




GUIDING YOUR ORGANISATION IN SUPPORTING SOCIAL JUSTICE
WHAT SHAPE SHOULD LAWYERS BE?
CRISIS COMMUNICATIONS FOR THE COVID-19 ERA



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PRESIDENT'S REPORT



Justin Coss
National President

Just as Australians were beginning to get used to the 'new normal' and slowly easing COVID-19 restrictions, Victoria's recent spike in cases and the reassertion of certain restrictions has given us a timely reminder that we are not out of the woods yet.

I am pleased to report, however, that ACC Australia has found a new equilibrium and, as I mentioned in the last edition of this publication, we have successfully achieved the two outcomes that were our focus these past six months, namely:

- we have continued to deliver to you, our members, the core services that you have come to expect; and
- we have taken steps to ensure that the Association stays financially and operationally sound.

In addition to the ongoing CPD programs we are delivering virtually with the assistance of our Corporate Alliance Partners, I am looking forward to our National Conference which is taking place from the 16th to the 20th of November in a virtual format. The conference offers some inspirational content and highly practical sessions designed to enhance your skills as an in-house legal practitioner. Given the virtual format this year, we have seized this opportunity to spread the conference over a period of five days to allow you ultimate flexibility in the sessions you may wish to attend and thereby tailor a program specifically suited to your needs. There will also be numerous opportunities to network with your peers and our corporate sponsors, all from the comfort of, well, wherever you please!

We have also listened to our members and have deployed additional resources on mental wellbeing with the launch of our 'in-House In health' program, recognising the additional burdens that we are all facing during these difficult times in our personal and professional lives.

The socio-economic environment in which we operate remains volatile and uncertain – a situation given even more prominence by the Back Lives Matter movement that has swept the globe following yet another death in custody of the African American man, George Floyd. Australia is not immune to this kind of racism and social injustice and, as such, I am proud that ACC Australia subscribes to the ideals so eloquently and powerfully articulated in an open letter recently published by our global President and CEO, Veta Richardson. You can find the letter, along with very useful resources that will assist you and your organisation to combat racism and social injustice, on the **ACC website**.

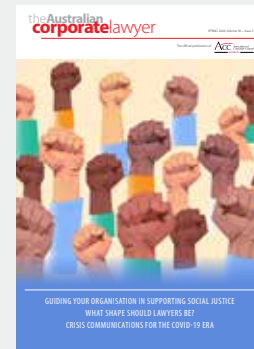
I am thrilled that ACC Australia has been able to collaborate with the National Pro Bono Centre in an initiative designed to allow In-House Lawyers to be added to the National Pro Bono Target and be covered by the Professional Indemnity Po-Bono insurance scheme.

In addition, ACC Australia has recently collaborated with the Law Council of Australia to help in the production of a concise Modern Slavery Fact Sheet designed to help in-house lawyers understand their organisations' obligations under the new law and how they can help their organisations meet these obligations. You can find the Modern Slavery fact Sheet on the Law Council of Australia website www.lawcouncil.asn.au; for additional useful resources on this topic, members can also search the dozens of Modern Slavery-related resources in the **ACC Resource Library**.

ACC is the peak global body advocating for and representing in-house counsel like you. Without your support, we cannot do the work such as I have briefly set out in this report or continue to serve the needs of the in-house profession. I hope that you will continue to support ACC by renewing your membership, encouraging your peers and colleagues to join, and building your knowledge and networks by attending our events.

Finally, I would like to acknowledge two of ACC Australia's former Board Directors, Mike Madden and Adrian Goss, who will assume the roles of Deputy Chair and Treasurer, respectively, on the ACC Global Board. Both Mike and Adrian have been great contributors to ACC Australia and will no doubt do us proud in their new roles on the Global Board starting in October.

Thank you and stay safe. **a**



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LEGAL WELLNESS

PERSONAL AND CAREER DEVELOPMENT TIPS FOR IN-HOUSE COUNSEL

During a webcast on 12 May 2020, former General Counsel, Rich Cohen shared his personal career development tips, including how he leveraged his ACC membership.

