again marked as 'without prejudice', and sent this under cover of an email offering:

> ***… to meet on a without prejudice basis but we would need to have received all potential defects notices prior to such meeting …***

Once again, consistent with its earlier letters, the plaintiff commented on the Technical Note in an 'open' letter, observing that the letter served as a notice of dispute under the contract. Some further correspondence then passed between the parties; this correspondence is not disclosed in the judgement.

Almost a year later the plaintiff sent a 'without prejudice' letter to the defendant offering 'to have a final without prejudice meeting with the Managing Director of [the defendant] in an effort to reach an amicable resolution of the dispute, provided such a meeting takes place by Friday 17th June'. This was followed by discussions between the parties. The plaintiff then sent another 'without prejudice' letter to the defendant; the defendant responded by email marked 'without prejudice'. Both letters deal with the role of the insurer and in broad terms express a desire to continue settlement discussions. There are no settlement offers or statements of compromise in this correspondence.

The plaintiff responded confirming its right to commence litigation or arbitration.

The defendant then sent the letter and the report that are the subject of this decision. The letter was sent in response to the plaintiff's first letter in the new dialogue. It was marked 'without prejudice' and enclosed a copy of the report. The letter 'took issue with [the plaintiff's claims]', but concluded with the words:

> ***[the defendant] is prepared to conduct a without prejudice meeting with [the plaintiff] to discuss the possible resolution of the Area 15 dispute.***

The plaintiff's response was not marked 'without prejudice'. It set out the steps taken by the parties in furtherance of the dispute and the settlement discussions since June 2016, but did not contain any settlement offer or compromise. Around six weeks later, the defendant made a without prejudice offer.

Consideration

His Honour referenced ss 118, 119 and 122 of the Evidence Act, noting the circumstances in the Act when client legal privilege can be lost. His Honour then turned to s 131 of the Evidence Act, which is entitled 'Exclusion of evidence of settlement negotiations', observing:

> ***As s131(1) makes clear, in order to attract the privilege, a communication or document must be made or prepared "in connection with an attempt to negotiate a settlement". The connection must be a direct one. An indirect connection is not sufficient. However, it is not necessary that the communication itself make an offer or that it be directed at achieving a compromise. It is sufficient if the communication or document is directed at arranging or bringing about a settlement: see Galafassi v Kelly [2014] NSWSC 190 at [115] ff per Gleeson JA. It is not necessary that the communication or document be described as "without prejudice", nor is it conclusive if it is. However, the fact that the parties have described a communication as "without prejudice" is some evidence that it is made in connection with an attempt to settle a dispute: id at [122].***

Was the report subject to client legal privilege?

His Honour rejected the submission that the report was protected from disclosure by client legal privilege. There were two reasons for this. First, his Honour found that the report had not been prepared for the dominant purpose of obtaining legal advice: '[a]t least a substantial purpose of the report was to provide an answer to [the plaintiff's] claim'. This finding was based on statements in communications between the parties. Secondly, his Honour found that the defendant waived any privilege in it by providing it to the plaintiff under cover of the letter.

Were the letter and the report covered by the 'without prejudice' privilege?

His Honour was not persuaded that the documents were protected by this privilege, finding that:

> ***there is not sufficiently close connection between the 26 October Letter and the OMC Report and any attempt to negotiate a settlement of the dispute for the letter and report to attract the privilege conferred by s 131 of the Act.***

In particular, his Honour noted that the letter and the report:

> ***were not themselves directed at an attempt to negotiate a settlement of the dispute even though they provided context in which settlement discussions could occur and settlement offers could be evaluated.***

His Honour also had regard to the fact that the letter and report were not provided 'as part of some process agreed between the parties to negotiate a settlement'. His Honour's view was that the information in the letter and the report 'was exchanged as a means of crystallising the dispute and providing the context in which discussion could occur'.

As to the fact that the defendant had expressly marked the letter as 'without prejudice', his Honour confirmed that this did not alter the position. A reference to 'without prejudice' discussions in the letter was also of no import when determining whether the letter and report were actually covered by the 'without prejudice' privilege.

The ruling

The Court ruled that both the letter and report were admissible and could be relied on by the plaintiff at trial.

Observations

This decision is a warning of the need for clear (and parallel) communications where parties are both exchanging information about a dispute and discussing a potential settlement. It is all too easy to send one email or one letter addressing all issues relevant to a dispute and its resolution. However, where parties are communicating both under the privilege and by express 'open' letters, the prudent course is to send separate communications. Had the parties in this case adopted that approach, aspects of the letter, which was the subject of the ruling, may have been protected. The earlier decision of *Gladio Pty Ltd v Buckworth*, cited by his Honour (and referred to above) reinforces this message.

As to the report, whilst it is difficult to see how it might be protected by the 'without prejudice' privilege, there are circumstances in which it might have been commissioned and provided to the other party whilst attracting and preserving protection under the litigation privilege. Here, that was not the case.

This decision makes it clear that the 'without prejudice' privilege (amongst others) will always be based on the purpose and content of any particular communication. The words 'without prejudice' will not protect a document from disclosure or render it inadmissible.

Bronwyn Lincoln

An international arbitrator Bronwyn practices in international commercial arbitration and commercial litigation, with a focus on cross border and multi-jurisdictional disputes. She has advised and acted for national and global clients across a range of industries, including telecommunications, resources and mining, infrastructure, consumer products, pharmaceuticals and real property.

TECHNOLOGY IN TRANSPORT: MOVING YOU IN(TO) THE FUTURE (PART 2)

In the previous issue, we introduced the rapidly developing technology revolutionising the way we will commute in the future. On demand transport services are already operating across Australia and the world, with newly established regulatory frameworks governing their operation. While the legislative position on automated vehicles (AVs) is still very much under development, a range of key legal issues are being considered and trials are underway in all Australian States and Territories.

The immense benefits accompanying automated vehicles are recognised by governments, however as the associated risks are numerous, it is vital that a framework is put in place to govern the transition between partial automation (in use today), and full automation. In light of both Australian and European developments, this article will focus on AVs and examine the key issues including liability; insurance; data ownership; protection and cybersecurity.

In August 2017, the Commonwealth Standing Committee on Industry, Innovation, Science and Resources released a report examining 'Social issues related to land–based automated vehicles in Australia' (Report). The Report examined and reported on social issues including safety, legal responsibility, access and equity issues and general social acceptance. In its June 2018 response, the Australian Government expressed support for the committees' 10 recommendations.

Addressing the Liability Issue: Who is responsible for an accident caused by an AV?

Due to increasing deployment of automated vehicle technologies, the global regulation of AVs has become a key focus over the last decade and the Vienna Convention on Road Traffic (Convention) was consequently amended to specifically address this. Under the Convention, "automated driving technologies transferring driving tasks to the vehicle" are now explicitly allowed in traffic, provided that these technologies are in conformity with the United Nations vehicle regulations or can be overridden or switched off by the driver. Although Australia is not yet a member of the Convention, it is moving in the same direction, taking initiatives to adapt its existing regulatory framework and implementing additional legislation as the technology evolves further.

When addressing responsibility for an incident, the key question of causation is decisive in attributing liability, and deciding whether the manufacturer, software developer or the driver is liable. Currently in Australia, for any vehicle to be allowed in traffic (including AVs) someone is required to be in control of the vehicle at all times – either physically or remotely. One of the major issues the legislator is faced with is how to define "control", and how this is affected by the acceptance of liability by manufacturers. Volvo, for example, has made a clear statement: "Volvo will accept full liability for damages or injuries whenever one of its cars is in full autonomous mode" (Report, 4.9). However, for this to apply, the question of who was actually driving will need to be answered. A possible solution proposed in communication from the European Commission to the European Parliament dated 17 May 2018 (EC Communication) is that automated vehicles are fitted with data recorders to clarify who was driving (the vehicle's autonomous system or the driver) during an accident. But this requirement, and the necessary protections under privacy law, lead to personal data protection issues.

Another paramount issue is the scheme for compensation of victims while liability is still being disputed. As stated in the EC Communication, in the European Union (EU) liability for motor vehicles is addressed through various instruments at EU level and implemented by "Member States", such as the Motor Insurance Directive or the Product Liability Directive. This is in addition to different liability regimes in the Member States, such as traffic laws, civil law or specific strict liability regimes.

In France, it is compulsory for any driver to hold a personal liability insurance, similar to compulsory third-party insurance schemes in Australia. The Report recommends the quick compensation of victims where an automated vehicle is involved. The insurer could then take legal action against a vehicle manufacturer if there was a defect in the automated driving system.

Data Protection and Cybersecurity: Ensuring the protection of personal safety and information in an age of evolving vehicle autonomy

Alongside the question of liability, another key issue associated with the introduction of AVs is cybersecurity. This is important from both safety and privacy perspectives. Similar to a computer, the technology controlling an AV can be vulnerable to hacking. The vehicle will also likely collect a significant amount of data about the owner.

AVs generate a significant amount of data. According to the CEO of Intel, over an eight-hour period, one AV will generate and consume approximately forty terabytes of data. As identified by Corrs Chambers Westgarth in their article 'All roads lead to the internet: Privacy in the age of autonomous vehicles, there is data from the AV's sensors responsible for interpreting the environment, and on the software that dictates the resulting action the vehicle will take. Yet there is also personal data relating to the passenger/driver such as location, potentially facial details for access purposes and preferences on things like music, air conditioning and route. This will only become more complex once AVs are more prevalent on the roads and start 'talking' to each other, necessarily involving the sharing of data.

So, who owns this data? Where will it go and what will it be used for? Provided the vehicle manufacturer's revenue is over $3 million, Australian privacy principles will apply to their collection, use and disclosure of "Personal Information". Requirements will therefore include taking reasonable steps to inform the individual of the purpose for the collection and not using or disclosing this for a secondary purpose. Similarly, in Europe, the EU rules governing the protection of personal information will apply to the processing of personal data, including that from vehicles. However, whether these protections are sufficient is questionable and there are a number of further considerations. For example, should the Government be entitled to access this data for establishing traffic policy or measuring carbon dioxide emissions? Or,

in the event of an accident will an insurer be entitled to request the recordings. The Report recommends further investigation into issues of data rights for consumers, vehicle manufacturers and third parties such as government agencies and insurance companies. Establishing transparency into what information is being collected and how it is being used early on will go a long way towards building public acceptance of AVs.

Another major consideration for AV manufacturers is ensuring these are not vulnerable to third party interference. In 2016, two people remotely assumed control of a Jeep Cherokee, changing internal features such as air conditioning and radio, and more seriously, shutting down the engine – a stunt that resulted in the recall of 1.4 million vehicles by Fiat-Chrysler across the US. This risk is heightened by the likelihood that the driver is no longer focused on driving, and will therefore be slower to react and resume manual control. Vulnerabilities to cyberattacks were acknowledged in the Report as a barrier to public acceptance of AVs, and on recommendation the Department of Home Affairs is working to embed strong cyber security into modern motor vehicles as part of the National Cyber Security Strategy. Similarly, in Europe, guidelines for the protection of vehicles against cyberattacks have been developed and it is the intention of the Commission to integrate these into legislation. Given the potential impact of losing control from a safety perspective, sufficient cybersecurity requirements such as isolating safety critical systems from features connected to the outside world, are essential to the successful rollout of AVs.

While there is not yet a national framework, work is underway to identify the way forward. Following the Report, the Australian Government is pursuing a number of actions, including the establishment of a fund for the compensation of victims, investigation into vulnerabilities of automation and associated data issues, along with the best solutions to address these.

