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A CASE FOR PROFESSIONAL RESILIENCE

UNITY OF PURPOSE – NEW TEST FOR CONTROL OF TRADE MARK USE

RESPONDING TO CHANGES IN MODERN SLAVERY LEGISLATION

CROSS BORDER M & A: CHALLENGES IN EMERGING NATIONS

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60 chapters

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ACC Association of Corporate Counsel AUSTRALIA

PRESIDENT'S **REPORT**

Karen Grumley
National President

As many of you know, during my in-house career I've worked in heavy industry, namely rail freight. When you work in an industry where the physical safety and well-being of your people is paramount, it challenges your beliefs about safety generally.

Recently at Pacific National, we initiated a project encouraging everyone in our business to share why it's important that they work safely and make it ***home safely every day.*** The aim was to encourage us to think about why it is important to make it home safely because, at the end of the day, we all have a reason to leave work. There were lots of photos of families and pets, and even a couple of fishing boats.

This initiative not only got me thinking about how to manage risk to ensure our people got home safely every day, but also what actions I could take to create a safer and more sustainable workplace for myself and my team. Of course, to do that, I had to challenge why my workplace as an in-house lawyer may not be safe.

In-house lawyers often assist the business in times of crisis and get to see the best and worst of corporate culture, behaviour and the repercussions of the decisions of our people. As I have embraced in this report many times over the past 2 years, our roles and our profession are continually changing, which can cause stressors in us and our teams.

Change is one of the few certainties in life and, for most companies, this is likely to be change in the people (culture, personnel or social change); the organisation (leadership, structural or strategic) or the systems (processes, business expansion or disruption). As in-house departments grow and innovate, we encourage change in our teams and in how our organisations engage with us.

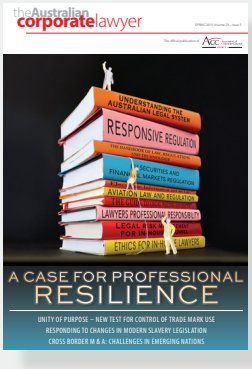
To enable us to address this change, and cope with the potential negative effects of the stressors associated with change, crisis or any other predicament we find ourselves across, we need to ensure that each of us have the requisite skills, mental processes and behaviours to harness our resilience and tenacity.

At ACC Australia, we endeavour to provide our members with the resources, programs and people to help us be a success at work, and ultimately make it home safely every day. This issue of the Australian Corporate Lawyer addresses some of these issues and how to manage change, the repercussions of internal and external factors on us and our organisations, and 'Professional Resilience'.

The program for the In-House Legal National Conference goes further, with sessions addressing Corporate Courage and the Future of Leadership with Dr Kirstin Ferguson, Planning for Tomorrow's Workforce with Bernard Salt AM and much more. The full program is available on the website and Early Bird prices are available until the end of September. Invest in yourself and your team, and come learn from leaders in our profession. This year is also the Conference's 25th birthday – I'm looking forward to celebrating being 25 (again)! I hope to see you all in Adelaide from 13 to 15 November.

Finally, share the reason you have to leave work every day. We are surrounded by change, we initiate change and we look to change the environment in which we work—don't let this affect the safety and sustainability of your team or lose your individual identity in the fast-paced world in which we operate.

The English author of the 1932 novel, Brave New World, Aldous Huxley, said it well – *I wanted to change the world. But I have found that the only thing one can be sure of changing is oneself.* I implore you to do all you can to make it home safely every day—it is in your control.



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LEGAL THINKING

Ian Hemmings SC

Having been admitted to the Bar in 1996 and appointed Senior Counsel in October 2013, Ian's practice is focused on matters relating to Valuation, Local Government and Planning and Environmental Law. He regularly appears in the Land and Environment Court of NSW and in appeals to the NSW Courts of Appeal and the High Court of Australia. Ian is the Chair of the New South Wales Bar Association's Practice Development Committee.

BRIEFING COUNSEL: ELECTRONICALLY

For many years, I have been working towards a paperless practice. Unfortunately, for much of that time, I was a victim of the technology, rather than benefitting from it!

The tide has turned.

Now, with the readily available touch- and pen-based devices, increasingly sophisticated note taking software and affordable cloud-based storage, the paperless practice has become a reality. Indeed, and as discussed below, because of the many advantages of the paperless practice it is now my preference. The new frontier is to extend this paperless practice into the Court room. The use of an electronic Brief in Court has all of the advantages of the paperless practice, and more.

The electronic Brief can only really be successful if it can emulate the paper one. I, like I assume most of you, cannot read anymore without colouring in. The electronic Brief lets you take that to a whole new level. Pen- and touch-based devices let you highlight and mark up with an almost unlimited palette. More usefully, and depending upon the software, they also allow you to link relevant parts of the Brief. Think of it as the modern equivalent of the Post-it note.

For the user of the electronic Brief, there are many other advantages, including (if the Brief has been properly prepared):

- The entire Brief is word searchable.
- The Brief, even if voluminous, is now available whenever, and wherever, you want it. Whether that is on your work computer, your laptop, your iPad or even your phone.

From the instructing in-house counsel's point of view, in addition to these advantages, there are also considerations such as:

- Speed, and ease, of delivery. Uploading a multi volume Brief to a cloud-based file sharing service is considerably easier, faster and cheaper than arranging for hand or courier delivery of the physical Brief.
- The Master Brief. Gone are the days of needing to retain a pristine copy of the Master Brief in the office. Further, copies of the Brief can simply, and easily, be made available to other solicitors, clients, experts and the like.

I have recently been involved in a number of paperless trials run by the Land and Environment Court as part of a pilot programme. They have been so successful – in my experience – that almost as a matter of course I will now run an electronic trial even if not directed to by the Court.

The ability to have word searchable access to the entirety of the Brief whether in Court – or, as is not uncommon in my practice, walking around with the Court on site – is an advantage that, once you have learnt how to properly use it, you will never want to give up.

Just like the preparation of a paper Brief, there is no right or wrong way to prepare an electronic Brief; however, there are a number of simple, but important, rules that should be followed. For my purposes, I have developed a brief protocol that I provide to my instructing solicitors for them to prepare an electronic Brief for my purposes.

Fundamentally, I return to where I started with my comments above. That is, the electronic Brief needs to emulate the paper one. Thought still needs to go into not only the content, but also the structure, of the Brief. Thus, to simply take a multi volume paper Brief and scan it as one single PDF document is of almost no assistance at all. However, to take the paper Brief and to prepare it as discrete electronic files makes each of those documents easily capable of use.

To descend then into the detail of the preparation of an electronic Brief, my protocol provides as follows:

Document Production

- Ideally, documents will be in *native* form. That is, the document will not merely be a scanned (PDF) copy of a document. Almost all software programs—such as Word or Excel—give you the option to 'save as' a PDF. This results in a better-quality document, which is searchable and is usually smaller than a scanned copy.
- If it is not possible to provide a document as a native PDF—and so scanning is the only option—care must be taken to ensure that it is a high-quality scanned document.

Document Collation

- Single large PDFs of 10s, or indeed 100s, of pages are to be avoided. Rather, documents should be broken down into (small) discrete parts, with each part being a separate PDF.

For example:

- An affidavit with Annexures: the affidavit and each of the Annexures should be separate PDF documents.
- An expert report: the body of the report and each of the Appendices should be separate PDF documents.
- A Court Book: each document behind each tab in the Court Book should be a separate PDF document.
- A long document: the document should be broken down into parts, ideally no more than 10 pages or at the very least 'bookmarked' into separate sections.

Conclusion

The electronic Brief carries with it numerous advantages, not only for in-house solicitors and Counsel, but also for the client. Ease of use, access to and delivery of the Brief is clearly in everyone's interests. The cost savings—simply by the reduced dependence on paper—are obvious and significant.

A DAY IN THE LIFE
GEORGE PAPANIKITAS

General Counsel, Kimberly-Clark Australia

George Papanikitas

As General Counsel of Kimberly-Clark Australia, George Papanikitas advises on a diverse range of legal matters affecting the Australian and New Zealand businesses. Since joining in 2013, George has held a number of roles with Kimberly-Clark, most recently serving as Regional Legal Counsel for the APAC Kimberly-Clark Professional division.

11:00 pm **In bed, where the following day truly starts – in the wrestle between mind, pre-occupied with the day to follow, and a weary body.** Thankfully, it's a short but brutal battle. Body – 1: Mind – 0.

6:27 am **I wake in the throes of a to-do list rudely commenced in my sleep.** Body – 1: Mind – 1, revenge served. A conventional start follows, the highlight of which is a strong flat white that I enjoy as much for the chat with the barista that accompanies it.

7:30 am **It's late afternoon in Neenah, Wisconsin, where my colleague in the global litigation team is based who receives my call.** We discuss a local matter. Ever the regulatory trendsetter, our Australian proceedings have global ramifications. Strategy agreed on, we end the call so that he can head home. The first of the day's decisions: to take the train or ride the Vespa to our office in Milsons Point. Both involve a ride across our glorious Harbour Bridge. The Vespa is quicker, but involves weaving through trucks in the cold – train it is.

8:30 am **I arrive, news fix and overnight email review completed during the commute.** I meet with my team

for regular morning catchup over another strong coffee, we discuss the day's challenges, our movements and whether Nicole truly deserved to be eliminated from Masterchef the previous night for her overdone mille-feuille.

9.30 am **I visit the head of our consumer service team to discuss feedback from a consumer on one of our feminine hygiene products.** I leave the meeting satisfied that the product meets our high safety standards and with a better understanding of the female anatomy.

10.30 am **I attend our weekly ANZ leadership team meeting.** We update one another on developments over the past week. I flag new risks, steps we've taken to mitigate them and the business initiatives that my team and I are driving or supporting. I leave impressed and humbled by the breadth of our involvement in, and influence on, the business. We might be a lean (and occasionally mean) legal team, but we pack quite a punch.

12.00 pm **I take advantage of a break between meetings and tackle the to-do list – a combination of contract drafting, advising on governance measures for a recapitalisation and reviewing marketing concepts for a new product.** Progress is staccato, with unplanned visitors and calls scattered throughout. Our head of procurement corners me in the kitchen, where we discuss the potential escalation of a dispute involving a key supplier.

2.00 pm **I Skype my indefatigable manager, our Singapore-based Chief Counsel for APAC, to discuss our latest challenges and progress on the various projects that are underway.** It's been a transformative year for our business, involving significant legal input, so the call is necessarily thick with updates and action items. We will meet again in another two weeks, although local or regional matters will connect us several times between then.

3.00 pm **I return two calls, the first from the manager of one of our mills to discuss the progress of negotiations with an energy provider.** Like others in our industry, particularly local manufacturers with national distribution footprints, escalating costs are a major challenge in a highly competitive, all but deflationary retail environment. Our team plays a meaningful role in helping to reduce costs and enable growth. The second call is from our sales director, who is keen to discuss both the interpretation of trading terms by one of our customers and the company's proposed contribution to a charity event. We resolve the first point and I promise to get back to him on the second.

3.30 pm **Music from the neighbouring communications team lifts energy levels (note to team: let's take the Spice Girls out of the playlist).** I attack and manage to clear a fraction of the email deluge. Most contribute to the to-do list, although one prompts a forward to our regional ethics and compliance team. I accept an invitation to a CLE session hosted by an ex-colleague at the corporate firm that gave birth to this legal career. Of course, the ability to attend is a whole other thing. This, I vow, will be the year that I avoid a mad CLE point dash to 31 March.

4.30 pm **I join a video conference with our APAC legal team to discuss a review affecting all our markets, led by my counterpart in Malaysia.** It's good to see their faces and I look forward to meeting with them in person later in the year. I'm reminded that we are part of a much larger team, with subject-matter experts dotted around the region and globe.

5.30 pm **I follow the conference with a call to our legal counsel for ASEAN for her view on a question raised by our internal controls team.** We're aligned and agree to share with the broader APAC team.

5.45 pm **I visit our Managing Director to update him on the issue relating to our supplier.** He's keen to stay close to it and the conversation quickly turns to other developments.

7.30 pm **Spurred on by a storm of WhatsApp messages, I arrange to meet friends at the gym for the day's last HIIT class.** They keep me honest and I return the favour. It's a painful assault on every part of me but almost always worth it.

9.00 pm **Dinner done, I read our draft company sustainability report ahead of a meeting the following morning.** It stirs pride in the good work we're doing and proves to be the highlight of a long day.

#morethanalawyer

Peter Le

Refugee, in-house lawyer, champion for cultural diversity and contributor to the community, Peter Le has successfully combined an in-house career with an extensive resume of volunteerism that has utilised both his legal skills and commitment to give back to the community. Peter's work has most recently been recognised as the recipient of the 2019 WA Volunteer for Multicultural Communities Award.

I guess it was always in my DNA to give back to my community in whichever way I can. I came to Australia at the end of the Vietnam War as a refugee with my family. I was only 4 years old and we came with nothing but the clothes on our backs. I think it's those humble beginnings that drive me every day to help people who are less fortunate.

I thought that becoming a lawyer would be a good way for me to help people so that's the career path I pursued. I ended up working in private practice for 15 years before deciding it was time to try something different and make the move in-house. Although private practice had the benefit of formal pro-bono hours, they didn't necessarily align with what I was most passionate about and I didn't have as much flexibility as I do now. I spent my first year working in-house at the Hyatt Hotel in Perth before moving to my current role as the Senior Legal Officer at the City of Rockingham, one of the fastest growing local governments in WA. My current role consists of both legal and governance work and there are three members of my team—the General Counsel whom I report to, myself and a junior lawyer who reports to me.

I have also used my legal qualifications to give back to the community—as I had always intended to do. I am the founder and chair of the Asian Business Alliance, which is an alliance of most of the Asian business councils and chambers in WA. With the downturn in the economy in recent times, I felt compelled to form the Alliance, which provides a united voice for the Asian business councils and collectively promotes trade and commerce, investment, education and tourism in WA. WA also, for the first time, has a dedicated Minister for Asian Engagement, which was also a nucleus to form the Alliance, and we work closely with the Minister's office. Additionally, I am the inaugural President of the Asian Australian Lawyers Association (WA Branch), which promotes cultural diversity and inclusion in the legal profession. Through the Association, I help, encourage and mentor those from culturally and linguistically diverse backgrounds who want to pursue a legal career.

I am also the founder and chair of the Lawyers in Local Government network, which promotes collegiality and provides a supportive network for lawyers working in local government. When I started my current role, I found that there wasn't much support for lawyers working at the local government level. It's a specialised area and local governments are becoming an increasing complex environment, so I wanted to help and connect with other local government lawyers in similar situations.

I have also served as the President of the Vietnamese Community in WA and have been involved with the Westnam United Soccer Club for nearly 30 years as a player, Secretary and President. Westnam was founded by refugees and helps to connect and integrate migrant and refugee youth from the area. During my time working with the club on a pro-bono basis, I have helped them obtain approval and receive funding for a major facility upgrade.

Despite not having pro-bono hours in my in-house role, I still manage to stay involved in these organisations and contribute to my wider community. Volunteering can take up a bit of time, so you have to be driven and passionate about what you are doing. One thing we learn as lawyers is to manage our time and prioritise tasks, which is hugely beneficial when taking on extra duties.

Luckily, my employer is very supportive of my volunteering work and allows me to be involved in various organisations and attend board meetings and the like through flexible work arrangements and rostered days off. I think if an employer fosters a culture of community service from the top, it has a flow on effect to the rest of the organisation. The City of Rockingham has a Corporate Volunteers Day every 3 months where a group of the City's employees help at a local not-for-profit or charitable organisation through gardening or re-painting the organisation's premises etc.