- 1 Meet, learn from, and forge friendships with global in-house counsel. Whatever your challenges may be, there is a member who has successfully navigated the issue. A great way to do this is by attending our annual **In-house Legal National Conference**, which will be held virtually this year, 16-20 November.
- 2 Find your balance by focusing on what matters most to you in work life and personal life (i.e., spending time with your family, reading that book you've always wanted to read, learning a new aspect of law that interests you, or giving back to your community). Finding balance can help you weather
- 3 Be the best in-house counsel you can be by taking your interests and experience outside the office. That can mean volunteering with a local non-profit organisation, getting involved with a reading group, or starting a meet-up with community members. Not only can you learn something new, but you can help others learn as well.
- 4 Find a group or a service that speaks to you and engage in it. Join an **ACC Network** or **eGroup**.
- 5 Be a better lawyer and community member by meeting new in-house counsel, engaging in working groups, and offering your ear and experience. One great way of doing this is by joining an **ACC forum**.
- 6 Pay it forward to lift other lawyers in the in-house counsel community by serving as a mentor. ACC Australia has developed the **Future Leaders Mentoring Program**, which you can join as either a mentor, mentee or both!
- 7 Share your knowledge, expertise, and experience by speaking at an event and/or authoring an article. For speaking roles, get in touch with programdevelopment@accglobal.com and for authoring opportunities get in touch with ACC Australia.
- 8 Engage in different sources of information or take a quick course on a new subject Register for an upcoming **ACC In-House Counsel Certification Program**, which has been specifically developed to cover the core competencies that are applied by in-house counsel.
- 9 "Live the business but love the law." While in-house counsel should learn the business and take a seat at the table when it comes to decision-making, you were hired to be the lawyer. Your job is to protect the company.
- 10 Master the business and industry that you are involved in. ACC has 19 industry-specific networks that you can join to connect with your industry peers and discuss common challenges. Join one or more of the 19 industry-specific ACC Networks [here](#).
- 11 Learn what makes your business succeed.
 - Understand and learn all about what the challenges are of the business beyond a legal perspective, including how the Human Resources department works; how budgets are created, etc.
 - Understand the big picture of your industry by asking executives what they read and allocate time each week to read those business journals.
 - Visit the **ACC Resource Library** and brush up on these relevant areas and see what other information you can find that will help you in fulfilling your duties.
- 12 Your job as an in-house lawyer is not to be the hero, but to make those who you work with the hero. Your role is to be so understanding, and so integrated, that your support allows your colleagues to succeed.
- 13 When giving business advice, you must clearly bifurcate when you're giving "business advice" and when you're giving "legal advice." Even saying something like "you're asking me for my business opinion, not my legal opinion" can clearly demarcate your role in decision-making.
- 14 Figure out what type of career you want and then pursue it through your current role. The **ACC Australia Career Centre** is a great place to start.
- 15 Don't wait for the final two-minute warning of your career to start thinking about your legacy in both your work life and personal life. How do you want to be remembered? [a](#)

ACC staff contributors



A DAY IN THE LIFE LAWRENCE LAU

Corporate Counsel, Momentum Media



Lawrence Lau

As Corporate Counsel at Momentum Media, Laurence's work focuses on data privacy, defamation, media, consumer law and contracts. He joined the legal fraternity with over 25 years of experience in operations and senior leadership roles covering finance, insurance, accountancy, marketing, information technology and digital platform development. Lawrence's broad skill base allows him to connect well with other teams in the organisation and develop effective legal and business solutions.



6.12 am Dawn, let's get up - rise and shine. I set my alarm to local day-break time. This has been a habit of mine for years. When the sun greets my city, I am ready to go all-in for the day.

7.00 am Thank you for coffee. While waiting at the coffee shop for my much-loved espresso, I switched on all my communication apps. My phone starts beeping with incoming email and messages from overnight. In my mind, I started to prioritise the matters for today, with my coffee in my hand, before I get into the office. I now have a plan of attack.

7.30 am First things first. I go through my daily checklist, something I do religiously every morning. It is a 15-minute exercise that informs me of who may be away on leave, reminds me of any scheduled requests from other departments, as well as any looming deadlines. The checklist also includes any incoming messages from my directors. When my directors reach out to me outside of our regular meetings, I know the matter is important. In the media business, we need to move quickly. Windows of opportunity can close very quickly.

9.00 am On to the important, not necessarily urgent projects.

Two of our vendor contracts are about to expire and will rollover. Given that we made them three years ago, we need to renegotiate the terms. The unfortunate situation of COVID-19 has been a catalyst for us to be proactive in working with our external vendors. Specifically, we have issued notices to terminate some of the services as we rethink how we do things in our business. For vendors who offer us distinct value, we work very closely with them. Interest based negotiation has been extremely helpful.

10.00 am Let's connect. The leadership team has a daily check-in meeting at 10:00am. We celebrate our wins and reach out for help to overcome any roadblocks. This is an efficient and effective way to raise any issues and ask for help. I take briefs right there and then. Today, there was a question about IP. General operation of the IP law could not dispose of that question, so it went onto my checklist as important, but not urgent.