The legal framework will evolve in parallel with the integration of AVs onto public roads. The period of mixed use is recognised as being especially challenging and therefore these key questions must be addressed early on so that Australia is sufficiently prepared. However, there will also be a myriad of new considerations to be addressed once AVs are on the roads.

Emily Jordan-Baird

As Senior Corporate Counsel to Transdev Australasia, Emily provides legal advice across a range of new and exciting areas of public transport. She is head privacy officer across the Transdev entities and, with the support of Transdev, has just completed her LLM with a focus on commercial law at Monash University.

Emilie Canavese

Commencing her legal career with the French Development Agency, Emilie advised on major infrastructure projects as a senior corporate counsel for Vinci and Dalkia. Having practised in France for 10 years, Emilie recently relocating to Melbourne where she joined Transdev as a Legal Counsel.

UNIQUE ETHICAL CHALLENGES FOR IN-HOUSE LAWYERS

In-house lawyers in their role as legal advisors to corporations, government departments, or other bodies or organisations are no different from other lawyers. However, because the client of in-house lawyers is usually their employer, some unique ethical challenges can arise for them.

Australia's Chief Justice, the Hon Susan Keifel AC, has written that:

> ***Lawyers may generally be said to be necessary to the working of the law in all its respects. But it is only the ethical lawyer who is essential to a system of justice.[1]***

Lawyers must be ethical in the practise of their profession at all times and be mindful always that their paramount duty is to the court and the administration of justice which, on occasions, may conflict with their other ethical duties, including those owed to clients and third parties.

The purpose of this article is to touch on some of those challenges by discussing two typical ethics scenarios that can arise for any in-house lawyer, often with very little warning.

1. Conflict of interest with a twist — company v personal interests

You are employed as general counsel to a company and are instructed by your employer's People and Culture Director to provide legal advice concerning a major corporate restructure following a merger between your company and another larger company. Part of your advice will need to address the legal issues surrounding proposed redundancies caused by the merger including the issue of redundancy salary and benefit packages.

You are provided with a detailed Redundancy Management Plan as part of your instructions. When you are studying this document, it becomes apparent to you that your role as general counsel is probably going to be one of those to be made redundant since the other company already has a small in-house legal team headed by a more senior and experienced lawyer than you.

What are the ethical issues arising for you and how should you address them?

Identifying the conflict quickly and managing it ethically

Since the employer of an in-house lawyer is their client, whenever the personal interests of an in-house lawyer do not accord with those of their employer, there is potential for conflict of interest to occur.

Like all lawyers, those practising in-house have an ethical duty to their employer client to avoid conflicts of interest. When faced with an unavoidable conflict of interest, in-house lawyers must be conscious of the conflict throughout their dealings, declare it openly, clarify the capacity in which they are acting, and cease acting should the conflict become unmanageable. In-house lawyers must, above all else, comply with their professional conduct rules.

Rule 12.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 provide that 'a solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor'.[2]

In the scenario described above, your ethical obligation is to inform your employer client immediately of the potential conflict of interest, since you are being asked to provide legal advice regarding an employment matter which, in part, involves your own personal interests. Once disclosure is made, it then becomes a matter for your employer as to whether it instructs another lawyer internally to provide the legal advice or briefs the task out to an external law firm.

2. It's not your problem — it's a management issue

You work as a solicitor in the legal and compliance department of a major financial institution. You were asked to advise on the legality of your employer ring-fencing into one separate group those customers whose personal financial advisers had retired, and then continuing to charge them for services no longer being provided.

You investigated what was happening and advised in writing that such a course was illegal and should be stopped and rectified. You have now been advised by senior management that they will consider your advice and then take a senior management decision that will be in the best interests of your employer.

Senior management instruct you to close your file. You suspect that nothing is going to change and that your advice will be ignored. What do you do?

Unethical business behaviour under close scrutiny

The importance of lawful and ethical behaviour in day-to-day business activities came into sharp relief during 2018 in the hearings and reporting of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.[3]

Even experienced observers and commentators were shocked by many of the revelations that came out of the public hearings, often only after sustained cross-examination by Senior Counsel assisting the Royal Commission.

What has become obvious already from that work is the need for financial and other institutions to foster and promote a culture of ethical behaviour within their organisations where the customer comes first. This approach must be endorsed and supported by boards and senior management with the early implementation of intensive staff training and salary incentives for ethical behaviour.

There is an urgent need for financial and other institutions to look inwards to their ethical obligations towards customers and

shareholders and commit to honest and transparent behaviour in the future. Only by doing so will they regain the trust of the public, which has now been shown to have unravelled so badly to the detriment of Australian society.

Lawyers working within these organisations have an important role to play in this regard because, as officers of the court, they have a fundamental commitment to ethical behaviour and are in an ideal position to lead by example and provide expert advice. Being ethical is not only about obeying the letter of the law, it is about doing the right thing when no-one is looking.

In the scenario described above, you have advised your employer that its activity is illegal and should be stopped immediately. As a solicitor you have a paramount duty to the court and the administration of justice, and you cannot be party to any illegal activity by your employer. Since you work as a solicitor in an in-house legal department you should immediately refer the matter to your managing solicitor or general counsel and seek their professional guidance and assistance.

Ethical lessons from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

The Royal Commission handed its Final Report to the Governor General on 1 February 2019.

The Introduction to the report stated:

> ***The central task of the Commission has been to inquire into, and report on, whether any conduct of financial services entities might have amounted to misconduct and whether any conduct, practices, behaviour or business activities by those entities fell below community standards and expectations.***
>
> ***The conduct identified and described in the Commission's Interim Report and the further conduct identified and described in this Report includes conduct by many entities that has taken place over many years causing substantial loss to many customers but yielding substantial profit to the entities concerned.***
>
> ***Very often, the conduct has broken the law. And if it has not broken the law, the conduct has fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to expect of them.***

The report made four observations:

1. In almost every case, the conduct in issue was driven not only by the relevant entity's pursuit of profit but also by individuals' pursuit of gain.
2. Entities and individuals acted in the ways they did because they could.
3. Consumers often dealt with a financial services entity through an intermediary.
4. Too often, financial services entities that broke the law were not properly held to account.

The report made 76 recommendations, which have been accepted in principle by both the Federal Government and the Opposition.

Conclusion

What has become obvious from the work of the Royal Commission and its reports is that it is imperative that all organisations foster and promote a culture of ethical behaviour, one that is characterised by appropriate board and senior management support and endorsement and the implementation of intensive staff training and incentives for such good behaviour.

There is an urgent need for institutions across the public and private sectors to look inwards to their ethical obligations towards customers, stakeholders and shareholders and commit to honest and transparent behaviour in the future. Only by doing so will they regain the trust of the public, which has now been shown to have unravelled so badly to the detriment of our society. Being ethical is not only about obeying the letter of the law, it is about doing the right thing when no-one is looking.

Early last year, ACC Australia described the relevance and high value of ethical in-house lawyers to their employer in this way:

> ***Corporate culture is widely acknowledged as adding value to companies, both in terms of improving financial performance and in creating an atmosphere that encourages ethical behaviour. Corporate culture is not a topic typically linked to a company's general counsel and legal department, but the failure to draw that link may prove short-sighted on the part of the board. Given the importance of the general counsel in matters of ethics, compliance, corporate governance, and risk and reputation management. The general counsel should be a key ally and partner in establishing a corporate culture that supports corporate performance without compromising ethical behaviour, and legal and regulatory compliance.*** [a]

References

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2. *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, https://www.legislation.nsw.gov.au/regulations/2015-244.pdf
3. Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry https://financialservices.royalcommission.gov.au/Pages/default.aspx

Michael Dolan

Having formerly served as a Senior Ethics Lawyer at the Law Institute of Victoria, Michaelis now a director of ethics4lawyers, a boutique law firm providing advice to lawyers on daily ethical challenges in legal practice. Michael previously held General Counsel roles at the State Electricity Commission of Victoria and the Electricity Supply Association of Australia Ltd.

With assistance from Polly Lowing, Corporate Counsel at Cement Australia; and Virna Trout, Manager Legal - ASEC, FLSmidth.

ACC Australia recently released the ACC Australia Ethics Handbook, Version 4. This resource provides a range of practical information on ethical challenges for in-house counsel, along with a series of hypotheticals and case studies. The ACC Australia Ethics Handbook Version 4 is available for download from the ACC Australia website.

ASIA FOCUSES ON LEGAL OPERATIONS

BCLP's Neville Eisenberg and Bruce Braude reflect on the recent ACC round table that they hosted in Hong Kong and conclude that General Counsel and legal operations specialists in Asia are rapidly driving the legal operations agenda.

Over the past three years we have had the privilege of hosting several round-table discussions in Singapore and Hong Kong for General Counsel (GC) and senior corporate counsel on the transformation of legal service delivery enabled by process optimisation, technology, alternative resourcing models and data analytics. Our most recent discussion was held in conjunction with the Association of Corporate Counsel (ACC) in Hong Kong in January 2019. These events have given us a great opportunity to assess the evolution of the market. We have come away from this most recent event with two key insights.

The first is that the focus on legal operations and technology in the region is rapidly growing and maturing year on year.

Second and more interestingly, at many multinational corporations, the legal operations and technology agenda is not being imposed by a head office in the United States, Europe or elsewhere, but rather is being driven by in-house counsel in Asia.

We believe that there are three main categories of needs driving this focus on legal operations:

- The first is the need to better manage legal risk in an environment that is increasingly global, regulated, volatile and complex. General Counsel must move beyond being experts in the law and its application toward managing risk in a far more structured, real-time and data-oriented manner.
- The second factor, which is exacerbated by the first, is the need to do more for less — i.e. the continuous cost pressure under which GCs operate.
- The third factor is the need to be offering an improved customer experience. Customers in this context are the businesses that the legal department serves and also the company's ultimate customers. As businesses digitise and offer more immediate digital solutions, the legal department can no longer justify slowing down the business and its customer journeys with traditional approaches to advice or contracting.

To address these three factors GCs are increasingly requiring new solutions for legal service delivery and developing their use of data analytics.

Growing range of options for GCs

In response to these changing needs and expectations from clients, we are also seeing various responses from legal services providers. Traditional law firms are investing more and more in innovation, technologies and other professionals such as project managers, process engineers and data scientists. Some law firms offer alternative delivery models such as managed legal services. To fund these transformations, we are also seeing a small but growing number of law firms taking external funding including through public listings.

Beyond traditional law firms, there is an increasing range of alternative legal service providers. Non-partnership service providers such as Lawyers on Demand, Axiom, and Elevate are now established participants in the legal eco-system and the Big 4 accountancy firms are focusing on the Asian legal market. The result is that General Counsel have a growing but fragmented range of service providers for their external legal needs.

Evolution in the delivery of legal services

Bringing together the changing needs in-house and the growing range of delivery models from service providers, we believe the delivery of legal services for many categories of legal work is going through an evolution — from an artisanal trade to an industrialised manner of delivery and then into a big-data phase. Historically, and to a large extent at present, legal work is delivered in a bespoke manner with experts applying their trade to the delivery of legal work. Through the adoption of standardised processes and technology, we are progressing into an industrialised manner of legal service delivery for a growing range of legal work. Based on this, we are also starting to see the early steps in a data-oriented approach to legal service delivery.