Having legal skills means you can offer a lot of valuable assistance to community groups or organisations. For example, smaller in-house teams can align pro-bono opportunities with the interests of team members and everyone can contribute to a cause they are passionate about. Some of the things that employers can do to promote pro-bono work are paying for practising certificates, allowing flexible work arrangements or reasonable use of resources, such as research tools, photocopying or other measures to facilitate volunteering, such as taxi vouchers or travel allowance.

There is so much an in-house lawyer can do to help. They can offer to review a not-for-profit or a charitable organisation's constitution or help them draft a new constitution, apply for charitable status, review the lease of their premises or sponsorship and funding agreements, prepare confidentiality and non-disclosure agreements.

If you want to get involved but are unsure where to start, I suggest the best place is with the peak volunteering body in your state. There are so many fantastic not-for-profit and charitable organisations out there—particularly at the local community level. My advice is to find a cause that you are passionate about and then find an organisation that champions that cause and get involved. No matter what you do in life, there is nothing more rewarding and satisfying than giving back to the community in which you live.

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DATA & DIALOGUE - A RELATIONSHIP REDEFINED

In this excerpt from *Data & Dialogue - a relationship redefined,* the authors describe the future relationships between clients and their law firms arising from the current and emerging forces of change. The authors introduces the distinction between 'creation' and 'production' in the delivery of legal services to help understand how the current business model will change in response to client's data-aided quest for value.

The imminent death of the billable hour has been pronounced many times, usually as a consequence of clients wanting to push prices down and forcing law firms to move to fixed pricing, or as a direct consequence of technology bringing increased automation. None of these, however, have been the dead ringer for time-based billing. In the current system, the billable hour works OK and remains under the motto 'better the devil you know' because both sides are reluctant to enter into risky budgeting and pricing discussions. We will most probably have to deal with the billable hour for the foreseeable future, however, a time-based billing system will have too many shortcomings to remain the base for a mainstream earning model.

So why is that? What is different now? The answer lies in the title of this book—data and dialogue. The structure that supports time-based billing as the main way to realise profit will crumble because of data and dialogue. Markets today are informed by data. We have entered the data economy. Even though we must not overestimate how much useful data is really available and how sophisticated businesses are in analysing it, most businesses know that it is in data where their future lies, both in terms of shaping their own organisation and operations as well as for creating new products and services. Amazon's 'product development' process, for example, follows a rather clear pattern: they collect data, identify inefficiencies that stand in the way of pleasing customers or increasing their market share, develop a technological solution, scale the solution into a platform and offer the platform as a solution for third parties. For example, the cloud-based web services they offer today have their roots in the cloud that Amazon developed for their own operational IT needs. But being data central is not only for the tech giants like Amazon, it is happening in every market sector, from heavy industry to healthcare. And we have only seen the beginning.

Getting a grip on legal service management has been the quest of legal departments for some time, although until now the progress for the entire market has been slow and difficult to measure. Obviously, the business clients of law firms have long been aware of the disconnect between value and price—or between value and time spent—under the billable hour. Clients have made efforts to close the gap by focusing on these hourly rates and demanding lower rates from law firms. However, years of panel formations and procurement discipline have amounted to disappointing results. By emphasising the competition element and concentrating on price, clients hoped they could drive pricing down as far as possible and include value-adding services such as secondments, free advice, training, alert services, newsletters, etc. However, the underlying mechanisms and drivers remained the same. Value is not 'goodies' or just a discount. How are clients going to be satisfied with the price–quality relation just by receiving value-adding services, such as 'free' secondments and 20 minutes of hotline advice? Somehow, the negotiations on rates and extra services did not translate into real change.

About 10 years ago, a small number of mainly West Coast US companies started to use data analytics to analyse their legal spend. These businesses were, and still are, leaders in the data economy, and it was only a matter of time before the same methods would penetrate the last stronghold of near artisan process within their own company: the legal department. Initially, the data collection and subsequent analytics were completed to obtain a grip on volume and then to use that volume to negotiate lower rates with their external law firms. Soon, however, data scientists and operational professionals became involved and, with the introduction of e-billing, it became possible to zoom in on time spent. Several years later, these companies have gathered enormous amounts of data. The data is used to find and eliminate inefficiencies in the process as well as to create benchmarks on how much time any single task takes.

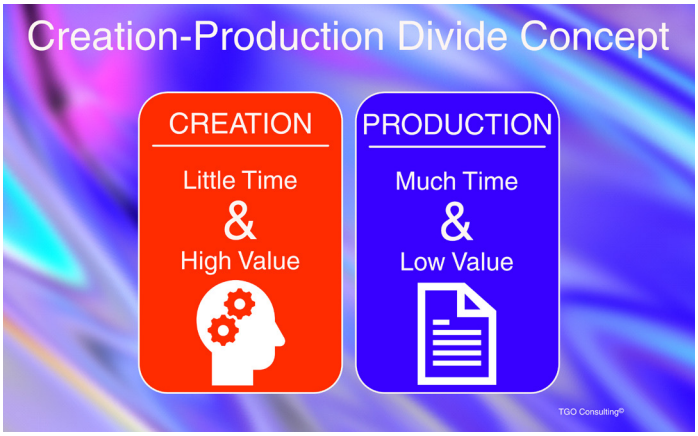
For data to have an effect on finding inefficiencies but still achieve value, there needs to be context. Today, pricing is still done using the hourly rate, irrespective of how much clients and law firms alike speak about adding value. This is because, when both sides are talking about value, they are not talking to each other. The two will differ in their understanding of value unless they both understand what value is to the other. Even though we are entering a data-driven world, this data is often useless without context. We will not be able to find value without dialogue. The data-driven companies understand this—after all, adding context is crucial for all of their data-driven undertakings—and have formalised regular dialogues with their law firms informed by the data to achieve context and obtain more value out of the relationship.

It follows that if you repeatedly talk about performance in terms of time spent in comparison to peers, then there will unavoidably be a race to increase efficiency both within the law firms and within the legal department itself. Such effects have already been achieved by the pioneers. By eliminating unnecessary steps and inefficiencies in the workflow between these clients and their law firms, there have been savings of up to 25% on external legal spend, savings that come without asking for lower rates and without having to compromise on quality.

Now, if you are a practising lawyer, should take a moment to think about your own practice. What would happen if from now on all your clients were 100% efficient? If they would give you all the documents and information you needed in a well-prepared file at the beginning of the matter? If they would only have one conference call or meeting instead of many? If your clients would know exactly what they wanted you to do and would never change the scope of work? Just by your clients being more efficient would significantly reduce your billable time. Most lawyers we speak to estimate that it would be 20% of the file. But it does not stop there. As we have explained, data analysis provides insights regarding inefficiencies for both the client and the law firm. The use of Big Data enables clients to create benchmarks for how much time they expect the lawyers to spend on a matter. The process of identifying and subsequently eliminating process

inefficiencies within the way the law firm handles the matter will have an additional eroding effect on the time spent. However, the efficiency drive, as we have pointed out, is not the only consequence of the new relationship of data and dialogue. There is an equal quest for value. These two drivers, value and efficiency/time, are both part of a service, but their prices will differ.

The process of producing a legal product, whether it be an agreement, litigation or anything else, invariably consists of two components: creation and production. Creation refers to the fruit of the brainpower, the skills and experience of the lawyer, and production is everything that needs to be done to make it happen. Creation is where legal expertise, strategic insight and creativity are applied. Production is all things needed to further process the creative output. For almost half a century, law firms have been charging equally for creation and production. This has made them dependent on production for income. For the client, creation is valuable, and sometimes priceless, as this is critical to the outcome. Production is just something that must be done in an efficient, economic and qualitative way.



Clients go to a specific partner because of his or her experience, because of his or her ability to prioritise what is important and draw up a strategy accordingly, and because of his or her ability to negotiate and persuade others to favour your matter. The associates and support staff working on the case will hammer out everything around this—producing the necessary paperwork, and finding the necessary pieces of information and references.

If we ask any partner the following: the part of any client matter that is not your creative work or possibly that of your most talented associate—how well could this be done by the associates of another reputable firm with a lower cost base? Surprisingly, many say, 'Probably equally well.' For a property developer who hires Frank Gehry as the architect, it is important to receive a design by Frank Gehry. The person who makes the mathematical calculations is not of any interest.

We talk to law firm partners daily and already there is an increasingly stronger trend towards clients asking for more partner hours. This is especially clear in the US where clients are asking for more partner involvement instead of having junior lawyers on their cases. In many cases, the partner hours not only represent the value that the clients are seeking (i.e. the value of creation), it is also more efficient to have the most experienced adviser (i.e. cost of production is lower).

The changes continuously occurring in managing outside legal services is because of clients that are increasingly reluctant to pay a lot of money for production while seeking value in the form of creation. As long as time-based billing is the only form of pricing there is, law firms will be under pressure to limit the costs for production, while they cannot charge enough for the value of creation. A business model that charges for the hours worked is not suited to accurately price creation. Creation needs to be value-priced and here the Value Matrix, (inserted below for reference), becomes important in understanding the relation between price and value.

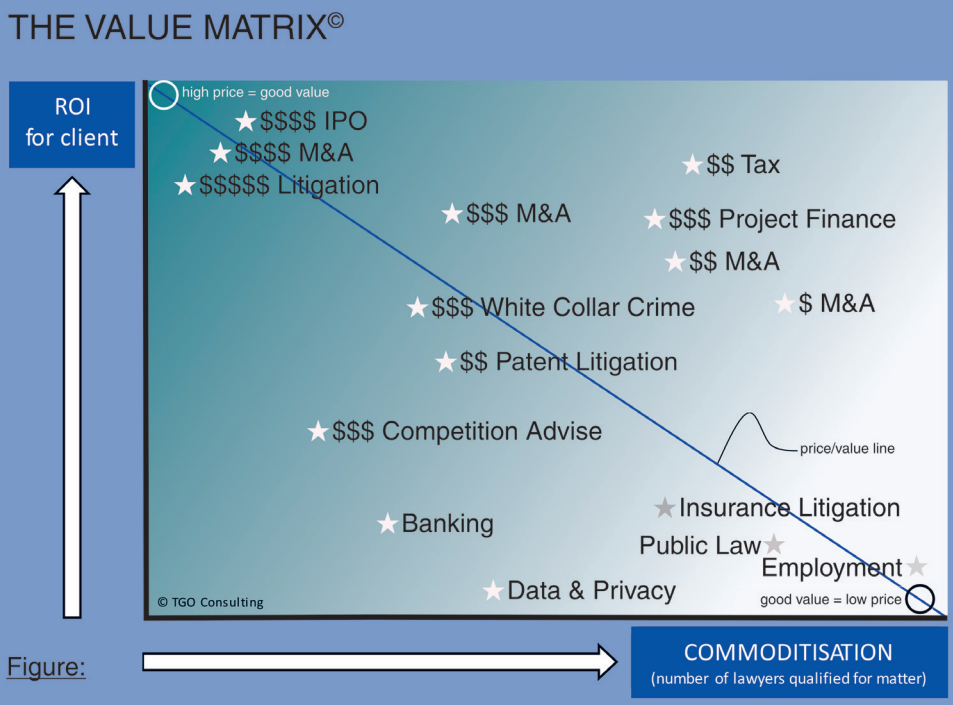


Figure:

The Value Matrix shows that value depends on the business opportunity and number of lawyers with the required experience in a certain market

As we move forward, data and dialogue chase inefficiencies in the operational part of legal services, and search for and drive value on the creation side. Value is what clients will pay for, but it will no longer be confused with pure operational aspects. Legal service providers need to concentrate on understanding and pricing the value of legal services or find themselves losing profit. At the same time, legal service buyers must learn to understand what value is to them. Most clients are no better than law firms in knowing how to price value. In many instances, clients must first understand what value is to them, which is not easy if you are new to the game. Both sides have to—together—learn how to crawl and then walk when it comes to understanding what a service is worth. Fortunately, this is by no means an impossible task. Deciding what something is worth is what successful businesses all over the world do with every component they buy into.

It is not unusual that more than half of a legal department's budget goes to outside counsel. Do they receive value in return? To measure value in practice, it is crucial to have a shared understanding of exactly what value is. What are the services of a lawyer actually worth to the business of the client? Looking at value from the perspective of a client's business, part of the value is commercial value. There is a commercial gain for the business, which is a net gain after all costs incurred have been subtracted—the return on investment. There is also no denying that quality is an important part of value, even though quality is really an aspect of production. This comes with its own set of difficulties when it comes to quantifying or evaluating it, but it is nevertheless necessary. Service delivery as well as budget performance also form part of value for the business. Value stands separate from price in the sense that raising or lowering the price of a legal service offering does not change the value that it provides. Rather, it changes the business incentive to leverage that legal offering. And yet, price cannot be seen as separate from value, as every consumer knows intuitively that the two must be related to each other. Dialogue, then, is the only way of understanding value in every specific client–law firm relationship.

Fundamentally, clients and law firms might not have opposing interests, but their business drivers are different and, consequently, their definition of value is ultimately disparate. Legal departments are driven by the goals of their company and it is their job to add value to the business. From the clients' point of view, value is what they receive in exchange for the price they pay, with the appropriate quality requirements being achieved. The business that the legal department enables and/or the risk or costs it reduces are part of the value. There is a relation between the legal budget and the exposure that the legal department must manage for the business they serve. The business is especially cost driven and is looking to increase profits and, therefore, pressures the operational costs to reduce prices.

The driver in the business of law firms is adding increments of time. Competition, rankings and profit per partner are elements of the economics that drive success in a law firm. Time keepers are the only resource that can achieve this for law firms. The incentive is to keep as many lawyers busy as possible without sacrificing quality. The value follows from the legal issue itself. The more complex a legal case, the more value a lawyer has delivered. Usually, a complex case takes more time than a simple case, and thus complexity will command a higher price. In this equation, complexity equals value added. Getting things done efficiently is simply not part of the equation in a law firm because reducing time has nothing to do with value. Even though efficiency is part of value for a client, in itself, time is not a reliable measure of value. Rather, it is a measure of cost. Time is finite. Time is a constraint that is essential to consider when managing projects and allocating resources. All work takes time, no matter how much or how little. Attaching price to time rather than value is a serious constraint in a law firm's business model. Efficiency, talent, unique experience or ingenuity are not rewarded by this system.

The story goes that, back in the 1950s, a woman approached Picasso in a Paris restaurant and asked him to draw her portrait on a napkin. Picasso politely agreed and, taking a charcoal from his pocket, made a rapid sketch of the woman and handed back the napkin. It took only a few strokes, yet was unmistakably a Picasso. 'It's perfect!' she gushed. 'You managed to capture my essence with only a few strokes. Thank you! How much do I owe you?' The artist replied, '40,000 Francs.' The woman was shocked, 'That is quite a lot. It took you 30 seconds to draw this!' 'No Madame,' Picasso replied. 'It took me 40 years.' The same applies for a lawyer. It can take 10 minutes to come up with an innovative solution that has a high value. We all know how lawyers demonstrate that time-based billing has some serious inherent flaws. The difficult question is how to move from here. However, such a move will be forced upon us as the market continues to evolve into a world of data analysis.

Technology will also play a role in eroding the profitability of the production of legal services. It will primarily do so as a tool to help achieve more efficiency in production. Technology is already capable of handling substantial parts of production today and this will only increase in the future. This is why we need to focus on creation to achieve value. So far, law firms have been playing around with new offerings when it comes to production—fee earner service centres from lower cost locations, outsourcing to alternative legal service providers or using technology. However, few have managed to leverage their most valuable assets: the ability to deliver creation. There are few innovative offerings around creation that properly reflect their value. When it comes to creation, technology is a far way off matching human skills, and many scientists wonder if it ever will.