10.30 am Now, let's read my email. By now, I have dealt with the strategic and important matters. My plan is set for the rest of



today. It's time to go through other messages. Whilst this may seem strange, and I may miss other equally important emails, I have already browsed through the messages that came through earlier in the morning. If there are any statutory notices or demands, I have enough time for a considered response and I can move them to my priority list. The key here is that I make time in the morning to do what is important for our business and I prioritise important tasks that will put our business in a better position tomorrow.

Today, a number of questions in relation to privacy law took me to some substantive reading of various pieces of the law and cases. During this exercise, the interaction and establishing a connection with other team members was equally rewarding.

12.15 pm Lunch break and news. Staying informed in our fast moving and changing world is not optional. I keep my channels open on the free-to-air news channels as well as social media. There was more discussion regarding the rising number of COVID-19 cases in NSW. Instinctively, I looked for and referenced the COVID-19 safe plan for our office. Very satisfied that we have a good

plan in place, I was ready for the rest of my day.

1.30 pm Great results! A vendor has come back with our amended contract. There were no further changes. This renewal has been a six-week negotiation. In this instance, our working relationship with the vendor was very strong and robust. We were very open about our interests in a platform that offers us better value given our current budget. They were able to meet our needs and build in some flexibility in the terms as well. Our discussion throughout the process, in fact, did not involve any substantive law. It was about two businesses helping each other to solve a problem. I was able to advise for a contract signatory and execution of the agreement with saving on operation cost.

2.45 pm Stay calm, and be very clear on all the facts. A question has come through from our editorial team. Reporting on stories and their facts, often, is not as straightforward as listing the key points. Our editorial teams invest a lot of time to ensure the material is informative with critical analysis to engage our audience. As corporate counsel, I worked with the editorial team in going through the source material and their authorities. Often, it would simply mean assurance that the piece does not expose our business to various risks which may result in litigation.

4.00 pm Contracts and COVID-19. Many business relationships are being put to the test in our currently very stressful economy. Businesses are finding new ways to deliver value to their customers. Whether these 'new ways' fall within the promises of the contracts signed some nine months ago are challenges many businesses face. Our Business Infrastructure Manager raised a question as to whether a refund in our favour is due. Many of us have read various opinions and operation of force majeure clauses as well as pathway to a frustrated contract. Legal principles aside,


solving a business problem with a heavy-handed legal solution may not offer you the results you are looking for. While the contract is on foot, it does not diminish or prejudice the rights and obligations of the parties involved. My role as the corporate counsel, is often to influence towards a suitable alternative to legal demands and litigation. Clearly, at the end of the day, my role is to protect the interests of our business. My advice for these matters, more often than not, is to start a conversation with the other party, and resolve with a win-win, or it may well be a 'live and let live'. Alright, many resolutions are not 'amazing', what's important here is that both parties can move forward.

5.15 pm Planning for tomorrow. Having dealt with matters in relation to IP, privacy, amending a vendor agreement, intermediary obligation in publishing, force majeure and frustrated contract, it's time to wrap up the day. There are still several unopened messages in my inbox. Whilst the subject line can be deceiving, I am quite confident my routine and processes have addressed the important projects and tasks.

5.30 pm Signing off for the day. As a legal practitioner, often, I cannot simply come off-the-grid at the end of my working day. It does mean leaving my phone on and taking calls from other team members when I am needed and I have no problem with that.

However, I do as much as I can to create some separation between work and spending time on my personal interests, such as working with other musicians and their education.

It is about taking charge of my day, though I don't always succeed. What is important in my role is to stay focused and better informed my teams and my directors of changes that impact the business.

Stay sharp, move fast! 

GUIDING YOUR ORGANISATION IN SUPPORTING SOCIAL JUSTICE ISSUES

In a time where social justice issues are attracting greater awareness, it is important to recognise how in-house counsel are uniquely positioned to guide their organisations in supporting these important issues. We have asked three ACC Australia members to share their views on how in-house and organisations more broadly, can do their part.



LORI MIDDLEHURST

**APAC Employment Law Lead,
Salesforce**

I am fortunate to be working for a company, Salesforce, that has been direct and at the forefront of promoting equality and social justice.