One of the main drivers of this evolution is the growing focus by in-house counsel on legal operations. We define legal operations as an in-house function that optimises legal service delivery to its business. The ACC Maturity Model for the operations of a legal department includes the following in the scope of legal operations: change management, compliance, contract management, e-discovery, external resource management, financial management, information governance, internal resource management, IP (intellectual property) management, knowledge management, and metrics and analytics.

According to the 2018 State of Corporate Law Departments report by Thomson Reuters, 50% of those surveyed have dedicated legal operations roles within their legal department and 70% of legal departments have identified a focus on legal operations as a high or medium priority. The growth of this role is having a direct impact on the nature of engagement between legal service providers and their in-house clients.

For example, while partners at traditional law firms have throughout their careers primarily spoken to clients about legal advice and issues, modern GCs are now concerned with a growing range of operational challenges and opportunities. Law firms are having to adapt their client interaction around these new paradigms. Furthermore, with GCs interested in new solutions and having a growing focus on data analytics, legal service providers are under increasing pressure to fine-tune and enhance their traditional service offerings. This is leading to law firms deploying other professionals alongside lawyers in building teams for engaging with clients — whether as part of pitches, service design, delivery, adjacent new services, or client relationship management generally.

Growth in the use of legal technology

No discussion about legal operations would be complete without considering the growing legal tech sector. This has primarily been driven out of the United States and the United Kingdom, but we are seeing the emergence of legal technologies from other parts of the world including from Asia. The number and range of legal tech start-ups is as active as ever. One just needs to review the Legal Geek Startup Map at https://www.legalgeek.co/startup-map/.

As with any start-up community, only some will succeed, but we are seeing a select group of legal tech companies gaining traction with corporate counsel and law firms, evidenced by the significant levels of

investment that some of these companies are able to raise. For example, we have recently seen Onit, a legal workflow platform, raise $200m, as well as AI (artificial intelligence)-enabled document review companies Kira, Eigen Technologies and LawGeex raise $50m, $17m and $12m, respectively.

From our discussions with corporate counsel in Asia, it is clear that there are similar levels of adoption of these technologies in Asia, and we have also observed an interesting maturation in the approach. Three years ago, there was great interest in learning more about the emergence of the legal tech sector and the range of solutions on the market. The following year we observed that several of the corporate counsel in Asia were experimenting with some of these technologies. On our most recent visit, we discovered that the use of legal technology is being considered in a far more sophisticated manner. Whereas in the past it was more about running interesting pilots using technology, today corporate counsel are considering holistic business cases regarding the benefits and returns on investment. Equally importantly, GCs are considering the technology in the context of the overall delivery framework and processes, recognising that technology is only one component of an enhanced delivery model.

How technology platforms are being used

The main category of technologies that we are seeing corporate counsel adopt are platforms to track and manage their work. This includes matter-management software to track legal matters including the ability for business users to raise new legal requests, the legal department being able to track the matters internally and, if outsourced to external legal providers, the external legal providers being able to update the matters online. The general counsel can then monitor all of this through a digital dashboard.

Another key management software is contract management. Even highly sophisticated and digitised organisations are often found to be using outdated systems to store their legal contracts, whether simply on a digital file server, in hardcopy files, or as is often the case, using no standard approach. The legal department then has the challenge of determining where all the organisation's contracts are. This lack of sophistication with contract management is a global problem and is a key area of focus for legal operations professionals. Some are adopting contract management solutions to track and partially automate the creation and execution of contracts and store the end products including managing key data and obligations.

Once these management requirements have been attended to, a natural next step is to automate various tasks using technology. These include document automation for automatically generating tailored contracts, the use of e-signing for executing contracts online, and some early adopters of AI-type solutions for reviewing contracts and identifying key concerns or risks.

This growing adoption of management platform and automation solutions is allowing significant amounts of data to be captured, enabling the general counsel to derive new and valuable insights. Data analysis can be considered from three perspectives. First, management information is typically a snapshot of the current status of matters, contracts, resourcing levels, litigation or costs. Second, one can then analyse historical information to derive insights into trends and issues regarding these areas. Finally, using the historic information, one can build models to provide predictive insights into future matter performance (e.g. predicting costs) or even litigation outcomes.

General counsel are currently mainly focused on obtaining more real-time management information for their legal department. Once some historic data are built up, they will start to analyse trends. Only a few are already starting to look at prediction, but we believe the focus on this will grow significantly and will have material benefits.

Dedicated legal operations resources

The challenges faced by legal departments in Asia tend to mirror those faced in the United States and Europe. Unless dedicated resources are assigned to legal operations, corporate counsel don't have enough time to focus on optimisation as they are too caught up in their 'day jobs'. They tend to have limited budgets and are not sure where to start on their optimisation journeys.

The challenge is compounded by the proliferation of quite fragmented technology solutions currently on the market. Some positive signs are, however, that corporate counsel are increasingly engaging with this field and are moving beyond the 'hype' to focus on their problems and needs holistically. There is also a high degree of collaboration and a strong sense of community across legal operations professionals, enabled by organisations such as the ACC.

A vibrant, ambitious Asian legal operations community

In our experience, the Asian legal operations community is remarkably active and vibrant. There is no shortage of ambition and there is a growing demand for new solutions, especially in fast-growing companies.

Our general advice is for general counsel and legal operations professionals to consider their legal operations from a strategic perspective. They should start by identifying any problems in their departments that need addressing and only then move into optimisation strategies. Gathering data about the current status quo in order to be able to measure, diagnose, improve and then re-measure is critical. Projects should be supported by proper business cases and finally, general counsel should implement change incrementally rather than trying to do everything at once.

For our part, we remain committed to bringing together legal operations innovators in Asia and supporting them in driving forward their agenda. While they should continue to collaborate and learn from others, we urge them not to hold back from taking the lead in transforming their operations for the future.

Neville Eisenberg

A Partner at BCLP, Neville is currently focused on the firm's innovation strategy and key strategic relationships for alternative legal service delivery. He was formerly managing partner for 16 years and, under his leadership, BCLP incubated, grew and sold Lawyers on Demand, the largest 'new law' spin-out to date from any law firm globally.

Bruce Braude

As BCLP's Director of Legal Operations Solutions, Bruce is a software engineer and legal technology expert and has advised numerous in-house legal departments on the enhancement of their legal operations and adoption of technology. Bruce was also previously responsible for transforming BCLP's own legal service delivery through the implementation of a range of new technologies.

THE (BIGGEST) PROBLEM WITH TENDERS

The advent of NewLaw and the disruption of traditional legal services are far from new concepts in our industry. But how are you unlocking the value of NewLaw for your organisation?

New business models for legal services is a favourite topic for conferences and industry publications. Countless commentators (including us!) have proclaimed that 'NewLaw is coming' and predicted how it will transform the industry.

For many years, there was more talk than action. But that's starting to change. Almost 40% of respondents surveyed for the Association of Corporate Counsel's *2018 In-House Counsel Trends Report* had worked with a NewLaw provider — a sharp increase from 2016, when only 26% were familiar with NewLaw.

This article is not another hype piece about NewLaw. It's an article about tenders and requests for proposals (RFPs). But — before you stop reading — it's also an article about the future of our industry. In particular, we want to start a conversation that we believe the industry needs to have: now that NewLaw has actually arrived, how can we all work together to unlock its value?

NewLaw has arrived

First: a quick overview of NewLaw (in case anyone missed the hype). In recent years, a range of alternative legal business models, built on the now widespread paradigm of 'NewLaw', have quickly gained ground in the Australian market. This paradigm was made popular by George Beaton, who emphasised how NewLaw was different from the traditional law firm model on key 'continuums' — such as alternative billing over hourly rates, corporate brands over personal brands, and disruptive technology over sustaining technology.

At its core, NewLaw is a philosophy rather than a business model. A large part of this philosophy is continual innovation and adaptation, informed by design thinking and emphasising the value added by technology. NewLaw providers (which include both innovative law firms and alternative legal service providers) are united by a common goal: to provide legal assistance that is responsive to the needs of users and to continually test — and, critically, improve upon — prevailing legal traditions and practices.

Let's talk about tenders

Tenders rarely come up in the same context as NewLaw. Tenders evoke thoughts of large-scale bureaucracy, driven by strict compliance rather than fresh ideas. However, despite the negative connotations, tenders hold a powerful position in our industry. The evolution of legal services will largely be determined by how money changes hands. Great innovation is irrelevant if no one buys it, and tenders control the flow of a huge amount of legal spend. (Here, we are using 'tenders' to refer to requests for proposals for specific projects, as well as broader panel processes.)

Design thinking (a popular framework for NewLaw) recommends asking 'what is the need?' before talking about problems or solutions. In that spirit, we should start by pinning down the true purpose of tenders. While it is easy to fall back on points like 'compliance', 'risk management' and 'transparency', we see those as side-benefits, not the main game. In our view, the central purpose of tenders is to give organisations access to those providers that will deliver the most value.

Over the years, tendering processes have remained static. Yet when we reframe their purpose in this way, it becomes clear that tenders cannot afford to stay the same while the industry evolves around them. Tenders must also evolve so that they can help organisations benefit from innovation and new business models. But, in our experience, tenders are not keeping pace with our rapidly changing industry.

Tender areas of tenders for NewLaw

The features that make legal providers NewLaw are the same features that are currently creating roadblocks in responding to tenders. In this section, we share the top four hurdles we've confronted in our tender travels as a NewLaw business.

1. Tenders look for individual capabilities within subject areas

The current approach: Tenders ask providers to demonstrate capabilities according to subject areas, usually by referring to key experts in those areas.

The NewLaw challenge: The core capabilities of NewLaw providers are often agnostic to subject areas.

The capabilities section of a tender is where the legal provider shows off their 'product'. The product of a traditional law firm is its lawyers. Unsurprisingly then, tenders generally require providers to demonstrate their capabilities by listing which lawyers in their firms are experts in various subject areas.

NewLaw covers a broad cohort of business models and this challenge impacts each differently. Some providers will still be able to wheel out their legal experts. LegalVision, for example, has over 80 lawyers across our business (and we're growing!). But others, like software businesses or process outsourcers, would be ruled out when the tender asks for individual CVs, even though they could deliver value to an organisation's legal function without having any practitioners on their payroll.

But the bigger concern here is not whether NewLaw can satisfy tender requirements; it's that the tender requirements restrict innovative providers from demonstrating their unique value propositions. The true value offered by NewLaw is driven by capabilities like technology, process and design, which sit above and across a traditional classification of legal practice areas. So, to give a real example, it's difficult to demonstrate how a provider could use technology and process engineering to transform an organisation's entire leasing function when the tender asks simply 'who is the nominated Partner for Property Law?'

2. The world-view of tenders is still 'hourly rates plus value-adds'

The current approach: Tenders ask for hourly rates and 'value-adds'.

The NewLaw challenge: 'Value' is built into the core offering and pricing structure.

In reviewing tender responses, businesses usually judge the value of legal services according to the discounts offered on standard hourly rates, as well as any 'value-adds'. Importantly, these value-adds are seen as separate from the core offering of law firms —lawyer hours. But 'value' is built into every aspect of NewLaw service delivery. By asking NewLaw firms to separate the 'value' from the 'service', tenders demand a comprehensive decomposition of the NewLaw DNA.

NewLaw also prices work according to the benefits delivered through legal services. The focus is on flexibility, transparency and certainty. NewLaw pricing is therefore not just about the number of hours clocked up by lawyers. Technology and processes are an intrinsic part of the service and can be tricky to unbundle from purely 'legal' assistance.

