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The official publication of ACC Association of Corporate Counsel AUSTRALIA

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ACC Association of Corporate Counsel AUSTRALIA

PRESIDENT'S **REPORT**

Justin Coss
National President

Welcome to the first edition of Australian Corporate Lawyer for 2020. This edition includes some fantastic content ranging from the need to address conflict as an integral part of innovation to global trends in M&A and much much more!

Before getting into the full substance of this edition however, it is worth pausing to note that 2020 has certainly started with a bang and not the good kind in the form of the Sydney Harbour Bridge New Year's Eve variety.

After years of record-breaking drought in Australia, we've experienced a bushfire season the likes of which has not been experienced before and cost many Australians their homes, livelihoods and some, their lives. The domestic and international response to this crisis has been overwhelming and although we are a small part of the community, we've strived to do our part. Many of our members fought the fires head-on as members of their local Rural Fire Services and ACC Australia itself has also endeavoured to contribute both financially and legally by providing our members with supporting information and avenues to contribute legal services on a pro-bono basis. In addition, I would like to acknowledge and thank ACC and our global leadership who donated $10,000 to bushfire related charities and have also offered assistance in other forms. The bond that has developed with our colleagues overseas in the 5 years since the advent of the ACC alliance has never been stronger and this will only continue as businesses become increasingly globalised.

Before the bushfires receded, the world was confronted with the Coronavirus outbreak. Having quickly exceeding the SARS epidemic in the number of deaths, Covid-19, as it has now been formally named, poses a serious threat to the global populace and economy. Once again, ACC has responded quickly by compiling an impressive toolkit of resources to help our members be the trusted advisor their respective businesses require and provide an effective, proactive legal response to this threat. If you missed it, the resources can be accessed via the ACC Australia website **acla.acc.com**.

Looking ahead, ACC has some great events and new initiatives planned for 2020 including:

- The launch of the new ACC Australia website: this admittedly overdue project will transform and greatly improve member access to ACC online resources and member benefits. To be completed over the next few months, this important development will allow members to move seamlessly between Australian and global resources; from local events to globally produced webinars and more.

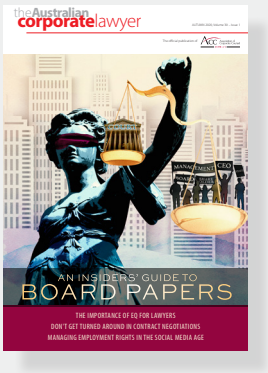
- In-House In Health: thanks to our new sponsor, Vario from Pinsent Masons, ACC Australia recently launched the In-House In Health initiative. This aims to bring greater focus to the prevalence of stress and mental illness among the in-house community and develop strategies to address those very serious issues.

- In-House Counsel Days in Victoria (4th March), Western Australia (7th May) and New South Wales (28th May): ACC will once again host an amazing array of quality speakers and provide delegates with great opportunities to network with their peers in a compact one day conference that provides excellent value for our stretched in-house legal department professional development budgets.

- New to In-House Network: Modelled on the very successful program of the same name developed originally in the U.S. and specially modified to fit the Australian market, this program will be introduced in 2020 to provide support, networking and educational assistance to smooth the pathway to those who are entering the in-house segment of the profession for the first time or those re-entering after a break.

Finally, I would like to acknowledge two of ACC Australia's former Directors, Adrian Goss, General Counsel of Bauer Media and Mike Madden, Head of Legal & Commercial at Hyne Timber. Adrian and Mike serve on the ACC Global Board and have been appointed to the ACC Global Executive as Secretary and Chair of the Membership Committee and Treasurer and Chair of the Audit & Risk Committee respectively. This is a tremendous achievement for both Adrian and Mike and is testament to the regard in which they are held by the ACC Global Board and the importance of ACC Australia as part of the global in-house community.

These are but a few of the many exciting things that are happening and that the ACC Australia team are working on so stay tuned and read on!



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Karina Veling

As an in-house commercial lawyer for the past 6 years, working across technology and entertainment industries, Karina found herself wanting to give back and do more. She joined the NSW Rural Fire Service two years ago. Karina has been able to devote some of her time off to helping our state fight some of the worst fires we've ever seen.

I'm still not entirely sure what attracts anyone to standing outside on a stinking hot Sydney summer's day, a thick jacket lining their body, feet covered in the thickest socks they could find under heavy (and to be honest, quite ugly) black boots. Sweat – everywhere. Literally, everywhere. Not to mention, the 600-degree celcius flames peppering the ground in front of them.

Why?!

For me – I think I've always been the kind of person who is always looking to do more. There's always extra work to take on, new books to read, more kilometres to run. Yes, exhausting at times, but I enjoy it. It's always pushing me to do more and be better – a better person, colleague, friend, partner.

Two years ago, at a time when I was settled in my legal career and personal life, I found myself questioning, "What else?" I wasn't really sure what I was looking for, but there was a gap to be filled. I wanted a new challenge; perhaps a new hobby. One afternoon, I found myself googling the Rural Fire Services (RFS), listening to the small but persistent voice at the back of my head, which, for years, had expressed an interest in learning more.

The beginning wasn't easy… I found it harder than law school. Nothing seemed to come naturally to me – the trucks didn't interest me, nor did the idea of starting a fire to fight a fire. I had no idea what a Storz spanner was and didn't understand the mechanics of a centrifugal pump.

This is exactly what kept me going back each week. I was fascinated by the idea of learning new skills completely different to my career or daily hobbies. As a 26-year-old, this was something I didn't really think I'd come across again. It made me nervous – I experienced that knotted feeling you get in your stomach – and I liked it.

A question volunteers get a lot of the time – is it all what it looks like on the news?

No, definitely not. Here's a quick snapshot:

- As part of the Hills District, we're not directly impacted by the current fires, so we often send crews on 3-5 day strike teams in areas around NSW (and sometimes interstate) to battle the fires. We're also heavily involved in hazard reductions, setting up contamination lines, ongoing maintenance of fire grounds and property protection.
- The other side of the coin is what we call "get ready and wait" – over the past few months, our brigade has been on 12-hour standby shifts, ready to go when incident or emergency calls come in.
- Then there's the unsexy, but very important, weekly training. Our brigade meets every Monday night to train, practice drills, upskill on theory and practical scenarios, maintain equipment, clean our trucks and strengthen social connections within the team.

Similar to the role of an in-house lawyer, a lot of what volunteer firefighters do is **proactive**, helping to **reduce the impact** of existing fires or avoid new threats starting.

Someone asked me recently if my legal background has helped with my role as a volunteer firefighter. The more I think about it, the more I suspect that perhaps it has worked in the reverse. I've learnt skills at weekly trainings and from being on the fire ground that I take back to my in-house work – working in a team of diverse individuals, applying specialised skills, responding under pressure, using intuition and being confident to make quick but important decisions.

It's taught me how to be a **better communicator** – one thing we practice weekly, and the most important thing on the fire ground (and to me, the most important thing when working in a legal team). I can see myself approaching challenging issues or situations differently – volunteering has taught me to persevere when things look insurmountable, **break it down** and **find creative solutions**.

I won't lie; being in the brigade does scare me (I really never knew how hot fire could be!). This month, in particular, I've had sleepless nights and vivid dreams before going on shift. Anxiety. Apprehension. Fear.

So why do we continue putting our hands up despite this fear and our loved ones' protests that we should choose another hobby (sorry, Mum)?

A lot of it is about using the invaluable skills we have as volunteer firefighters to protect and help people and our environment. Similar reasons as to why I wanted to become a lawyer – helping others and being part of something bigger. It's a worthy way to contribute to society, especially considering Australia's bushfire defences rely heavily on volunteers. It also has a wonderful communal and welcoming vibe – we are true teammates and friends.

If the RFS is something you've always wanted to look into – go on, make that Google search. It's that easy. The 'Volunteer' section of the NSW RFS website (**www.rfs.nsw.gov.au**) will help direct you to your closest brigade, and details other ways you can help. If you're wondering how you can support the current disasters, we, as lawyers, have our own superpower – consider offering pro bono legal assistance or even something as simple as sharing helpful legal information to affected individuals and communities.

A DAY IN THE LIFE

TARA EATON

Head of Legal, Australian Red Cross

Tara Eaton

As Head of Legal at the Australian Red Cross, Tara advises on a wide range of legal and governance issues affecting the organisation and board. She has previously led Legal and Compliance teams in the innovative pharmaceutical sector. Her career highlights so far include: assisting the current Red Cross emergency response to the 2019/2020 bushfires, negotiating the multi-billion contract putting Hepatitis C cures on the Pharmaceutical Benefits Scheme and working with the World Health Organisation to implement Vietnam's WTO obligations.

5.30 am **Alarm goes off. I lie in bed for a few minutes, savouring the snugness before the day starts.** I nudge my husband to make the day's kick-starter for both of us – a double-shot latte. With two young girls and two careers, we are genuinely 50/50 in all things domestic…except for coffee. He rues the day he started bringing me a coffee in bed to start the day, but he's stuck with the tradition now.

5.58 am **After knocking back the coffee then managing to pull on exercise gear in a half-asleep state, I rush out of the house to make Reformer Pilates.** The studio is a 2-minute walk away but I'm always late. Today, I am literally running the 400 metres to make it in time.

6.00 am **Make the class. It's still too early to make eye contact or chit chat with anyone, which is why lying on a reformer bed to exercise is perfect.** Reformer Pilates in its native German must mean 'torture device' with sole purpose of making everyone uncoordinated, I think to myself, as I sweat through 45 minutes of balancing precariously on a moving surface.

6.45 am **I am now wide awake and energised, so the day can start.** Rush home to get myself ready and help kids get ready for school. They're now only a few days into Grade 1 and Grade 3. Defuse argument about toast vs Weet-Bix and search for missing library bag, before showering and getting myself dressed and (very vocally) encouraging the girls to get dressed.

7.30 am **All four of us walk to school. It's an easy 20-minute walk but there are complaints about bags, new school shoes, etc.** It's still a highlight of my day, holding their hands while walking and hearing about all the crazy things going through their heads. "Did dinosaurs have baby teeth? Mummy, did you know that we are all made of star dust?" The train station is on the way to school so either my husband or I peel off and head to work, leaving the other to do drop-off. Today, I get to do drop-off duties at school as he heads off to work.

8.15 am **After drop-off and a brief chat to fellow parents, I head back to the station to hop on a crowded train/tram to get to work.** I use the opportunity to review overnight/morning emails and forward relevant bits of information to my team. Given this season's bushfires are proving to be intense and sustained, there is a lot of activity happening. Developments/media are moving fast, and we all need to be across the current state given the various ways it impacts us – usually being asked to do urgent reviews. I respond to emails that can be typed with one hand.

8.50 am **Arrive at my desk. Legal is located in open plan.** Half of the team work part-time, one lawyer is in Perth and two secondees come in two days per week each, so it's varied as to how many people are working. Today, there's two of us in the office and two working offsite, so we have a quick chat about recent developments in bushfire relief activities. I also head up the National Archives team, who are located in another part of the building, and I quickly pop in to say hello. In their area, you get to feel the weight of the history of the Red Cross, given the various uniforms, trunks and related paraphernalia from various wars that they have on display.

9.00 am **Run into our Media Communications lead and discuss today's bushfire-related media announcements.** The speed at which we have received a significant amount of donations and the continuing need of the community has meant that we are able to put together additional emergency grants, which we are all working towards at the moment. I take the opportunity to explain why we need to include specific wording in public-facing documentation.

9.15 am **Return a number of phone calls from potential legal counsel applicants.** I am recruiting for two additional positions. Where possible,

I like to speak with applicants who have questions about the roles, not only to get a sense of who they are and whether they have the specific technical skills needed within the team, but whether they could complement the team. We have a great team spirit and culture that is important to maintain, given we're a smallish team of 9. We need everyone to be accountable, feel comfortable giving advice directly, challenge/build on each other's thinking and enjoy each other's company (usually with baking involved).

9.45 am **Review and draft documents in anticipation of the second meeting of our external Panel assisting us with the allocation from our Disaster Relief and Recovery Fund (while eating breaky at my desk).** There are a few documents that need to be settled, including terms of reference for the Panel and legal review of the current proposals for distribution. One of the team has already done an initial review of the proposals, so I just make myself familiar with the issues so I can speak to them later today. The issues are based in century-old charity law as well as tax law, necessitating support from one of our very generous pro bono firms, so I give the partner a quick call about a tax question.

11.00 am **Meet with one of my team about an ongoing employment compliance project.** We're now at the stage of planning the next 6 months in the project and there is significant legal support needed. We talk about the regulator's recent communications and the diversity of Red Cross operations, which means we have a large number of applicable awards. I'm not an employment lawyer by background, so I take the opportunity to learn about the more technical IR aspects. We settle communications that need to be sent today and review our strategy for the next communications.

12.00 pm **Have a quick chat with the CFO/COO about planning for this year's internal audit schedule and upcoming so-called 'industrial manslaughter' legislative changes.** Given we have delegates sent overseas to a variety of locations, including war zones and disaster zones, we are very mindful of safety.

12.15 pm **Have my fortnightly catch-up with one of the team.** We talk about all the support she has been providing to bushfire fundraising efforts. We are both amazed at the generosity and issues that we have had to traverse related to bushfires as well as the novel promotional activities. Airlines now raising funds for us on board their flights; celebrity chefs hosting fundraising dinners; offers of ads in the Super Bowl! This has necessitated fast, agile legal advice, which creates practical guidance for the organisation that can be easily implemented in a pressured and resource-constrained environment. Scoff down lunch.

1.00 pm **Meet with CEO and CFO/COO about our employment compliance project and next steps in planning for an upcoming Board meeting.**

1.30 pm **Attend a panel with external advisors discussing the distribution of the Disaster Relief and Recovery Fund to bushfire-affected individuals and communities.** It's a fascinating discussion, which touches on the length of time it will take communities to recover (therefore needing Red Cross to be there for the long-term), how we shape practical yet meaningful criteria for grants and how we balance the fact that fundraising is still continuing with the need to be careful how we spend the money now. Legal issues involve charitable and tax law, privacy, mitigating against fraud, and data security.

3.30 pm **Catch up on daily emails and quick chat with team.**

4.15 pm **Speak with CIO about recent donor concerns regarding invoices received over social media.** Discuss our ongoing IT investigations and regulatory requirements. Discuss possible insurance coverage.

5.15 pm **Do another catch up on emails and share information with the team regarding outcome of Panel discussions earlier.**

5.30 pm **Run out the door to get tram/train home.** Use opportunity to continue reviewing emails from today and read some articles from firms regarding legislative developments. The Red Cross's operations are extremely varied, with over 6000 separate legislative obligations applying to us so the breadth of issues I'm interested in is wide.

6.10 pm **Arrive home to relieve the girls' nanny.** She is part of our family after being with us for 3 years now and the girls adore her. Discuss developments at school today. "How was school?" "Good." "What did you do?" "Nothing." They have been fed and bathed, so we chat while they eat dessert and I get a little bit more out of them regarding the day's activities. Husband also arrives home.

6.30 pm **Home learning time.** After some initial reluctance, the girls settle into it. My husband and I divvy up the girls as they still need us to sit down with them while they do their reading. Miss Grade 3 and my husband then sit down to do some cello practice together – which is lovely to watch (hearing, not so much).

7.30 pm **Bedtime routine for girls and we let them read in bed while we prepare dinner.** We cook in bulk on a weekend to avoid eating cheese on toast every night, so it's just a matter of heating up the curry and turning on the rice cooker.

8.00 pm **Bedtime protests finally stop, last goodnight kisses provided, and we watch the news while eating.** Bushfires continue to headline the news and the people impacts are sobering.

8.30 pm **Given what's due tomorrow, log on to finish to-do list arising out of this afternoon's meetings, specifically, the Panel, while husband does dishes and packs school bags for tomorrow.** Given the Panel recommended exploration of additional grants, there is more work to do on operationalising these to get support out to people who really need it now. Have a quick text chat with friends about upcoming catch-ups.

9.30 pm **Toddle off to bed.** To wind down, I often read for a little while in bed. My book club (made up of fellow school mums) encourages me to read fiction I would not usually pick up. Tonight, it's a few pages of a fascinating story of a woman who grew up in a strict Mormon household in the US.