Here is, in summary, why the current business model will finally give way for more tailor-made offerings: data harnessing and analytics will come to the legal market whether its players want them or not. Dialogue will be necessary for both law firms and legal departments to compete and thrive in a data economy. A relationship based on data and dialogue (measure, discuss, repeat) will lead to a drive for increasing efficiency as well as value delivered. This will—e.g. through openly shared data, trickle down and be available even for smaller clients and law firms. Time and value will increasingly separate from each other throughout the legal services market. It will be clear that creation and production are two separate parts of a legal service. Production will need to be as efficient as possible to compete, while creation drives the value to both the client and the law firm. At the current business model price, neither of them is at their true potential.

***Data & Dialogue, a relationship redefined*, describes what industry pioneering legal departments are achieving by applying sophisticated data analytics to support and improve the relationship with their external lawyers and why this will have an impact on the future of the entire legal services industry. Several models are introduced on how both in-house and law firms can understand key issues such as value, service delivery, and core legal technologies.**

Jaap Bosman

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COUNTERING FOREIGN INTERFERENCE IN YOUR ORGANISATION

There has been much media coverage regarding the threat of foreign meddling in international democratic processes and, most recently, in attempts to undermine elections. Most strikingly, the report released by US Special Counsel Robert Mueller in March 2019 detailed how Russian intelligence agencies conducted 'sweeping and systematic' interference in the 2016 US Presidential election.[1] But what of the risk of foreign interference that may exist within our organisations?

Foreign interference, as distinct from legitimate and transparent forms of foreign influence, involves activities that are covert, deceptive, corrupting or coercive[2] that are intended to advance the interests or objectives of foreign actors.

Clearly, multinational corporations and other institutions are not immune from being used by authoritarian regimes to manipulate democratic political processes.[3] The Mueller Report, for example, documents dozens of examples of Russian intelligence agencies using major corporations, non-governmental organisations and other organisations as vehicles for interfering in the US Presidential elections.[4] In November 2018, the Australian Security Intelligence Organisation (ASIO) reportedly ordered the cancellation of the Australian resident visa of a prominent Chinese citizen businessman on the grounds that he was 'amenable to conducting foreign interference'.[5]

However, there may be less awareness of how foreign interference is being used to distort commercial decision-making, obtain intellectual property and undermine corporate profitability. ASIO has recently warned that foreign states are engaging in espionage and interference to gain commercial advantage over Australian businesses, obtain access to our innovations in science and technology and shape the actions of Australian decision-makers and public opinion.[6]

Authoritarian states are engaging in increasingly invasive efforts to shape and exploit the international environment through political interference and espionage. Countering foreign interference has become a top-tier national security concern across developed world countries, with particular focus on Russia, the People's Republic of China and other authoritarian states.[7]

In Australia, Federal Government officials from ASIO and the Departments of Foreign Affairs and Trade, Defence and Home Affairs have been delivering foreign interference briefings to major corporations and universities. Official concerns are focused on the theft of intellectual property, the theft and manipulation of personal data and the manipulation of decision-making.

Foreign actors may seek to obtain confidential or sensitive information about your organisation's strategies, technology, research and development, intellectual property, mergers and acquisitions' activity or trade negotiations. They may exert influence on employees to develop strategies or make decisions that advance their interests or objectives. They may also operate 'front organisations' that are intended to influence public debate, business decisions and governments to support foreign policies or undermine government policies.

The mechanisms of foreign interference include:

- Arbitrary detentions of personnel abroad[8]
- Harassment and obstruction of personnel and commercial partners[9]
- Manipulation of trusted insiders[10]
- Cyber attacks[11]
- Espionage[12]
- Expropriation and manipulation of commercial information[13]
- Expropriation of personal data and information[14]
- Coerced political advocacy[15]
- Propaganda attack campaigns and orchestrated consumer boycotts
- Economic coercion[16]

How Foreign Interference can affect your organisation

Analysing the impact of foreign actors on Australian public and private organisations may be defined with reference to commercial, reputational, financial and legal risks.

- Direct commercial risks can manifest as forced intellectual property transfer, coercive partnership arrangements and export embargoes. Commercial risks can also stem from the unravelling of supply chains or Australian Government-instituted security audits regarding research funding, procurement contracts and other forms of international collaboration.
- Reputational risks may flow from parliamentary inquiries or investigations by the media, ASIO, think tanks, cyber consultants or US enforcement agencies.
- Legal risks can flow from class actions and other claims relating to directors' duties as well as direct compliance risks under the new legal regime.

What are your compliance obligations under the legislation?

In June 2018, the Australian Parliament passed some of the toughest and most targeted counter-interference laws in the Western world. The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* introduced a new crime of 'foreign interference' as well as a series of tiered provisions for espionage, sabotage, secrecy and treason. These offences are targeted at foreign intelligence agencies and those who knowingly collaborate. Those who engage in foreign interference aimed at influencing elections or supporting foreign intelligence face up to 20 years' jail.

A separate law, which is targeted at indirect influence, creates a new transparency regime that builds upon the *US Foreign Agents Registration Act*. This Foreign Influence Transparency Scheme (FITS), enabled under the *Foreign Influence Transparency Scheme Act 2018,* came into full force in March 2019. Under the FITS, businesses who have a 'registrable arrangement' (including a contract, agreement, understanding or other arrangement of any kind, whether written or

unwritten) with a 'foreign principal' who undertakes certain activities for the purpose of political or governmental influence are required to register, unless an exemption applies.[17] Failing to register is a crime.

As at 1 August, 40 individuals and organisations have voluntarily added themselves to the public Transparency Register.[18] For example, former Cabinet Minister Brendan Nelson AO has registered that he is a board member of French subsidiary Thales Australia (since 17 March 2015). His record discloses his role, which is namely to advise management on issues facing them. The record also states *'The Republic of France holds approximately 25% of the issues shares of Thales SA',* which is listed on the Paris Stock Exchange.[19]

Similarly, energy companies such as Chevron Australia Pty Ltd, Shell Australia Pty Ltd, South32 Limited and Woodside Petroleum Limited have also registered. As operators or managers of joint ventures (JV), these entities act on behalf of all JV partners including foreign principals (either because they are state-owned entities or are partly owned by governments or government-related entities).

Categories of registrable activities include:
- parliamentary lobbying on behalf of a foreign government;
- parliamentary lobbying on behalf of other kinds of foreign principals for the purpose of political or governmental influence;
- general political lobbying for the purpose of political or governmental influence;
- communications activities for the purpose of political or government influence;
- disbursement activities for the purpose of political or governmental influence;
- activities undertaken by former Cabinet ministers on behalf of a foreign principal; and
- activities undertaken by recent designated position holders in the 15-year period immediately following their public role where those activities draw on the knowledge, skills or experience gained in their previous role.[20]

Most organisations have registered their engagement in one or a number of activities including general political lobbying activities, parliamentary lobbying activities and communications activities, on behalf of the JV participants.

These JV arrangements are obviously known to these companies and are in the public domain. However, what if your organisation is unaware of an agent of influence who is acting on behalf of a foreign principal? How would your organisation discern and respond appropriately to try and resist foreign interference?

Proactively managing Foreign Interference risks in your organisation

Understanding, managing and mitigating foreign interference risks as identified and targeted in the Australian Government's counter-foreign interference legislation and strategy is critical.[21] These risks can be substantially mitigated via a comprehensive and specialised programme of transparency, accountability, vetting, counterparty due diligence and risk awareness.

A carefully designed foreign interference risk review should be framed by clear positive principles that reflect and reinforce the organisation's values, such as transparency and accountability. It should be informed by strategic due diligence 'core samples' in agreed priority areas.

Leading Australian and international financial institutions, investment banks, non-profit organisations and universities have commenced these reviews for the purposes of understanding and building resilience for:

I. client relationships;
II. supply chains;
III. funding partners;
IV. intermediaries; and
V. key personnel.

The due diligence performed should inform decisions on whether and how to engage counterparties, research partners and key personnel. More broadly, the foreign interference risk review should help to inform, adjust and extend the organisation's existing risk management systems.

SUGGESTED CHECKLIST

☑ **1. Know your networks**
- **Review your:**
  - **JV arrangements / partnerships;**
  - **client and supplier lists;**
  - **portfolio companies; and**
  - **investment targets.**
- **Review key personnel (external and internal).**
- **Educate your staff.**
- **Ensure internal transparency, proper process and oversight.**

☑ **2. Assess vulnerabilities**
- **Perform enhanced due diligence for high risk entities**
- **Conduct network mapping of intermediaries, counterparties and key individuals regarding political linkages and patronage networks.**

☑ **3. Design tools and policy frameworks to proactively manage foreign interference risk**
- **Increase awareness of the threat and implement effective mitigation strategies.**

The objective is to mitigate legal, reputational, financial and commercial risks by applying standards of good governance without confronting staff, clients or partners. In turn, this will strengthen your organisation's status as a trusted partner, improve commercial sustainability and build resilience within your organisation.

How to advise your board and senior leadership on mitigation strategies

Questions for the board:
- What is our foreign interference resilience strategy?
- Do we know who we are engaging with?
- Is our organisation compliant with the new legislation?

Footnotes

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2. https://www.themonthly.com.au/issue/2018/august/1533045600/john-garnaut/australia-s-china-reset
3. Foreign Influence Transparency Scheme: Factsheet 2, Australian Government Attorney-General's Department (February 2019)
4. https://www.washingtonpost.com/graphics/2019/politics/read-the-mueller-report/?utm_term=.ce04316321e5
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14. https://www.anu.edu.au/news/all-news/message-from-the-vice-chancellor#overlay-context=user
15. https://www.whitehouse.gov/briefings-statements/statement-press-secretary-chinas-political-correctness/
16. https://www.caixinglobal.com/2018-05-12/south-koreas-lotte-hit-by-consumer-boycott-sells-more-china-stores-101248605.html
17. https://www.ag.gov.au/Integrity/foreign-influence-transparency-scheme/Pages/default.aspx
18. https://transparency.ag.gov.au/search/#
19. The FITS applies to foreign government related entities including those where they:
    - control 15% shares or votes;
    - can appoint 20% board directors;
    - have directors accustomed to acting in accordance with their wishes; or
    - are able to exercise, in any other way, substantial control.

    https://transparency.ag.gov.au/SearchItemDetail/6f0af20c-983f-e911-8122-0050569d617d
20. https://www.ag.gov.au/Integrity/foreign-influence-transparency-scheme/Pages/default.aspx
21. See former Prime Minister Malcolm Turnbull's speech introducing the legislation in December 2017: https://www.malcolmturnbull.com.au/media/speech-introducing-the-national-security-legislation-amendment-espionage-an

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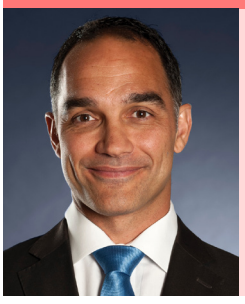

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UNITY OF PURPOSE – NEW TEST FOR CONTROL OF TRADE MARK USE

The *Trident* case is good news for corporate groups, providing a more flexible test for determining whether use of a trade mark by a related company is 'under the control of' the trade mark owner, but where the test is not satisfied, it is still necessary to prove control.

The Full Court of the Federal Court recently overturned a finding that an Australian trade mark owner did not exercise control over the use by its parent company of its marks: *Trident Seafoods Corporation v Trident Foods Pty Ltd* [2019] FCAFC 100 (20 June 2019). The decision is significant because it provides a more flexible, less legalistic approach to the question of whether use of a mark by a related company is 'under the control of' the trade mark owner, so as to protect a trade mark from removal from the Trade Marks Register for non-use.

The facts

Trident Foods was the owner of two trade mark registrations for the word TRIDENT, which were registered for fish and fish products (and other foods). These marks were blocking Trident Seafoods' application to register a logo mark that included the word TRIDENT:

Trident Seafoods tried to remove the word mark registrations from the Register on the basis of non-use to clear the way for its application. However, the TRIDENT marks were, in fact, being used by Trident Foods' parent company, Manassen. The companies had common directors, operated from the same business premises and were part of the same corporate group. Manassen's TRIDENT products were labelled 'Registered trade mark of Trident Foods Pty Ltd' but there was no written licence agreement between the two companies at the relevant time.

Non-use

It may come as a surprise to some trade mark owners that, if a registered mark is not used, it can become vulnerable to being removed from the Register for non-use. This can occur in one of two ways:

a. the owner had no intention in good faith to use the trade mark in Australia at the date of filing the application (or authorise its use or assign the mark to a body corporate) and has not used the mark at all or has not used it in good faith; or
b. the mark has not been used, or used in good faith, in Australia at any time during the relevant three-year 'non-use period'

(s92(4) of the *Trade Marks Act 1995* (Cth)). Thus, the Act adopts a 'use it or lose it' approach, wanting the Register to be decluttered of unused marks.

Control of trade mark use

If someone uses a trade mark under the 'control' of the owner, they are an 'authorised user' and use by an authorised user to the extent that the use is 'under the control of the owner' is called 'authorised use' (i.e. a double control requirement – s8). Quality control over the goods or services or financial control over the user's trading activities are deemed to be control (s8). Authorised use is taken to be use by the owner (s7(3)) and will protect a mark from being removed from the Register for non-use.

Lodestar Anstalt v Campari America LLC [2016] FCAFC 92 (28 June 2016) was a seminal case that held, to the surprise and consternation of many, that there must be actual control by the trade mark owner over the authorised user for there to be authorised use. It was not sufficient for the parties to have executed a licence agreement that included provisions for control of the licensee's use that were not, in fact, exercised.

Trial judge's findings

The trial judge in the *Trident* case held that, because Trident Foods was a wholly owned subsidiary of Manassen, it could not control its parent. The fact that the two companies had common directors did not, on its own, allow Trident Foods to control its parent. There was no evidence of actual control by Trident Foods over Manassen's use. The judge concluded that the marks were not used by Trident Foods during the non-use period and were vulnerable to be removed from the Register although, in her Honour's discretion, she declined to remove the marks from the Register (s101).

Calico case and Goodyear case

A similar result to *Trident* was reached in *Calico Global Pty Ltd v Calico LLC* [2018] FCA 2096 (21 December 2018) where a mark was assigned by Kevin Owens to Calico Pty Ltd who licensed the mark to Calico Global Pty Ltd. There was no evidence of the exercise of actual control by either Mr Owens or Calico Pty Ltd over Calico Global. The judge held that the fact that Mr Owens was the managing director of both companies did not assist in establishing control because differences in shareholdings of the two companies showed neither company was wholly the creature of, or completely controlled by, Kevin Owens. The mark was removed from the Register for non-use.

The result in the Calico case can be contrasted with that in *Dunlop Aircraft Tyres Limited v The Goodyear Tire & Rubber Company* [2018] FCA 1014 (6 July 2018) where the use of trade marks by the wholly owned Australian subsidiary of Goodyear US was held to amount to use under the control of Goodyear US because the parent company exercised financial and managerial control over the subsidiary's entire business operation.

The Full Court's decision

The Full Court in the *Trident case* overturned the finding of lack of use during the non-use period. Their Honours held that the question was not whether one company controlled the other but whether Trident Foods had control over Manassen's use of the TRIDENT marks. The fact that the two companies had the same directors was significant, given that the directors of Trident Foods had a duty to maintain the value of the marks (which had a book value of $10 million). Trident Foods necessarily controlled Manassen's use of the marks by reason of the fact that it owned the marks and its directors, who were also Manassen's directors, must have had one common purpose—to maximise sales and enhance the value of the brand. The two companies therefore operated with a 'unity of purpose' regarding the use of the trade marks.