For businesses, value-based and alternative billing can be hard to assess in a vacuum. These principles really only come to life in the context of a specific matter. Hourly rates are a much simpler metric for procurement teams looking to quantify their cost savings. But if a firm with the lowest hourly rate just ends up taking twice as long to do the same work, the 'value' is lost.

3. Tenders expect a lengthy track record

The current approach: Procurement teams look for a history of transactions.

The NewLaw challenge: NewLaw firms are by their very nature … new!

One of the difficulties for NewLaw firms when invited to demonstrate the capabilities of their younger brand is that businesses look for a comprehensive timeline of relevant work. When assessing tender responses, length of experience can sometimes converge with depth of experience and there can be a temptation to preference providers with longer histories. Demonstrating strong technical capabilities is, without a doubt, critical for both traditional firms and NewLaw firms. But assessing proposals through a time-based lens creates a significant handicap for NewLaw providers, who, by name and definition, are newer to the game.

4. Tender compliance requires huge investment

The current approach: Tenders demand extensive compliance measures.

The NewLaw challenge: NewLaw providers are extremely lean.

NewLaw providers are lean organisations without big teams dedicated to tender responses. But, with the high stakes of landing a big client, tenders are often handed to key team members — which means less time for innovation, product development and growth. The compliance elements of a tender create a huge burden. A tender might be the first time a NewLaw business is introduced to the exciting world of ISO standards and business continuity plans.

Of course, compliance measures are essential, and no client should engage a provider who poses a material risk. But NewLaw firms could be forgiven for deciding it's not worth the hassle, especially when they're already facing the hurdles we've discussed, and it might all amount to nothing anyway. That, however, would be a serious loss for the provider, the client and the industry.

Recommendations for rethinking tenders

The good news is that each of these challenges gives clues for how forward-thinking clients can reap the rewards of NewLaw. The emergence of technology platforms dedicated to legal tenders suggests that clients are willing to change. However, many of these platforms are focused on making the existing way of doing things more efficient, rather than asking whether the current approach is fit for purpose. Meaningful change will need to come from the mindsets of clients themselves. We offer four recommendations to help make that change.

1. Redesign the process

A perfect place to start is to adapt your tender process to accommodate the different business models of NewLaw. Make providers explain their capabilities without just relying on CVs; go beyond hourly rates in assessing commercial offers; ask providers to quote for a hypothetical project (and see who responds with value-based or alternative pricing); and consider experience, without closing yourself off to newer providers.

More generally, explore whether you can ease the upfront burden of tender compliance. For example, one client requested an initial proposal from LegalVision before inviting us to respond to a formal RFP. This step helped us commit to the tender, because we knew the client had done some due diligence and was serious about exploring a relationship.

2. Have a dedicated NewLaw panel

If making these changes seems too unwieldy, why not just create a separate panel for NewLaw? This approach recognises the limits of comparing apples with oranges and opens a direct route to working with NewLaw. The NewLaw panel structure was successfully pioneered by a large financial services company in 2016. Now this company has access to a leading legal process outsourcer, contract lawyer service and tech-driven firm, all within the comfort of a formal panel structure.

The next challenge will be to use the NewLaw panel once it's set up. Old habits will make it tempting to send all work to the traditional panel of familiar firms — but that will remove the benefits of your progressive panel structure.

3. Go 'off panel'

By being prepared to go 'off panel', you can try out new providers without redesigning your tender process or panel structure. Testing alternative providers in this way would allow you to find out what NewLaw looks like in practice. This strategy can work for discrete or one-off pieces of work, giving NewLaw providers a chance to showcase their unique capabilities while still allowing businesses to maintain existing relationships for ongoing matters.

4. Reward partnerships

A final option is to reward traditional firms that partner with NewLaw providers. By working with a NewLaw firm that partners with BigLaw, you can get to know a new provider without losing the comfort of a long-standing relationship with a traditional firm.

At LegalVision, we've adopted this approach with Gilbert + Tobin to give clients the benefit of complementary skill sets through a joint delivery model. Joint delivery works best for projects that combine complex strategic advice (suited to BigLaw like Gilbert + Tobin) with ongoing implementation (suited to process-driven, tech-enabled legal providers like us).

Where to from here?

It's time to shift the conversation: we should accept that NewLaw has arrived — and start talking about what we should do now that it's here. Hype aside, the potential of NewLaw is extremely exciting. But we will only be able to realise that potential if we are prepared to change some fundamental industry practices. Tenders are an essential way for clients to access providers that will deliver the greatest value. They must evolve at the same pace as our industry.

Thomas Kaldor

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THE T-SHAPED IN-HOUSE LAWYER

New vision and skills for new times. Progressive in-house lawyers at all levels are looking to do more than provide legal advice. To do that it is essential to develop 'non-traditional' business skills and to know how to apply these in new ways of working (NWOW). This article introduces the concept of the The T-shaped In-house Lawyer™ and how you can become one.

In 2016, when I was writing my article 'The T-Shaped Lawyer' for later publication in the *ACC Docket* magazine, I thought that I was the first to apply the T-shaped Professional concept to lawyers. However, since that time I have become aware that someone beat me to it![1]

Our messages were consistent, although we were writing about different things. I was writing my article for lawyers working in-house rather than in a firm. In-house lawyers do very different work compared to lawyers in firms and need very different skills, especially as new ways of working (NWOW) take hold. Also, my article was based on my own personal experience of using a specific set of 'T' skills as an in-house lawyer and incorporating these into my T-shaped In-house Lawyer™ program, which I have delivered to in-house lawyers around the world.

I am encouraged by the increasing interest in the T-shaped lawyer concept. However, it is important to understand that being a T-shaped In-house lawyer involves learning specific skills AND then applying those skills in collaboration with your functional colleagues to innovate for the legal team and your organisation as a whole. So, with those clarifications, and a change to the title of the article, I think you will find that my original article is equally relevant today, if not more so.

Since I wrote my article and started my business AlternativelyLegal, innovation and transformation has evolved from a matter of interest for a few progressive General Counsel (GCs) to an imperative for every GC. Of the many challenging aspects faced by GCs in a legal department transformation, perhaps the most challenging is changing the individual team members. How do you encourage them to become more innovative, collaborative, strategic, and creative? What specific skills, knowledge, and experience should you focus on and how do you provide them with relevant training and development?

The Skills for the 21st Century General Counsel Report[2] outlined a comprehensive list of what is required to be a general counsel. Although the GC role is unique, many of the skills identified will also be relevant to other in-house lawyers. The report highlighted the importance of non-legal skills and noted that 'most of the skills (listed) are not new'. But, in my experience, new skills — which I refer to as non-traditional skills — are essential for any in-house lawyer who wants to collaborate successfully with their business colleagues and help the legal department and the company innovate.

The T-shaped professional

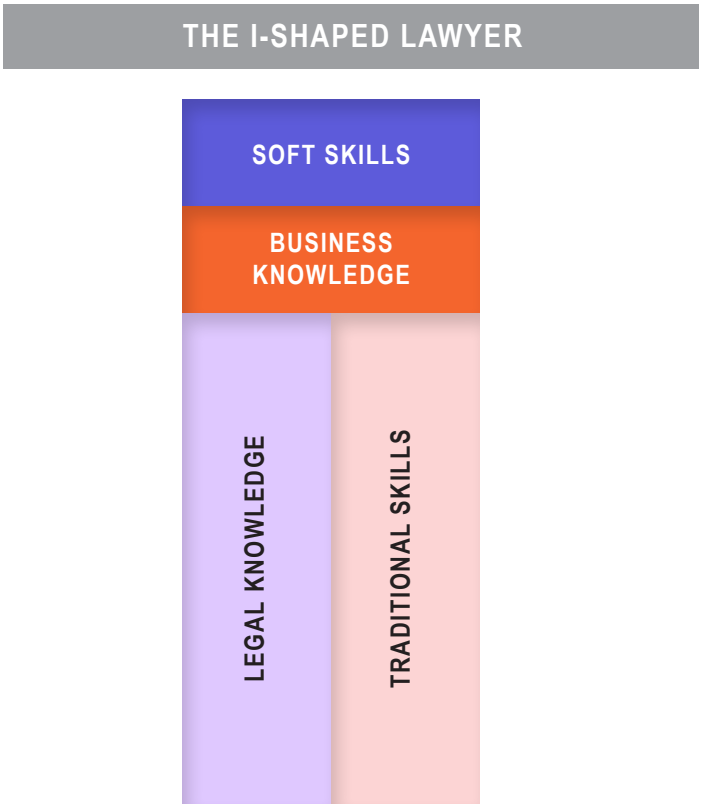
In the absence of any authoritative framework to inform me which skills were critical, I looked for something to support my personal opinion about the importance of these non-traditional skills. I came across a helpful concept from the business world — the 'T-shaped professional'.

References to T-shaped professionals and skills have been around for a while in the business world.[3] So, what does it mean? In simple terms, it refers to someone who has deep domain expertise in one discipline, fused with skills and knowledge from other areas, that facilitates collaboration with specialists from different disciplines. According to a recent Cambridge University study, T-shaped professionals are:

> ***people who are entrepreneurial and capable of thinking in the many project roles they may fill in their professional life. In contrast to the specialized problem solvers of the 20th century who are sometimes called 'I-shaped' professionals for their knowledge depth.*** [4]

The study highlighted the growing imperative for service innovation through cross-functional collaboration but found that the main obstacle is a skills or knowledge gap. To fill that gap, the report recommended that companies should consciously develop more T-shaped professionals throughout the organisation.

When you apply this concept to the legal world, it is apparent that most lawyers fit the profile of the I-shaped professional, as shown in the graphic below. They have deep knowledge of, and expertise in, certain areas of the law and their training focuses on honing that knowledge and expertise. They might add some general leadership, business, or soft skills training, but the primary purpose is to enhance their ability to do traditional legal work.



Is it time to consider broadening your training and development focus to become more like a T-shaped professional and, if so, what might that involve? This article explores that question by first examining why in-house lawyers should develop non-legal skills. Secondly, it will consider which 'non-traditional' skills, competencies, and knowledge are important and why. Finally, it will briefly outline the challenge of sourcing training for these skills.

1. Why should in-house lawyers develop non-traditional skills?

The primary traditional skill of a lawyer is applying the law to solve problems and almost every lawyer develops a range of related skills (see sidebar) that can also be useful beyond just providing legal advice.