10.00 pm **Lights out.** My mind is occupied still on a few to-dos but I fall asleep relatively quickly.

THE IMPORTANCE OF EMOTIONAL INTELLIGENCE FOR LAWYERS IN THE WORKPLACE

Most of us have worked with someone that is technically brilliant at their job, an expert in their field, yet lacks the fundamental basics of effective communication and people skills, which means they really aren't that nice to work with. What they are lacking is Emotional Intelligence to support their IQ.

Emotional Intelligence (EI) and its concepts were first spoken about as early as the 1930s, and was coined as a term in 1990 by Peter Salovey and John Mayer. It was in 1995 that Daniel Goleman's book, *Emotional Intelligence*, heightened the popularity of the concept, provoking conversations around whether it can matter more than IQ.

Emotional Intelligence is all about understanding what makes you 'tick' and more importantly, what makes those around you 'tick'. It's about understanding and being able to control your emotional response and the impact you have on those around you.

There are 5 key factors to EI, being:
1. Self-Awareness
2. Self-Regulation
3. Motivation
4. Social Skills (Communication)
5. Empathy (People/Leadership Skills)

Is this another 'fad' or 'buzz' word?

Emotional Intelligence is often mistaken for being a soft "wrap each other in cotton wool" and "shower each other with positive affirmation" reference and this is certainly not realistic. While there is a large aspect that works with the power of the mind and challenging our mindset to leverage the chemical reactions and workings of the mind, it is not about wishing for money and prosperity and having the wish come true. Emotional Intelligence can be extremely challenging, thought-provoking and has been described by many as confronting, as we peel back the workings of our thoughts and the impacts they have on us and the people around us.

Why is it relevant for lawyers?

When lawyers are working with corporations/organisations, providing advice on substantial current or future risk, the level of EI will influence the relationship and the ultimate outcome. For corporate lawyers, there is a high level of trust that is required, with the senior levels of the organisations relying on lawyers to provide security and safety measures of the highest standard in preparation for the worst-case scenario.

We know that in situations like these, the effectiveness of the communication, empathy and leadership skills that the lawyer has will determine the outcome and level of success. Before we can truly develop any of these skills, we first need to be self-aware and able to regulate our emotional responses, ensuring the emotion and the severity in play is appropriate for the situation.

Developing Emotional Intelligence

Developing our EI is not a quick, overnight fix, nor can we attend a workshop and walk out emotionally intelligent. This is a slow build and can only be done if we genuinely want to develop it. Without the desire to grow our EI, there isn't a tool or reference material that can assist.

Here are 3 tips for developing EI:

1. Power of the Pause

It is natural human behaviour to fill silence with talking. We've been encouraged to talk since we were born. For this reason, ask questions of others rather than making statements and then take the time to just pause. Allow the other person to fill that silence with words. The longer we pause, the deeper they go into their subconscious minds and the more we learn. Many times, the other person tends to solve their own problems and also learns a lot about themselves by unleashing the thoughts in their subconscious mind.

2. Disrupt an Emotional Hijack

Emotional Hijack is a reaction that occurs in our mind when our thalamus sends a signal to our amygdala before analysing the information in the neocortex. Usually, certain situations or words trigger an emotional response and we start reacting before we understand the situation. Information is key here; provide more information, allowing time for the recipient to process the information and react appropriately. Be careful not to let the emotional response of others also trigger an emotional response in us.

3. Empathy

Empathy is one of the greatest skills to build and is evident in iconic organisations and admired individuals. It is different to sympathy. With empathy, we don't need to know what occurred, be able to relate to the situation or even agree with the emotional response. We simply need to recognise and recall the emotion that the other person is feeling, including the severity. For example, when was the last time I felt that angry? At that time, what was the worst thing that someone could say or do and what was the best thing that someone could say or do? Our minds default with a quick response that is usually the last thing that the person wants to hear. Empathy takes disrupting our mindset to pause and respond the best way based on the emotion on display to resolve the situation.

Technical skills and IQ will only take us so far before great EI is required to master the delivery of these skills and effectively work with people. Equally, EI will only take us so far before technical/IQ is required to deliver. It is a common occurrence that IQ will get us hired, yet it is our EI skills that get us promoted. It's not what we know, it's how and why we do it.

Amy Jacobson

As a Human Behaviour Specialist with 19 years' experience of more than doubling engagement and market brand scores, Amy takes people out of their comfort zone and helps them bring passion and purpose to every work day. With her balance of tough love and infectious energy, she creates purpose-driven teams who get results!

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AN INSIDERS' GUIDE TO BOARD PAPERS

In the year following the conclusion to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, corporations and boards have faced significant scrutiny from a number of sources over their conduct and decision-making processes. This increased scrutiny has been reflected in public opinion and discontent. The public expects corporations, not just those entities in the financial services industry, to respond appropriately and in a timely manner to customers, suppliers, the community and stakeholders, as opposed to merely a corporation's shareholders, when making decisions.

This article is a practical guide for the in-house counsel of a small- or medium-sized company, not-for-profit or government organisation, who contributes to or prepares board papers or reports. I'll use board papers and reports interchangeably, referring to either. Its aim is to refresh or provide an understanding of the standard of information a board needs to support the decision-making process and enable its directors to discharge their duties. It's not intended to be prescriptive; though it outlines the lessons I've learned in my role as a general counsel and company secretary with responsibility for governance functions.

As corporations' governance practices come under the microscope, senior management experience greater pressure and scrutiny and an expectation that they will be held accountable for the information they provide to the board. Corporate counsel, compliance, legal risk, regulatory and governance professionals responsible for their own reporting process and processes face this increased focus. For corporate counsel and governance professionals, reporting and disseminating information is critical to an organisation.

Directors look for relevant, quality and timely information from senior management to ensure the board has the information it needs to fulfil its oversight and monitoring role, and for directors to discharge their responsibility and duty to exercise care and diligence. How directors inform themselves is formally, through board papers, or informally, through access to an organisation's employees, site, clients, contacts and operations. Directors don't make decisions in isolation; they depend on management for information, to develop projects, proposals and carry them out. They are influenced in their decisions by a variety of factors, including the way the corporation is regulated, the culture and operation of the corporation, the director's profession, skills, experience, interests and their own degree of involvement in the corporation.

In terms of board reporting, effective governance means ensuring directors are provided with access to the right information in a meaningful way through complete board papers. One of the findings of the *ASIC Corporate Governance Taskforce Report* (October 2019) was that material information on non-financial risk was often "buried in lengthy board packs or reports". Boards did not own information flows from management, and reporting did not clearly identify and prioritise non-financial risks.

The final report from the Royal Commission focussed on the responsibility of the board and its role overseeing the governance of a company. A measure of a board demonstrating oversight and holding management to account is ensuring board members has access to quality and focussed information and they are not overloaded with pages of lengthy board papers. Given board packs now contain more regulatory, compliance and risk reporting, management want this information to be clear and concise, easy to read and compelling to a board who can be satisfied that key issues are clarified and resolved. This involves corporate counsel and governance professionals ensuring the business considers appropriate matters and provide timely, relevant and quality information.

As an in-house lawyer or one with a dual or combined role with compliance, risk, ethics or regulatory in a wider governance function, you will invariably contribute to, review a report for a board meeting or present that paper to the board. You may be asked by the business to assist with drafting a board paper recommendation or resolution for discussion, noting or approval. There is no need to approach board meetings with unease if you understand the role of the board, the role of board members and know what's expected.

Top Tips to Nail Board Papers

1. Structure and style matter

One size does not fit all. Your organisation will determine the style and approach to board papers. Each organisation is different. The structure and type of paper will vary and will likely depend on your company's size, resources, strategic priorities and risks. A start-up will require a differently structured paper to that of a mature company, one in the not-for-profit space or a subsidiary company. Make yourself aware of any protocols and structure your company adopts. Consider if you are preparing a document that is subject to legal professional privilege as this will be dealt with differently to ensure privilege is not waived.

A part of your role may include reviewing or rewriting a board paper created by the business. You may be responding to a board request arising from an agenda item that is imprecise, unclear or unfocussed, where no clear instruction has been given. You want to know if the paper or report is one requesting a decision, for noting or discussion or is being provided just by way of an update. In these scenarios, you may have to understand what the board is looking for, what issues need addressing, the level of detail required, how and who is to present and what is going to be done with the information. You should do this before sign-off from senior management or the CEO.

2. Objective, balanced reporting will always be in style

As lawyers, we are trained to analyse and present advice and information clearly and transparently, with an unfettered, objective and balanced view of a matter. Our advice contains the necessary downsides and risks and doesn't inflate an unrealistic positive outcome or benefit. In-house lawyers are sometimes called upon to distil the subject matter of an issue, project, matter or deal for a business paper to be presented at a board meeting. Make sure the information is reliable and comprehensive, unbiased and satisfies the expectations of the business or directors.

A board needs to be confident the information is dependable and verifiable and not influenced by any agenda. It is not a director's role to review raw statistics or data so this information should be interpreted or explained. Any insights you have should be communicated so that real value can be extracted from the data. That report in the board pack is probably the main source of information for the director prior to the board meeting so it needs to be comprehensible.

3. Write to your audience

Put yourself in the shoes of your audience. Consider the director's skill set, knowledge and understanding of the company. A non-executive board director may be less experienced in operational matters, have a lower level of understanding of subject matter, technical expertise, the context and environment. In-house need to consider how the board is to best use their time, focussing on strategy rather than operations, and consider subject matter and significance as to whether the matter needs board approval. The risk is that important information is overlooked by a director and if the paper or report misses the point, it could lead to wasted time, and decisions being made without a real understanding of the matter, or the impact or consequences of a decision.

4. Have a purpose

Your paper or report should have a clear purpose to direct the board to where it should focus its attention to prioritise any questions or discussion. It should contain all necessary information to facilitate pertinent questions. A board is required to be across significant matters impacting an organisation, but the board member may have had minimal time to read, digest and consider the paper for questions or form an opinion. There may be little consideration to then decide or advise on the course of action for management to take.

5. Make it relevant and aligned to the organisation

Consider if the paper has covered enough detail, relevant considerations, implications for the company and stakeholders, customers, community and suppliers. Consider whether your paper is to be presented to a committee meeting or a board meeting. Usually, more information is provided at committee level, so the additional information could be covered in an attachment at committee-meeting level and removed for the board meeting. If required, your paper should state alternative options or courses of action as needed for an impartial decision to be made. The content of the paper should align with the organisation's strategy and risk profile.

6. Use the board template

Board templates are great for guidance and consistency because they remind you what to include and they also prompt the board where to look for information by clearly setting out what is covered. Templates have limitations as different formats may be required for subject matter such as a project development or regulatory matters. Ask if your company has a template or standard format for different subject matter board papers or ask if there has been a previous paper that hit the mark that you could adopt the style, format or design from, making sure it hasn't been superseded.

PowerPoint presentation slides that just contain shortened statements are often requested to be used as part of or attachment to a board paper. The risk of PowerPoint presentation slides is that it is only when the slide is presented that there is enough detail and clarity to explain the subject. This makes it difficult for board members to understand the matter fully and properly prepare in advance of the board meeting.

The board must have proper oversight of the issue in order to make an informed decision, so provide context for the paper, setting out how the subject matter fits in to the landscape and environment. Directors are not necessarily familiar with all organisational issues, but, conversely, they do not need to know every detail or everything you can think of about the subject of the project, investment, negotiations or agreement.

7. Be concise

Most likely your company imposes a word or page limit on the length of the paper as a hard and fast rule. This encourages board paper authors to focus on explaining the subject and the point of the information. You need to prioritise information and highlight the salient points to ensure the board receives information clearly and efficiently, to steer the discussion to the right decision and not spend board time focussing on less relevant information. If you have lengthy paragraphs of written text or sentences, consider using dot points, but no more than six dot points; otherwise, the effect is lost.

Consider the detail and extent of the material required. You may risk weakening the focus of your report or frustrate a director by having them wade though information irrelevant to the strategy or broader picture. It is often said 'quality over

quantity' and through fear of leaving something out, too much irrelevant detail is left in. In a government organisation I was involved with, the business report stretched over pages and pages as it had evolved over time. No doubt this was in response to distant and various requests by numerous non-executive directors over the years trying to explain what was useful for their decision-making but the relevance had been lost over time. Be alive to redundant historical data that has become irrelevant. An executive summary to set out what is proposed, identifying all key issues and what action you are seeking from the board, is helpful.

8. Think creatively

Those of us reporting compliance, regulatory, risk, and even financial information, need to outline more detail than just statistics or numbers and analyse, compare and explain underlying data or trends. If your board report or paper requires comparable data or benchmarking, make sure the format and style are the same to illustrate trends or comparisons.

As lawyers, we are often comfortable reading large chunks of text, and reports often require narrative. You should think of creative ways of presenting information simply and clearly. Identify, focus on and follow changes, aberrations or anomalies, point out scenarios, drill down on concerns or solutions and give judgement (but only within own expertise) to encourage a better decision to be made.

Some board directors may respond better to visualisation of information and data rather than the written word. It may be possible to mix up your information and deliver it visually with line charts, bar charts, bubble charts, configuring numbers in a table or percentages in a pie chart. You could use a map to explain proximity, distance and direction, use a decision tree, guiding the board visually from start to end, make a timeline to show changes over time, make comparisons in a graph, or visualise your data with infographics. Use all the array of methods of presenting information. Even a two-column layout will increase readability or a Venn diagram, which can be used to show a series of trade-offs or compromises.

9. Ensure your information is current

Scheduled board meetings are, at a minimum, likely to occur monthly and the board production process can take place even two weeks prior to board paper finalisation. Therefore, it's important the information you provide is current, sufficiently up to date and timely. To avoid your report having completely out-of-date information or no information, you may want to include an estimate or range that is not perfect rather than entirely accurate.

10. Avoid jargon

It's easy to fall into the trap of assuming a director understands industry jargon, technical terms, abbreviations and acronyms but avoid using them unless they are supplemented with an explanation. Where possible, don't use your company acronyms, especially when they may have a completely different meaning in another industry or company. I've been tripped up thinking 'foc' was "free of charge" and not 'fibre optic cable'. I've also experienced colleagues using the term 'gbh' when I had always known it as an acronym for 'grievous bodily harm' not 'gifts, benefits and hospitality'.

11. Utilise technology

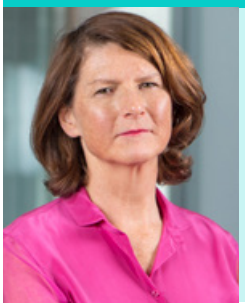
It is essential for corporate counsel and governance professionals to utilise technology and different techniques when presenting data. Given most boards use board portal platforms, consider how your information will be presented and appear on an iPad or laptop, landscape or portrait. If the text, diagram or tables are too small or across too many screens, it will not be easily understood and will lead to more questions and wasted board time.

12. Build to a logical resolution

If you have been asked to write a recommendation or resolution, keep your sentences short and specific and outline what is being sought, for how much and when. It makes sense to number the items rather than write another sentence. If a decision is being sought, the key issues should be explained in the paper or executive summary, so ensure the paper is clear about the decision the board must take. Consider whose authority is required to make a decision or if the decision can be delegated, whether there are regulatory requirements and if there are clear criteria or policies determining if and when, and at what stage, a new proposal goes to the board.

Finally, it is good to keep front of mind that once a matter makes it to the board, it may stay on the board agenda for future meetings. Consider if and when or how often the matter should return to the board for consideration. If you need further direction or guidance on governance issues in board papers or would like to learn more, the Governance Institute of Australia (**www.governanceinsitute.com.au**) has reading material and seminars specifically targeted at the governance professional and board papers.

Claire Miller



As a general counsel and company secretary, Claire has extensive experience in corporate governance, compliance, government and regulatory liaison. Her previous industry experience includes holding executive legal and governance roles in the infrastructure, energy, resources, utilities, financial services and property across the private and government sectors.

FREEDOM AND FIDELITY—MANAGING EMPLOYMENT RIGHTS AND FREEDOMS IN THE AGE OF SOCIAL MEDIA

As the lines between work and personal lives continue to shift, it is increasingly challenging for employers to balance their own interests and obligations with the rights and freedoms of workers. These challenges are particularly clear when managing social media use and the workplace.