The lack of evidence of actual control exercised over Manassen's use was unsurprising, in the Full Court's opinion, given the relationship between the companies. The Full Court also accepted one director's evidence, that it was unnecessary to give directions to Manassen, as supporting the finding of the unity of purpose of the two companies.

Significance of the decision

The Full Court's decision will be very welcome to many corporate trade mark owners where the registered owner is often not the holding company. The trial judges in the Trident, Calico and *Goodyear cases* appear to have taken a strict legal approach to corporate groups, finding sufficient control where the user is a wholly owned subsidiary of the owner, but finding a lack of control in other corporate structures. The Full Court has taken a more realistic approach to corporate groups and has introduced a 'unity of purpose' test to determine whether owner and user are in lock step regarding the use of trade marks.

Where there is no unity of purpose

The new test depends on the circumstances of the use of marks within a corporate group. If a user exercises a significant level of independence from the owner, such as in a business takeover, where the trade marks are assigned to the intellectual property holder but the operation of the business is unaffected and remains practically separate from the owner, the unity of purpose test may not be satisfied.

Another instance where the test may not be satisfied is where the mark is used by a company unrelated to the owner under an arm's length licence agreement. This was the situation in *Lodestar.*

Unless the relationship between the owner and licensee can be characterised as one of 'unity of purpose', actual control over the licensee's use needs to be exercised and recorded, so that evidence can be produced if the owner needs to defend a non-use action.

The difficulty is that licensors frequently do not exercise actual control over the use of their trade marks and may be satisfied just to receive a royalty stream. The policy of the Act is that a trade mark is supposed to be an assurance to consumers of the origin, and therefore quality, of trade marked goods or services. If the owner does not apply the mark itself, there needs to be control over the use of the mark or it may become deceptive—representing the goods or services of the licensee rather than those of the owner.

How to protect licensed trade marks

If there is a risk that the unity of purpose test may not be satisfied, in-house counsel can assist owners to control the use of marks by:

1. Having a written licence agreement executed between licensee and licensor that includes control provisions such as:

a. compliance by the licensee with guidelines/standards/specifications;
b. provision by the licensee of samples; and
c. inspection by the licensor of goods/premises; AND

2. Implementing a control regime.

The simplest way to implement a control regime is by approval of samples (in the case of goods). In-house counsel can take responsibility for this—removing the administrative burden from the business. This would involve:

a. drafting, sending and following up standard form letters to licensees each year requesting samples of the licensed widgets;
b. in consultation with the relevant department, drafting an approval form for each type of widget, with basic standards that each widget must comply with;
c. receiving the samples and forwarding them to the relevant department for completion of the approval form;
d. maintaining files of completed forms and advising the licensee of the result.

If samples do not meet the requisite standard, the parties can work together to fix this; thus, improving the quality of the product and maintaining the reputation of the trade mark.

For licensed services, samples may not be possible and a more ingenious method to evidence control will be necessary (and specified in the licence agreement). One option may be to send the licensees a standard form questionnaire. This would ask questions about the services provided including (if appropriate) the method of delivering the services, provision of photos or samples of material provided to customers (de-identified if necessary) and any customer feedback.

The Full Court decision in the *Trident case* is likely to reduce the risk of removal of trade mark registrations on the basis of non-use within corporate groups, but the risk is not entirely removed. Implementing a standard approval process where a risk remains can be a win-win situation—providing evidence of control to defend any non-use action and maintaining product and service standards to the benefit of consumers and the reputation of the trade mark. a

Margaret Ryan

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A CASE FOR PROFESSIONAL RESILIENCE IN THE LEGAL INDUSTRY

The legal industry is changing at a relentless pace. The expansion of NewLaw, coupled with the emergence of new legal technologies, artificial intelligence, environmental pressures and continually evolving practice management strategies mean that legal professionals must continually adapt to keep up, or risk falling behind.

On top of this, lawyers must balance large workloads, long hours, tight deadlines and high levels of responsibility. Against this backdrop of a rapidly evolving industry and the unique challenges of the profession, it's no surprise that lawyers are disproportionately affected by mental health issues compared to other white-collar workers. In fact, research shows lawyers consistently rank among the most depressed professionals, with approximately 30% suffering from depression or anxiety during their career.

Poor mental health is one of the most critical health and safety risks in legal firms; therefore, in times of change and uncertainty, resilience is essential.

But what does it mean to be resilient? Broadly speaking, resilience is defined as the ability to persevere when things go wrong and the capacity to face life's challenges with greater resolve. Yet, while this is an accurate definition, it's crucial to understand resilience as more than just having a positive attitude.

In the context of the legal industry, resilience is an invaluable tool for both personal and organisational growth. It enables us to respond to challenges and crises with innovation and agility, accelerating performance and increasing efficiency, focus and productivity. Importantly, resilience enables us to navigate change and adapt during periods of transformation.

Resilience is often disregarded as too elusive and complicated a concept to invest in; yet, in the legal industry it is a major strategic asset. When resilience is developed at a personal, leadership and organisational level, law firms are, in effect, 'future-proofing' their business. An integrated approach to resilience helps build a broad range of competencies that protect individuals from distress and lift productivity in times of change.

Our own global research on resilience published in 2018 shows that investing and participating in resilience programmes leads to a 38% growth in resilience and a 30%–32% reduction in distress and depression symptoms. This is a stark comparison to anti-depressants, which have been shown to have only a 3% impact.

So, in the midst of transformation and uncertainty, how can lawyers build resilience? While formal, company-wide programmes are indeed beneficial, their impact is only as far-reaching as the commitment from individuals. A comprehensive approach to organisational resilience requires engagement and involvement across all levels of a firm, with each individual actively working to develop and fortify their personal stores.

Simple yet effective measures include:

Change your thinking.

We have approximately 65,000 thoughts each day of which only 1% are helpful. The generalised thinking style in the legal profession is that of a pessimist, which happens to be the opposite of a resilient person. Success as a lawyer in part comes from being able to harness the value of the discriminating legal insight with the lifestyle outlook of realistic optimism. The latter is highly correlated with health, happiness, relationships and performance. Take time during exercise or meditation to observe thoughts and identify whether they're optimistic and hopeful or pessimistic and negative. If you find yourself thinking largely negative thoughts, ask yourself if they're helpful to the situation—if not, try to replace them with something more productive and positive.

Sleep optimisation.

Sleep deficiency leads to impaired cognitive function, resulting in lowered productivity, mental fogginess and an inability to effectively manage emotions and responses. To avoid this, aim for between 7 and 8 hours of restful sleep per night and commit to a regular wake-up time, even on weekends. A consistent, regulated sleep cycle ensures you're operating with clarity and focus and are able to navigate challenges with confidence.

Mastering stress.

In any workplace, the ability to effectively manage stress is what sets the top performers apart from the rest—but when it comes to high-pressure environments like law firms, stress management becomes a crucial survival skill. Useful strategies include organising your workload into manageable segments and practising slow, conscious breathing in between tasks. In the face of seemingly stressful situations, it's also important to pause and re-evaluate, ensuring you're avoiding thinking traps that lead to catastrophising.

Making time for regular exercise.

Regular exercise is one of the biggest contributors to positive mental health and wellbeing and, in turn, one of the biggest influences on resilience. Heightened mental clarity, improved mood, increased energy and a sense of grounding are some of the instant yet long-lasting benefits of frequent exercise. Commit to at least 30 minutes of exercise a day and you'll find yourself feeling better placed to manage your workload.

Prioritising relaxation.

Daily relaxation may sound like a luxury few can afford, particularly in the context of the fast-paced, high-pressure legal world. Yet, disregarding downtime could be at your own expense. Rather than viewing relaxation as a reward or an act of self-indulgence, view it instead as an act of self-care. Physical and mental time-outs are crucial to allow yourself space to rest and rejuvenate, especially in times of change.

It's said that a chain is only as strong as its weakest link and this applies to organisations. For legal firms to fortify themselves during periods of change and upheaval, resilience across all levels is critical. It requires commitment and conscious effort, and must be developed over time. Importantly, it must be modelled, not delegated, by the C-suite and reflected in the values and visions of the firm.

When resilience is invested in and prioritised, lawyers have a strategic upper-hand when it comes to navigating change. And if industry evolution is set to continue, it may prove to be the tool we can't survive without.

Stuart Taylor

As Chief Executive Officer and founder at Springfox, Stuart helps people and organisations shift into a more compassionate space in order to reach sustainable high performance. Following a diverse career within organisations as diverse as the Royal Australian Air Force, KPMG, and Heinz, Stuart's top-down approach is driven by the belief that organisational culture can operate with an increasing emphasis on humanity.

THE CHALLENGE OF 'KEEPING YOUR LEGAL HAT ON'

Legal professional privilege is arguably one of the most important protections to help maintain client confidentiality and open communication. Privilege is important for all legal professionals—but how does it work in practice for in-house counsel, who hold a position beyond that of just a legal advisor? With the in-house role continuing to merge between legal and commercial, this can be a tricky field to navigate and is best managed through a proactive and hands-on approach.

Working as an in-house lawyer brings with it many benefits, one of the most notable being the ability to apply legal knowledge and skills in a commercial context. As an in-house lawyer, each day it's refreshing to take on new business-focused and operational responsibilities. The work is often split between legal and non-legal tasks, and more often than not counsel are providing advice that is structured as ***both legal and commercial.***

From an organisation's side, no longer are lawyers seen as external third-party providers. Lawyers are now salaried employees of the company, colleagues in the open-plan office and members of strategic management teams. More and more, in-house legal teams are 'becoming one' with an organisation.

From the perspective of many, this is simply the nature of a corporate counsel position—perhaps the lure of in-house life—and what makes a commercial lawyer really thrive in-house.

Unfortunately, however, this ever-changing role can put lawyers in the middle of a difficult situation. When looking at the increased non-legal work we're called on to do, a question mark is raised over the application of legal professional privilege.

Refresher on legal professional privilege

We've all learnt about it in law school and it's something we apply unconsciously in our day-to-day roles… but how many of us can accurately define what legal professional privilege is?

Simply put, legal privilege protects all communications between a professional legal advisor and their client from being disclosed. Its role is to protect a client's ability to access the justice system by encouraging absolute disclosure without fear that such information will be used against the client later down the track.

Under both Australian common law and statute, we speak of two forms of privilege: *Advice Privilege* and *Litigation Privilege*. As the names suggest, these protect all communications provided for, or documents prepared for, the ***dominate purpose of providing legal advice*** or where the ***dominate purpose is for actual or anticipated litigation.*** The common factor here is the concept of the 'dominate purpose test'. In simple terms—if a communication would have been made or a document prepared, regardless of an intention to seek legal advice, it will not be privileged.

Is it a 'privilege' to work in-house?

Confidentiality

For legal privilege to attach to a communication or document, the relevant advice must be made confidentially. While this may be easy for in-house lawyers to keep in-check themselves, a concern presents itself when we think about what our internal clients do with the legal advice provided.

No matter how big the font is, or if you've **bolded** and underlined the text, it's funny how often the marketing coordinator or your sales managers miss the warnings: 'Confidential – For Internal Use Only' or 'Legally Privileged – Please Do Not Forward'. Even internal sharing of privileged information can create issues, which often our internal colleagues aren't aware of. In-house life brings with it increased risk that confidentiality is lost and consequently privilege unintentionally waived.

Independence

The nature of privilege means it only applies if a lawyer is *'sufficiently independent'* from the organisation to truly act as an unfettered advisor.

This is a tricky concept for in-house counsel, who arguably wish to move away from this position. This is especially the case for those who act in a dual role—'General Counsel & Compliance Officer', 'General Counsel & Company Secretary' or even 'General Counsel & Business Affairs Director'. It appears the industry is moving towards an expectation that in-house counsel take on more and more, becoming ingrained in an organisation as a trusted business partner.

Legal vs non-legal work

Even when confidentiality and independence are upheld, the nature of privilege means it will still only apply to the legal portion of advice. Young J in *AWB Ltd v Cole* (No 5) (2006) 155 FCR 30 noted that privilege 'extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; ***but it does not extend to advice that is purely commercial or of a public relations character'*** [emphasis added].

I'm sure this makes any in-house lawyer nervous! Think of that email you sent last week, where you provided advice on the company's contractual termination for convenience rights but also some guidance on the reputation and operational risk if such right was invoked… where do we draw the line at what is 'purely commercial'?

This concept was explored in a well-known case, *Sydney Airports Corporation Ltd v Singapore Airlines Ltd and Qantas Airways Ltd* [2005] NSWCA 47. Here, a Singapore Airlines aircraft was damaged when an aerobridge at Sydney Airport, which was operated by Qantas, malfunctioned. Singapore Airlines commenced proceedings against Sydney Airport and Qantas. Sydney Airport's in-house solicitor commissioned a report following the incident and claimed privilege over such report.

In the court of appeal, it was held that on evidence, the report was prepared for at least four purposes: (1) for anticipated litigation, (2) to enable Sydney Airport to understand what caused the incident, (3) to allow Sydney Airport to alleviate concerns of the Airline Operations

Committee in allowing the aerobridge to return to service and (4) for Sydney Airport's own operational reasons and ensuring a similar incident wouldn't occur again.

In considering whether (1) was the dominant purpose, Spigelman CJ found that, when considered objectively, the evidence coming from the report was 'always to be deployed for non-privileged purposes… which were of significance to the Claimant – particularly to have the aerobridge back in service…' Although anticipated litigation was an important factor, it was not shown to be dominant due to the ***commercial and operational interest*** of the report of the company. This resulted in privilege not applying.

This suggests that the nature of privilege is not up to speed with the modern operational role in-house lawyers play. How do these concepts work together? How can in-house counsel ensure this important protection remains in play?

The 'tried & tested' advice

The traditional tips for ensuring privilege attaches are still relevant, yet don't always work in practice for internal counsel:

- keep your practicing certificate up-to-date;
- label everything with 'confidential and legally privileged';
- use different email sign-offs to distinguish between your multiple roles;
- don't wear two hats at once; and
- always keep legal and non-legal communications separate.

As we've explored, legal and commercial advice are becoming one and the same, and organisations are looking more and more for concise legal advice that is commercially driven. Due to this, an attempt to disconnect the two is not easily done in practice.

This raises an important area where in-house counsel must exercise ***integrity and strength to resist commercial pressures and keep their legal hat on.*** It's an important skill for in-house counsel—we must be armed with the ability to keep these stakeholders happy and meet our targets as an employee, while also upholding legal independence and legal safeguards.

This is often a struggle, especially when you have the sales teams reaching for monthly targets to your right and the marketing manager trying to get a funky new catch-phrase approved to your left. We are employees of the company, required and encouraged to align with company objectives, policies, targets and goals; yet we also have professional obligations requiring independence and a degree of separation.

A very difficult mix! Having the skills to balance commercial and legal priorities is perhaps something that can't be taught, but rather best learnt in practice. Acknowledging the importance of balancing the two is a good starting place—and perhaps something that law schools need to consider when educating future commercial lawyers.

Practical tips for in-house counsel

- *Educate your non-legal colleagues and executive teams.* If your internal clients understand the nature of your position as internal advisor, they will better appreciate the role they can play in preserving confidentiality and privilege. Training your team mates is essential—explain what the words 'Legally Privileged' actually mean, create a half-page illustrative fact sheet that's easy to understand, arm them with template wording for how best to request formal legal advice, emphasise the importance of not forwarding emails around the company or to third parties and explain why sometimes a phone is the best resource.

- *Set up a monthly '15 minutes with legal' roundtable.* Taking proactive steps is often difficult when the day-to-day work is piling up. It can help to set specific time aside for clients to fire questions at you or, more importantly, for you to provide training. Position this as business training, not legal training—speak their language to ensure your internal teams grasp the importance of these sessions. Give some real-life examples of how privilege can directly impact the organisation (the Sydney Airport case is a good place to start!)