TRADITIONAL SKILLSET

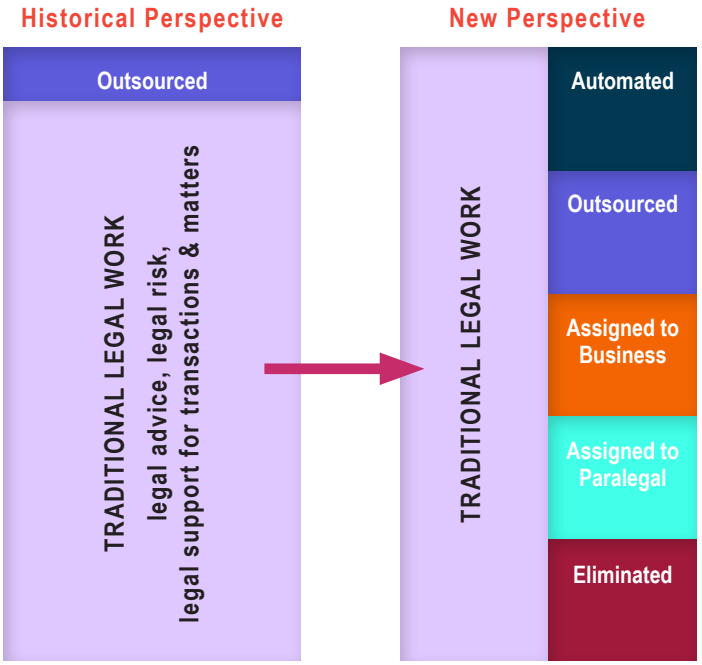
A lawyer develops skills that can be used beyond providing legal advice. For example:

- **Problem-solving**
- **Analytical**
- **Communication**
- **Persuasion/advocacy**
- **Negotiation**

However, are these skills sufficient? One way to answer this question is to look at the type of work that in-house lawyers are now doing and might do in the future. Everyone's situation is different, but it is possible to make some general observations on how work is evolving for many in-house lawyers.

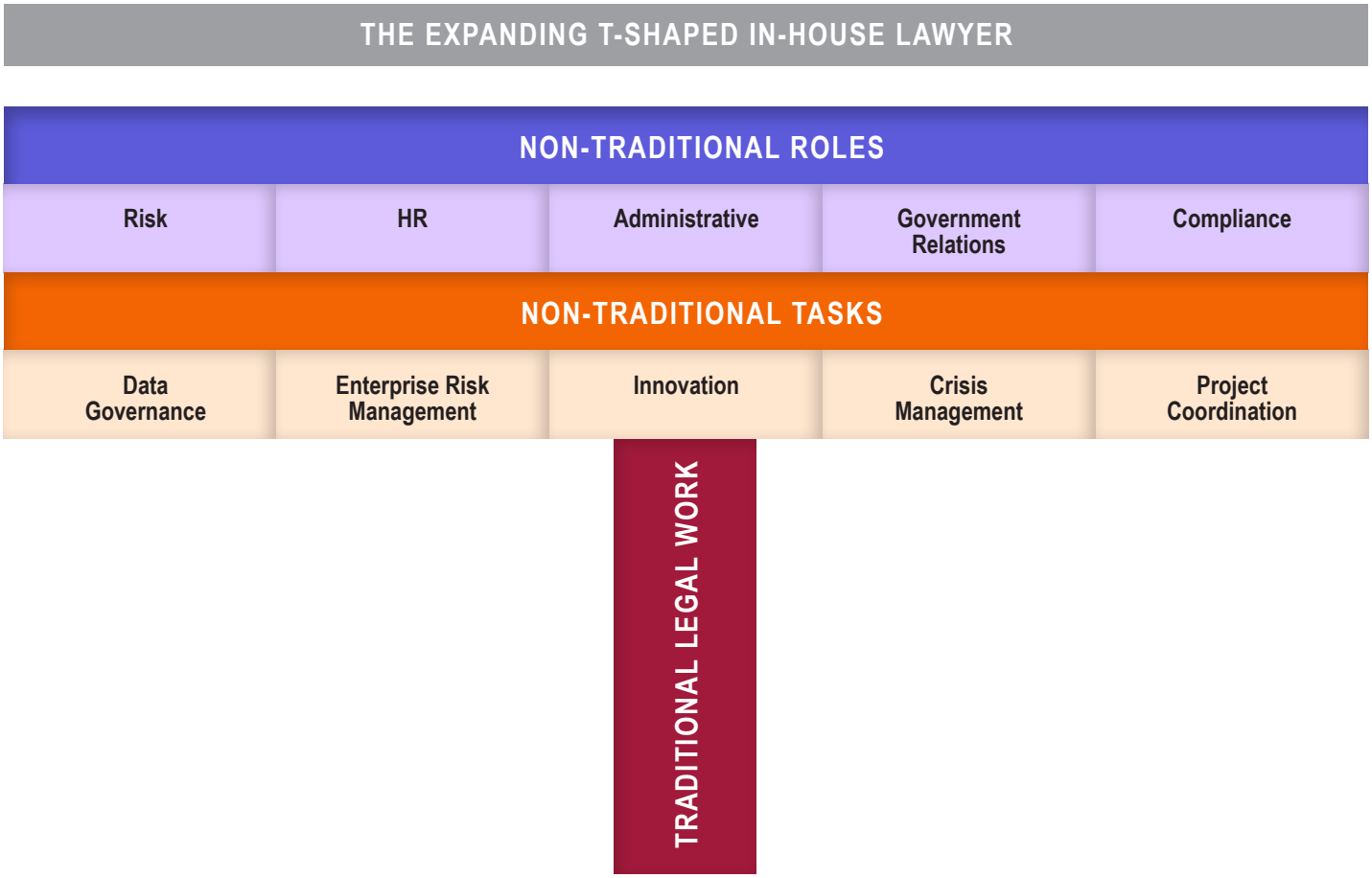
In some instances, the work traditionally performed by in-house lawyers is shrinking due to factors such as a conscious decision to stop doing some work; empowering the business to self-help; assigning work to contract managers and others; outsourcing to firms and other service providers; or automating work. For some lawyers this evolution, especially the advance of technology, might be worrying. However, much of the 'displaced' work is low-value work, and this can be a positive development if it frees you to do additional higher value, varied, and interesting work.

THE SHRINKING I-SHAPED IN-HOUSE LAWYER



On the other hand, as shown in the graphic below, the type of work performed by some in-house lawyers is expanding as they take on non-traditional tasks and responsibilities. For example:

- GCs are assuming new roles in the company. 'There is little argument that today's GC has a much wider purview beyond the customary responsibilities as chief legal officer.'[5] The GC is now 'a more strategic business advisor'[6] and sometimes assumes additional roles such as human resources, risk, and government relations.
- New roles being created in the legal department. You only have to look at firms and some larger departments to see a trend in new full-time or part-time roles for lawyers and others in areas such as operations, project management, innovation, process, technology, and data analytics.
- New tasks for all lawyers. Progressive in-house lawyers at all levels are informally doing more than providing legal advice. They seek out business partners in all areas of the business and in particular in areas such as data governance, crisis management, government affairs, and enterprise risk management.



In addition to the changing roles and tasks that will result in in-house lawyers doing more non-legal work, there are other significant trends that are relevant to the skills needed. For example, in-house lawyers will increasingly:

- Work more collaboratively with internal colleagues who are not lawyers to address business challenges over and above providing legal advice;
- Be required to choose between a vast range of new and different legal service and product providers and then be able to work effectively with them;
- Need to be able to not only use technology, but also apply and provide it for the benefit of business colleagues; and,
- Be expected to innovate not just for the legal department but for the company as a whole.

It is quite obvious that traditional legal skills will not be sufficient for these purposes. According to PayPal General Counsel Louise Pentland, legal training is no longer sufficient training for working in-house. 'The high-potential people in my team are able to work in parts of the business that call on different skills.'[7]

This requirement for different skills becomes more critical the further you progress in your career because, often, the more senior you become the less time you spend advising on the law. However, junior lawyers would also benefit from developing non-traditional skills, in addition to traditional skills, early in their career. Indeed, if they do, especially in areas such as technology, they may be able to make more of an impact in the department and the organisation than they would otherwise.

2. What new knowledge, competencies, and experience are important?

In this 'new normal', in-house lawyers will benefit from not just non-traditional skills but also greater diversity in knowledge, experience, and competencies. This is mostly obvious — but before focusing on skills, I will briefly mention a few salient points.

Knowledge of the law has always been the bedrock for lawyers. Whereas lawyers working in law firms tend to specialise, many in-house lawyers benefit from a more general knowledge of a range of legal areas — especially if they aspire to a GC position. Also, in an increasingly global business world, it helps to develop a global understanding of the main legal areas that affect the business of your company — at least to a level to be able to 'spot issues' and then seek more specific guidance, as and when necessary.

Business knowledge, in particular, knowledge about the business of the company you work for is important for in-house lawyers in order to provide effective traditional legal support. This knowledge assumes greater importance as you do more non-legal work.

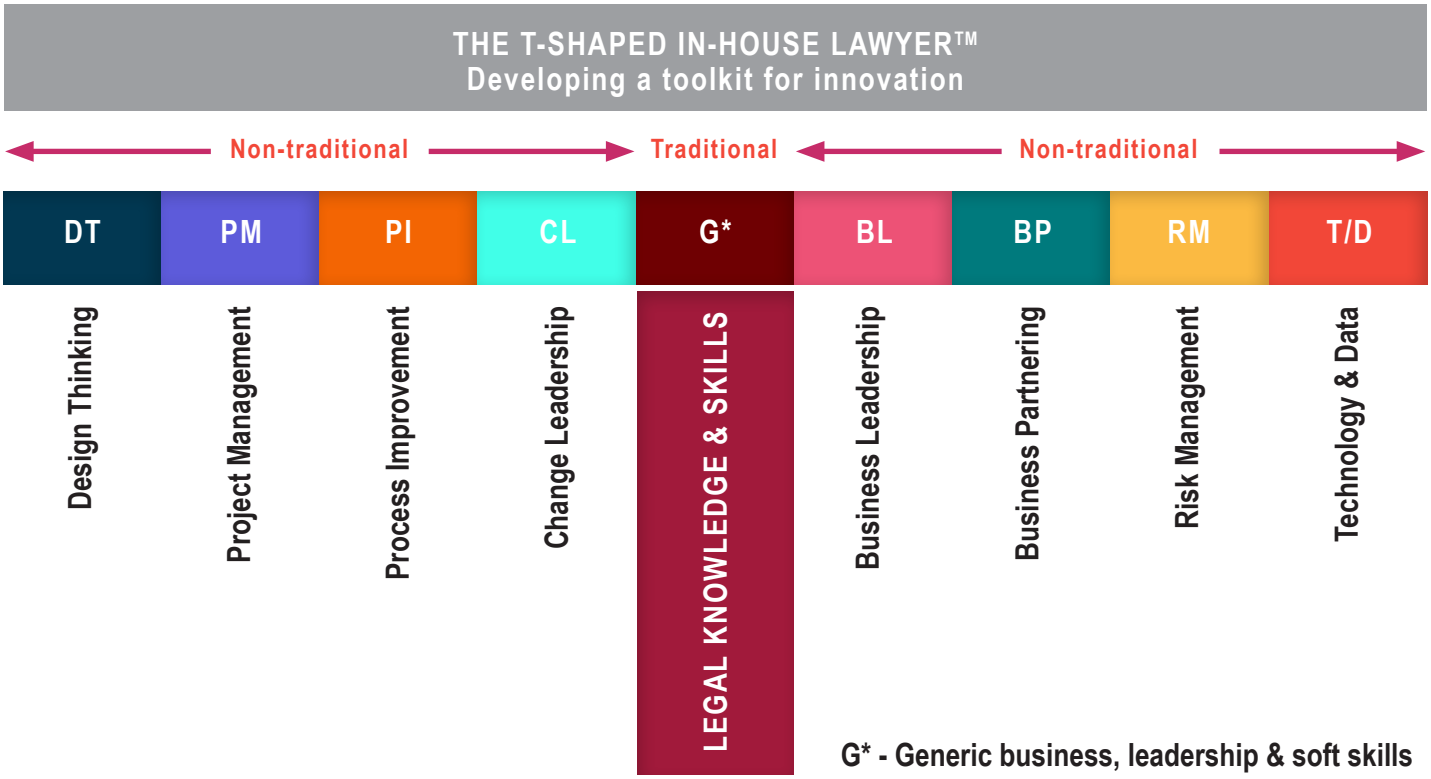
Knowledge about technology is the other major area that is now crucial and will become increasingly so. Most in-house lawyers are reasonably competent at using the basic technologies relevant for their work. However, you also need to enhance your overall technology IQ and be able to make informed decisions about whether, and if so what, technology to acquire, develop, or leverage.