In 2019, themes of employment, social media and religious freedom were at the centre of a highly publicised case involving renowned rugby player Israel Folau and the Federal Government's release of a Religious Discrimination Bill 2019 (Cth) for public submissions. While these events put employment and social media at the centre of public debate, courts and tribunals have been examining these themes for years.

As was apparent in Folau's case, the risks to employers go beyond legal and financial risk. Welfare, reputational and cultural risks can arise where the boundaries of respectful and appropriate behaviours are pushed, whether at work or after hours.

Legal and practical implications

When policing social media use, an employer may be attempting to manage out-of-hours conduct—so the basis for action can be unclear. Whilst employees have an implied duty of good faith and fidelity at common law, this is necessarily balanced against the agency they have over their choices outside of the workplace. Courts and tribunals will carefully assess out-of-hours conduct to determine whether it warranted disciplinary action. There must be a connection with the workplace for the employer to establish a contravention of workplace policies, codes of conduct, procedures and/or breach of the employment contract.

To assess whether the conduct is 'connected with the workplace', courts will consider whether the conduct:

1. is likely to cause serious damage to the employment relationship, when viewed objectively;
2. damages or adversely impacts the employer's interests; and
3. is incompatible with the employee's duties.

When assessing an employer's action, courts look at:

1. whether the employer promulgates a social media policy;
2. whether employees are aware of the social media policy and are trained in it;
3. the terms of the employment contract;
4. the nature and format of the offending conduct;
5. the employee's mitigating circumstances at the time of the offending conduct; and
6. incompatibility between the conduct and the employee's duties.

Social media use has been part of claims about unfair dismissal, breach of contract, work health and safety, bullying and harassment under the *Fair Work Act 2009* (Cth) and workers' compensation legislation.

Freedom of Folau

The highly publicised case of Israel Folau against Rugby Australia and the NSW Waratahs emphasised how nuanced this assessment is in practice.

Over 12 months (April 2018–2019), Folau made around 62 social media posts featuring religious content, and his contract with Rugby Australia was terminated due to a "high-level breach" of the Code of Conduct enshrined in his employment contract.

The alleged breach arose from two posts regarding his religious beliefs that, according to Rugby Australia:

- caused a "media firestorm";
- damaged the relationship of Rugby Australia with its sponsors;
- caused discord among rugby players, hurt and distress to Rugby Australia's employees;
- damaged the reputations of Folau, Rugby Australia and the game of rugby more generally;
- placed Folau's interests above those of any other person; and
- saw Folau refuse to mitigate the hurt and distress caused by removing the offending posts.

Rugby Australia claimed it was not seeking to interfere with Folau's religious beliefs but was concerned that his voluntary conduct was a breach of his contractual obligations. It maintained its Code of Conduct and contracts didn't restrict a player's religious views in any way.

While some commentators posited the case was more about contract law than religious freedom, the statutory basis for the claim, s 772 of the *Fair Work Act 2009* (Cth), positioned religious discrimination at the centre of the case.

Folau's claim involved a number of contractual claims, as well as a claim he was dismissed contrary to s 772 of the Act for reasons that included his religion. That section states:

> *An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons…*
>
> *…(f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*

Importantly, s 772 did not require Folau to establish the termination was due to his religion—the protection operates so that religion is presumed to be the basis for the termination. Rugby Australia bore the onus of proving otherwise. Folau's claim was carefully framed to link his social-media activity and his views closely to his religion. He pleaded that, as an evangelical christian, it was his "mission and duty to spread the word of God" and that these beliefs go to the "very essence of his personhood and define him as a human being".

Had the s 772 part of Folau's claim been judicially determined, the Court would have had to determine whether it was possible to detangle Folau's religion and the purported manifestation of that religion in "spreading the word of God" via social media from the 'breaches' that formed the basis of Rugby Australia's termination decision.

This is an unenviable task, particularly when considering the nature and practices of evangelical religion.

Folau's case was settled, without needing a Court to answer these questions. Although the case settled and there's no judicial ruling to give insight into how these cases might be decided in the future, it still had a considerable impact on the reputation and business of all parties, something most would prefer to mitigate.

Religious Discrimination Bill 2019

It is likely any strategy adopted by a business responding to similar risks will soon need to navigate the provisions of the foreshadowed Religious Discrimination Bill 2019 (the **Bill**).

The Bill aims to enhance the statutory protection of the right to religious freedom and prohibits discrimination on the ground of religious belief or activity in key areas of public life, such as work, education, goods and services. Further submissions on the second exposure draft of the Bill could be made until 31 January 2020, so the landscape for employers may shift again.

The expectations of Folau, in terms of avoiding conduct that could be discriminatory, harassing, bullying, abusive or isolating on the basis of someone's sexuality, were clear in the Code of Conduct and by-laws that applied to his employment. Also clear was the expectation that Folau's obligations extended to conduct that may be detrimental to or discredit the game of rugby on social media.

There are proposed provisions of the Bill that could impact how organisations should frame expectations and regulate employees' religious beliefs and activities.

Like other discrimination laws, the Bill prohibits indirect and direct discrimination.

Indirect discrimination occurs if a person imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who hold or engage in religious belief or activity. Indirect discrimination will be unlawful where the condition, requirement or practice is not reasonable. This prohibition would extend to 'employer conduct rules' that unreasonably disadvantage people who hold or engage in religious belief or activity when compared with a non-religious person.

The Bill states that an employer conduct rule that could restrict or prevent an employee from making a statement of belief outside the employee's employment **is not reasonable**, unless employee compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer.

This means that a Code of Conduct that prohibits offensive or humiliating statements or conduct on the basis of race, sexuality or religion will be deemed unreasonable if that requirement impinges on a person's religious belief or activity (including religious expression).

Employer conduct rules that prevent conduct/comments that are malicious or likely to harass, threaten, seriously intimidate or vilify another person or group of persons are not unreasonable. However, rules that prevent religious activities or expressions that would otherwise be disrespectful, humiliating or offensive to persons, don't appear to be captured by this exemption.

While these changes are not in force yet, they do underline the need for a carefully drafted social media policy and code of conduct. Reprimanding an employee who preaches potentially offensive but inherently religious views on social media may soon be unlawful.

Policy power

It is trite to say "have a social media policy" in 2020. It's more about how robust the policy is and how it evolves. It is timely to consider how social media policies and codes of conduct may interact with the Bill if it becomes law.

Cases where employers have successfully argued breaches of a social media policy are often those where the policy is specific, detailed, reasonable and the employer can demonstrate that the policy is well-known and understood.

A good social media policy will carefully articulate the employer's values, the policy's scope of coverage and set clear expectations and boundaries for online behaviour. It will also inform employees that conduct on social media can impact their employment and their working relationships.

Interestingly, many social media policies and codes of conduct frame expectations in terms of respect of others and avoiding conduct that could be offensive or humiliating to others.

Respect can be a subjective concept and informed by culture, religion and personal difference. When it comes to religious expression, the Folau case has shown how difficult it can be to articulate what is or isn't disrespectful or at least reach a common understanding on such things. The Bill, as it is currently drafted, would not permit employees to make statements of belief that are malicious, harass, vilify or incite hatred or violence against a person or group—but these are more serious concepts that overlook disrespect, offense and humiliation.

Be prepared

Despite an organisation's best efforts or intentions, it can't control every social media interaction or comment outside work that impacts the workplace. What is within the organisation's control is how prepared it is to respond to and effectively manage these incidents and mitigate the damage. This is particularly important for organisations with a public profile.

In practical terms, this means:

1. Setting the standards by:
   a. defining your values and culture;
   b. understanding the boundaries of employer intervention/involvement;
   c. consulting with workers and stakeholders; and
   d. articulating standards and building them into policies, contracts and systems.

2. Implementing those standards and monitoring compliance by:
   a. educating and training employees and workers;
   b. leaders setting the standard and leading by example;
   c. having ongoing dialogue and providing feedback; and
   d. implementing a fair and consistent process for dealing with contraventions.

3. Having an incident response and risk control strategy in the event a significant breach occurs by:
   a. understanding and articulating the triggers for a response to a breach on social media;
   b. assessing the nature and severity of risk (safety/wellbeing of workers, business and legal risk, reputation and culture); and
   c. implementing risk control strategies.

Employees and workers can engage in social media activity that significantly affects their relationships with co-workers, safety and welfare at work and an employer's reputation. Impact can often reach beyond what was originally intended at a speed that takes employees, employers and stakeholders by surprise. Planning and preparing for such an event is one of the most important steps an organisation can take to mitigate risk.

Emma Gruschka

As Special Counsel at Sparke Helmore Lawyers, Emma advises on employment and work health and safety issues for clients in diverse sectors, including government, mining, transport and financial services. She helps clients with workplace investigations, unfair dismissal and general protections claims, enterprise bargaining, safety investigations and advises on legislative compliance for safety matters. Emma is an experienced workplace lawyer.

WAGE THEFT: KEEP CALM. PROTECT YOUR BRAND. AUDIT!

No one wants the mistakes they make today to become tomorrow's headlines, to see the reputation of their company burned to the ground by a firestorm of negative public opinion. Matthew Robinson dons an asbestos suit to tell you how to fireproof your business against allegations of 'wage theft'.

Over the last few years, the public consciousness has turned time and time again to what is seen as a growing problem with what's now named 'wage theft' (everyone loves a catchphrase).

Throughout 2019, it was common to see brand after brand splashed across the news and social media platforms as having underpaid their staff monstrous amounts. Politicians have been climbing over themselves to decry 'wage theft' and pushing for harsher penalties on those who exploit the vulnerable.

As much as I would like to write about what the harsh new penalty regime will look like, I don't have a crystal ball. The ultimate position on these laws could substantially change depending on the political opportunism of some Senate minorities. However, it is fair to say that in 2020, the *Fair Work Act 2009* (Cth) is likely to be changed to increase penalties, perhaps even impose prison sentences, for serious and/or systematic underpayments of wages.

In years gone by, wage compliance was an HR/payroll concern. These days, it's more commonly at the front of minds of a board seeking assurances that their house is in order, when often it is not. So, where do you start?

Wage Theft – how did we get here?

'Wage theft' is, in most instances of underpayment of wages, a highly inappropriate label. Having assisted a countless number of clients through back-payment processes, I cannot think of any client who has deliberately designed a wage structure to swindle their staff. Without doubt, there are many businesses that deliberately do this, but they don't reflect the approach to business compliance taken by the bulk of Australian businesses. The overwhelming number of underpayment claims arise due to a business making minor errors that get dramatically compounded when applied across multiple employees over several years. For example: a $1/hr payroll mistake (level 2 or level 3 Award classification) that impacts 1,000 employees over 3 years will lead to an approximately $6,000,000 underpayment liability. A big number parked next to a brand logo makes for a good headline and sells advertising on news sites via click-throughs. The more accurate heading, "*HR Coordinator Makes Friday Afternoon Mistake 3 Years Ago!*", doesn't seem nearly as interesting.

Based on my experience of over 20 years in workplace relations, the common mistakes made by companies that lead to 'wage theft' can include:

1. Confusion as to the interpretation and/or interactions of Award or Enterprise Agreement terms;
2. Confusion as to which Award or Enterprise Agreement applies;
3. Employment contracts that are misaligned with the Award or Enterprise Agreement (e.g. are penalties and overtime absorbed by a higher rate of pay, or are they separately payable?);
4. Ignorance of specific changes to Awards – e.g. transitional rates, changes to penalty rates;
5. Failing to properly implement changes to payroll rules when a new Award term or Enterprise Agreement has begun to operate;
6. Certain sites having 'their rules' as to how staff are expected to work – often due to productivity-focussed operations managers not properly considering labour cost triggers;
7. A lack of consideration as to whether a pattern of work is that of a shift worker, or of a day worker with regular overtime;
8. Rostering beyond the Award/Enterprise Agreement span of hours to meet client needs, without properly satisfying Award/Enterprise Agreement facilitative provisions;
9. *"You're on a salary so the Award doesn't apply"* – this can be due to ignorance/poor advice or the staff in question being worked large numbers of hours that don't align with the underlying labour cost calculations that set the 'salary'; and
10. Operational Managers who are so laser-focussed on customer outcomes/deliverables that they browbeat staff to fit into a business culture that emphasises the importance of "we do what's needed to get the job done and deliver on our promises".

There are countless other reasons and ways in which an organisation can be let down by one or more managerial errors or systems errors. Everyone makes mistakes. But due to the climate of fear and brand demolition associated with 'wage theft', it's important that organisations take proactive steps to minimise any exposure, and to react in a considered and measured way if an issue is unearthed.

What to do and how to respond

Historically, we've dealt with, essentially, two types of clients in regard to alleged wage thievery:

1. Clients who've had an underpayment exposure pointed out to them by the Fair Work Ombudsman, a union or perhaps several aggrieved employees – in this situation, the business is in a reactive mode and may be having to focus on damage limitation **(Reactive Risk Issue)**. We'll get to this further on.

   or

2. Clients who've uncovered one or more questionable practices within their working arrangements or payroll and would like to explore whether there are broader issues within a department, business line or whole of business **(Proactive Risk Issue)**.

Due to the continued media campaigns that link 'wage theft' with the threat of brand destruction, we've seen the emergence of a third class of sophisticated clients over the last 12 months – that of organisations seeking annual IR health checks on their businesses. This seems to be the growing trend, especially for organisations whose brand name can be swamped with negative and hyperbolic social media posts about alleged unethical business practices.

Sometimes IR isn't easy and can't be explained in 280 Twitter characters.

Sadly, most matters involving **Reactive Risk Issues** present a lot of difficulties in containing the damage. They require the organisation to act rapidly to assess the nature of the problem, determine the extent to which the 'contamination' is limited or widespread, ascertain the availability and depth of the best sources of time and attendance and payroll data, and develop a strategy (all the while responding to further developments) to try to:

i. Figure out how to correct the practices that have triggered the non-compliance, including determining the operating impacts (and labour costs) that will arise by making these operational changes;
ii. Communicate with the board, senior leaders, staff members and shareholders;
iii. Protect their brand and positioning – including liaising with specialist PR agencies;
iv. Retain staff in areas of the business deeply affected;
v. Consult with unions about the problem, and manage/correct any inaccurate communications to staff;
vi. Respond to demands by the Fair Work Ombudsman for information, and produce records and/or interviews with managers to explain what has occurred; and
vii. Find the best method to analyse how much is owed, to whom and for what reasons – is the underpayment amount business-critical and, if not, how is it capable of being funded?

It can be a scramble. You're essentially building the aeroplane while you fly it! It's often the case that the hole keeps getting deeper and deeper as the impact of the error(s) is felt in areas of the business that were unanticipated, resulting in shifts in strategy – never a good move in a crisis.

Managing a **Proactive Risk Issue** is generally much more measured, but it's really only available if key levels of management take the opportunity to listen to concerns raised by staff and are prepared to ask difficult questions. If your business discovers an area of concern, then look to get the issue diagnosed as soon as possible. If the issue(s) looks potentially complex, then consider calling in some assistance.

Do NOT underestimate the benefit that legal privilege can offer to the business and any managers 'involved'[1] in the design, implementation and/or supervision of the systems of work that may be defective. You cannot retrospectively create legal privilege: emails sent prior to establishing legal privilege are likely to be admissible in a future prosecution. The protection of privilege allows for greater freedom in the communications aimed at working out what has gone wrong, why, and who is impacted. Due to media and public interest in 'wage theft', we recommend that you limit awareness of your project to an extremely small number of staff. The less knowledge there is of the issue, the easier it is to minimise leakage. Using the protection of legal privilege, a forensic analysis can be conducted to determine the extent and specifics of the back-payment exposure. At the same time, the business can look to develop strategies on how to fix the problem. Does it require substantial changes to the industrial instruments, contracts, systems of work, and shift patterns, or the renegotiation of client service agreements that may be causing huge overtime obligations? There are many options.

If the business is concerned about the risk of knowledge of the project leaking into the public domain during the initial phases, then consider engaging a Public Relations Crisis Management specialist. In our experience in working in this area, we've found that PR specialists are a valuable resource, and can prepare materials and media strategy ahead of time so you're not having to react to the story as it unfolds in the press.