- *Consider if it's worthwhile implementing a Legal Engagement Policy.* Such a document can cover exactly how the legal team is to be engaged and helps document the business responsibilities that flow from the training you provide. It's the place to address the rules around forwarding legal emails and who should be in certain meetings and copied on email chains. This may also be the place to set ground rules for when to engage legal—the earlier the better—especially when workplace investigations are involved. Bringing the legal team in later down the track can open-up communications around a specific matter to be discoverable. *'If in doubt, talk to Legal'!*

- *Assess who is on your email chains.* Often lawyers themselves hit 'reply all' without thinking. It helps to take not even 30 seconds to review the individuals on an email to determine whether they all really need to be included. The wider the audience, the more likely privilege (and confidentiality) may be inadvertently waived. This can also apply for verbal advice—ensure those present are necessary.

- *Consider why you're giving advice in the first place.* It often helps to take 5 minutes before you start drafting advice to question what the purpose of such advice is. Which hat are you wearing—legal, operational, executive or a mix? Identifying the purpose upfront will help direct how you deal with such advice and may also be the prompt you need to 'carve-out' the pure legal work, especially in high-risk matters.

Taking a proactive approach and establishing internal processes and training guides will give in-house counsel a head-start on what is a tough area. Take time to stop before drafting advice, evaluate risk and determine when to expressly distinguish between legal and commercial advice. This can help protect the application of privilege while also allowing you to succeed in your dual legal and operational role.

Karina Veling

With a background in commercial and technology law, Karina is a corporate lawyer for an ASX listed entertainment company, providing advice to large technology and procurement teams. Karina has a keen interest in applying a proactive legal approach to business and enjoys partnering with internal clients as a trusted business advisor.

CROSS-BORDER MERGERS AND ACQUISITIONS: TRANSACTION CHALLENGES IN EMERGING NATIONS

One of the most exciting times for a company—and its employees—is when it decides to expand overseas. While thrilling, it is also a time of challenges, particularly for in-house counsel who are tasked with coordinating every detail of the mergers and acquisitions transaction agreements. With a focus on emerging nations, this article offers practical tips to assist in-house counsel in identifying the risks of cross-border transactions, navigating those challenges and closing the deal.

Globalisation—the interconnectedness of worldwide businesses—has substantially changed the mergers and acquisitions framework, and has created a compelling case for cross-border transactions. Cross-border mergers and acquisitions contracts are therefore on the rise, and are becoming increasingly attractive to multinational companies.

In 2018, despite global uncertainties, such as trade wars and Brexit, cross-border deals represented a 'record US$1.6 trillion (39%) of last year's deals (including six of the 10 largest deals).'[1] Although the types of deals may vary, organisations usually consider cross-border mergers and acquisitions transactions to be highly challenging, in part because they add layers of complexities and risks compared to a deal in the domestic market. Sometimes the challenges and complexities of the legal and/or regulatory environments may be too great, and opportunities may have to be turned down.

Cross-border deals may break down due to, for instance, an unfavourable regulatory or legal environment, the difficulty of finding suitable local counsel, and tax burdens or financial or employment issues. In-house counsel plays a critical role in the risk assessment of such transactions, by developing a mitigation strategy, demystifying the challenges and helping the business team navigate them.

Specific challenges of cross-border transactions

In-house counsel and the rest of the business team face the challenges of working in different cultures, time zones and multiple legal systems and/or languages. Such challenges may include significant communication issues, which can arise from negotiating in different cultural environments with dissimilar negotiating styles. What is customary in one country may not be acceptable in another, rendering the negotiations lengthier and making it harder to find common ground.

To add to the cultural and communication challenges, the team may be faced with legal, regulatory, labour, antitrust and anti-competition, tax and accounting challenges. Logistical problems can also arise when closing a transaction requiring wire transfers of money from different countries and/or time zones. Furthermore, dealing with different legal systems implies relying heavily on local counsel to assist in the drafting of documents and choosing contract language regarding dispute resolution, intellectual property and the choice of law or forum. Together, these can add costs, delays, uncertainties and, hence, additional risks to the transaction. In that case, the common factor—the in-house counsel—often acts as the solid link unifying the pieces of the transaction chain.

Working in difficult geopolitical and economic environments

In some emerging economies, cross-border mergers and acquisitions transactions may present risks and complexities because the transaction is occurring during political or financial instability. Myriad factors can significantly delay the deal process, from opening negotiations through to closing.

For instance, the geopolitical environment, including political instability or widespread bribery and corruption, can be complicating factors. Some transactions that require regulatory or administrative approvals may stall after a political uprising or instability. Political issues can also include protectionism, problems with local bureaucracy, state intervention in business affairs and social unrest. Currency instability, especially if the transaction takes more time than expected and closing is delayed, may also increase costs and constitute a substantial risk of jeopardising the entire deal.

In certain regulated industries, where special licences or permits are required by law, often such licences or permits may not be 'acquired' simply through acquisition of the local entity holding the licence or permit. Instead, separate review and application processes with government agencies must be followed. This will mean more time and uncertainty for the transaction, and, depending on whether or not the licence/permit is essential, successfully obtaining such approval may need to be stipulated in the deal documents as a condition precedent to the investment.

Don't underestimate cultural differences

A lack of existing legal approaches around risk management, financial reporting requirements or corporate governance can raise additional issues that must be addressed when considering a deal. Restrictive workforce laws or undeveloped intellectual property regimes can also add to uncertainties.

In addition, finding law firms with international or specific in-country expertise or proficiency in the company's official language may prove difficult. Dealing with a trusted advisor in an emerging country can mean the difference between a successful deal or failure.

Train your team in compliance

In addition to sanctions regimes, local or otherwise applicable anti-bribery statutes (e.g. the *UK Bribery Act 2010*) and anti-money laundering regulations, US entities with overseas subsidiaries must comply with the *US Foreign Corrupt Practices Act 1977* (FCPA).

Generally, the FCPA prohibits any payments or offers of cash, favours, gifts of any kind or anything else that has value to the intended recipient, where the intended recipient is a foreign official, or where

the intent of the gift is to influence the foreign official to use his or her position to benefit the offeror. In short, the FCPA prohibits knowingly and corruptly giving anything of value to a foreign government official to obtain or retain business. In the countries that are high on the Transparency International's annual index of countries with perceived corruption, the highest FCPA due diligence scrutiny is advisable and internal due diligence must be tailored accordingly.

Dispute resolution challenges abound

Furthermore, working with countries with different or developing legal systems may create additional interpretation or enforcement issues, thereby increasing the risk profile of a deal. Not only the laws themselves, but even certain legal concepts may differ and be subject to various interpretations in common law as opposed to civil law systems. For instance, in common law systems, 'consideration' is necessary for a contract to be binding, whereas civil law does not have this concept. Similarly, the concept of 'trust' is generally unknown in civil law systems.

Vague or undeveloped laws in some specific areas may also require relying heavily on local counsel's interpretation, with the risks that this implies. Enforceability of certain provisions in an efficient manner, or with equity, may also be a challenge. The legal value of the transaction documents may be diminished if the documents are governed by local law and there are serious doubts as to one party's ability to enforce certain provisions of the agreement. There might also be limited confidence in the predictability of interpretation or the impartiality of the judicial system.

Similarly, if a foreign judgement needs to be enforced in the local jurisdiction, uncertainty as to the impartiality or effectiveness of the local judicial system may add additional risks. Frequently, a court's judgement may be biased towards a native party, as opposed to a foreign actor. Therefore, foreign investors usually opt for arbitration, hoping for less biased decision-makers and more certainty in the enforcement of arbitral awards.

Impact investing considerations

Align your social mission with your transaction

For companies and social enterprises working in international development seeking to create long-term changes, additional considerations may come into play, such as embedding impact into transactions. Specifically negotiated provisions in the transaction documents may be required to ensure the alignment of the buyer or the investor with the mission. For example, supermajority voting rights may be required to change the mission or the vision of the organisation. Social investors may also request the right to sell their shares if certain social objectives are not reached. A social investor may also require embedding certain ethical principles into the business (e.g. customer protection principles) through policies, processes or operational practices. Social investors may also look for buyers who fundamentally share their values. This can translate into terms applying the highest quality of environmental and social standards, business integrity or governance.

SOME PRACTICAL TIPS TO LOCATE QUALIFIED LOCAL COUNSEL IN EMERGING COUNTRIES INCLUDE:

- **Careful due diligence through online searches;**
- **Vetting through legal or financial contacts (e.g. law firms, in-house counsel or financial advisors);**
- **Asking for referrals from other global law firms;**
- **Asking specific legal questions to the local counsel to test their competency;**
- **Asking for deal sheets, names of clients or clients' industries;**
- **Using local counsel for smaller projects before the transaction to test competency (if possible); and**
- **Interviewing local counsel (in person if possible).**

Negotiate a responsible exit

To ensure the sustainability of impact, some social enterprises, wanting their mission to endure, may also want a responsible exit from the emerging country in which they are operating. Social enterprises may therefore focus on selecting buyers who are aligned with their mission or vision, with similar experience in the industry and a proven track record. They may also look for buyers who have a history of strong business ethics, solid governance and high environmental and social standards. Some provisions may also have to be negotiated in a share purchase agreement to contribute to a responsible exit (e.g. employee retention and protection post-closing, or provisions to preserve impact, etc.). These provisions relating to a responsible exit may be difficult to enforce for exiting investors, however, this can make deals more complex or assets less attractive to a buyer or an investor.

KNOW YOUR CUSTOMER

Know your customer (KYC) procedures refer to the due diligence required by internal policies and local laws or regulations to verify the identity of the individuals and entities with which an organisation is contracted to. KYC procedures may vary by jurisdiction or the type of transaction. These procedures are generally part of an organisation's anti-money laundering and counter terrorism policies.

Customer knowledge is critical in a cross-border transaction. Not only do you want to know who you are partnering with, but you also want to avoid any potential liability for your organisation. For instance, it may be unlawful for your organisation to do business with an individual or entity recorded on anti-money laundering lists.

The organisation's compliance or risk department is generally in charge of KYC procedures. For cross-border transactions, prior to entering into the transaction, KYC procedures generally entail:

- Verifying the identity of entities and individuals (e.g. target, shareholders, board members and management) through general (documentary or non-documentary methods) or specific (proof of incorporation, verification of ownership) procedures;
- Ensuring that the entity or individuals do not match any name on the anti-money laundering lists, which refers to online services combining governmental and international watch or sanctions lists and checks required by local regulatory authorities; and
- Verifying the sources of funds and identifying any suspicious activity, or any applicable additional exclusion lists specific to your organisation's business.

Practical tips to navigate the challenges

Choose local counsel wisely

Identifying the local counsel for a cross-border transaction in an emerging country can be challenging. In some countries, a specific transaction may be the first of its kind for the local counsel. Extreme caution should be given to this process, as the choice of local counsel can be a determining factor in making the deal successful.

Interviews, preferably face-to-face, provide an opportunity to analyse the level of expertise and sophistication of the local counsel in depth, together with their foreign language proficiency (especially if the transaction documents are only in the company's official language). In some cases, the government will require bilingual transaction documents, or sometimes in the local language only. It is often good practice to submit translations together with the local language document. In any event, a local counsel who speaks, reads and writes the company's official language fluently is required.

The global outside counsel or global financial firm that may be assisting in the transaction can also provide insight into a specific firm's expertise. If the transaction requires regulatory approvals, good relationships and extensive professional experience dealing with the regulator, this should be requested from the local counsel. Expectations and timing of the transaction should be stated clearly from the beginning to avoid misunderstandings. In some countries, deadlines are flexible and can depend on a variety of factors, including holidays, rough weather or the death of an important figure in the country or region.

Always be aware of cultural and communication differences

Staffing an international legal department with lawyers and support staff who are familiar with the culture of the countries where the transaction is taking place, and who speak the language, is a definite plus. Being mindful of the local environment and cultural sensitivities will help manage expectations and timing. Plan accordingly. For instance, in some countries, it may be unrealistic to close a transaction

in August or during a religious holiday. Being considerate of time zones when scheduling meetings and conference calls will also help the transaction progress more smoothly. In some countries where security is a major concern, owing to roadside attacks or kidnappings, proper risk assessments and related staff training may be required.

Always conduct deep due diligence

A 'one size fits all' due diligence approach is not recommended. Tailoring due diligence to the specificities of the local jurisdiction is extremely important. The global outside law firm assisting on the transaction may provide a general template for a due diligence checklist; however, this should be adapted by the local counsel to the specific location and environment.

Starting the due diligence process as early as possible will allow time to mitigate the risks and ensure sufficiency of the due diligence. Face-to-face meetings with the target business and its management team should help create a better understanding among all parties, as well as its decision-making process and governance structure, which can be important during the negotiation stage.

When dealing with countries rated high on the Transparency International's annual corruption index, additional FCPA due diligence may be required. KYC checks should be performed based on the specific risks of the emerging country, on the target acquisition, its board and management and other potential investors or shareholders. The reputational risks for global organisations should not be disregarded.

Take steps to retain talent

Due diligence on the human resources of the target is not only necessary from a business perspective to ensure proper understanding of talents and workforce, but also to anticipate any cultural and organisational issues for the post-closing integration. Identifying technically skilled workers in some emerging countries

may prove difficult, and talent shortages might be a common issue. Therefore, having a good understanding of staff skills, including those of the local key employees, can be a determining factor behind the success of a transaction. This contributes to the effective structuring of short- or long-term incentive plans, such as retention bonuses during the transaction and post-closing, or increased compensation for local key employees. The real value of the target may oftentimes be in its people and their talents; therefore, caring for them, communicating well and sensitively, and preserving their loyalty to the business is critical.

Pay early attention to the post-closing integration issues

Post-closing integration is sometimes viewed as one of the most difficult parts of a transaction and, again, the in-house counsel plays a crucial role. Post-closing, and as part of the integration process, in-house counsel should ensure that the policies of the local entities are updated (e.g. corporate governance, anti-money laundering, data privacy) to include, for instance, FCPA or European Union General Data Protection Regulation provisions, if applicable. For increased enforcement of FCPA provisions, in-house counsel should consider training the local legal or human resources teams. In turn, they can train the local staff (in local languages if needed) on FCPA requirements, and post FCPA/anti-bribery flyers in the local offices to raise awareness. Other measures could include having an ethics hotline and a place for incident reports where staff can report violations of any ethics rules in complete confidentiality. Insisting on the need to guard the company's reputation and global brand and the costs associated with any violations that can impact the entire network may also prove useful to 'cascade' the message to the local management team.

Additional measures to consider include thorough internal controls and procedures, together with employee training, anticorruption language in agreements and an efficient compliance and monitoring programme. Management should be proactive in cultural integration and in-house counsel can assist by flagging concerns raised during the due diligence process. The in-house counsel can also bridge the various functions of the target company and get to know the target's staff and the structure. This can help the management to assess the extent of business and culture integration that is required. Collaboration among the deal, in-house counsel and integration teams facilitates the integration process, especially in jurisdictions where certain business practices may be limited by the legal or regulatory environment, and where translations may be required. Information technology systems may also be a critical issue for integration and can cause delays in the operation of local entities. Organisations may consider entering into transition services agreements to cover the licensing of critical software, or the provision of information technology services for the transition period.

Familiarise yourself with the governing laws and dispute resolution mechanisms—then promote standardisation

Agreeing on acceptable governing laws is one of the most crucial aspects of the negotiations. In most cases, it may not be a good idea to choose the local law, for reasons explained earlier. Global organisations may prefer well-established laws, such as the New York or English laws. Arbitration may also be preferred. It is atypical in cross-border deals to use local courts for dispute resolutions. Also, to ensure that fewer deals break down, the use of a standard approach in the drafting language of the transaction documents, using globally accepted legal norms of US or UK origin, may also help, regardless of where the transaction is located. As mentioned earlier, forum choices may also be a material point for negotiation.