Integrity and judgement have always been critical competencies or qualities for in-house lawyers. However, in times where there is a premium on innovation and collaboration, other competencies — such as empathy, foresight, adaptability, resilience, creativity, and emotional IQ — become increasingly important.

It will come as no surprise to hear that diversity of work and life experiences will provide you with unique insights and skills that you can apply to your work as an in-house lawyer. As AB InBev General Counsel Sabine Chalmers suggested: 'move out of legal altogether and go into investor relations, sales, or M&A. Working in a different geography is also very helpful.'[8]

3. What non-traditional skills are important?

In selecting the skills to include in my T-shaped In-house Lawyer™ program, the best reference point was my own experience as an in-house lawyer. The skills listed in the graphic below are the ones that, more so than others, really helped me to innovate, collaborate and add significant value over and above providing legal advice. Learning how to do these things will help you become a T-shaped lawyer.



Below is a brief explanation of these non-traditional skills and an indication as to why they are important for in-house lawyers to develop.

A. Process improvement

A process is any sequence of events with a start and an end point and a series of actions and decisions in between. Most of what you do can be reduced to a process. Engaging outside counsel or putting an NDA (non-disclosure agreement) in place with a customer are examples of processes.

Process improvement is about continually reviewing and optimising a process. There are different process-improvement methodologies ranging from simple process mapping to Lean and Six Sigma. Process improvement might sound very industrial and perhaps ill-suited to what many lawyers believe to be an artisanal practice like law. However, if you learn how to use it, you can:

- Help address problem areas and identify activities for Legal to start or stop doing;
- Collaborate with business colleagues to improve business processes and, at the same time, transfer ownership of tasks that should not be done by lawyers, and;
- Lay the essential groundwork prior to the adoption of any new technology.

B. Project management

Project management and process improvement are often incorrectly used interchangeably. They are related but distinctly different skills and have different uses.

The best way to explain the difference is with an example. When a company acquires another company, it is a major undertaking or a project. To achieve an optimal outcome requires cross-functional collaboration and coordination to provide various deliverables on time and within budget. Project management refers to that coordination in relation to that project. Each acquisition may have its own unique considerations, but a company can define an optimal process, with variations, to follow every time it acquires another business. Over time, it can refine and improve that process.

Confusion can also arise when law firms stress the importance of legal project management because from their perspective most matters they work on are viewed as a project. Much of what you do as an in-house lawyer would not qualify as a project. However, some transactions, disputes or initiatives do require project management. If you have the time and ability to project manage, it is an excellent way to collaborate with your colleagues and show business leadership.

C. Design (or creative/innovative) thinking

Design thinking[9] is becoming a critical new skill in the business world. It is best known as an iterative process involving regular user feedback that anyone can follow to rapidly develop products and services that meet users' real, as opposed to perceived, needs.

Lawyers are also starting to experiment with it. For example, when I was working in-house as head of global compliance several years ago, I led a design-thinking workshop to tackle the well-known problem of providing corporate employees with engaging online compliance training. I observed first-hand how it facilitated a reframing of the problem, which resulted in the development of the breakthrough video product that I now market.

Of all the different business and legal-specific innovation concepts, design thinking is particularly useful for lawyers because it helps you to see familiar problems in new ways through the eyes of your clients. Design thinking is not to be confused with the increasingly popular concept of Legal Design.[10] The former is best suited for collaborative breakthrough innovations whereas the latter can be used on an everyday basis for improving presentations, contract drafting, and providing advice.

D. Business partnering

Being viewed by colleagues as a business partner or trusted advisor is something that most legal departments rate very highly. But in my work helping departments all over the world, I am often told that business partnering is not really a skill but rather just 'something we do'. That probably explains why, despite its undisputed importance, very few legal teams have received training on business partnering. As a result, lawyers working in the same team often have a completely different understanding of what it means. Some instinctively do it. Others have concerns and don't do it at all.

I believe that if you do treat business partnering as a skill, and spend time on developing it, then it enables every lawyer to collaborate with business colleagues every day to enhance their value over and above providing legal advice.

E. Business leadership

Business leadership is really an advanced form of business partnering with a few fundamental differences. First, unlike business partnering, you need to create and invest additional time in business leadership initiatives. Secondly, it invariably requires a more strategic focus and an ability to lead a cross-functional

team. Thirdly, and the reason it is such an important skill, is that it can provide an opportunity to innovate and make a significant business impact.

Like everyday business partnering, business leadership is a skill that needs to be developed. General leadership training will help, but there are many unique considerations for an in-house lawyer to identify a business leadership opportunity and then work collaboratively with, and lead, their business colleagues.

F. Risk management

It is often said that the primary role of a lawyer is risk management. Despite it being so important, very few in-house lawyers have received any formal training or guidance on risk management. The result is often inconsistency in advice between lawyers in the same team as well as missed opportunities to add value. Risk management is a critical skill for in-house lawyers for a number of different reasons:

1. If it is understood that risk identification is just the first in a multi-step process, then it can truly aid optimal business decisions.
2. If you apply risk management to all types of risks, not just legal risks, you can enhance your value.
3. Risk can and should inform what work you decide to do and how you decide to do it.
4. Risk is one of the most crucial levers for innovation in the legal department.

G. Technology

Enhancing your ability to use technology for efficiency is a frequently discussed and important skill. Technology can also offer opportunities to innovate if you know how and when to adopt it for the legal team and/or your business colleagues. To do that requires consideration of many different factors and it requires a new set of skills. Some of these are touched on in the article 'Will law firms become software companies? The potential implications for in-house lawyers.'[11] These skills include the ability to:

- Decide whether technology is the best solution or whether process improvement will suffice;
- Prioritise and define your technology needs in a technology plan and roadmap for your department so that technology decisions are based on a strategic process and not a reaction to vendor pressure;
- Develop and implement a data plan to capture operational and knowledge data in a structured way
- Identify and re-purpose existing technologies used by the company;
- Decide whether to make or buy software;
- Write software code (although this is not an essential skill for all lawyers, as explained in my article);
- Manage the production of software in appropriate cases using internal and/or external resources;
- Select and work with the most appropriate third-party vendor and/or consultant, and;
- Hire and manage tech-savvy team members (who may not be lawyers) where appropriate.

Very few lawyers have the above skills and related experience. Some might ask: 'How difficult can it be? I'll just figure it out'. But it is easy to get technology adoption wrong and the consequences can be damaging. At best, it will mean a waste of time, money, and effort. At worst, it can create problems for the legal team and for any work colleagues who use the technology. The prudent thing to do is to enhance your skills in the above areas through training and/or seek guidance from those with relevant experience.

H. Change management and leadership

It is important to remember that using these new skills — and any innovations that arise as a result — necessarily involves change both for the legal team and, typically, also for your business colleagues. Learning how to apply change management principles maximises your chances of turning great ideas into lasting change.

Leadership has always been important. But, in times of change and if you want your team to change, it has become even more important and a lot more challenging. Many of you will have had leadership experience and training. However, rarely does that experience or training prepare you for new leadership challenges such as:

- How to create an inspiring vision that represents a clear picture of the change you want your team to make;
- Preparing an innovation plan as opposed to making ad hoc changes, and;
- Leading a cross-functional virtual team.

It is important to continue to refine your leadership skills so that you can not only manage the changes happening in the legal industry but also lead change for the legal team and for the company.

4. Where can you source training on these non-traditional skills?

In-house lawyers have historically sourced training from law schools, law firms, legal conferences, and internal training provided by your company.

With some notable exceptions in North America, law schools around the world have been slow to respond with changes to their undergraduate and postgraduate curriculum to meet the demand for non-traditional skills and knowledge. As a result, the best that law students can do is to include relevant and available general business and technology subjects in their courses.

Law firms will continue to provide robust training programs on traditional skills for lawyers fortunate enough to work for the firm. Firms also provide valuable legal updates for in-house legal departments. Progressive firms are starting to extend the scope of this training, beyond legal knowledge and skills, in an attempt to retain an ongoing and relevant training support role. The challenge for firms is that, for many of the reasons raised in the first section of this article, there is an ever-widening gap in the way that in-house and law firm lawyers work. As a result, traditional law firms don't have the same need for, or relevant experience in, applying non-traditional skills.

The major challenge for legal departments, as well as the traditional training providers, is finding someone who not only understands these non-traditional skills but who also has relevant experience in applying the skills as an in-house lawyer. If you can't find someone with that experience, then the next best solution is to find someone who can at least teach you the theory. You can, as I did, learn how to apply the skills on the job through trial and error.

Conclusion

There is a lot of negative talk in the press about job prospects for lawyers and it may be that 'traditional' legal roles in traditional firms and departments are in relative, if not absolute, decline. However, by taking steps to develop and apply critical non-traditional skills, you will, as much as possible, insure yourself against whatever changes may come your way in the future. It is how you can become more creative, innovative and collaborative and add more value for your organisation. At the same time, you will increase your marketability and do more varied and interesting work. This is also how you can become a T-shaped In-house lawyer.

Footnotes

1. R. Armani Smathers – 'The 21st century T-Shaped Lawyer', *American Bar Association*, vol. 40, no. 4.
2. ACC 2013 report.
3. See David Guest, "The hunt is on for the Renaissance Man of computing," *The Independent*, September 17, 1991. The concept was popularised by Tim Brown, the CEO of IDEO, when referring to the type of person his famous design studio seeks to recruit.
4. 'Succeeding through Service Innovation' – www.ifm.eng.cam.ac.uk/resources/service/succeeding-through-service-innovation/
5. www.barkergilmore.com/hubfs/The_Rise_of_the_GC_-_From_Legal_Adviser_to_Strategic_Adviser.pdf?t=1461255829126
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Peter Connor

As Founder & CEO of AlternativelyLegal, Peter Connor provides guidance on innovation and transformation to in-house lawyers around the world through his T-shaped Legal Team™ and T-shaped In-house Lawyer™ programs. Prior to that he worked in Hong Kong, Australia, UK, Switzerland and the US for 25+ years in various general counsel and compliance roles. In Australia Peter has joined forces with KPMG and can be contacted at pconnor@kpmg.com.au

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COSTS BUDGETING: CONTROLLING THE COSTS OF LITIGATION

One of the most significant challenges for in-house legal teams is resource and budget limitations. In the 2017 ACC Benchmarks and Leading Practices Report, the majority of in-house lawyers reported they were under pressure to reduce legal costs.

One of the largest categories of legal expense for businesses is litigation. As the costs of litigation continue to rise, many companies are deterred from pursing claims, even where they have strong prospects of success.

Third party dispute funders are also concerned with controlling the costs of litigation. Funders agree to finance the legal costs of their clients (and to pay for any adverse costs if the case is unsuccessful). Consequently, funders closely monitor legal expenses during the dispute. Experienced funders also provide input into case strategy, including cost sensitive aspects of the litigation, such as discovery, selection of experts, and narrowing the issues in dispute.