Proactively identifying underpayment risks before they become Reactive Risk Issues means that appropriate attention and thought can be applied to critical aspects of the project. You want to create a smooth transition without hostility, brand damage, regulator involvement, decline in morale and financially crippling the business. Some critical aspects in your project will include:

a. On what day are you shifting from your non-compliant practices to new compliant practices, and who is responsible for consulting with the union/staff as to these changes?
b. At what point do you need to notify the ASX?
c. Are you confident that your record-keeping and payroll systems can successfully operate in the new, compliant framework for business? Do you need to run testing parallel to current systems?
d. How are the current and ex-employees who are impacted going to be advised of the back pay due to them, how the problem arose and how it has been fixed? This needs to be very carefully considered, and the process properly managed. We recommend that one or more specific managers (or a team) is assigned to oversee this process, and it's not broadly delegated out across the business, to:
    i. Avoid inconsistencies in messaging to staff;
    ii. Ensure that any objections and third parties involved (e.g. Fair Work Ombudsman, unions and bush lawyers – oh, there are plenty of the latter!) are given the necessary attention; and
    iii. Keep any Public Relations Crisis Management specialist informed of any elevated risk of the process spilling into the media.
e. Do you need to provide impacted employees with financial planning advice or assistance with understanding the impacts on their tax, social security entitlements or child support payments?
f. How are you going to manage any negative publicity? Do you have sufficient resources to manage your social media accounts?

There's a lot to size up when the dark spectre of 'wage theft' kicks down your office door. So, to avoid the prospect of that horrible day, foster a management culture that looks to identify potential problems and doesn't ignore them. Consider proactive audits – even random spot audits – in areas of concern. If you can do this, your business should avoid getting drawn into a reactive model – the one where your brand gets labelled a 'wage thief' by a media hungry for stories on this emerging social trend.

Footnotes

1. See s550 of the *Fair Work Act 2009* (Cth) that is often used to impose personal liability and civil penalties on managers "involved" in the contravention.

Matthew Robinson

As a partner and solicitor with FCB Workplace Law and accredited specialist, Matthew has been advising clients on industrial relations and employment matters for over 15 years. He is also the recipient of the 2017 LexisNexis award for legal innovation, which he received in recognition for developing the PayCheck Underpayment Auditing System.

SHOULD WE, EVEN IF WE CAN?

Among the specific findings identified in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was that a culture of good governance was lacking in some of our most prestigious financial institutions. In-house counsel play a key role in addressing non-financial risks in all organisations. This article presents some strategies for legal officers and their external advisors to help close the gap between the expressed values of organisations and the values that are actually lived on a day-to-day basis within those organisations.

In his final report, Commissioner Kenneth Hayne AC QC, delivered strong warnings that financial service entities who engage in misconduct will be held to account. But the lessons were not confined to the financial services sector. Importantly, for those tasked with running any organisation, the Commissioner made clear that the primary responsibility for organisational misconduct lies with boards and senior management – in other words, those in control of the entities in question.

In dissecting the causes of legal non-compliance, singled out for particular emphasis by the Commissioner was organisational culture. Poor culture was identified in a number of case studies as being a key contributor to legal non-compliance. It was also more broadly implicated as having the potential to undermine any processes and procedures that an organisation may have in place for risk identification and mitigation.

According to Commissioner Hayne, organisational culture is "what people do when no one is watching". He advised taking steps to assess culture and governance, identify any problems, deal with those problems, and then regularly measure the effectiveness of those changes – but how well has corporate Australia really understood, appreciated and implemented these key learnings?

A few months after the findings of the Commission were released, a question was asked at an in-house forum as to whether participants thought their organisation had changed how they did business *in any way* since the Royal Commission. Only 38% of in-house counsel present thought their organisation had done so.

This suggested to me that whilst some organisations may have found the Royal Commission interesting, they felt disconnected from its outcome; they perceived that its key learnings were remote from their own operations and experience.

I found this interesting as in my view, the learnings arising from the Royal Commission extend well beyond the financial services industry. In particular, Commissioner Hayne's advice about the importance of organisational culture and its connection to managing non-financial risk is relevant across all industries.

In November 2019, the Victorian Bar partnered with the ACC to explore these issues at a CPD panel session. I hope that relating here some of the issues discussed can help in-house counsel, legal teams and external advisors identify and manage non-financial risks in their organisations.

How do you know if cultural change may be required?

One thing that was consistently exposed in the Royal Commission was the gap between what organisations said they did and what they *actually* did. In terms of being able to make this assessment, in-house counsel are in a special position. Therefore, they can have a key role as a check and balance to ensure that internal governance processes are not only in place but are also being complied with. But, as the panel pointed out, where there is a poor governance culture, even the most robust processes are irrelevant.

So, there is a two-step process for identifying whether cultural change might be needed.

Firstly, have you mapped your legal and regulatory obligations with your corporate activities? You need to go beyond your compliance manuals for this. For instance, does your actual salary payments and consequence management framework match your statutory and contractual obligations? Is this transparent? How complex is the interface? The more exceptions and qualifications involved in your system, the greater the risk that operations are not following legal obligations. The recent scandals involving wage underpayments across various Australian industries is testament to this.

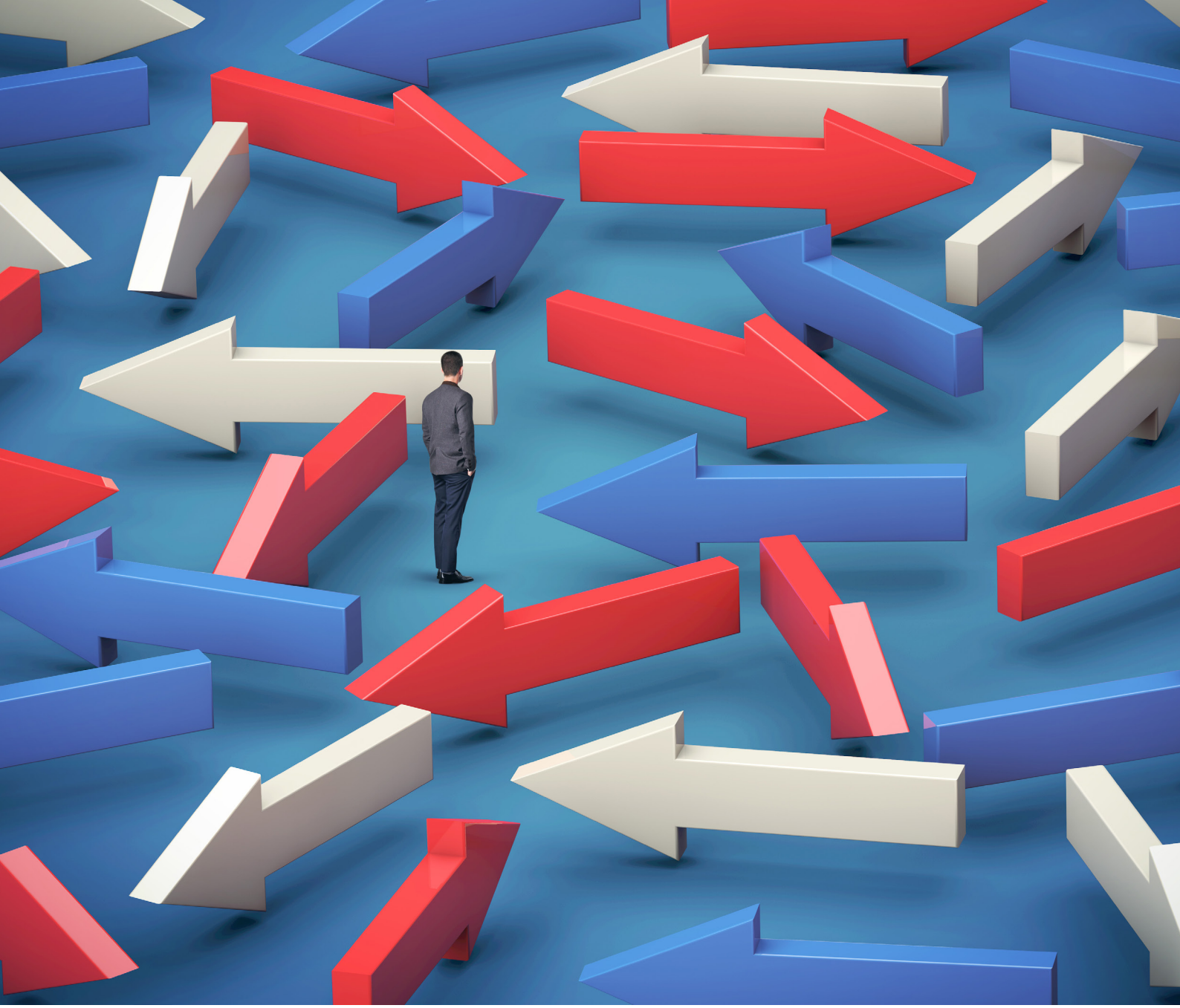
Secondly, as panellist and barrister Katherine Brazenor from the Victorian Bar pointed out, you need to be aware that 'mere compliance' no longer meets community expectations in a post-Hayne world. Mere compliance is evidenced when an organisation's dominant attitude to compliance is to ask, "can we?", rather than asking (and answering), "should we, even if we can?"

What is the role of the board, senior management and the in-house legal team in maintaining a good culture?

In-house counsel are uniquely positioned to add value in this regard. On the panel was Catherine Walter AM. Catherine has considerable experience on boards in a variety of organisations, including as a director of listed entities such as ASX, National Australia Bank Ltd and Orica Ltd, as well as currently being Chair of Melbourne Genomics Health Alliance and a director of the RBA Payments System Board. She urges in-house counsel to demonstrate that they are not afraid to involve themselves in the 'should' part of the conversation, as well as the 'could' part.

The panel discussed that, while in-house counsel almost uniformly want to be seen as problem solvers and adding value, they are acutely aware of being seen to be creating obstacles. But it is part of the role of in-house lawyers to identify, encourage resolution of, and, if necessary, escalate ethical and non-financial issues within their organisation. It's the role of senior management and general counsel to ensure that these issues are regularly on board agendas. And it's the role of boards to discuss, enquire and advise on resolutions.

A healthy organisational, governance and risk culture is built on the foundations of transparency and rewarding those who question. There are still too many cases of whistleblowers within organisations being ignored or worse. Irrespective of what protocols and processes are in place or how often a business conducts internal surveys and meetings, resistance by management and boards to internal and public criticism is a clear demonstration that good governance is wanting.



What is the role of 'psychological safety' in reporting organisational risks?

This issue highlights the importance of cultivating psychological safety within organisations – namely, environments where employees feel safe to speak up and call out issues relating to risk.

Carolyn McSweeney, Managing Director of 6peas, a marketing and engagement consultancy, highlighted to the audience the key role that employee engagement plays in driving an organisation's culture and brand, and in appropriately identifying and reducing financial and non-financial risk. How do you know if employees are confident in raising concerns before those concerns turn into reputational crises? A key part is having the right feedback mechanisms in place, and a demonstrated process that ensures concerns are both heard and acted upon where appropriate.

Employees are much more likely to report minor incidents or failures where they are directly affected. Ensuring that such concerns are taken seriously and demonstrably acted upon, and that the individual is praised for contributing to the improvement of the organisation's performance on micro matters is key to building a culture of psychological safety that could save your business when a significant failure is detected. This is as important within the legal team as it is across the rest of the organisation.

Is culture built top-down or bottom-up?

The panel agreed it's both. Transparency in communications between the organisation and the board and proper enquiry by the board into relevant matters is essential to good governance and lowering both financial and non-financial risk. Ensuring all employees are empowered to offer suggestions and identify failings improves the chance that risks are identified and addressed before they become crises.

In my view, it's crucial that as lawyers, both internal and external, we play our part in driving better risk management and positive cultural change through the advice we give and the perspectives that we offer. I don't think we should be afraid to challenge established business models and practices – financial and non-financial risk can very quickly transform into reputational risk, as some of Australia's most well-known financial institutions, convenience stores and celebrity chefs have found.

Wendy Harris QC

As Commercial Barrister and President of the Victorian Bar, Wendy assists organisations and boards with complex disputes, transactional advice and class actions. She advised NAB in the Hayne Royal Commission. Wendy gratefully acknowledges the assistance of Katherine Brazenor, of the Victorian Bar, in the preparation of this article.

BUSINESS DECISION EXPEDITION: DON'T GET TURNED AROUND DURING CONTRACT NEGOTIATIONS

The road to finalising a contract can be tricky. Here are seven steps to keep you on track.

Flashback eight years. Your business is sold on a new widget. The widget is going to revolutionise processes by saving time, money, and effort with a substantial return on investment. WidgetCo is the best of its kind and a known industry leader. And, to nobody's surprise, the deal must close immediately. After a few weeks of rushed, tumultuous negotiation, the widget deal closes. Everyone pats each other on the back. Confidence is at an all-time high. A new budget is drafted for the following years' worth of widgets.

Fast forward six years, the widgets have, indeed, lived up to a vast majority of their promises. Your business buys more widgets. Fast forward another two years to present day. A few widgets have begun to exhibit buggy behaviour. These widgets have become so vital to the core of your business that even a few minor malfunctions translate to screeching stops and lost revenues. The parties disagree on how to handle the bugs.

You pull the agreement from eight years ago. No one who negotiated the original transaction on either side is there to give any detailed insight. For all the negotiated provisions, all notes point to a resounding 'business decision'. Now, you are faced with the negotiation of this critical relationship based on an unfavourable contract.

All too often, engaging a new service or entering into a different transaction — and assuming certain risks as a result — are ultimately business decisions. But what is the role of in-house counsel? Are in-house counsel tour guides, helping the company avoid the pitfalls in contracting? Or are they strategic advisors, carefully guiding the business toward the proper considerations?

It depends on the company, but there are disadvantages to either role. Guides risk not seeing the forest for the trees. Strategists risk missing the path through the trees for the forest. Here are seven steps that will help in-house counsel balance their dual guide and strategic advisor roles as they seek the right path.

CHEAT SHEET

- **Scope it out.**
  Begin a negotiation by analysing the scope, identifying key decision makers, prioritising important items, and referring to a request for proposal.
- **Rely on experts.**
  Your procurement team should consist of representatives from other departments to fully understand the needs and expectations of any contract.
- **Assess the vendor.**
  When assessing a vendor, consider its track record with your company, other customer reviews, and whether third parties are involved in the offer.
- **Use templates.**
  Using a vendor template form can help you spot potential roadblocks that often come up in provisions like liability, indemnification, and compliance.

1. Map the trail: Analyse the scope of the negotiation

Skilled navigators research the terrain and plan their routes before embarking on a journey. If you are in a rush, planning is an act of 'hurrying slowly' toward your destination. Without a plan, you risk injury along the path. As in-house counsel, you analyse the scope of the negotiation from the outset as part of your strategic plan.

For complicated transactions, first identify all the key decision makers, both internally and externally. For simpler negotiations, prioritise the big-ticket items, such as warranty terms or timeline, in the initial conversations. Mapping out a potential trail in the beginning will help you guide your business through the negotiation and may guarantee a successful contract relationship and outcome.

Depending on your business or the nature of the deal, some companies implement request for proposal (RFP) processes that help business, procurement, and legal teams develop a clear scope. If Legal partakes in the RFP drafting, which is highly recommended, use a formal RFP process. It will benefit the vendor's legal team in understanding your company's main areas of concern. The RFP process will also assist your company (and any intermediary buyers) keep track of the important topics during contract negotiations.

In the absence of a formal RFP process, or other formal contracting frameworks, use meeting notes or an email exchange of key topics to help you focus on crucial points without getting lost in the day-to-day details. As conversations between the parties progress, there is a high probability that your team's focus areas and requirements will change over time.

Thus, always consider the impact of future changes within your contractual relationship and follow up regularly with your teams to ask for any significant updates. Regardless of what tools are used during this initial stage, it is important to maintain the key concepts identified on your trail map in order to avoid ending up at the wrong destination.

2. Gather supplies: Identify the must-haves and the nice-to-haves

Once the trail is mapped out, the next step in any expedition is packing the essential and non-essential items. In contract negotiations, a clear set of must-haves and nice-to-haves is important during negotiations. This will help you focus and engage your internal clients with the comfort of knowing that you have kept their issues in mind during negotiations. Keep in mind that the development of a priority list of must- and nice-to-haves will require active engagement with key stakeholders (e.g. the chief information officer or the chief technology officer).