Have an exit and repatriation strategy

Planning an exit strategy and obtaining a clear understanding of the repatriation issues in the targeted country are also important when considering a deal in an emerging country. In-house counsel should clarify the legal requirements as well as regulatory or other approvals needed to exit and to repatriate either dividends or proceeds, as well as the tax implications for such exits and repatriations. An upfront plan on exit and repatriation should allow the in-house counsel to anticipate any issues and potentially structure the ownership to avoid or limit any roadblocks to an orderly exit or proceeds repatriation.

Conclusion

Overall, deals in emerging countries may offer challenges similar to those encountered in any cross-border mergers and acquisitions transaction. However, in some situations, such deals may present added layers of complexities. Some organisations may turn down transactions in a country where the government has too much influence over legal or regulatory matters, or where political instability is too great. The risk may not be worth taking.

If the transaction is pursued, the role and involvement of in-house counsel in the success of the transaction are paramount. In that context, working outside of a familiar legal environment and being confronted by a myriad of legal, regulatory, political or other challenges in the target country can be disconcerting or even overwhelming. In-house counsel working on cross-border transactions in emerging countries are oftentimes required to be extremely creative and flexible. Finding solutions may involve extensive discussions and brainstorming with the local counsel and deal team. Therefore, local counsel selection, and clear communications with such counsel, the deal team and the local partners on their respective roles and expected contributions to the deal, are crucial for a successful transaction. An experienced translator is also invaluable.

The importance of extensive due diligence cannot be overstated. It is absolutely necessary to fully understand the legal and regulatory environment, the target company, its culture and related risks. A comprehensive due diligence programme also contributes to a successful post-closing integration and proper retention of talent. Appropriate use of the skills and knowledge of local counsel, as well as on-site visits, will facilitate obtaining accurate facts and anticipating issues both for the transaction and the post-closing integration.

Cross-border transactions in countries with unstable conditions require additional advanced planning and extended timelines. Any in-house counsel must be well prepared to manage the expectations of the deal team, especially on timing issues, potential delays or setbacks, and regulatory or administrative roadblocks. In many instances, increasing planning timelines and having patience during the deal process are essential.

Upfront investment in in-house counsel remains key to the successful completion of these transactions. When done well, the role of the in-house counsel will be strengthened and prized as a bridge between legal and business cultures worldwide. a

Footnotes

1. https://corpgov.law.harvard.edu/2019/01/30/cross-border-ma-2019-checklist-for-successful-acquisitions-in-the-united-states/

Stephanie J. Bagot

A senior lawyer for FINCA Impact Finance, Stephanie's primary responsibilities include cross-border mergers and acquisitions, corporate governance, and corporate law. Prior to her current role, she was a Senior Associate at law firm Holland & Knight and has held a number of legal positions across both France and the United States.

SAVE THE DATE

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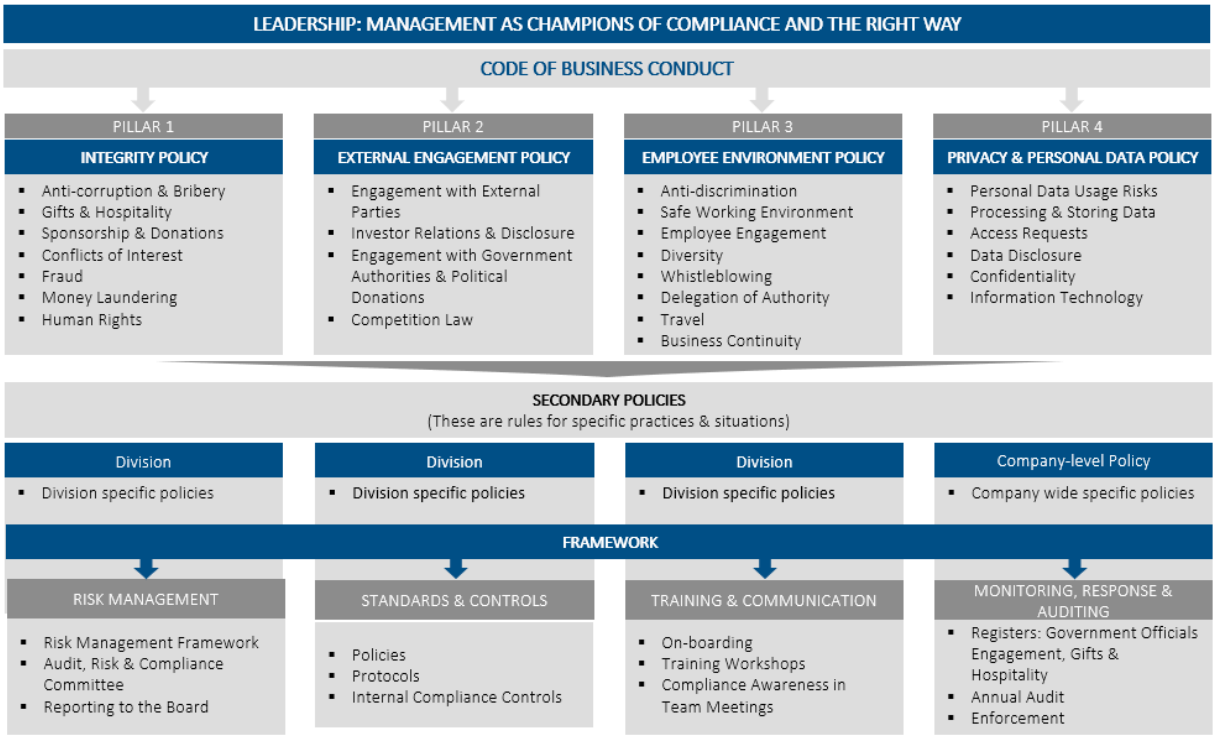
ALL A-BOARD: FIVE STEPS TO STEP-UP YOUR ORGANISATION'S COMPLIANCE

The Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry (Royal Commission) has triggered a historical turning point for corporate culture, good governance and compliance. While the focus was on the banking, superannuation and financial services, the Royal Commission has also placed the spotlight on compliance more broadly.

In-house counsel are well versed and comfortable to navigate the law but designing a compliance framework that fits the organisation is no easy task. Unless you are a large financial services organisation, chances are you do not have a 'dedicated' team for compliance and the task of compliance is usually placed on the in-house counsel. It is not like we studied 'Compliance' at university, yet we are left with the task of designing a compliance framework when facing perceptions that compliance is 'boring', 'a roadblock' and 'a money burner'. Faced with the same challenges in our own organisation, we provide some tips for tackling compliance and how to create an impactful and effective compliance program.

1. Demystify your policies

Unfortunately, we are plagued with policy after policy—privacy, whistleblowing, AML, sexual harassment and anti-bribery and corruption just to name a couple of the topical ones. The first step to tackling compliance is to design a framework that makes sense and captures all your policies and helps tell the compliance story. It needs to be accessible to the business and easy to understand. An example of framework is provided as follows:



It is important that the framework provides the structure of how the policies talk to each other and how they integrate with risk, controls, training, monitoring, response and audit. It also provides the road map as to how the policies are to be implemented within the organisation—and this is just as important as the policies themselves!

The policies must be readily available to all employees. With an array of compliance software programs available on the market, finding the right fit for your organisation is important. It should be carefully implemented and can be effectively used as a means of storing policies and tracking employees' access.

2. Training and creativity

Having established your policies and framework, delivering the training in a creative manner is key to implementing a robust compliance program. Training is important to deliver buy-in from the business and to change the mindset of employees towards a compliance culture. Grouping compliance training with team building activities and team events is a good way to make the training engaging. For example, doing a mock trial on curly issues (for example, sexual harassment or bribery) is a good way to present how compliance and legal issues are not black and white. When we did this for our organisation, we arranged costumes for judges, bailiffs and advocates to simulate a court room. We also used interactive quiz programs such as Kahoot—it is a good creative way to encourage engagement. A sample breakdown of a compliance training day may be as follows:

Sample Agenda: Compliance Training
Welcome
Break up into groups: Discuss what you expect to get out of today on butcher paper
Today's Agenda
Compliance Milestones
Importance of Compliance
Team building activity
Code of Business Conduct Framework
Integrity Policy Highlights
Kahoot! Questionnaire/Case Study Examples
Employee Environment Policy Highlights
Two truths and a lie – sexual harassment/discrimination cases
External Engagement Policy Highlights
Privacy and Personal Data Policy Highlights
Policy Navigation
Raising a Concern and Reporting an Incident/Risk
The Courtroom: Four groups, two case studies covering compliance issues
Conclusion
Announce winner of trophy

3. Create a whistleblowing portal

While whistleblowing has largely been driven by whistleblowing laws, it is prudent to consider how this integrates with the compliance framework. Creating an online form through the company website to report compliance breaches is a 'cheap and easy' way for persons to raise compliance concerns and to report non-compliance of policies. Having the option to be anonymous is also important.

4. Create a quarterly compliance committee

A compliance committee or a committee with audit and risk such as an Audit, Risk and Compliance Committee is a smart way to oversee the compliance program, to ensure policies are up-to-date and to review the compliance registers and controls. Having independent non-executive directors or independent compliance professionals on this committee is important—it creates a level of objectivity but also provides a neat way to deal with conflicts. That is, conflicts can be referred to the independent members for approval (although such protocol should be endorsed by the Board).

It is also an effective way to ensure the Board draws careful attention to compliance issues as delegating to a compliance committee or similar ensures that more time is spent on compliance items and that those with specialist skills and direct business involvement are granted the opportunity to filter feedback through to the Board. It is imperative that the compliance committee or similar report all findings and valid information back to the Board. The easiest way to do this is to ensure it comprises members of the Board and that minutes of such compliance meetings become a Board agenda item. The committee should be advising and making recommendations to the Board, and thus channelling a culture of compliance from the top down.

5. Cultural artefacts

As part of Schein's levels of organisational culture, artefacts are acts and omissions that are visible but not often decipherable. They include personal enactment, ceremonies, rites and rituals and stories and symbols. For compliance, it is important that you have those elements to achieve a compliance culture and for leadership teams to drive those elements. Management reporting gifts and hospitality are examples of personal enactment that enable positive cultural artefacts.

Schein's levels of organisational culture

Basic Assumptions	• Nature of human relationships and human nature • Nature of reality, time and space	Taken for granted: Invisible & preconscious
Values	• Testable in the physical environment • Testable only by social consensus	Greater level of awareness & deliberate
Artefacts	• Personal enactment • Ceremonies and rites/rituals • Stories and Symbols	Visible but often not decipherable - it's the "how" we achieve outcomes

Schein, E. H. (2010). Organizational Culture and Leadership. Jossey-Bass.

Culture should be on the agenda of all Boards. It will require active monitoring, assessment and oversight. Implementation of robust accountability frameworks, meaningful corporate values and governance policies will be necessary to ensure the longevity and value of the organisation. This will involve more than a simple drafting exercise and will require management to actively engage with employees to ensure they understand and continue to comply with the organisation's values as the business landscape evolves.

It is expected that organisations will assess themselves regularly as risks and opportunities change. You should ensure such assessments are well documented, based on evidence and articulated accurately. Compliance and legal functions will play a pivotal role in ensuring the key drivers of culture are assessed properly and in driving any corrective action.

Culture must be well-defined and interrelate with the organisation's strategy, structure and governance. While each organisation is unique and will thus have its own values and priorities, you will need to be involved in implementing and refining sturdy compliance programs, ensuring staff are aware of their obligations under the program, and board and senior management are well across and embedded in the implementation of such programs.

The path ahead might not be an easy one but by applying these five steps you can move forward in the right direction and facilitate a strong corporate culture, good governance and compliance.

Anthony Ursino

With over 10 years of legal industry experience, Anthony has extensive experience in corporate governance, compliance and the law. As Senior Legal Counsel & Chief Compliance Officer at Pro-invest Group, Anthony guides the implementation of internal governance policies, compliance programs and other corporate culture initiatives.

Yvonne Nehme

With prior exposure to corporate governance, compliance and financial services law, Yvonne is presently Legal Compliance Manager at Pro-invest Group. Yvonne completed both undergraduate and postgraduate studies in Business and Law at the University of Technology Sydney.

IS GENERAL DATA PROTECTION REGULATION (GDPR) COMPLIANCE ENOUGH FOR ENTITIES OPERATING IN ASIA?

The European Union GDPR, which came into effect in May 2018, is widely considered the most comprehensive data protection law in the world. Many businesses treat GDPR as an international standard and assume that as long as they comply with it, they will satisfy all other international requirements as well. While it is generally true that GDPR constitutes the most wide-ranging data handling regulation to date, it does not necessarily set the highest bar in all areas. In particular, Asia's data protection policies differ from GDPR in a few key areas. A business that fails to account for these differences may fully comply with GDPR and still run afoul of Asia's laws, subjecting itself to the possibility of fines, penalties or other legal actions.

Under GDPR, the transfer of data between international jurisdictions that are not in the European Economic Area, or not deemed to have an adequate level of protection, trigger certain requirements such as using model contract clauses, binding corporate rules, an approved code of conduct or other approved mechanisms pursuant to GDPR. Many countries in the Asia-Pacific region, including Australia, India, Malaysia, Japan, the Philippines, Singapore and South Korea, also restrict cross-border transfers of personal information overseas, unless the recipient is located in a country that provides adequate protection of personal information.

'Adequate protection' usually means the overseas recipient is located in a 'whitelisted' country recognised by data protection authorities (DPAs) and a contract with the recipient and/or consent from the data subjects is required to transfer personal data outside the country. For example, the Australia Privacy Principles (APP) require entities disclosing the personal data of Australians to take 'reasonable steps' to ensure adequate protection, which usually means obtaining an enforceable contractual commitment from the overseas recipient that it will handle personal information in accordance with the APP.

Singapore takes a similar approach and prohibits any data transfer outside Singapore, unless an organisation has taken appropriate steps to ensure that the recipient will be bound by legally enforceable obligations to protect the personal data under standards comparable to the *Personal Data Protection Act* (PDPA). Such legally enforceable obligations would include any applicable laws of the country to which the personal data is transferred to, contractual obligations or binding corporate rules for intra-company transfers.

Most of the DPAs in the Asia-Pacific region have not yet issued a list of the 'whitelisted' countries that they believe provide adequate protection. Therefore, organisations operating in these countries are left to assume that all countries are deemed to be inadequate and must establish approved mechanisms to satisfy the rules.

Multinational conglomerates, including Apple and Cisco, have chosen to voluntarily certify with the Cross-Border Privacy Rules (CBPR) system to transfer personal data among Asia-Pacific Economic Cooperation (APEC) economies. There are currently eight participating APEC economies: the United States, Mexico, Japan, Canada, Singapore, South Korea, Australia and Taiwan. To obtain a certification from the CBPR, organisations must develop their own privacy policies governing their cross-border data transfer practices and submit their privacy policies for evaluation by an APEC recognised accountability agent. Their internal privacy policies must meet or exceed the standards under the APEC Privacy Framework.

Two institutions are recognised as qualified accountability agents: TRUSTe and the Japan Institute for Promotion of Digital Economy and Community. If an accountability agent determines that an organisation is in compliance, then that enterprise will be certified as being CBPR-compliant and identified on the CBPR website. As of 4 March 2019, there were 26 organisations listed as APEC CBPR certified.