Costs Budgeting in England and Wales

In 2009, Sir Rupert Jackson, a Lord Justice of the Court of Appeal of England and Wales, conducted a comprehensive review of the civil litigation costs system in England and Wales. The key objective of the review was to promote access to justice by making costs of litigation more proportionate. This year-long review resulted in significant reforms to civil procedure and costs rules to promote access to justice at proportionate cost (commonly referred to as the Jackson Reforms). These reforms included the introduction of costs budgeting by lawyers which is actively managed by the Court (called Costs Management).

Sir Rupert believes that the only way to control costs effectively is to do so in advance by the use of:

- Fixed costs for lower value cases. Certain business and property courts in England have commenced a two year capped cost pilot scheme for cases valued at up to £250,000 from January 2019. The pilot derives from Sir Rupert's costs review in 2017.
- Costs Management for larger cases.

Dispute funder, IMF Bentham Limited, recently hosted Sir Rupert in Australia at its national conference with the University of New South Wales. Sir Rupert gave the keynote address at the conference on costs management.

How does Costs Management work in England and Wales?

Under the costs management procedure, the parties prepare, discuss and attempt to agree budgets for their litigation. The Court determines the steps to be undertaken in the case and amends or approves the budgets (to the extent that they are not agreed). The parties then manage the litigation, aware that the recoverable 'party/party' costs will be those incurred in accordance with the approved or agreed budgets. Whilst it is open to a party to incur costs outside of the budget, they do so on the understanding that such additional costs will not be recoverable.

At the end of the case, unless there is a good reason to do otherwise, the costs that are recoverable by the successful party are assessed in accordance with the successful party's last approved or agreed budget.

The Jackson Reforms also introduced new rules on proportionality of legal costs to claim value, complexity, and wider factors. Under these rules, the recoverable costs are usually limited to those costs that are considered to be proportionate.[1] Costs incurred are proportionate if they bear a reasonable relationship to:

a. the sums in issue in the proceedings;
b. the value of any non-monetary relief in issue in the proceedings;
c. the complexity of the litigation;
d. any additional work generated by the conduct of the paying [unsuccessful] party; and
e. any wider factors involved in the proceedings, such as reputation or public importance."

These factors are reflected in the current cost rules in many Australian jurisdictions, as being relevant to costs to be allowed to a successful party.

The costs management rules, in conjunction with the rules on proportionality, are designed to restrict recoverable costs to proportionate levels.

What are the Benefits of Costs Management?

The costs management procedure was introduced in England and Wales in April 2013, following a pilot scheme in a few courts, and reviewed in 2017. Initially, many lawyers and judges were resistant to the increased work required by costs budgeting and costs management. Over time, that opposition dissolved as people became more familiar with the process of costs budgeting and costs management. According to Sir Rupert, many court users are pleased to see that litigation (like all other business projects) is now conducted on budgets rather than on an open-ended basis.

Other benefits of costs management include:

- Both parties know where they stand financially and have clarity as to what they will have to pay if they win or lose the case. This information is not only beneficial for those making decisions about the future conduct of the litigation, but it is also extremely helpful in the context of settlement negotiations. Insurers (who in practice end up paying many litigation bills) also find costs budgets valuable for the purpose of setting reserves.
- It encourages early settlement. One of the causes of excessive litigation costs identified by the costs review was the lengthy duration of the litigation process. However, with costs budgeting, parties can see the total costs of the litigation and the extent of their likely exposure at an early stage of the litigation.
- When costs management is implemented effectively, it controls costs from an early stage:
    - In some cases, the very act of preparing a budget that will be subject to critical scrutiny tempers behaviour. Any party who puts forward an over-elaborate case plan or an excessive budget invites criticism and encourages similar extravagance by the other party.
    - For many clients, the party/party budget also forms a basis for discussion with their lawyer about the actual costs that will be incurred and a means of controlling those costs better.
    - Effective costs management by the Court generally reduces the costs payable by the unsuccessful party. It also brings down the actual costs of the litigation for both parties, despite the additional costs involved in the costs management process.

Overall, although the costs budgeting process itself adds an additional layer of costs to the litigation, if done properly, the English experience is that the savings achieved significantly exceed the costs of the process.

Costs Management in Australia

IMF Bentham's conference also included a panel session on costs management in Australia with Justice Michael Lee of the Federal Court of Australia, barrister Rachel Doyle SC, costs expert Liz Harris and Jonathan O'Riordan, Claims Recovery Manager - Asia Pacific for Liberty International Underwriters. Here Liz, Jonathan and IMF Bentham Investment Manager Kristen Smith share their unique perspectives, insights and tips for corporate counsel wishing to contain litigation costs from a Plaintiff's perspective:

- **Fixed fees:** Liz and Jonathan are both in favour of fixed cost arrangements in litigation, namely set amounts to be paid for each stage of the case, over hourly costs in which tasks are priced retrospectively. Liz says: "The lawyers need to scope the case thoroughly in advance. In the event that circumstances change, then there is scope to renegotiate the fixed fee with the client.". Jonathan says: "The benefit of these arrangements is that it gives you certainty of your costs which assists in the decision making process throughout the matter".
- **Costs capping:** As a frequent consumer of legal services for the purposes of corporate litigation, Jonathan regularly requires lawyers to cap their fees for each stage of the litigation, including the investigations phase. By doing this, he is able to control the costs to ensure that they do not become disproportionate to the amount being recovered. At the outset of the case he makes his expectations in relation to costs clear to his lawyers. Jonathan says: "I find that when the lawyers have some "skin in the game" they think more commercially about the matter and how they use their time." Jonathan always seeks to resolve matters in the most cost efficient way possible. He also says: "Another advantage of cost capping, particularly in relation to the investigation and evidence gathering stage, is that you know what the cost is to determine whether you have sufficient evidence to bring a claim."
- **Setting Realistic Budgets:** Liz has assessed the costs of many cases and seen the best and worst of budgeting and costs management by lawyers. She believes that one of the biggest pitfalls is setting an unrealistic budget at the outset of litigation, often as a result of being overly optimistic about the steps in the matter, and how it will be conducted. A further pitfall is failing to actively manage the costs against the budget as the litigation progresses. The costs may blow out due to inefficient and ineffective delegation, whereby junior members of the team do not have sufficient direction, work is duplicated, or senior members of the team undertake tasks which they should have delegated to more junior members.

  Jonathan is of the view that the main reason for costs blow outs is the failure to actively monitor the costs being incurred against the amount budgeted. He considers that for too long lawyers have not been held accountable enough for costs blowouts.

  IMF Bentham Investment Manager Kristen Smith acknowledged the difficulty of estimating legal costs and preparing accurate budgets, particularly in large scale litigation. Kristen said "As Sir Rupert discussed at the IMF Bentham conference, the English experience is that budgeting accuracy improved following the introduction of costs management, as lawyers became more familiar with the process and gained experience in accurately forecasting the costs for each stage of the litigation."

  Dispute funders can play a valuable role in relation to costs budgets. IMF Bentham's team of investment managers comprise highly experienced former litigators who require the lawyers on the cases they fund to prepare detailed budgets for every stage of the litigation. Experienced funders also assist in the management of the case to ensure the lawyers keep within those budgets wherever possible, for example, by requiring them to focus on the key issues in dispute and by seeking to avoid time and costs being spent on the pursuit of aspects of a claim that are weak or unlikely to increase the return for the claimant.

Proposed Trial of Costs Budgeting in Australia

Since the conference, Justice Bernard Murphy of the Federal Court has said he would like to trial costs budgeting in proceedings currently on foot in Victoria. Justice Murphy said he would like to adopt the English procedure outlined by Sir Rupert Jackson at IMF Bentham's conference. Justice Murphy's proposal is that the budgets should be prepared in stages and that, in line with the English procedure, costs outside the budgets would not be recoverable by the successful party. Justice Murphy said that Justice Michael Lee was also in favour of such a trial.

If implemented in Australia, costs budgeting has the potential to enable the Courts, as well as the parties, to better manage and control the costs of litigation and to avoid the risk of costs becoming disproportionate. This is a risk that currently deters many claimants, including solvent companies, from pursuing meritorious claims.

Footnotes

1. The overriding objective in the Civil Procedure Rules in England and Wales has been updated so that all cases should be dealt with "justly and at proportionate cost". The court will not allow parties to incur costs that are disproportionate to the value, complexity and importance of the claim, even if they are reasonably or necessarily incurred.

Kristen Smith

An Investment Manager with Australia's leading dispute financier, IMF Bentham. Kristen previously worked in the Commercial and Project Litigation team of a leading national law firm. She also worked at Dundas & Wilson (now CMS) in Scotland and as an Associate to a Supreme Court of Victoria judge.

Liz Harris

As a consultant to government and corporate legal departments on legal spend management, Liz is often engaged as an expert witness on legal cost and litigation management in class actions and complex commercial litigation. Having reviewed thousands of files, Liz has developed key insights into what works well, how costs blow out, and what are the best practices in managing work and legal costs.

Jonathan O'Riordan

A qualified lawyer with over 20 years of insurance experience, Jonathan has handled many large and complex claims in Financial Lines, Property, Casualty, Accident & Health, Crisis and Marine. Having previous worked as a General Counsel and Claims Manager, he has drafted policy wordings, advised on compliance issues and managed claims across Australia and overseas.

THE POWER OF PLAIN LANGUAGE

A lawyer friend of mine recently sent an email he'd received from another lawyer. He thought I'd enjoy it as an example of what not to do. He was right. It read:

> *We refer to the abovementioned matter and previous correspondence. We advise that we are in custody of the Certificates of Title pertaining to the above development in [suburb]. We have attempted to contact you and persons within your team to co-ordinate the hand delivery of the Certificates of Title this afternoon, to no avail. In the interests of expediency and efficacy, kindly advise which persons will be signing receipt of the documents tomorrow morning.*

After rolling my eyes in disbelief, we decided to use it as a snapshot case study to highlight the power of plain language. Just look at the difference:

> *We have the certificates of title for the development property in [suburb]. Please let us know who can sign for them tomorrow morning, as we were unable to contact you today.*

As you can see from my example, plain language isn't about making language boring and it isn't about dumbing it down. I define it as 'succinct writing that has a defined audience and purpose. With it the reader can easily find, understand and use the information they need'.

The evidence of value

Between 2014 and 2017, GE Aviation ran a project to create plain language contracts in its digital services business. The project was a case study in Harvard Business Review. In the article, GE Aviation's GC shared the staggering results:

- contracts took 60% less time to negotiate
- there was not one dispute over wording
- some contracts were signed without a single change, and
- customer feedback was universally positive.[1]

This is not a new concept. Back in 1986, a Victorian Law Reform Commission report[2] outlined some of the cost benefits from studies undertaken in the United States and Australia. On average, writing in plain language meant documents took 20% less time to read and there was:

- 85% decrease in time spent clarifying meaning
- 25% decrease in time spent searching, and
- 27% increase in the success rate in finding content.

Readability is also a key metric. I've tested hundreds of documents — emails, reports, legal advice, memos, proposals and brochures — using the Flesch-Kinkaid Grade Level metric and seen many documents that, to be readily understood, need readers with 20+ years of education. That's a problem.

So how do you write in plain language?

There are four basic steps to writing in plain language.

1. Thinking

Start by asking yourself who your reader is and what they need to know. Also think about your own purpose in writing — for example, are you writing to inform, influence, instruct, or record?