Many times, this assessment will also require working with other supporting departments that provide guidance on specific topics such as tax, operations, and human resources. Common contract must-haves include:

- Properly defined payment clauses to ensure revenue flow for your vendor and to keep your account current;
- Clear time commitments and service level agreements (SLAs) to guarantee meeting timelines and budgets;
- Compliance matters (data privacy, international regulations, security software, restricted territories, and cybersecurity);
- Business priorities (strategic product procurement, commitments on future updates, and support); and
- Adequate legal protections (projecting and accounting for potential litigation risk, warranties, indemnity coverage, policies, etc.).

The must-haves are where in-house counsel can act as guide and gatekeeper. For example, if robust data privacy practices are a vendor must-have for your organisation to proceed with the deal, then prior to moving on with other salient terms, identify the missing data standards and be such a gatekeeper. If your chosen vendor is, in fact, the best (or one of the best), it will likely have your missing data standards in a detailed data security document within its internal repository. The same vendor may not know to give you its data standards.

If you identify this gap in information early in the process, you give yourself and the vendor ample opportunity to fill the information gap. If your selected vendor is resistant or unreceptive to your must-haves early in the process, then you have two options immediately available:

1. Go back to the drawing board to evaluate the other vendors; or
2. Require the vendor to meet the standards prior to contracting, assuming there is ample time remaining before the expedition.

Under the first option, the business has an opportunity to evaluate the reasonableness of the 'must-have' based on responses from the other vendors. Under the second option, you give your selected vendor an opportunity to be more competitive, which helps solidify the relationship on a go-forward basis.

Attention to detail will go a long way when dealing with nice-to-haves. As a strategic advisor to the business, you should help the procurement team see possible gaps or cause-effect relationships in vendor offerings. If you identify these issues from the outset, then it will allow you to anticipate future problems during the contractual relationship.

Look at the vendor's template agreement, even if you are considering using your own, to shed light on some of these nice-to-haves. The vendor may offer them as standard clauses, so they may be sought without expending too much effort. Moreover, discussing possible issues within your contract will reduce the risk of future disagreements.

Even if you do not have a broad knowledge base of certain procured products, use your legal rationale when dealing with confusing or ambiguous language. Once you have your list of supplies, you'll be ready to provide exceptional legal guidance during negotiations.

3. Read the signs: Assess vendor promises

When en route to your destination, you follow the signs to keep from getting turned around. In the pursuit of business, companies will exchange continuous "signals" throughout the pre-sales and sales stages to stay on track. Signals often take the form of presentations, demonstrations, and proofs of concept outlining proposed benefits.

These initial promises form an integral part of the agreement and provide a valuable basis for other covenants, including maintaining the security of confidential information, delivering quality in a manner consistent with service-level agreements and, for the vendor, a reliable promise of payment from you, its customer. Some initial promises described in the earlier stages, like delivering a particular function, product, or service, may be carried over into the contracting stage, while others may fall out along the way.

If available, other customer reviews, accolades, or words of caution may position the conversation and provide a useful blueprint for the vendor to begin flagging the substantive points for discussion. Throughout the negotiation, the vendor seeks to meet your company's expectations without broadening the scope of the transaction beyond what was anticipated or discussed.

> ***"Attention to detail will go a long way when dealing with nice-to-haves. As a strategic advisor to the business, you should help the procurement team see possible gaps or cause-effect relationships in vendor offerings."***

If the signs are clear, and your business is receptive, you and your business must then select the right path. Knowing what the realistic promises are will undoubtedly provide valuable insight, especially if the insight comes from the procurement and business teams. Has your company worked with the vendor previously?

Align the business team's expectations with the risk team's; review a legacy agreement for a historical perspective on past business pursuits. If your company's relationship with the vendor has many years of history, make a list of the vendor's strengths and weaknesses in a given project. Run the past insights by the team and have a conversation to avoid any past pitfalls.

Are there ways to remediate past issues, or should the business seek alternative routes? If there are known gaps in the vendor's capabilities, speak candidly with the vendor about possible technical or commercial gap fillers. The vendor may be well-positioned to seek external help, including acting as a valuable resource for certain subcontracting opportunities in its pursuit of strategic procurement.

Finally, as a consideration of the vendor relationship, take into account any third parties involved in the offer. What exactly are their roles within the transaction? Depending on the level of participation, decide the extent to which you should include their involvement within the agreements. Additionally, in case your vendor subcontracts part of its services, you must consider what obligations should pass onto said subcontractors. Assessing the signals from your vendor and deciding what action to take in response will keep you on the right path.

4. Get to a higher vantage point: Consider multiple perspectives

Everything starts to look the same when you're deep in the forest, so get to higher ground for perspective on the whole landscape. Review the documentation provided by your potential vendors to get your bearings. All the documentation, including everything from the simple marketing pamphlets or websites to the more complex specifications and instruction booklets provided post-NDA signing, will give you key insights into the vendor's business and capabilities, which, in turn, will provide the basis for reps and warranties you can request during negotiation.

By engaging in a careful analysis of the vendor's materials in conjunction with the procurement team's support, you will be able to share with the vendor what works and what doesn't. At the end of the day, every vendor wants to know what it can sell you, and every customer wants to be sure that he or she is selecting the right vendor and products.

> *"Start with the most legally contentious items to lead internal discussions toward potential stopgap provisions. Since the greatest legal risks are associated with the unknown, certain provisions, including liability, indemnification, and compliance will likely be at the forefront of these discussions."*

Take a step back and consider both sides' motivations. From the vendor's perspective, mitigating risk means not losing you as a customer; selling you what you intend to buy; and making sure its product descriptions accurately represent the product it will offer. On the other hand, you, as a buyer, may very well have your own definition for mitigating risk, including picking the right vendor/product; obtaining the necessary warranty and support from the vendor; and guaranteeing that the purchased product will resolve the underlying business need without issues.

If the teams are ready to proceed with contracting, then the big-ticket items have likely been flagged, including a basic plan and a few layered promises. Preferably, for more complex purchases, the team would have a grounded understanding of the delivery model, the timeframe, and a list of expectations for the vendor prior to any redlining. From atop the mountain, you can survey all the variables and better understand how to move forward.

5. Avoid roadblocks (and deal-breakers)

Even the most prepared and cautious explorers run into roadblocks. The path towards a purchase can be riddled with unexpected challenges. What is an appropriate liability cap? What are the risks of third-party litigation? Are the parties compliant with applicable law? Discussions of potential first-party liability, third-party harm, and compliance are arguably three of the most contentious issues in any procurement matter. They can affect numerous departments and span many conference calls. As a strategic advisor, expeditious contracting includes knowing when to stop.

Depending on the sophistication of your chosen vendor, begin with a vendor template form because they are framed and detailed in accordance with the vendor's product specifications. In doing so, you can identify potential roadblocks and discuss them internally with your procurement or business teams.

Start with the most legally contentious items to lead internal discussions toward potential stopgap provisions. Since the greatest legal risks are associated with the unknown, certain provisions, including liability, indemnification, and compliance will likely be at the forefront of these discussions.

The three areas tend to seep into other areas of concern, including covenants and warranties. Any limitation of liability or indemnification agreed to would ideally reflect the benefit of the bargain on all sides, whether internal or external. In this case, the most effective negotiation with the vendor would be exploratory and minimal. Avoiding roadblocks in negotiations begins with spotting them.

6. Connect with others: Operate within the broader business ecosystems

Linking up with others who know where the rough patches are and how to solve the problems they present is essential to successfully make it out of the woods. With the upper limits and risks of the transaction in mind, you can rely on feedback from the team to chart your path forward.

It takes a team — of two or 200 — to effectively clear the way. The makeup of your procurement team, for example, may consist of a business liaison, risk manager, procurement specialist, compliance professional, and legal counsel. Since the request generally originates from the business, it is important to understand the need behind the purchase, which you can obtain from a liaison.

You can also use your relationship with this liaison to effectively communicate relevant processes and advise the impacted business teams along the way. The management of procurement risk is not just about project and liability vulnerabilities, it's also about mitigating relationship issues and internal expectations. Provide strategic advice on financial expectations, technology concerns, and risk areas that may affect other parts of the company. This will offer balance and control to seemingly urgent business needs.

> *"Your roles as a guide and a strategic advisor are not mutually exclusive. Arguably, the act of guiding, in part, lends itself well to strategically advising the business to ensure a reasonable and sound outcome."*

To strike a balance between the business pursuit and legal considerations, effectively engage a procurement specialist to explain the minutia of the purchase. For example, a technical procurement specialist could identify specific areas of risk that affect small areas of the operation but have large-scale financial implications for the business.

A specialist can see and recommend strategic points of contact within the company for ongoing discussions. If technical specifications are important for privacy compliance, the specialist may be the ideal person to explain needed areas of compliance. The compliance professional could then expound upon it in terms of current and planned compliance for your company. The combined team feedback not only molds future discussions but paves the way for a smooth negotiation with the vendor.

7. Finish the journey: Execute and implement

See the expedition through to the end. After the parties have discussed the scope of the transaction, understood each other's concerns, and agreed on next steps, the moment of truth emerges. No matter how thorough you and your team have been, there are inevitable instances of uncertainty during the course of implementation.

To minimise uncertainty and any risk of litigation, sophisticated vendors will be forthright with their ongoing performance obligations and may use SLAs as a signal of quality. As a customer, your primary concern with respect to these SLAs is how to enforce them during moments of need.

Perhaps there was an unexpected technical issue and a vital component within your business has halted operations. To minimise the risk of consequential losses in this scenario, use SLAs to set clear expectations with your vendor on what performance obligations are necessary to directly restart operations. Sometimes, the best route may be a side trail to get back on track.

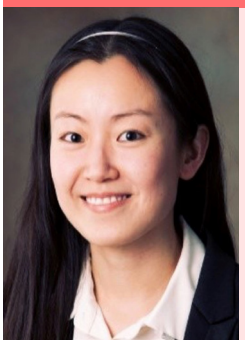
As data security and privacy become more ubiquitous in modern contracting, selecting a legal forum and authority within a contract may be a broader way to minimise the risk of conflict during performance. In other words, if neither party is willing to go through the time, expense, and hassle of conflict resolution in a mutually inconvenient forum, then an alternative conflict resolution route would be the most favourable option for the parties.

If the transaction spans geographic borders and neither party is willing to preemptively select a venue or governing law provision, parties should consider having multiple governing jurisdictions and venues based on the various locales of the transaction. For example, if the parties are purchasing cloud services for multiple affiliates located primarily in the United States and Spain, it could be desirable for the parties to have governing law and venue clauses based on the locations of both countries, at the convenience of the contracting affiliates.

Your roles as a guide and a strategic advisor are not mutually exclusive. Arguably, the act of guiding, in part, lends itself well to strategically advising the business to ensure a reasonable and sound outcome. Providing counsel in this sense is not unlike leading a team through a trail: identify the roadblocks, avoid the pitfalls, and arrive successfully at your destination.

An original copy of this article appeared in *ACC Docket's* Jan./Feb. 2020 issue.

Jane Kelly



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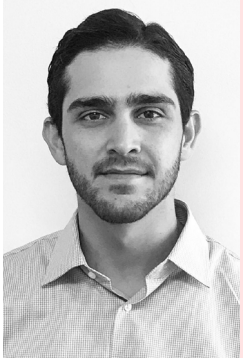
Felipe Jaramillo



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DOING DEALS IN 2020 – REGIONAL THEMES AND TRENDS

On January 13, 2020, Lex Mundi published the first edition of its Global M&A Trends Report (the Report). In the Report, 69 Lex Mundi member firms from across the legal network shared their insights with respect to mergers and acquisitions (M&A) in their respective jurisdictions, including key concerns facing private company M&A practitioners, deal activity by market segment and sector, and their predictions for 2020.

While the state of deal activity in the Asia-Pacific market is, of course, impossible to boil down to a short article, we thought it would be useful to share some common themes and trends across the region for external and in-house counsel to keep top of mind when advising businesses on transactions during the new year.

Summary of deal activity in Asia-Pacific

When surveyed on deal activity by market segment, Lex Mundi member firms in Asia-Pacific overwhelmingly agreed that most private company M&A during 2019 fell squarely below the mid-tier market segment (83%). Comparing that to global trends, 61% of member firms saw most private M&A fall below mid-market, with 33% in the mid-market and 6% in the top-tier.[1]

In terms of sectors, most publicly listed company M&A in Asia-Pacific during 2019 fell within technology and financial services. Similarly, most private company M&A involved the tech industry. The increased activity in the tech sector demonstrates that the Asia-Pacific market has become more robust in technology and innovation, and that multinationals have taken advantage of the low-cost product development capability that is becoming more attractive in the region. It is unclear whether, and if so, how soon, governments in the region may impose further restrictions on tech acquisitions.

Interestingly, this finding deviated from sector activity on a global scale, the results of which showed energy and power as the most active industry across both public and private M&A (20%), followed by financial services (17%), and technology and manufacturing (both at 11%).

Top three concerns for counsel doing deals in Asia-Pacific

The top concerns for private practitioners surveyed across the region when advising on M&A were due diligence (19%), foreign investment restrictions (17%), and governmental approvals (14%). On a global level, due diligence also measured as a key concern at 18%. Foreign investment restrictions and governmental approvals were much less of a concern across other regions, with the number of lawyers designating these risk categories as high priority at 6% and 8%, respectively.

Due Diligence

Perhaps not surprisingly, practitioners in Asia-Pacific continue to identify due diligence as a top priority in the M&A life cycle. This was similarly flagged across each of the other regions, other than in North America. In certain developing economies, historic business practices continue to demand an increased level of scrutiny during the diligence review. Offshore jurisdictions, such as the British Virgin Islands and Barbados, expect due diligence to take a more prominent role in 2020 as companies are required to show economic substance in compliance with OECD standards. In parts of the Middle East and Latin America, publicly available information on corporate entities is limited, hence, the importance of a comprehensive exercise.

In Asia-Pacific, the degree of attention has shifted towards target company compliance to mitigate risk across various practice areas such as cyber, anti-corruption and data privacy. For inbound investment into China, due diligence around anti-corruption and data privacy is vital, given the lack of enforcement and ambiguity in the law. In-house counsel managing the M&A process have found it helpful to include IT professionals in the deal team to understand how the target collects, uses, transmits and stores the customer and employee data. Tax compliance, employee social security compliance and export control compliance are three other areas that we expect in-house teams to place greater emphasis on during the diligence exercise.

Foreign Investment Restrictions

Corporate counsel stress the importance of taking local advice up-front to identify foreign investment restrictions or burdensome processes that will impact a cross-border transaction, so that these hurdles can be addressed adequately in the broader deal process.

According to Audrey Chen, partner at JunHe LLP (Lex Mundi member firm for China), foreign investors are subject to the foreign investment negative list promulgated by the government, and M&A activities are subject to approval/registration with competent authorities, depending on the transaction structure. It is worth noting that foreign exchange control has become a significant barrier for cross-border transactions in China, especially since MOFCOM approval or filing is no longer required for transactions outside the scope of the negative list. China is a foreign currency-controlled country, which means that Chinese buyers are required to apply to relevant foreign exchange authorities in order to exchange foreign currency and remit payments out of the country. These authorities are permitted to limit the quota of certain banks (or banks in a particular area) to exchange foreign currency, which in turn may impact payment terms in the relevant transaction documents. While China's Foreign Investment Law came into force on January 1, 2020, thereby streamlining the approvals and supervisions for foreign investment and enhanced investor protections, there are still challenges for investors and government regulators alike given the lack of detailed guidance on implementation.