Data storage and localisation requirements

A recent trend is emerging where some countries are requiring certain data to be stored within a country's own borders. GDPR does not have any data storage or localisation requirements; however, several Asian countries do. These countries include China, Indonesia, Vietnam, South Korea and Malaysia. Data localisation rules pose specific challenges for companies operating in these jurisdictions.

For example, the newly passed Chinese Cybersecurity Law requires 'critical and personal information' collected from China 'in critical industries' to be stored within the territory of China. Although China has not yet provided guidance on the data localisation requirement, companies have interpreted it to essentially require an entity to hold an updated copy of each Chinese citizen's personal data in China. Additionally, China also requires localisation of data servers by any insurance institution processing the personal data of Chinese citizens.

Similarly, Indonesia's draft regulation for internet audio, video or other media service providers requires an offshore entity to have a physical presence in Indonesia. Further, Indonesia requires electronic system operators that provide public services to have data centres and disaster recovery centres in Indonesia as part of a business continuity plan. South Korea does not have broad data localisation requirements;

however, it requires specific data to stay within its borders. For example, local mapping data is restricted from being exported to foreign companies that do not operate domestic data servers.

Companies operating in these countries should remain aware of applicable data localisation laws to assess the potential impact on their businesses. One practical solution to comply with these data localisation rules is to host at least one data centre in the local country, storing restricted personal data in local data centres. Another solution is to make arrangements with cloud service providers to store data locally.

In China, multinational technology giants such as AirBnB, Uber, Evernote, LinkedIn, Amazon and Apple started storing data for its Chinese users on domestic Chinese servers well before the official implementation of the Chinese Cybersecurity Law. Compared to storing data in cloud-based offshore platforms, this solution comes with substantial increased costs, including expenses associated with setting up a local infrastructure and hiring employees. Obviously, these expenses must be taken into consideration when designing a compliance strategy.

Review of sectorial laws

One of the key benefits of the GDPR is that, for the most part, it harmonises and standardises data protection laws across the European Union. There are a few key areas in which member states depart from GDPR to adopt their own national laws (i.e. privacy issues related to employment law). Most Asian countries do not have an all-encompassing law that covers all sectors of the economy. Thus, reviewing sector-specific laws in each country, depending on the types of data processed, is a must.

For example, in Australia, in addition to the APP, specific state and federal Acts will apply depending on the types of information processed (such as credit information, tax file numbers, healthcare identifiers or health records) and the types of activities an organisation is engaged in (e.g. communicating over telecommunication networks). India has different regulations governing the collection, use and disclosure of financial records, children's information and biometric information. In South Korea, in addition to the *Korean Data Protection Act* (which serves as the umbrella privacy law in South Korea), various subject-specific laws regulate privacy and cybersecurity in their respective sectors. These laws include the *Act on the Promotion of IT Network Use and Information Protection*, the *Use and Protection of Credit Information Act*, the *Electronic Financial Transactions Act* and the *Use and Protection of Location Information Act*.

CASE STUDY: HOW TO COMPLY WITH ARTICLE 37 OF THE CHINESE CYBERSECURITY LAW

Companies attempting to comply with article 37 of the Chinese Cybersecurity Law may choose between establishing a data centre in China or making arrangements with cloud providers that are able to retain data in China. A Chinese legal entity is usually required to take advantage of either option. For example, some companies have chosen to establish wholly-foreign owned enterprises or joint ventures with Chinese partners to make arrangements with Amazon to use its Chinese-specific cloud products, in compliance with data localisation requirements.

Data Protection Officer (DPO) requirements

According to article 37 of GDPR, public authorities, as well as entities whose core activities involve 'regular and systematic monitoring of data subjects on a large scale,' or that control or process special categories of personal data, must designate a DPO. Certain Asian countries such as Japan, South Korea, New Zealand, Singapore and the Philippines also require a DPO. For example, section 11 of Singapore's PDPA requires that an entity hire an individual or service provider that is responsible for ensuring that the entity complies with the PDPA. In addition, it is also important to remember that a DPO under the GDPR may have different responsibilities or obligations than a DPO working under a country-specific Act.

Proceed with care

For many organisations with a global footprint, compliance with GDPR does not guarantee a free pass in the Asia-Pacific region. As a starting point, organisations might consider taking the following actions:

Data mapping and inventory activities.

Organisations should conduct data mapping and inventory exercises to better understand the categories, quantity and location of personal data they collect from the Asia-Pacific region.

Determine the applicable laws for specific sectors.

For multinational companies, it is essential to identify the applicable local laws and regulations to ensure compliance with all laws and regulations in the Asia-Pacific region. A compliance officer may consider the following factors when identifying all applicable laws: What are the specific types of personal data collected? What are the processing activities? Who, and from where, is the organisation collecting personal data?

Implement mechanisms to enable cross-border data transfers.

For organisations needing to move personal data out of a country with restrictions on cross-border data transfers, implementing an appropriate mechanism to legalise such international data flow is a must.

Evaluate costs and risks for keeping data locally.

For companies operating in countries with data localisation requirements, it is important to keep in mind the increased costs of, and expenses incurred in, storing data locally.

David Chen

An experienced technology and privacy lawyer, David is currently Director of Legal (Commercial & Data Privacy and Security) at Appirio; an IT consultant offering technology and professional services to companies adopting public cloud applications. His current role follows a range of private practice and in-house positions with a focus on data privacy and emerging technology.

Hannah Ji

As a lawyer at Polsinelli, Hannah brings a deep understanding in the legal implications arising from data privacy, security and technology. She is also certified by the International Association of Privacy Professionals as a Certified Information Privacy Manager (CIPM).

LEGAL TECH

Verity White

As Legal Counsel and Automation Coach at Telstra, Verity is part of the Enterprise Customer Contracting legal team. She has a keen interest in the way legal information is designed and in helping simplify legal issues to strengthen positive relationships with customers, clients, and the community.

Find Verity on her blog
www.checklistlegal.com

SIMPLIFYING CONTRACTS FOR AUTOMATION: HOW TO MAKE A REVERSE SANDWICH CONTRACT

Automating contracts isn't just about digital signatures.

> *'Lawyers must consciously imagine contract structures that will promote full understanding of the purposes and provisions of a contract. . .'* [1]

If you want faster, easier to use, automation-ready contracts that smoothly slide through the approvals process and get signed on the bottom line sooner, you don't need a top tier law firm or expensive consultants. All you need is a bit of tenacity and an openness to digital thinking.

Document Collation

A **Reverse Sandwich Contract** may sound messy and silly but it's a fun way to encourage yourself and your team to think digitally about contracts, make contracts work harder for you (so you can focus your talents elsewhere) and take a more proactive approach to the contractual process.

A traditional sandwich has lots of boring bread on the outside and then some tasty stuff in the middle. Not terrible, but why is the traditional sandwich a problem for contracts?

As Daniel and Richard Susskind write in the Future of the Professions, 'Where there is opacity and mystification, there will be mistrust and a lack of accountability.'

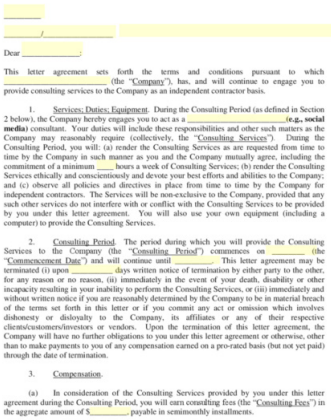
And this is exactly what we get with a traditional contract. The things that make the contract unique to each customer or situation are often hard to find and difficult to edit easily. The important terms are buried. Hidden. Just like the fillings of a traditional sandwich.

With a traditional contract:

- You have to go through the entire contract to hunt for the key terms.
- Lots of standard terms on the outside hide the key terms in the middle.
- You can't always easily see what's inside the contract.

Here's an example:

Example 1 - Consulting services Letter Agreement



Dear _____.

This letter agreement sets forth the terms and conditions pursuant to which _____ (the "Company"), has, and will continue to engage you to provide consulting services to the Company as an independent contractor basis.

1. Services; Duties; Equipment. During the Consulting Period (as defined in Section 2 below), the Company hereby engages you to act as a _____ (**e.g., social media**) consultant. Your duties will include these responsibilities and other such matters as the Company may reasonably require (collectively, the "Consulting Services"). During the Consulting Period, you will: (a) render the Consulting Services as are requested from time to time by the Company in such manner as you and the Company mutually agree, including the commitment of a minimum ____ hours a week of Consulting Services; (b) render the Consulting Services ethically and conscientiously and devote your best efforts and abilities to the Company; and (c) observe all policies and directives in place from time to time by the Company for independent contractors. The Services will be non-exclusive to the Company, provided that any such other services do not interfere with or conflict with the Consulting Services to be provided by you under this letter agreement. You will also use your own equipment (including a computer) to provide the Consulting Services.

2. Consulting Period. The period during which you will provide the Consulting Services to the Company (the "Consulting Period") commences on _____ (the "Commencement Date") and will continue until _____. This letter agreement may be terminated (i) upon _____ days written notice of termination by either party to the other, for any reason or no reason, (ii) immediately in the event of your death, disability or other incapacity resulting in your inability to perform the Consulting Services, or (iii) immediately and without written notice if you are reasonably determined by the Company to be in material breach of the terms set forth in this letter or if you commit any act or omission which involves dishonesty or disloyalty to the Company, its affiliates or any of their respective clients/customers/investors or vendors. Upon the termination of this letter agreement, the Company will have no further obligations to you under this letter agreement or otherwise, other than to make payments to you of any compensation earned on a pro-rated basis (but not yet paid) through the date of termination.

3. Compensation.

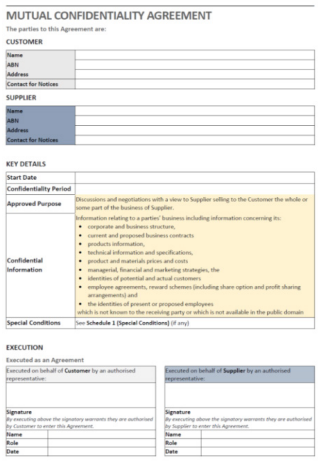
(a) In consideration of the Consulting Services provided by you under this letter agreement during the Consulting Period, you will earn consulting fees (the "Consulting Fees") in the aggregate amount of $_____, payable in semimonthly installments.

- Document is poorly formatted. "Headings" make things more confusing rather than helping to find information fast.
- Difficult to see names of people or companies involved.
- The type of agreement is hidden in the first paragraph, there's no agreement heading or subject line.
- Key obligations (such as the number of hours of work each week) are buried among other terms.
- Key information squashed together in a confusing way. It's not easy to extract the information at a glance. Here we see *Consulting Period, Commencement Date* and *number of days notice needed to terminate* are all squashed in.
- Inconsistent titles and confusing language. Why is this section called *Compensation* when it refers to *Consulting Fees*? What is "semimonthly"?

To make our contract documents and processes easy to ready, easy to use and ready for automation, we reverse the contract sandwich.

With a reversed sandwich, you can see what you're eating before you bite into it. The same goes for a Reverse Sandwich Contract: you can see what you are getting before you take a (contractual) bite.

Here's a basic example that's ready for automation:



MUTUAL CONFIDENTIALITY AGREEMENT

The parties to this Agreement are:

CUSTOMER

Name	
ABN	
Address	
Contact for Notices	

SUPPLIER

Name	
ABN	
Address	
Contact for Notices	

KEY DETAILS

Start Date	
Confidentiality Period	
Approved Purpose	Discussions and negotiations with a view to Supplier selling to the Customer the whole or some part of the business of Supplier.
Confidential Information	Information relating to a parties' business including information concerning its: • corporate and business structure, • current and proposed business contracts • products information, • technical information and specifications, • product and materials prices and costs • managerial, financial and marketing strategies, the • identities of potential and actual customers • employee agreements, reward schemes (including share option and profit sharing arrangements) and • the identities of present or proposed employees which is not known to the receiving party or which is not available in the public domain
Special Conditions	See **Schedule 1 (Special Conditions)** (if any)

EXECUTION

Executed as an Agreement

Executed on behalf of **Customer** by an authorised representative:	Executed on behalf of **Supplier** by an authorised representative:
Signature *By executing above the signatory warrants they are authorised by Customer to enter this Agreement.*	Signature *By executing above the signatory warrants they are authorised by Supplier to enter this Agreement.*
Name	Name
Role	Role
Date	Date

- The title and type of agreement is clear.
- It's easy to see who is agreeing to the contract & how to contact them.
- This section is called KEY DETAILS, so we know where the important info lives. It's the best place to find answers for most questions about this contract.

  This is where we put information that changes from contract to contract (e.g. the Approved Purpose might change depending on what is being discussed. It's easy to update quickly and also see what is being agreed to.
- Signatures are easy to find. This means we can see easily & instantly:
  - whether the contract is signed:
  - who signed it: and
  - when it was signed.

The ultimate aim of a **productive contract** is:

- Business terms and key information that the contract users need to know, which often change, are at the front **(Key Details Table)** and back **(Schedule)**.
- Standardised stuff that doesn't change is in the middle **(Standard Terms)**.

Footnotes

1. Thomas Barton, Helena Haapio, and Tatiana Borisova, 'Flexibility and Stability in Contracts' © (2014) Retrieved via ulapland.fi/loader.aspx?id=5a80d6cd-83dd-4126-bb16-a069b85533d2, accessed 10 June 2017.

RESPONDING TO CHANGES IN MODERN SLAVERY LEGISLATION

Australia's Modern Slavery Act 2018 (Cth)[1] is part of a broader global trend of new or impending legislation requiring companies to address human rights risks. Similar legislation has also been passed at the state level in NSW.[2]

However, the repercussions extend well beyond Australia. International suppliers, contractors and consultants working with Australian business partners need to be aware of the Act's new reporting requirements and must be prepared to respond accordingly. Meanwhile, other Western jurisdictions are monitoring Australia's experience with a view to enhancing their own modern slavery laws.

International companies will need to monitor new human rights legislation in countries where they have important business relationships, not just in their home jurisdictions. At the same time, going beyond the details of individual laws, firms should be ready for a process of continuous improvement in human rights standards in supply chains. This process starts with enhanced risk assessment.

An incremental approach to a global challenge

The term 'modern slavery' includes issues such as child labour, forced labour, debt bondage, human trafficking and involuntary servitude.[3] Australia based its new legislation on the *UK Modern Slavery Act 2015*. However, the Australian regulation goes one step further.

The key principle behind both laws is that compulsory reporting is an essential first step; it does not in itself end human rights abuses in supply chains. However, the reporting requirement makes it easier to hold companies accountable if they fail to develop strategies to address these issues. A combination of market pressure, non-governmental organisation (NGO) scrutiny and—in due course—tighter regulatory requirements will gradually lead to innovative solutions and higher standards.

There was broad bipartisan support for the Act in both houses of the Australian Parliament. The new law will be reviewed in 2021 and may well become stricter.

Key provisions of the Australian law

The Australian *Modern Slavery Act* applies to large companies, with consolidated revenue of more than AUD 100 million,[4] that are Australian owned or operating in Australia. The law requires these companies (estimated by the Department of Home Affairs to number more than 3,000[5]) to publish, within six months of year-end, annual statements explaining their actions to identify, mitigate and address the risks of modern slavery in their operations and supply chains.[6]

The first Australian reporting period will be 1 July 2019 to 30 June 2020, with statements due by 31 December 2020. The period will, however, be assessed on a company's financial year-end (the most typical variants being 31 March and 31 December).

Within six months of the end of their financial year, each company will be required to issue an annual report explaining what steps they have taken to address modern slavery risks in their supply chains, including risk assessment and remediation processes. The report must be approved by the company's board and signed by a director. The same requirements apply to Australian Commonwealth (Federal Government) corporate entities with revenues of more than AUD 100 million. Companies must publish the reports on their websites and in a public registry that will be accessible online, which will make it easier to monitor corporate compliance.