2. Planning

Once you know why you are writing, you need to plan what to write and how you are going to do that. That will include choosing the right logical structure for your purpose — for example if you are preparing a witness statement, you would use a chronological order. You also need to plan how to present the information, which may include headings, tables, diagrams, infographics or other visual aids.

3. Writing

The most effective way to help professionals improve their writing is to show them how to re-write. I often share these tips:

- Start at the word level. Replace big words and phrases with better words – these are clearer, more succinct and say what you mean. As George Orwell said, 'Never use a long word where a short one will do'.[3] Our pet hates are:
  - in relation to – use 'regarding' or 'about' instead
  - prior to – use 'before'
  - pursuant to – 'under', 'because of' or 'in line with' are better options
  - per annum – swap for 'each year' or 'annually', and
  - terminate – use 'end' or 'finish' instead.
- Avoid jargon, technical words and acronyms that the reader won't readily understand.
- Keep capitals just for the beginning of sentences, acronyms and proper names — don't use them for emphasis or words you think are important.
- At the phrase level, check for metaphors, colloquialisms, double negatives and noun strings.
- At the sentence level, use the active voice more often than the passive. This means you put the subject of the sentence — the person or thing doing the action — first.
- Be careful with your punctuation — overusing punctuation can distract the reader and underusing it can make sentences hard to understand or change their meaning.

4. Checking

Ideally, find a colleague to proofread your work. If that's not an option, the best review method is to read your work aloud. This will help you spot missing or wrong words and incomplete sentences, and will help you achieve the right rhythm and tone. You should also use the spell-check function but be careful because it will accept words that sound like what you mean but aren't.

The demand

There's no doubt plain language adds value to every organisation in ways that vary from meeting client expectations, driving efficiency gains, and delivering better client and staff outcomes.

It also has a significant role in risk management and — increasingly — in corporate responsibility. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has emphasised the importance of having internal protocols and policies that achieve clarity, transparency and accountability. Using plain language will be an important tool to meet those stakeholder expectations.

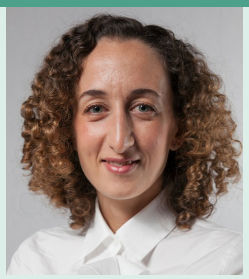
Footnotes

1. Shawn Burton, 'The Case for Plain Language Contracts', *Harvard Business Review*, January–February 2018 at hbr.org/2018/01/the-case-for-plain-language-contracts.
2. Law Reform Commission of Victoria, 'Legislation, Legal Rights and Plain English', Discussion Paper No.1, August 1986 at victorialawfoundation.org.au.
3. George Orwell, Politics and the English Language, 1946.

Sharon Stockman

As principal of Write Results, a strategic communications and plain language consultancy, Sharon provides plain language writing, editing and training for corporates, governments and professional services firms.

LEGAL WELLNESS



Desiree Baldacchino

As a corporate lawyer in the legal team at UBS Investment Bank based in Sydney, Desiree provides a range of legal advice across commercial law and governance to internal clients and management across Australia and New Zealand.

Desiree is the current Secretary and a Committee member of the NSW Division of the ACC Australia.

CULTURE AND CORPORATE WELLNESS – What can we learn from the Prudential Inquiry and Royal Commission?

The Prudential Inquiry and recent Royal Commission[1] identified a complex interplay of organisational and cultural factors at work. In particular, the impact of corporate culture on an organisation's conduct, governance and business outcomes, and the need to apply ethical decision making by asking "should we?" rather than "can we?" and then challenging behaviour that doesn't meet this higher standard.

These themes are now the focus of boards and senior executives across Australia, who are taking the opportunity to learn from the experiences of other organisations and critically evaluate the management and governance of the organisations that they've been entrusted with.

In-house legal teams that support these organisations are also taking these themes on board. Indeed, they are uniquely placed to have a significant role in driving and guiding the cultural tone of an organisation, including by challenging where appropriate, and asking the question, "Although we can, should we?" More than ever, in-house teams can and should lead by example and model the behaviours and ethics that organisations should aim to achieve.

The current focus on these themes also provides an opportunity for in-house legal teams to reflect on and assess the culture within their own team and its potential impact on the organisation as a whole. Given the widely publicised high rate of mental health and well-being concerns in the legal profession, the issue of team culture and its impact on how lawyers execute their responsibilities within their organisations becomes more relevant.

Ensuring that legal teams themselves operate within a healthy culture of wellness and mutual support is crucial. Cultivating a legal team where wellness and mutual support is encouraged provides the right foundation for a high-performing legal team to deliver expert legal advice to the organisation and to be valued as trusted advisers in the business. Focusing on maintaining a healthy culture within a legal team pays dividends not only to the team and the individuals who make up the team, but also to the organisation and the organisations that rely on the support of that team.

The Prudential Enquiry and Royal Commission defined culture as "the shared values and norms that shape behaviours and mindsets"[2] within an institution. The collective culture of a legal team will depend on the background of the individuals making up the team, their experiences, drivers and priorities, and the lens through which they view the world. Also relevant is how the organisation's overarching cultural tone defines its ethos, business practices and behaviours.

As well as focusing on managing and being part of high-performing teams working in fast paced, high pressure and often challenging environments, we need to be cognisant of the human aspect of our teams and acknowledge the importance of encouraging and maintaining a supportive, collaborative and sustainable environment where the well-being of individuals can be nurtured, developed and ensured. The achievement of professional and organisational success should not be at the expense of the health and well-being of those involved.

Acknowledging this human aspect can take many forms: ensuring team members have confidence and trust in each other; management reinforcing a supportive and collaborative environment through which lawyers can execute their responsibilities in a sustainable manner; investing in personal and professional development and mentoring; acknowledging and facilitating individuals' responsibilities and interests outside the office; taking an active, authentic and ongoing interest in the wellbeing of colleagues; and encouraging a "speak up" culture[3] and an environment where taking responsibility for calling out unacceptable or damaging behaviours is second nature.

As noted in the Prudential Inquiry, "desired cultural norms require constant reinforcement, both in words and deeds"[4] and an important element of cultivating a culture of wellness is leading by example and the modelling of these positive behaviours by team members, in particular those in leadership positions including middle management.[5]

The ripple effect of a team where a culture of wellness and support are encouraged is easy to see within an organisation: individuals bring their best selves to the office and feel invested in their role and in the organisation they support; they are able and willing to cultivate strong collaborative relationships with colleagues and the clients they support; their confidence, motivation and resilience levels are high; sharing and collaboration flows naturally; creativity and initiative flourish; and business critical outcomes such as engagement, staff retention and productivity are strong. A healthy team culture can provide a competitive advantage, with positive outcomes for the organisation and the team itself.

A poor wellness culture within a team can mean that individuals are not fully invested or engaged in their role and its place within the organisation; the level of trust, collaboration and sharing is low; complacency is creeping in; effort and creativity is stifled; and absenteeism and turnover increases. As demonstrated by the findings of the Prudential Inquiry and Royal Commission, a poor culture has the potential not only to damage the team, but to permeate through the organisation it forms part of, with poor legal, regulatory and reputational outcomes for the organisation and its stakeholders.

Often an organisation's vision or code of conduct advocates the very principles that are relevant to maintaining a healthy culture – trust, respect, honesty, integrity, safety and sustainability. These principles are as essential to developing a robust corporate culture as they are to cultivating a wellness culture. As such, proactively encouraging a wellness culture becomes a matter of leading by example and consistently "walking the talk". Going forward, it is incumbent on us, as leaders or as members of in-house legal teams, to demonstrate these behaviours on a day to day basis and by doing so, influence our workplaces in a positive way.

Footnotes

1. Prudential Inquiry into the Commonwealth Bank of Australia and Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
2. APRA, Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, Final Report Volume 1, p 375 and APRA, Prudential Inquiry into the Commonwealth Bank of Australia, April 2018, p 81
3. APRA, Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, Final Report Volume 1, p 388
4. Australian Prudential Regulation Authority, Prudential Inquiry into the Commonwealth Bank of Australia, April 2018, p 81
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The views and opinions expressed in this article are those of the author alone.

ACC GLOBAL UPDATE

ACC releases 2019 CLO report

On 30 January the Association of Corporate Counsel (ACC) released the *ACC CLO Survey,* the distilled feedback of 1,639 chief legal officers (CLOs) in 55 countries. The report assessed where CLOs stand in terms of their influence year to year. The issues that affected that status included sustainability, disruptive technology, privacy law, data security, and brand reputation.

Overall, the report was optimistic. The number of CLOs who report directly to their chief executive officer (CEO) stands at 78 per cent, up from 64 per cent. Of these, 70 per cent reported giving regular input on business decisions at the CEO's invitation. These figures, especially the l4-point leap in CLOs reporting to the CEO, are a clear sign that the business world has fully embraced the 'age of the chief legal officer'. In the words of Veta T. Richardson, ACC president and CEO, 'companies are awakening to the significant role their CLO can and should play'.

The report also lays out the issues of most concern to CLOs. Just over two-thirds of respondents listed data breaches as most important for 2019, followed by regulatory or governmental changes, information privacy, and technology developments. Other concerns included brand reputation, disruptive technology, and mergers and acquisitions (M&A).

The 2019 *ACC CLO Survey* also found that:

- CEOs are most likely to ask the CLO about growth, while boards tend to ask about risk or compliance.
- Forty-five per cent of CLOs expect their budgets to increase in 2019, down from 56 per cent in the 2018 survey.
- As CLOs solidify their place in the C-suite, they increasingly oversee corporate functions other than legal. Compliance is the most common corporate function reporting to the CLO; one in four CLOs oversee government affairs, and one in five oversee human resources.
- Two in three CLOs regularly attend board meetings. CLOs who report to the CEO are more likely to state that they almost always attend board meetings (75 per cent versus 46 per cent).
- Forty-seven per cent of respondents expect M&A activity in 2019.

The ACC CLO Survey is available at www.acc.com/closurvey.

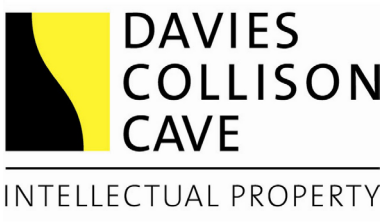
ACC opposes proposed law limiting foreign lawyers in Hong Kong.

ACC has advised the Hong Kong Law Society (HKLS) against changes to the Foreign Lawyers Registration Rules (FLRR). The proposed amendments would change the ratio of Hong Kong solicitors to foreign-qualified lawyers in a Hong Kong firm from 1:1 to a minimum of 2:1. About 1,500 foreign lawyers work in Hong Kong, or 15 per cent of staff in local firms. Many of them are from Anglophone, common law countries, and are thus indispensable in matters related to the Cayman Islands and the British Virgin Islands, crucial jurisdictions for Hong Kong's business community. Hong Kong firms would have two years to adjust to the revised ratio.

'ACC members in Hong Kong work for sophisticated companies, and in-house counsel operating in the city are in the best position to assess their own legal needs', said Lin Shi, president of ACC Hong Kong. 'While loopholes in the existing regulations for foreign lawyers should be addressed, narrowing the number of foreign lawyers and their practice areas will only hurt the corporate legal market in Hong Kong without resolving the underlying issue.'

ACC Hong Kong's statement is available at www.acc.com/advocacy/upload/ACC-Response-to-FLRR-Amendments_20181221.pdf. a

ACC AUSTRALIA CORPORATE ALLIANCE PARTNERS



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