In Taiwan, investors are subject to burdensome regulatory review of M&A deals involving Chinese money or investors. Janice Lin and Scarlett Tang at Tsar & Tsai Law Firm (Lex Mundi member firm for Taiwan) write that, given the relationship between Taiwan and China, the local regulator is likely to take an extended amount of time to review any M&A deal if such transaction involves (whether directly or indirectly) Chinese money or investors. In certain cases, the regulator may reject such investment based on national security and a number of key industries are still prohibited from investment or source of funds from China. During the review process, the local regulator may request further disclosure by the foreign investor of the investment structure, including the name of its ultimate beneficial owner and supporting documentation confirming source of funding or investors (including audit reports issued by an independent accountant). A key takeaway for counsel advising on inbound investments in Taiwan is to confirm the investment structure and source of funding from the

foreign investor up-front. When drafting the transactional documents, one recommendation would be to include the regulator's approval as a closing condition, although this may have an impact on the timeframe for closing.

In Japan, the government plans to impose more restrictions on inbound investment in national security-related sectors, such as high-tech and cybersecurity, and other public interest-related sectors, such as the telecommunications and energy sectors. Under the proposed regulations, a foreign investor will be required to pass a government review before taking a stake of 1% or more in Japanese listed companies in the said sectors (under the current regulation, the threshold is 10%). Note, however, that the regulations will introduce a number of exemptions, under which the pre-transaction review will not be required if an investor complies with certain conditions. These conditions include refraining from appointing a closely related person as a director of the issuer, from proposing the transfer of the issuer's important business, and from accessing non-public technology information possessed by the issuer. In addition, most foreign financial institutions' investment activities will be exempt. However, there are certain limited cases where the application of the above exemption rules will not be allowed.

Takemi Hiramatsu, counsel at Nishimura & Asahi (Lex Mundi member firm for Japan), advises that a foreign company intending to carry out the hostile acquisition of a Japanese listed company needs to carefully consider and analyse up-front whether it would be able to overcome any takeover defense measures that the target company may have already put in place or may take after facing the threat of the hostile takeover. In addition, in light of the above amendments to Japanese regulations on inbound investment, a foreign company intending to acquire shares in a Japanese company needs to carefully check whether the acquisition will be subject to the prior notification requirement entailing a waiting period (which is usually 30 days) and, if the answer is in the affirmative, should further consider whether it might fall under an exemption. Depending on the nature of the investor and sensitivity of the target company's business, these may not be applicable.

Governmental Approvals and Antitrust Clearance

In our Report, practitioners indicated that governmental approvals (including antitrust clearance) require detailed consideration in many jurisdictions across the region.

In India for example, M&A deals in heavily regulated sectors, such as financial services and insurance, often hinge on successfully obtaining regulatory approvals. Large scale M&A deals may also be subject to antitrust approvals. As a result, M&A transactions in highly regulated sectors run the risk of falling through if these approvals are not obtained.

In Thailand, antitrust considerations are likely to be top of mind for M&A practitioners in 2020. Merger control rules that were issued by virtue of the *Thai Trade Competition Act* have come into effect and guidelines have recently been issued. According to Charunun Sathitsuksomboon at Tilleke & Gibbins (Lex Mundi member firm for Thailand), M&A transactions are typically conducted in one of three main ways, namely by share acquisition, by asset acquisition or through an amalgamation. Antitrust analysis is now mandatory for all types, regardless of whether the transaction involves a direct or indirect acquisition of a Thai target or an acquisition at the parent or holding company level outside Thailand. This is to facilitate determination of whether the M&A transaction will require pre-merger approval from the Trade Competition Commission (TCC), or a post-merger notification to the TCC. If it is determined that pre-merger approval is required, this will likely prolong the closing for several months, as under the *Trade Competition Act*, the TCC's consideration period is 90 days, plus an additional 15 days if necessary. If post-merger notification is required, notification to the TCC must be provided within seven days from the closing date. During the drafting of the transaction documents, pre-merger approval must be set as a condition precedent. Post-merger notification may be set as a condition subsequent in the transaction documents.

The importance of securing competent counsel to provide advice on approvals is critical in order to avoid governmental penalties or orders to unwind deals that should have been approved by the government. In addition to due diligence, governmental approvals for inbound investment in China is high on the list of priorities for corporate counsel. In China, the government certainly appears serious in enforcing the rules. Recently, China's State Administration for Market Regulation (SAMR) fined New Hope Investment (which invests in start-ups) RMB 400,000 (approximately USD $57,501.00) for acquiring a 23.6% stake in Xingyuan Environment Technology without first seeking approval from SAMR. As SAMR believes the deal met the statutory notification criteria, with both parties' combined revenue during the prior year meeting the statutory notification threshold, the investor's failure to seek review and approval by SAMR was in violation of the PRC's Anti-Monopoly Law. However, SAMR stated in its decision that the deal will not have an effect of eliminating or restricting competition. This may explain why SAMR only imposed a monetary penalty on New Hope Investment.

New year, new opportunities

Half of the practitioners surveyed in the Report expect M&A deal volume to increase in their jurisdictions during 2020.

For some, this is reflective of periods of political stability and steady economic growth. In Bangladesh, the government is adopting a pro-business and pro-investment attitude, resulting in more dynamic legislations. With average annual GDP growth exceeding 6.5% since 2006, Bangladesh has emerged as an attractive location for foreign direct investment in the fast-moving consumer goods (FMCG) industry due to relatively low wages and being a large consumer market. There has also been a sharp rise in investments in the energy sector due to the government's infrastructural projects. The Legal Circle (Lex Mundi member firm for Bangladesh) also predicts increased activity in the information and communications technology (ICT) sector due to funds entering the financial market. Indonesia is also an example of increased stability in terms of political risk coupled with the promise of fewer restrictions on foreign investment and increased tax incentives. There is also the growing interest in production/manufacturing relocation from China to Indonesia due to the trade dispute with the US.

2019 saw the number of private equity deals and outbound deals in South Korea increase, as well as the consolidation and reformation of businesses of Korean conglomerates. Lee & Ko (Lex Mundi member firm for Korea) foresees that these trends will continue and result in an increase of private deal volume during 2020.

In China, the economic slowdown and lack of liquidity may create more opportunities for acquisition of privately owned (as opposed to state-owned) companies. The last couple of years have seen multinational companies acquire targets at a lower price than normal. Market players would expect the same for 2020, unless the economy and liquidity situation picks up for the privately owned companies.

Finally, despite the fall of M&A activity in 2019 in India attributed to general economic slowdown and the uncertainty of the global market, as a result of recent court decisions and growing non-performing assets, distressed M&A is expected to gain further momentum in 2020. Further, an economic slowdown has also resulted in valuation realignment in certain sectors, and if this continues, M&A resulting from private equity investments, especially growth deals, may see a substantial uptick.

Conclusion

We hope private practitioners and corporate counsel alike find the examination of regional themes and trends in this article a valuable and useful resource when advising businesses on cross-border transactions in Asia-Pacific during 2020.

To download a copy of the Lex Mundi Global M&A Trends Report visit: https://www.lexmundi.com/lexmundi/Global_MA_Trends_Report.asp.

Footnotes

1. We note that categorisations by market segment can vary widely between different jurisdictions and asked our member firms to respond based on how their particular country categorises deals (noting, however, that for the purposes of benchmarking, we see top-tier transactions as deal value over US$500m and mid-tier transactions starting at US$250m, with lower-tier being less than US$250m).

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ADDRESSING CONFLICT WITHOUT TANKING YOUR DIVERSITY PROGRAM

"For good ideas and true innovation, you need human interaction, conflict, argument, debate." Margaret Heffernan, CEO, entrepreneur, business writer.

We ask our employees to bring their whole selves to work. The intent is that if people are honest and open about who they are, they will be comfortable to share their diverse ideas and viewpoints. This will promote innovation and also ensure that the products and services created meet the needs of a diverse global marketplace. Creating a diverse and welcoming workplace also meets the needs of the community and prospective employees. This is critical to the continued success of a company that must look beyond the needs of its shareholders, to meet the needs of its stakeholders as well.

Conflict, which is a positive by-product of diversity, must be expected and welcomed in today's innovative, diverse workplace. Diversity of thought is increased in the more diverse workplace, and while most Australian companies look for ways to increase diversity, they may struggle if the inherent conflicts get out of hand. How, then, to allow for innovative conflict, while controlling and addressing disruptive and damaging conflict?

Proactively avoiding 'bad' conflict

Inappropriate conflict must be addressed at both the company and individual level. At the company level, policies and employee training must educate on respectful interaction, unconscious bias and microaggressions. While an important foundation, training on anti-harassment and bullying may miss more subtle forms of disrespect that can be cumulatively damaging. Making sure that all employees have a voice and that their concerns are heard will help create company-wide policies and positions that are respectful of differing beliefs.

When working across different groups, companies, countries and cultures, it is important to build employee and management muscle that recognises individual and cultural differences in responding and dealing with conflict. There are a number of models that can help on both the personal and cross-cultural level. Personality-type analysis (HBRI, Myers Briggs, Deloitte's Business Chemistry, etc.) are often seen as too 'touchy-feely' for lawyers, but can help improve group dynamics and reduce the risk of 'bad' conflict by providing insights into how different people interact and what sort of decision-making makes them comfortable or not. Providing individual employees with insight into their preferred interaction style and helping them build self-awareness gives them tools to control their own reactions. Similarly, sharing that input across a team and then applying that knowledge of the team can lead to more constructive interactions, which allow for new ideas to be expressed in a safer space.

At the macro level, while stereotyping is unhelpful, understanding some of the cultural imperatives of different country cultures can avoid misunderstandings and conflict. Hofstede Insights, a consulting group that is particularly focussed on intercultural management solutions, looks at how different country cultures address concerns such as uncertainty and how that needs to be taken into consideration when building a company culture where diversity and inclusion can thrive. In a recent blog, Hofstede Insights described Jamaica, Singapore and Denmark as 'Low Uncertainty Avoidance Cultures' and Greece, Portugal and Japan as 'High Uncertainty Avoidance Cultures' – one of the impacts being that the former group of cultures values results more than specific procedures and the latter group values procedures being followed (**news.hofstede-insights.com**). Consider how that might impact a large change management project, or, turning it around, how a mix of those cultures might increase chances for success. In any event, increasing awareness of these differences and keeping them in mind, will allow for more constructive interactions. While many companies have English as a working language, important communications to offices overseas, where English is not the primary language, may need to be translated by a competent translator to ensure understanding.

Conflicts, including bullying, also arise due to overwork and lack of clear direction or lack of role clarity. (See Final Report on Workplace Bullying in Australia at **https://www.headsup.org.au/docs/default-source/resources/workplace-bullying-in-australia-final-report.pdf?sfvrsn=2**.) These factors are within management control, but may also be caused by failure to comply with collective agreements or awards. In Australia, 'reasonable' overtime may be required; however, it fails to be reasonable if the hours clock up day in and day out. Management should monitor use of annual leave and actively encourage (or, if need be, schedule) employees with large balances to take leave. Similarly, stresses outside the workplace can result in conflicts caused by frequent absences or difficult behaviour. Companies need to ensure that employees have access to mental health assistance, and may want to consider a mental health charter or policy, including access to an EAP program. The current bushfire crisis in Australia will undoubtedly cause strains on the workplace both now and in the future and Legal can help companies to make sure that they are prepared.

A consistent number of low-level conflicts in a particular organisation is a marker that there are more serious organisational problems. I once advised a manufacturing group where the conflicts involved co-workers taking desk items from each other and finally escalated to a fight between two employees where one put a dead squid in the other's handbag. The apt analogy is that small issues, if unaddressed, are like a dead fish – they eventually become unbearably 'smelly'. Monitoring and addressing small conflicts, even if they seem silly at the time, can get to the underlying issues, which are often more serious. In my squid matter, the underlying issue was actually racism and cultural conflict.

Discrimination, harassment and bullying need special attention

When conflicts arise due to discrimination, harassment and bullying, the company must have effective and efficient means of reporting, investigating and remediating disputes. Wherever possible, informal mediation or early intervention should be utilised. I once dealt with a situation where a female assistant in Hong Kong complained about her newly appointed male supervisor. She raised a unique complaint that he made inappropriate references to menstruation. In fact, what the manager, newly arrived from the US, was doing was punctuating sentences with the word "period". As she was accustomed to the phrase "full stop", she was confused and upset by his exclamations. Fortunately, she felt comfortable raising the matter early, when it could be quickly resolved. At intake, it is critical to explore whether the person bringing the concern can be empowered to deal with the matter directly. Where this is possible, it will often salvage the working relationship of the parties, because many conflicts are the result of misunderstandings and are not intentional. Formal processes, while necessary, break down relationships in the workplace and often create their own conflicts (among witnesses, for example) which, in my experience, often result in the employee who has raised the complaint leaving the company, even where their claim is found to be confirmed and appropriate action is taken. Some companies are experimenting with ombuds roles, which can sometimes bring the parties together instead of making them adversaries, where that is appropriate.

Where a formal process is necessary, such as when the conflict is severe or there is fear of retaliation, then it is important to understand the roles

of intake, investigator and remediator. For smaller companies, all of this responsibility may fall on the shoulders of one human resources person, counselled by in-house counsel. However, these are distinct phases requiring different and sequential approaches. Increasingly, even smaller companies may have access to competitively priced external reporting mechanisms that can provide an efficient means of reporting. In larger companies, the reporting, investigating and remediating phases may each be handled by different specialists in that regard.

Because investigations are, and should be, handled with a high degree of confidentiality, the challenge for companies is building in employees a confidence that the company has a fair process that is applied equitably. This starts with some transparency about the process and setting expectations with respect to that. If there are delays because witnesses are unavailable, or due to other unforeseen circumstances, then those involved – accusers, witnesses, accused – are apprised. Closing out the investigation with all parties helps both witnesses and accusers understand that while they may not be privy to individual disciplinary action, they know that appropriate action has been taken or, at a minimum, the matter has been concluded.

Companies should keep track of the remedial actions taken so that, even given factual differences, they can aim for proportional treatment. It is important that appropriate remedial action takes into account the severity of the acts, whether it is a repeat offense, the level of the parties involved, the training they have received and any mitigating factors.

Modelling respectful behaviour

At the cultural level, appropriate behaviour starts at the board level and must be modelled in the selection of the board members and the CEO. The company must communicate the importance of respectful behaviour consistently in company communications and through its external communications with the press and stakeholders. Behaviour must be consistently modelled at each level of management – again, disrespectful behaviour can never be rewarded. While alcohol is never an excuse for disrespectful behaviour, alcohol at company events should be kept in check and managers need to understand that they never take off their management hats and have a responsibility to monitor behaviour and safety. While team-building is meant to bring teams together, if poorly designed, they can exclude. In the past, I have addressed valid concerns raised by employees who felt excluded or uncomfortable with ropes courses, cruises, beer-making and even escape rooms.

At the individual level, the company must build a reliance on respectful interactions from the top down so that it creates an environment where conflict is safe, welcomed and respectful. Senior managers must be open to dissent from their reports, and so on, down the line. While maintaining their decisional authority, managers need to seek a variety of positions and suggestions prior to espousing their own point of view. They need to ensure that all people in the team discussion have a voice by seeking out the opinions of the less vocal in the team. This is where innovative conflict can arise. Again, it is management's role, and the responsibility of all employees to listen to those viewpoints respectfully, even when they disagree, and to ensure that criticism is factually based and not emotional or giving rise to personal attacks.

How can in-house counsel help?

So, what is the role of the in-house counsel in ensuring conflict doesn't lead to legal claims? For those in-house counsel with a seat at the board table, that begins with recognising the importance of diversity at the board level and the inclusion of the diversity of thought that brings. For less highly positioned in-house counsel, the work in this regard probably begins with setting or drafting policies and practices that both encourage and support diversity of thought. This means that instead of boiler-plate legalese, lawyers are called on to move beyond legal imperatives to moral ones. Also, in-house counsel should review training for employees to confirm that it not only educates on requirements but is also consistent with the tone the company needs to set of respectful discourse.

Where conflicts between employees do arise, the legal team must ensure that the company has systems in place and trained people who can address these issues as a priority. It is important that Legal is not seen as the arbitrator of disputes. An in-house legal team is not neutral – it owes its duties to the client (and the court) and cannot be seen to be advising individual employees. When a disgruntled employee arrives in a lawyer's office, the lawyer must tell the employee that they are not their counsel, can't keep a complaint confidential, and must refer the person to human resources to lodge their concern. Failing in this regard will just complicate any escalated concern as the lawyer will, at best, be a witness and, hence conflicted in their duty to represent the company and, at worst, be violating professional responsibility.