Salesforce transformed philanthropy with the 1-1-1 integrated philanthropy model when it started Salesforce and its foundation in 1999. Founder of the **Pledge 1%** movement, or 1-1-1 model (where the company dedicates 1% of its revenue, 1% of its product, and 1% of its employees' time to the community), Salesforce has changed the face of business philanthropy.

In addition to focusing the business on philanthropy, Salesforce values the equality of every individual at our company and in our community. The company not only practises this with its people, but also with its technology. That's why Salesforce created the Office of Equality and an Office of Ethical and Humane Use and is a signatory to the UN General Compact, a voluntary commitment to sustainable and socially responsible practises.

With that being said, in June, when George Floyd's murder touched off global protests, it was no surprise to me that our leadership reacted immediately to take steps to address the pain caused. Salesforce provided forums for our employees to express their distress and anger as well as avenues of education for those who wanted to help. Salesforce also became a leading voice in the tech sector. The result was not just a press release <https://www.salesforce.com/company/news-press/stories/2020/6/racial-equality-and-justice/>, but also a set of tangible goals and actions.

I was left thinking, "what can an in-house lawyer sitting in Sydney add?" Salesforce is very effective at making its corporate goals accessible to all employees. My challenge was to translate that into goals and concrete actions. My role is a regional one, so my focus is on Asia Pacific, including, of course, Australia. I decided that one of my local focuses could be what the company could do to promote inclusion, support and employment of Indigenous and Torres Strait Islanders. Again, I was fortunate to be able to join a group of employees who were seeking to establish a Reconciliation Action Plan (RAP). As a lawyer, my role is to look at our existing policies and practises and determine where we need

to adjust or expand them to align with the goals of our particular plan. If your company doesn't have a RAP, I'd encourage you to investigate how to create one. First, it is a great way to educate yourself on the issues that confront Indigenous Australians and Torres Strait Islanders. Second, it is an opportunity to learn about your own organisation.

To be successful, a RAP needs to reflect not only your company's values, but also your business model. Each RAP is unique to the organisation in which it is developed. So, for instance, a financial institution might have an action that connects Indigenous and Torres Strait Islander small businesses to lending sources, whereas a technology company might include actions that support STEM learning. A successful RAP requires a multi-faceted approach, starting of course with leadership support, but including engagement such as: recruiting developing internships, procurement sourcing and on-boarding Indigenous and Torres Strait Islander suppliers; marketing ensuring meetings and conferences reflect Australian origins; facilities sourcing Indigenous artwork; and lawyers in negotiating with government. Finally, as a lawyer, you have a suite of organisational and analytical skills that will assist your company's RAP team in charting a course forward that is clear and attainable.

As an employment lawyer, and as a person passionate about equality, I have always sought out opportunities to work on diversity and inclusion initiatives. This has taken different forms at different companies. However, one action that I'd advise for all in-house counsel advising on promoting equality, is to focus not just on recruiting a diverse employee population but to consider how your company can promote a life cycle of equality and inclusion. In-house counsel can encourage human resources to review all programs that involve selection between people, including promotions, merit increases, performance reviews as well international assignments and training, and mentoring opportunities. So, for instance, if you find that your diversity is great at entry level, but not so great in the C-suite, then there is something about your promotion process that likely needs inquiry. Help your clients to look under the hood of the programs offered - by helping them formulate questions that will help them get at the truth (remember that from your law school advocacy class?). Are parental leave policies rarely used by men? What are the barriers to use? Do you have a flexibility program that one team never utilises? Is that a barrier to employees with disabilities or those who have carer responsibilities joining that team? Are your training offerings on issues of social justice a 'tick the box' exercise or have you provided opportunities for employees to engage, discuss and educate themselves? Is there a significant gap between the responses of majority and minority employees when your company surveys them on workforce satisfaction?

As lawyers, we have a great opportunity to contribute to social justice. The Australian Pro Bono centre has challenged the in-house sector to commit to 20 hours of pro bono work a year. You can read about this challenge and sign up your team here <https://www.probonocentre.org.au/provide-pro-bono/target/signup-inhouse-team/>. Make sure you and your team take advantage of pro bono activities and that you share your experiences more broadly across your organisation. That will help your business understand the leadership role their lawyers can take.

Finally, if you still aren't sure where to start to build your social justice muscle, ACC Australia has a new sub-committee that is focused on gathering ideas and building a toolkit for our members to help them to do just that - watch this space.



NICK WILLETS

**Board Director (volunteer),
John Mac Foundation**

I am sitting in the comfortable reception area of a mid-tier Sydney law firm, suited and booted, waiting, with a touch of nerves, for an interview.