The Department of Home Affairs is setting up a Modern Slavery Business Engagement Unit to advise businesses on compliance. There is no formal penalty for failure to comply, but the minister may request non-reporting companies to provide a written explanation. If they fail to respond, he may publish information about their failure on the official registry. Failure to report could therefore have significant reputational impacts.

Future tightening of the UK law?

Meanwhile, the UK is reviewing its human rights legislation and drawing lessons from Australia.

In UK policymaking circles, there is general consensus that the *Modern Slavery Act* marks a major advance. However, human rights NGOs have criticised it for not being tough enough. For example, there is no penalty for companies that fail to comply with the Act's reporting provisions.

In response to such criticisms, the government in July 2018 commissioned three parliamentarians to conduct an independent review of the law. The independent review team published their final report in May 2019 and this refers to Australia's new law in several places.[7] Among other measures, the reviewers recommend that the UK follow Australia's example by introducing a central government-run repository where companies are required to upload their statements, which should be easily accessible to the public and free of charge. Similar to Australia, the UK should apply the provisions of anti-slavery legislation to the public sector. At the same time, the government should introduce tighter guidance on the reporting requirements for companies. Penalties for failure to comply should include fines and disqualification of company directors.

The distractions of the current Brexit debate mean it may be some time before the UK Parliament devotes its full attention to the proposed amendments; however, the existing law has broad support across the political spectrum and the overall direction of British policy is clear.

Wider international trends

The Australian and UK laws are part of an expanding list of new or potential future legislation that requires certain types of companies to conduct due diligence of human rights.

Existing statutes include the French Corporate Duty of Vigilance Law, which was passed in 2017. The law requires large companies to establish a 'vigilance plan' to address the risk of serious violations of human rights and fundamental freedoms in their supply chains. As part of this plan, they should prepare a risk map (*cartographie de risques*) that extends to subsidiaries, sub-contractors and suppliers. Based on this exercise, they are required to draw up a risk mitigation plan. A summary of the plan must be published in their annual management reports.

How should companies respond?

The general trend towards tighter regulation is clear; however, it will take time for the full impact of the new laws to take effect. Companies therefore have time to develop incremental responses, drawing on the lessons of existing programmes for anti-corruption due diligence for third parties.

Both the Australian and UK laws require a board member to sign off on annual modern slavery reports and this reinforces the need for senior management to take responsibility for their companies' implementation plans.

To properly identify and assess modern slavery risks in a company's operations and supply chain, it will be vital for legal counsel to be involved and engage with various parts of the organisation. These various business functions will be required to adequately map out the organisation's broad operations and supply chain structure.

The first step is to map out supply chains to assess the areas with the highest risk and greatest potential impacts on rights holders. The legal team will play a key role; however, risk assessment requires active participation from a range of stakeholders across the business, including human resources, finance, procurement, sourcing, risk, sustainability, major projects and senior leadership.

As with anti-corruption, country risk assessment is important. At the same time, companies need to look out for high risk sectors, for example those that employ large numbers of low-skilled or migrant labourers. Such risks may apply in, for example, office cleaning services or agriculture, even in otherwise advanced economies. The widely cited Global Slavery Index 2018 estimates as many as 15,000 victims live in conditions of modern slavery in Australia.

As is the case with anti-corruption programmes, companies also need well-drafted human rights policies and training programmes. Companies will need to tailor both to the specific risks they face and the demands of individual teams.

The complexities of international supply chains may mean it is impossible to eliminate human rights risks entirely. However, laws that are either pending or already in place send a clear signal. At a minimum, international companies need to demonstrate they have assessed supply chain risks and have a considered programme to address them. If they have not already started, they should do so now.

Footnotes

1. https://www.legislation.gov.au/Details/C2018A00153
2. *The Modern Slavery Act 2018* No 30 (NSW) was passed in 2018 but has yet to come into effect.
3. The Australian regime criminalises these types of conduct at federal (Divisions 270 and 271 of the Commonwealth Criminal Code) and state levels (for example various sections of the Crimes Act 1900 in NSW).
4. The NSW legislation will apply to companies with annual consolidated revenue of AUD 50 million.
5. Australian Government, Department of Home Affairs, *Modern Slavery Act 2018*, Draft Guidance for Reporting Entities
6. Statements will be published by the minister on a public register, which will be freely accessible to the public.
7. *Independent Review of the Modern Slavery Act 2015: Final Report.* Presented to Parliament in May 2019.

John Bray

A risk consultant and policy specialist with more than 30 years' experience in Asia, Europe and Africa, John's particular areas of expertise include: anti-corruption strategies for the private sector; business and human rights; and private sector policy issues in conflict-affected areas.

Mark Pulvirenti

As the head of Control Risks' Forensics and Technology practice for Southern Asia and Oceania, Mark has extensive international experience in anti-fraud and corruption advisory and investigation matters. He is a chartered and certified forensic accountant with case management experience in more than 25 countries across Asia Pacific, Europe and the Americas.

INTERVIEW

EMMA YIM Managing Counsel, LOD Legal

In May this year, LOD announced its acquisition of lexvoco, further positioning itself as one of the world's largest and fastest growing innovative legal services businesses. lexvoco built an impressive track record of helping in-house counsel succeed by delivering innovative legal operations and legal-tech solutions as well as providing law firm services and in bringing that expertise to LOD, they are creating further value and solutions for the lawyers and clients of both firms.

Australian Corporate Lawyer **caught up with Emma Yim, Managing Counsel, LOD Legal, to discuss the LOD + lexvoco deal, NewLaw vs BigLaw, LOD Legal and how GCs can benefit from working with NewLaw providers.**

ACL: First of all, tell us about what has been happening since the LOD + lexvoco deal?

It has been a busy time as we integrate our complementary businesses but thankfully our cultures are very similar, so the transition has been very smooth. There is a palpable sense of excitement within the bigger and brighter LOD about the new possibilities created by LOD and lexvoco joining forces. We are now able to service clients with a specifically tailored solution involving a combination of one or more of the following services: Law Firm (**LOD Legal**); Legal Operations and Technology (**LOD Innovation**); Secondments and flexible lawyers; Risk & Compliance and Managed Services, with many clients already drawing upon at least two types of the services offered. For example, after providing a client with a short term secondee, the client requested that LOD Legal become its external legal advisor. At the same time, the client asked for more secondees.

Another example - in talking with a client about a resourcing need, the conversation moved to the processes they have put in place to streamline their operations and how LOD can assist with the next phase of their project, automation. LOD is now working with them to automate their contracting processes in full.

GCs and in-house teams are looking for support in transforming their business and with LOD and lexvoco coming together we are perfectly placed to support their transformation agenda. It really is an exciting time for us and for the legal market.

ACL: What is the difference between NewLaw and BigLaw from your perspective?

For me, the key difference between BigLaw and NewLaw is that NewLaw can provide solutions that go far beyond providing just legal advice. BigLaw continues to focus on

legal expertise with some tech solutions, especially in the context of litigation and due diligence. In contrast, the most sophisticated NewLaw providers today can offer businesses and in-house teams holistic solutions drawing upon a wide range of services as mentioned previously in relation to LOD. In this sense, there are probably more similarities between sophisticated NewLaw providers and the Big 4 professional services firms (though not in size!) than NewLaw and BigLaw.

Another major difference between BigLaw and NewLaw is culture. Founders and leaders of NewLaw are generally opportunistic, commercial, agile and passionate about technology and new ways of doing things. This is probably reflective of their not so distant start-up phase but is also the product of their understanding of where the market is heading. They place strong emphasis on culture and foster an environment where junior professionals are encouraged and empowered by sharing of information and expert knowledge often across the different service lines. Every type of expertise is respected not just legal expertise and collaboration rather than competition is rewarded.

This culture not only helps attract top talent but also helps NewLaw professionals to seamlessly adapt to what I personally call the "New Economy" – tech-enabled, tech- driven or tech-friendly businesses. For example, you will find that a typical LOD Legal lawyer is not alarmed at having to work within a G Suite environment or use Okta, Trello, Slack etc and is generally quite tech-savvy for a lawyer! As for LOD Innovation professionals, many of them are "tech natives" and have both legal and tech qualifications. NewLaw is uniquely positioned to service the New Economy which is obviously a very important and growing sector.

ACL: Tell us a little about LOD Legal and how it differs to BigLaw?

LOD Legal is the law firm arm of LOD currently only available in the lexvoco footprint - Australia and New Zealand - but with LOD, we have global ambitions. LOD Legal provides legal services to clients in a more commercial and cost-effective way. How do we do that? The key differentiator is that the LOD Legal lawyers have considerable in-house experience as well as top tier private practice experience. This means that we are used to assessing and managing legal risk in real business settings. We understand that businesses make money by assuming manageable risks, not avoiding them. We are also used to dealing with different stakeholders within a business and are frequently trusted by GCs to deal directly with business managers because LOD Legal understands what the business wants - fit for purpose advice.

LOD Legal is more flexible in that it is willing to tailor the service delivery model to the needs of clients. For example, LOD Legal offers not only the traditional time-based legal advice but also monthly retainers, fixed quotes, outsourced general counsel services and remote quasi-secondment work. It is about working with the client to see what works best for them. Sometimes this might mean that another LOD service is what would really solve the client's issues in which case LOD Legal will recommend that. So, we are not just about fit for purpose advice but also about fit for purpose service!

Finally, LOD Legal focuses on the following practice areas: Corporate, Commercial, Financial Services, Banking & Finance, Sports and Media, Employment, Litigation, Property & Construction, IT and Intellectual Property. We specialise in these areas and have a great team of lawyers to deliver legal advice and solutions to clients. We attract top talent because we can offer lawyers the chance to work as a true extension of our clients' teams, give them the ability to give pragmatic advice and the opportunity to work flexibly and remotely if they choose to. It really is a case of win/win for the client and lawyer.

ACL: How has NewLaw impacted the role of GC?

GCs are now more influenced by Board priorities and achieving shareholder value than they are by their loyalty to a BigLaw firm which traditionally has been an automatic choice. Many GCs are being forced to undergo a "transformation", i.e. find ways to reduce legal spend while still delivering quality legal services. So, they are re-shaping their teams to drive efficiencies, measure success and use tech and outsourcing to find new ways of delivering value to their business – all on a tighter budget.

At LOD we are in a unique position to see this GC evolution firsthand, working with legal teams across 500+ organisations globally. As the new look GC transitions into becoming a "strategic advisor", there has been a shift in modern legal panels incorporating more than BigLaw firms. LOD and other NewLaw providers (including secondment firms, project managers, regulatory compliance and training providers, legal technology solution and, legal process outsourcers) are now on legal panels of large organisations.

I think that once time poor GCs know where to look in terms of support, it is more likely that they will be able to provide their organisations with the legal, strategic and cost-effective solutions that are being demanded. We at LOD are listening to what our clients need and have established our business models and structured our fees accordingly.

Emma Yim

Having held previous roles at Clayton Utz, Allens, Babcock & Brown, CapitaLegal, Emma boasts 15 plus years of legal experience. Since joining LOD she has completed secondments at Allianz, Xero and the Domain Group and now as Managing Counsel, she works across LOD's Financial Services, Corporate & Commercial and Banking and Finance practice areas.

ACC GLOBAL UPDATE

ACC and The Prince's Accounting for Sustainability Project Collaborate to Inspire General Counsel to Act on Environmental, Social and Governance (ESG) Missions

His Royal Highness The Prince of Wales contributed to the ACC Global General Counsel (GC) Summit, held in London in May, by delivering a video message focused on climate change. At the Summit, ACC and The Prince's Accounting for Sustainability Project (A4S), a non-profit founded by HRH The Prince of Wales in 2004, announced their collaboration to advance the role of the GC in encouraging corporate initiatives that drive ESG missions forward.

A4S currently works with chief financial officers and their teams, accountants, investors, governments/regulators and academia. The cooperation between A4S and ACC recognises that the chief legal officer (CLO) can have a significant influence on the creation of sustainable business models.

Jessica Fries, Executive Chairman of A4S, said: 'We are thrilled to be working with the global in-house legal community to advance efforts around the world. ESG issues tie into the legal, regulatory and risk matters GCs handle every day, and we see the GC playing a vital role in advancing sustainable outcomes.'

According to the 2019 ACC CLO survey of more than 1,600 CLOs in 55 countries, 56% of law department leaders say their companies currently have or are developing a sustainability plan. Of those CLOs whose companies have sustainability plans, 93% say they lead, influence or contribute to these efforts. Sustainability is slightly more likely to report to the CLO (11%) than to the chief operating officer (10%) or chief financial officer (9%), although the chief executive officer is still the most common company lead for sustainability efforts (33%).

ACC and Major, Lindsey & Africa (MLA) Release 2019 Global Legal Department Benchmarking Report; ACC Announces New Advisory Service Offering with Smarter Law Solutions

ACC and MLA, the world's leading legal search firm, released the first Global Legal Department Benchmarking Report.

The report tracks standardised metrics, both financial and operational, in 508 corporate law departments, operating across 30 countries and 71 industries. These metrics quantify the most recent trends in staffing, inside and outside spend, workload, work allocation, law firm and fee structure usage, and legal technology adoption.

While the summary is free, reports that compare legal department data in the same company revenue, industry, legal staff size and company ownership structure categories are available for purchase. In addition, legal departments can commission custom reports to analyse performance relative to comparable peer groups.

2019 ACC Value Champions Announced

Corporate law departments are more frequently turning to both bespoke and ready-made digital tools; sophisticated partnerships with law firms and legal service providers; and quantifiable, long-term strategies to improve efficiency.

ACC recognised 10 law departments, together with five external partners, as 2019 ACC Value Champions. The champions range from banking to mining companies, and are based in Australia, Germany, Portugal, South Africa and the United States. Their strategic approaches have streamlined processes, increased client satisfaction, enhanced the value of legal service spending and reduced turnaround times.

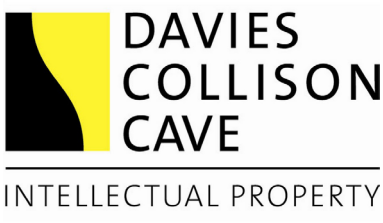
Here are the 2019 ACC Value Champions:

- AbbVie (Chicago)
- Anglo American (Johannesburg) and Exigent (London)
- Deutsche Bank (Frankfurt) and QuisLex (New York)
- Hatch (Brisbane) and lexvoco/LOD (Brisbane/Melbourne)
- MassMutual (Springfield, Mass.)
- McAfee (Santa Clara, Calif.)
- Rabo AgriFinance (RAF) (Chesterfield, Mo.) and Thompson Coburn (St. Louis)
- Sonae (Maia, Portugal)
- Telstra (Melbourne)
- Toyota Motor North America (TMNA) (Plano, Texas) and The Counsel Management Group (CMG) (New York)

Hatch's Australia-Asia legal team in collaboration with Lexvoco used design thinking to build a global, legal information platform, mapped against Hatch's project life cycle. The platform empowers clients to self-serve for routine legal issues. This has led to a decrease in the response time for document requests, from an average of one week to a few hours. The legal team also implemented key change management techniques as part of design thinking, including enhanced visual communications and training practices.

In need of greater flexibility and reduced resources, as part of a plan to simplify operations, Telstra's legal team re-imagined its operating model, moving away from a traditional business-aligned model to organising lawyers into enterprise-wide legal practice areas. To operate more efficiently, they applied Agile practices and designed an online tool, Engage Legal, to guide users to the practice area team best positioned to handle their requests. Operating costs fell 15% and demand management has dramatically improved.

ACC AUSTRALIA CORPORATE ALLIANCE PARTNERS



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