As author Max Lucado said, "Conflict is inevitable but combat is optional." In the workplace, conflict is a given, but in-house counsel can and should take steps to decrease the incentive for combat.

Lori Middleshurst

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TURNING CONSUMER PRIVACY EXPECTATIONS INTO TRUST

Consumer expectations concerning the use of their personal data are rapidly evolving as evidenced by the uptick in privacy-related news, regulations, and a general increase in understanding of the personal data lifecycle. Laws such as the *EU General Data Protection Regulation* (GDPR) and the *California Consumer Privacy Act* (CCPA) — regulations uniquely borne out of a private citizen's desire for more personal data privacy are introducing never-before-seen rights to consumers. Consumer awareness and understanding of these rights will be accelerated through platforms such as social media, and through mainstream activists.

As more and more laws are developed to create and address the privacy rights of consumers, as well as the duties and liabilities surrounding data breaches, understanding your consumers and their respective privacy expectations has become a business imperative. Gaining insight into specific consumer expectations can be a starting point to understanding the risks and the management steps needed to mitigate or eliminate these risks.

CHEAT SHEET

- **A foundation of trust.**
  The amount of data that consumers are comfortable sharing is dependent on how much they trust the company. By increasing trust, companies can receive more personal data and better customise products and experiences for the consumer.
- **Increase transparency.**
  Use required disclosures and notices about personal data collection as an opportunity to explain the who, what, where, and why — and emphasise the benefits — of collection in a user-friendly way to consumers.
- **Train and educate.**
  When training staff on the regulatory and operational requirements of managing consumer data, also focus on the impact requirements have on consumer rights and expectations.
- **Optimise efficiency.**
  Use technology to meet consumer expectations and regulatory requirements; for example, implement a self-service portal for consumers to exercise their rights of deletion and access.

Consumer expectations

Every company has at least a baseline understanding of their consumer, typically categorised by various demographics. But with the rapid growth of privacy requirements around the world, coinciding with everyday technological advances, in-house counsel can greatly benefit by staying informed about their company's consumer insights and expectations, as this can help better implement privacy regulatory requirements across all facets of a company's operations.

In a recent survey, 63 percent of consumers stated that personalisation is now part of the standard service they expect.[1] In order for companies to provide the level of personalisation expected, they must collect personal data able to be analysed to provide the right level of insight into the individual's wants, needs, and overall preferences. This typically requires a fundamental understanding of more than simply the consumer's demographics. It includes such insights as their purchase history, preferences for communication, the level of control over their data they expect, and their overall behaviour, both online and offline.

> *"Legal counsel should be proactive and flexible in working with operations and compliance departments to identify ways to increase transparency, train and educate employees, create operational efficiencies, and automate technological solutions to meet compliance requirements, where appropriate."*

However, multiple surveys exist to show that a majority of consumers will respond negatively when asked if they want companies to track their behaviour on devices, social media, or company websites. Device and location tracking has many legitimate purposes, including fraud prevention, assisting in public safety issues, and providing real-time offers. Unfortunately, this generalised negative consumer sentiment around tracking obviously

conflicts with the ability of companies to meet a consumer's desire to receive personalised offerings, products, and services. This is a challenge that must be taken head-on with solutions that not only address consumer expectations, but also fit within the confines of regulatory and company requirements and obligations. Legal counsel should be proactive and flexible in working with operations and compliance departments to identify ways to increase transparency, train and educate employees, create operational efficiencies, and automate technological solutions to meet compliance requirements, where appropriate.

Consumers have shown little faith and trust in a company's ability to not only to meet their personalisation expectations, but also to protect their data. A recent survey of 2,000 US consumers over the age of 18 showed that only 25 percent believe most companies handle their sensitive personal data responsibly, and just 15 percent think companies will use that data to improve their lives. Consequently, 88 percent of these consumers say the amount of data they share with a company is dependent on how much they trust it.[2] Instead of viewing this as a negative, in-house counsel should see the opportunity to differentiate their company from their competitors by earning that rare consumer trust with respect to data privacy.

By targeting the areas below, in-house counsel can help lead the charge in meeting consumer expectations and in identifying competitive differentiators while also mitigating and eliminating some of the more pressing privacy risks that companies face today.

Transparency

Many of the concerns consumers express around the use of their personal information can be alleviated or mitigated through taking advantage of opportunities to be more transparent to the consumer. 73 percent of consumers state that it is 'very important' for companies to explain how their information is being used.[3] In-house counsel, in crafting their required disclosures and notices, should embrace opportunities to tactfully explain the benefits to the consumer of the company's data collection and processing practices. A simple clause such as, "We collect your location data as part of using our service," can be easily enhanced by explaining that location data is collected because it not only is a necessary part of delivering the service, but that it also allows the company to offer personalised rewards, services, offerings, etc.

Essentially, every organisation that has a consumer-facing website also has a privacy notice, usually in the form of an external-facing privacy policy. Typically, this notice is found in a size 9 or 10 font, toward the bottom of a site, and aligned within a list of other links consumers rarely make their way to. Companies that believe most of their consumers read their notice are either lying to themselves or are extreme optimists. While the drafting of a thorough and complete privacy notice along with properly crafted opt-in and opt-out consent mechanisms can serve to meet regulatory disclosure and notice requirements, having these notices should not be considered all that is necessary to meet consumer expectations.

Consideration should be given to offering consumers easy-to-digest information on what personal data is collected, how it is processed, who it is shared with, and, arguably most importantly, why it is collected. For example, consider suggesting your company develop a video or flow-chart for consumers to view at the time of collecting consent that describes the data lifecycle journey and also emphasises the benefits to the consumer; this, in turn, provides greater assurance that the consumer (1) has a better understanding of what is collected and why, and (2) is receiving the personalised and targeted experience they desire. Thus, the company will not only meet regulatory requirements, but also improve upon consumer expectations and understanding.

Given the unique requirements found in regulations such as the CCPA and GDPR around notice and disclosure to consumers, companies should consider creating a 'consumer-friendly' privacy site that explains in easy-to-digest terms the necessary information around collection and processing of personal data. Developing an easy-to-use, self-service portal for consumers to exercise their rights, such as deletion and access, is another important way to show consumers that you care about their privacy. Only 10 percent of consumers feel they have complete control over their personal data.[4] A self-service portal can be a part of the overall effort to bring value to the consumer by explaining their privacy rights and your company's role as well as putting the consumer back in control and meeting their expectations.

Educating and training your workforce

In developing internal training and educational materials, in-house counsel should focus on translating the regulatory and operational requirements into concise and easy-to-understand language that not only explains the rules and regulations the company must follow, but the impact these requirements have on the consumer's rights and expectations. The immediate benefit of having a well-trained and educated workforce with respect to privacy is that this helps to minimise the likelihood of employee-caused data breaches or other misuse of consumer data. However, the importance of understanding privacy laws as part of the product or service design lifecycle should not be underrated.

While the GDPR has specific privacy-by-design requirements that companies must adhere to, even companies that do not have to follow these requirements should consider the operational and competitive advantage of having similar processes and efficiencies in place. Arming your design team with the details of the privacy landscape and the expectations of the consumer will help ensure that privacy is an important consideration, and potentially a differentiator, in your company's product or service offering.

> *"Only 10 percent of consumers feel they have complete control over their personal data."*

How to measure your privacy policy's readability

Privacy notices, typically in the form of an online 'privacy policy' to consumers, have evolved from being a mere few sentences in the 1990s to some of the more complex notices today, with some reaching more than 4,000 words. Additionally, many companies have developed standalone cookie notices as an extension to their privacy notice. While the increase in privacy regulatory requirements has necessitated some level of expansion, the corresponding effect is legitimate readability concerns for consumers.

Many studies have shown that the average adult reads at around a year seven or eight grade level. Fortunately, several tools and formulas exist in order to assist in crafting a privacy or cookie notice

that aligns with a readability level consistent with a company's consumer base. One example of an automated-type approach is using a tool such as the Automatic Readability Checker from **www.readabilityformulas.com**. This tool will assess your content against seven commonly used readability formulas and indexes.

Another approach is to take the data from website analytics cookies and develop an understanding of how quickly individuals click away or exit from the privacy notice or cookie policy page and compare that against the average time it takes to read the content in its entirety. Regardless of your approach, some factors to focus on include sentence and word length, number of syllables, paragraph length, and the native language of the user.

Most practitioners know that the sharing of personal data with vendors and service providers is an essential part of offering a service or product. 57 percent of consumers stated they would be less likely to shop or use services in the future if a company sends their personal data to other companies.[5] Knowing that consumers are becoming more and more fearful of companies sharing their personal information with third and sometimes even fourth parties, design teams can identify ways to either eliminate third-party sharing, or identify opportunities for transparency to the consumer and consolidation of vendor services, where appropriate.

An added benefit of a well-trained and educated workforce is arming employees with the knowledge to identify areas to promote data minimisation practices, thus decreasing many risks that lead to serious and deeply consequential data breaches. Without that understanding of the importance of consumer privacy, employees cannot be expected to take it into consideration with respect to the development or design of the process or product they are responsible for.

While the focus on the above has primarily been on educating and training the workforce, it is prudent to also ensure that the C-suite and board of directors are also properly informed and made aware of the exact risks that privacy laws create. Privacy laws are relatively new and have only truly come into a level of significant impact to companies in recent years. With this recent emergence comes the reality that many board members and executives today do not have the same years of experience in addressing privacy risks as they would, for example, in addressing other consumer protection or financial risks. With the potentially large fines for GDPR infringements, as well as the potential volume of litigation stemming from the CCPA, both from regulators and individuals, the board and executive team must be made aware of the privacy landscape and what it means to the company.

> ***"Fifty-seven percent of consumers stated they would be less likely to shop or use services in the future if a company sends their personal data to other companies."***

The communication to the board and C-suite should be in a manner that is relatable to their experiences throughout their careers. GDPR, CCPA, and potential future privacy federal legislation can be explained as having a similar significance to historical laws such as Dodd-Frank or Section 5 of the *Federal Trade Act* (US). These laws are great examples of regulations that forced companies to complete thorough gap assessments of most, if not all, processes and implement remedial activities to reach a compliant state or face major financial, reputational, and business consequences. For those companies and counsel that have been through GDPR assessments and implementation efforts, this is easier to understand. However, the full impact may not quite be appreciated yet as we still await the large GDPR enforcement fines as well as the 2020 effective date of CCPA. Therefore, regular communication is a necessity going forward.

The trend of privacy laws increasing both in volume and complexity is expected to continue, and thus boards and executives must understand the corresponding increase in risks as well as any potential opportunities to develop competitive differentiators. Furthermore, maintaining a level of privacy awareness throughout the workforce will help serve as an accelerator for individual departments to implement or enhance privacy-related improvements to processes and controls owned by their respective teams.

Improving and automating technology solutions

Consumers are showing a tendency to be unforgiving if a company does not protect their data, especially where a competitor's readily available service or product offerings exist: 89 percent of consumers are at least somewhat likely to switch brands if a company is hacked and their basic personal data is compromised, and 86 percent of these same consumers would at least be likely to switch if a company sells their data to other companies for marketing purposes without their permission.[6] This example demonstrates the importance of identifying gaps in processes and implementing the right controls and other remedial technological solutions to meet consumer expectations that also align with regulatory requirements.

Most in-house counsel have experienced the headaches that come with enhancing or improving existing processes and controls, or even a total creation from scratch, in order to meet regulatory requirements. Implementing automated solutions creates a consistent process that can help eliminate and mediate some of those headaches, as well as the risks that are more prevalent for manually controlled processes. Fortunately, many privacy compliance tools and solutions are rapidly being developed that bring at least some level of automation. Furthermore, automated solutions to help prevent and detect incidents and breaches involving personal data have become essentially mandatory for all companies. But in-house counsel should also explore the automated solutions that both exist out of the box or as a customisable solution to help address the rights of consumers and are tailored to meet their expectations. These solutions could include, as mentioned previously, a self-service portal that serves as the platform for the consumer to exercise their rights. An automated solution can provide the consistency in not only the delivery of the request from an individual, but also in the communication, and, importantly, the timing of the response to the individual. Companies that can rapidly triage a request and provide a response can not only satisfy regulatory requirements, they are also able to prove to consumers that they care about their privacy rights. This type of solution would also prove to regulators that your company takes these rights seriously and strives to offer consumers a simple and transparent manner for them to exercise their rights. This type of goodwill can go a long way should the need arise to present a case to the regulators of proving a good faith effort in developing and implementing your compliant data privacy program.

The competitive advantage

The companies we serve are at a unique crossroads where consumer expectations are not being met and consumers do not trust most entities to protect their data; all the while, privacy regulations are increasing both in volume and complexity. The above strategies not only serve as opportunities to improve functions, processes, and offerings, but to also earn goodwill from our consumers and regulatory bodies in the event mistakes arise, and we must face the demands of both.

While the challenges are significant, so is the opportunity. By ensuring there is a foundational understanding of both the consumer and the regulatory requirements with respect to consumer personal data, in-house counsel can serve as a leader of their company's efforts to not only meet consumer privacy demands, but to develop privacy notice and disclosure differentiators to compete successfully in the marketplace.

Footnotes

1. RedPoint Global, The Harris Poll. "Addressing the Gaps in Consumer Experience." Survey. Jan. 28, 2019.
2. PricewaterhouseCoopers. "Consumer Intelligence Series: Protect.me." Survey. September 2017.
3. RedPoint Global, The Harris Poll. "Addressing the Gaps in Consumer Experience." Survey. Jan. 28, 2019.
4. PricewaterhouseCoopers. "Consumer Intelligence Series: Protect.me." Survey. September 2017.
5. RedPoint Global, The Harris Poll. "Addressing the Gaps in Consumer Experience." Survey. Jan. 28, 2019.
6. RedPoint Global, The Harris Poll. "Addressing the Gaps in Consumer Experience." Survey. Jan. 28, 2019.

Jim Sturm

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IN FAVOUR OF COMBINED ROLES: GENERAL COUNSEL AND COMPANY SECRETARY

Northern Star Resources consistently achieves industry leading safety results and sector leading shareholder returns. The decision-making ability and responsiveness of the board, the executive and the senior leadership team is enhanced by the general counsel and company secretary roles being combined in one individual, reporting both to the CEO and to the executive chairman.

The case for the separate role of company secretary is considered first, followed by the business case for holding the combined role of company secretary and general counsel.

The business case for separation of the company secretary and general counsel roles

Fresh eyes; seeing the wood for the trees

The company secretary in a dedicated, single role may have the workload capacity and ability to see the business more holistically, reflecting that there is some distance from the details of the business, or specific transactions. This increased objectivity, due to being less embedded in transactions compared to general counsel, allows for effective scrutiny and challenge over disclosures relating to a particular transaction or the business generally.

Greater depth of financial literacy may be necessary

Some sectors require the company secretary to have a stronger background in finance than other sectors. A deeper level of financial literacy enables the company secretary to appreciate and understand more readily the financial controls within the business, and to determine whether the company's financial narrative and non-financial disclosures are consistent with the true financial position of the business. A financially literate company secretary engaging closely with the CFO and the auditors may add more value to the business in overseeing compliance with the financial governance frameworks of the business, than a company secretary having only legal rather than financial acumen. All company secretaries must engage in relation to financial reporting for the business, but some sectors demand a far greater level of engagement than others, calling for a financially experienced company secretary rather than a lawyer.

Liability – only one hat is worn

In the James Hardie decision, the High Court of Australia found that the role of company secretary and general counsel was indistinguishable when held by one individual. "…It is not possible to sever responsibilities into watertight compartments, one marked 'company secretary' and the other marked 'general counsel'. Limiting one's role to the single role of company secretary provides a clearer demarcation of obligations and liabilities carried by that individual. There is only one hat to wear.

Employee or external consultant

Some businesses, more noticeable in the ASX100-300 and the lower ASX100, have not matured or reached complexity in its operations to the point where in-house lawyers are required or justified. The increasing range of external legal services solutions and technologies open to a business to outsource its legal services may reduce support for recruitment of in-house legal counsel. In those situations, there is no possibility of a combined company secretary general counsel role. Indeed, the company secretary may be an external consultant, not an employee, who provides services for a monthly fee rather than a salary, and enjoys a greater degree of separation and objectivity as a result of this fairly common business model.

No conflict

A company secretary in reporting to the board is free of the risk of receiving conflicting instructions from the CEO, in situations where the board and the CEO have opposing views.

Agent for the board

The company secretary is the board's agent. A company secretary who does not hold a senior management role, is liberated from the constraints of internal politics to some extent and is able to explain the board's role, priorities and needs to management. There is far less temptation to try to get the board to come around to accepting management's views; there is only one master. Reporting lines through the CEO, which a general counsel commonly reports to, runs the risk of directors thinking that they are not receiving independent and unbiased advice, thus reducing the effectiveness of the company secretary role. Confidentiality and trust are key components of the company secretary role, so far as the board is concerned, and reporting to two masters can place pressure on preserving those essential elements of the company secretary's relationship with the board. The company secretary's duty to the company overrides any duty to the CEO. Resisting being capturing and persuaded by the CEO and senior management generally, may be simpler when the company secretary does not report to the CEO in a management role in addition to the company secretary role.

The business case for combined roles

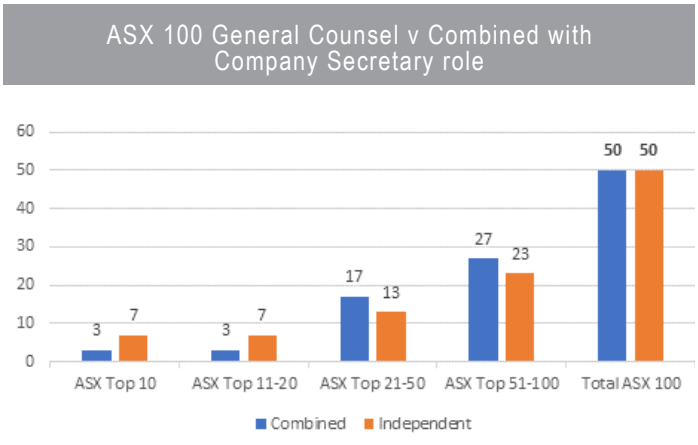
The decision to have two individuals in the company secretary and general counsel roles, or one individual fulfilling both roles, is dependent on several factors, such as:

- what the board wants (generally, this should be what the board gets);
- whether the board habitually includes general counsel in all board meetings or only upon invitation for specific issues that crop up;
- the size, maturity and complexity of the company's operations – do the operations and the regulatory environment in which the company operates justify an in-house legal function – there may be no commercial justification for a general counsel/chief legal officer role; conversely, does the complexity of a company's regulatory environment justify an independent company secretary role from a workload perspective;
- whether the company's operations are centralised or run on a geographical basis, and where the legal function physically sits – a general counsel who is physically located in a different city or country to the chair and majority of the directors may find carrying out the role of company secretary more challenging as a result of lack of easy physical proximity to the board and increased reliance on technology that doesn't adequately convey the softer dynamics during board meetings;
- the experience and skill set of the general counsel; a general counsel with a litigation or property law background would be a weaker candidate for the company secretary role compared to a general counsel with solid experience in corporations legislation and the ASX Listing Rules/ other relevant securities exchange; conversely, an experienced company secretary with a corporate legal background may be a stronger candidate for that role compared to a junior lawyer with no *Corporations Act* and securities exchange experience.
- sometimes, the best person available for both roles is the same individual.

In considering the factors to support one individual holding both roles, I have assumed the general counsel also holding the role of company secretary has a corporate law background; reports to the CEO (as general counsel) and to the chairman of the board (as company secretary); the company's in-house legal function is centralised, and general counsel is a member of the executive. The assumption is also made that other likely candidates for the company secretary role (and any supporting admin or company secretarial assistants) do not have legal training or in-depth knowledge of the *Corporations Act* and relevant securities exchange experience. Lastly, the assumption is made that where the roles are split across two individuals, the general counsel does not usually attend board meetings unless invited in advance. 'General counsel' also means other responsibilities that describe the chief legal officer role.

Snapshot of ASX100

As a convenient sample, the graph below illustrates the current position for ASX listed companies based on market capitalisation at close of trading on Friday, 24 January 2020. 70% of the ASX top-20 companies have two individuals holding the general counsel and company secretary roles.



Factors in favour of the general counsel and company secretary combined

The dual role forms an effective bridge across compliance, risk management, strategy and commercial knowledge of the business:

1. Trusted Adviser

The combination of the general counsel and the company secretary roles in one individual provides the board, the rest of the executive, and the leadership team with a unique, one-stop shop. The combined resources within one person include legal knowledge, transactional experience, best governance practices, risk identification and mitigation skills, compliance and consequences of non-compliance, an understanding of the views of the board, knowledge of the priorities of the CEO, alignment with company strategy, an understanding of external stakeholders and regulators' expectations, and the perspective of employees and other stakeholders within the company. This wide knowledge base, and possibly deep corporate memory, can lead to expedited decision-making, effective problem-solving, decisive leadership, time-saving, and contribute to clarity in how to achieve strategic objectives across the business.

2. Identify legal risk in the boardroom

Issues crop up in board meetings which the directors and the company secretary may not realise carry legal risk or opportunity. Having general counsel in the boardroom at all times, in the dual role of company secretary, is expedient for the board, and enhances the ability of the general counsel to foresee, identify, raise and resolve legal issues for the board promptly. Similarly, issues crop up in board meetings where the directors might make wrong assumptions on the legal position, which can be rapidly corrected on the spot due to general counsel being in the room.

3. Dual pathways for reporting on risk

A key component of the general counsel function is to balance risk and company goals, make judgements on risks across the business, typically in conjunction with the audit and risk committee and CEO, and perhaps the company's internal auditors. Combining the general counsel and company secretary roles in one individual allows that individual as general counsel to report to the CEO on risk, and also, as company secretary, to report to the board on risk. The business and the board benefit from these two routes for raising key risks.

4. Execution risk

Sometimes the need for legal review of documents that the company secretary may be asked to sign with a director may have been overlooked by others in the business. Combining the two roles means the company secretary's legal acumen and training as general counsel enables the individual to alert the business to the need for legal review, and possibly wider consideration of other issues, before the documents are executed. This operates as a further safety net at the document execution stage in relation to legal risk.

5. Concise drafting skills

Not all company secretaries or other non-lawyers possess the skills or experience to draft minutes and ASX releases concisely, in plain English, ensuring the legal issues have been correctly addressed or reflected. This is a significant strength in general counsel preparing legally effective and accurate written company secretary deliverables on behalf of the company.

6. Attention to detail and clear communication

Attention to detail and explaining complex issues simply is usually an inherent aspect of general counsel's skillset, and both skills are of benefit in carrying out the company secretary's duties.

7. Expanding role of the company secretary demands a deeper skillset –
The company secretary role is both one of performance and compliance. In addition to the statutory duties under section 188 of the *Corporations Act 2001* (Cth), additional duties include, for example, the drafting, development and implementation of company policies and procedures, advising the board on good corporate governance, counselling the board on standards of ethical and corporate conduct across the business, risk management, ensuring the board has the necessary information it requires to make decisions, investigating incidents under the company's whistleblower policy, and investigating reports under the company's anti-bribery and anti-corruption policy.

The value of company secretaries is recognised in the fourth edition of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations, which state in the commentary to Recommendation 1.4:

> *"The company secretary of a listed entity plays an important role in supporting the effectiveness of the board and its committees. The role of the company secretary should include:*
>
> - *advising the board and its committees on governance matters;*
> - *monitoring that board and committee policy and procedures are followed;*
> - *coordinating the timely completion and despatch of board and committee papers;*
> - *ensuring that the business at board and committee meetings is accurately captured in the minutes, and*
> - *helping to organise and facilitate the induction and professional development of directors.*
>
> *Each director should be able to communicate directly with the company secretary and vice versa."*

The company secretary is the chief governance specialist within the company, relied upon by the board to provide advice, implement good governance practices and be proactive in governance.

It is becoming increasingly difficult to reconcile this expanded scope and seriousness of responsibilities with the fact that a company secretary is not required to complete any particular education level or attain any particular professional qualifications or complete any particular period of service with a company. This can present a risk to companies.

General counsel, through their legal practice experience, are usually better placed to have accumulated and developed the skills and resilience to cope with the more significant responsibilities increasingly expected of company secretaries. In addition, the strength of character required of the general counsel is equally useful and necessary in carrying out the company secretary role.

8. More than just a lawyer –
As the role of the company secretary has expanded over time, so too has the role of the general counsel. The general counsel is valued for demonstrating leadership generally across the business in relation to governance, risk, compliance, running transactions and identifying opportunities based on their knowledge of the law and transactional experience. This involves building an aptitude for project management, change management, legal management, technology solutions, human capital management (talent retention, attraction and development), possessing a heightened radar and strong moral compass to ensure a healthy company culture is reinforced across the business, and holding the difficult conversations when policies and procedures of the business are not being followed, from the top-down.

These are skills that the company secretary role benefits from also, in terms of leading the company's continuous disclosure decisions and practices, co-ordinating the company's periodic regulatory disclosures and engaging with external stakeholders such as proxy advisers on the subject of governance, remuneration, risk and sustainable operations.

9. Legal Professional Privilege –
If general counsel in a combined general counsel/company secretary role successfully demonstrates that they are acting in their legal capacity, legal professional privilege will, nevertheless, only apply if general counsel demonstrates they are sufficiently independent from the organisation to be truly acting as an independent legal adviser. General counsel's independence can be the subject of challenge, whether in a combined general counsel/company secretary role or sole general counsel role. In other words, splitting the roles across two individuals does not necessarily mean the general counsel is going to be successful in claiming legal professional privilege remains intact. Ensuring the business utilises external legal advisers is a safer course than risking challenge of the general counsel's independence, where legal professional privilege is or may be relied upon in the future.

Conclusion

General counsel's legal training, communication and management skills are augmented in a powerful way by the knowledge and experience gained in the role of company secretary in relation to the details of the business, knowledge of the board and its dynamics, and delivering on company strategy. Combining the roles results in a compelling blend of legal knowledge, attention to detail, problem-solving, business acumen, executive presence, influence, and strategic thinking.

Hilary Macdonald

As General Counsel & Company Secretary with Northern Star Resources Limited (ASX:NST), Hilary reports to the CEO and the Executive Chairman, enhancing the decision-making ability and responsiveness of organisation. She has provided legal advice to NST since 2010 and became General Counsel in 2016 and Company Secretary in 2018.

BUSINESS STORYTELLING: THE HOT NEW SKILL OF THE DECADE?

It may seem counterintuitive to start with a story, but, because stories help us relate and are memorable, they can ground business strategy and be a powerful tool in any stage of the innovation process.

A few years ago, a friend and I went backpacking in the pristine wilderness of Denali National Park in Alaska. We bought every piece of equipment known to man to fight off grizzly bears, like pepper spray, bells, etc. Before we set off, the rangers made us watch a video in which they instructed us to wave our arms in the air in the unlikely event we encountered a bear. My friend and I laughed so hard at the actors in the video. We made fun of the idea that something so ridiculous would scare away a bear.

The very next day, we set off and had barely turned the corner when there, right in front of us, was a giant grizzly bear. My knees started knocking and my friend shouted, "Hand me the pepper spray!" And I replied, 'No, just wave your arms in the air,' and we both did. To our shock, the bear ambled off.

When we returned, we told the ranger about our encounter and he replied, "I am so glad you did not use the pepper spray as that just makes the bears mad. Either that or you accidentally spray yourself!"

I am sharing this with you because it reminds me of our daily choices with technology. We can choose the 'bells and whistles' version for our customers but sometimes, just like waving your arms can scare off a grown grizzly, all that is needed is the simple and effective version.

This story was shared by Bill Arconati of **Atlassian**. It ticks all the boxes for a great business story. It hooks us in, is engaging and purposeful. It marries story and message.

A good story is pure velcro for the brain. When you share a story, people connect with you and your message. Your audience thinks about what you have said – and it sparks an 'aha' in their hearts and minds. Also, they remember your stories and will often retell them.

However, at work, the word 'storytelling' can conjure up negative images. It is important to differentiate traditional storytelling (what we might do at home and in our personal lives) from business storytelling.

Business storytelling is storytelling with a purpose and for results, like the example shared above.

Stephen Denning laid the foundations for the field of business storytelling in 2005 with his book, *The Leader's Guide to Storytelling*. Business storytelling is the practical application of appropriate, purposeful (on message) short stories in the work context. The stories support your data; they don't take the place of data but add to it.

Business storytelling helps us to stop wasting time on the unnecessary (more PowerPoint-heavy presentation stacks, overloading our audiences with ever more information). Storytelling gives us a different strategy that is fresh and relatable in business, so we are not condemned to putting in the hard yards and wondering why it's not working. Storytelling is not the most obvious or easiest place to look. But in my work with clients all over the world, I have seen how storytelling gives them the richest rewards in terms of impact.

In chaos theory, the butterfly effect refers to the way a small change in one state (a butterfly beats its wings) can produce a very large effect (a tsunami) in a later one. In communication, business storytelling is the butterfly effect. That is what a story can do for you. Are you ready to embrace this new skill?

Yamini Naidu

A best-selling author, master facilitator and keynote speaker, Yamini is the world's only economist turned business storyteller and business humourist. She works with leaders globally helping them shift from spreadsheets to stories. Yamini's latest book, ***Story Mastery: How Leaders Supercharge Results with Storytelling****, reveals the secrets of effective business storytelling.*

www.yamininaidu.com.au

ACC GLOBAL UPDATE

Veta T. Richardson: Legal is the linchpin for corporate sustainability

The President and CEO of the Association of Corporate Counsel (ACC), Veta T. Richardson, wrote in *Ethisphere* this month about the key role that in-house counsel play in sustainability.

"A growing number of investors, along with consumers, governments, and stakeholders up and down the supply chain, are making demands from a moral standpoint, rather than a strictly commercial one," she writes. "In the end, the planet's wellbeing is our responsibility; to ignore that imperative looks more and more like a gross dereliction of duty. Today's workforce and tomorrow's talent want to work for employers who match their values, and those values are increasingly connected to action on climate change…

"If boards want to get serious about sustainability, they cannot afford to let the natural leaders in this new space languish without a seat at the leadership table. All CLOs should report to their CEO. In developing ESG policy and dealing with stakeholders large and small, national and international, boards and executives alike should look to their best-suited ally."

The article is available at **https://magazine.ethisphere.com/acc_w2019/.**

ACC CLO Survey: good news for counsel (and for readers)

As 2020 begins, compliance, data privacy, and cybersecurity remain critical challenges to business, strengthening the influence of CLOs both as legal experts and as business strategists. This is according to the figures in the *ACC CLO 2020 Survey*, data from 1,007 GCs and CLOs across 20 industries and 47 countries.

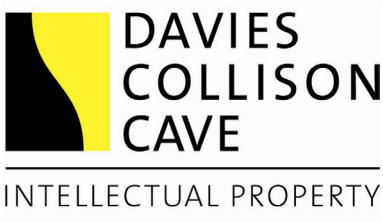
The report also shows that 80.2 percent of legal leaders report to their CEO, continuing a multiyear upward trend. Nearly 73 percent of CLOs report that they are "almost always" involved by the executive leadership team on business decisions. However, only 53.2 percent of CLOs have a direct reporting line to the board of directors. This is cause for concern, since the CLO is effectively the board's lawyer.

Other notable findings include:

- Compliance and risk are the most common functions that report to Legal.
- In-sourcing legal work is not yet common, with most law departments expecting to maintain or slightly expand last year's levels of outsourcing to law firms and alternate legal service providers.
- A majority of CLOs (60 percent) believe cybersecurity is the most pressing danger to their company.
- More than half of CLOs make use of cutting-edge legal technology, and 70 percent expect legal AI to take off in the near future.
- "Redesign workflow processes" (57.6 percent) and "greater use of legal technology solutions" (49.7 percent) were the top initiatives used to increase law departments' efficiency in delivering legal services.
- Two-thirds of CLOs plan to accelerate their environmental, social, and governance (ESG) efforts in 2020.

The *ACC 2019 CLO Survey* is now available from the ACC Australia website.

ACC AUSTRALIA CORPORATE ALLIANCE PARTNERS



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