The two white male partners appeared out of the lift well, jaws physically dropping when they saw me. Immediately they fell into a conspiratorial whisper, presumably wrong-footed by my anglicised surname.

Less than twenty minutes later my interview was over. Barely time enough to dispense with pleasantries, let alone for a credible review of my suitability for the role.

I left deflated, scarred again by the blatant discrimination I had encountered and not for the first time.

Fortunately, in my experience at least, these situations are rare but when they do occur, they cut deep and are nearly impossible to prove.

I have been brown Black a long time and have given this issue a lot of thought over the years. Would my experiences have been different had my skin colour been lighter or darker? Yes.

Would I change anything? No. Where would the fun be in that!

The content of our character is shaped by our experiences – the test is how we react and in turn build resilience. Besides – it's good to be different.

“The content of our character is shaped by our experiences – the test is how we react and in turn build resilience. Besides – it's good to be different.”

I am the London born son of a Ghanaian father (student) and a Melbourne mother (legal secretary). They separated whilst I was still an infant due, I am told, to the cultural and financial pressures that come with the collision of different worlds and raising a young child.

My mother brought me here during the last vestiges of the White Australia Policy and seeing no future, promptly did a U-turn to England. It would be another twenty years before I reconnected with my father and thirty years and three surnames later before I returned to these shores. And from an early age I was lucky enough to have a stepfather who told me I could be whoever I wanted to be and encouraged me to do a law degree.

I mention this so you can see how my life has been shaped in no small part by the colour of my skin. This is just my story. “... the Black experience and fight for justice around the world is as varied and diverse as Black people themselves...” - Global Statement of Solidarity with Black Lives Matter.

As a person of colour you develop a sixth sense of ‘otherness’. You are not born with it, it grows over time from direct experience – the slurs, the slights, the sideways glances, the stop and searches, the spare seat, the being served second.

Well intentioned people often say, “...You probably imagined it...” or “...You’ve got a chip on your shoulder...” but believe me when I say it is very real.

You are not though expected to ‘walk in my skin’. In much the same way I cannot be female and fully understand what it is like to navigate my way through a group of vocal young men or venture down a dark alley – but I can try.

All Lives Matter

Much has been written about the murder of George Floyd and rightly so. Who was not horrified by the images that bombarded our screens? Eight minutes.

The rising prominence of the Black Lives Matter movement has shaken up the whole world. And with COVID-19 pressing the global pause button, many of us have had more time to reflect on social justice issues.

I cannot speak for Aboriginal and Torres Strait Islander peoples whose experiences are different to mine, but I think Meyne Wyatt’s outstanding monologue on Q&A powerfully sums up the frustrations of our first nations people <https://www.abc.net.au/news/2020-06-09/meyne-wyatt-delivers-powerful-monologue-on-racism/12333854>. Please watch it and watch it again.

A perennial optimist, it seems to me that real change is finally coming; police deaths in custody are being assiduously investigated, sporting clubs steeped in history are changing dubious names, statues are toppling (best not destroyed but consigned to museums in my opinion), even a well-known brand of cheese is getting a makeover.

We must collectively maintain this momentum otherwise there is a real danger that Black Lives Matter will just become an empty slogan.

I often hear “I do not see colour” or “I am colour blind” – highly commendable on one level but it is not helpful on another. It should be a given to assume we don’t like the idea of other people being treated as inferior because of the colour of their skin. You don’t get an award for that. Don’t be a passenger in this debate, be an active agent for change and part of the solution.

Get comfortable with the uncomfortable

As in-house counsel, we occupy a privileged position – we can extend long arms into every corner of our organisations. However, with that privilege comes responsibility and we can and must be instrumental in change.

It is now an undisputed fact that diversity makes for a broader, richer environment which produces more creative thinking and collaborative solutions. Not only is it a business imperative – increased profits – it is also the right thing to do. Kick over the ‘too hard’ basket that been sitting in the corner of the Executive Boardroom for so long. No more excuses.

Let’s step out of our comfort zones and start getting comfortable with having some uncomfortable conversations about race inside and outside our organisations.

Let’s review our recruitment processes – wherever practical, encourage the use of anonymised resumes and strive for diverse interview panels.

Let’s make sure our own organisations and our panel of external law firms are truly engaged with the Indigenous community – for example graduate programmes, a Reconciliation Action Plan, a fair go for suppliers.

Let’s get involved in pro bono work and NFPs – there is no shortage of worthy causes that need our skills and never more so than in this current environment.

No one is saying this is easy. It will take time. But if we all play a part, together we can make the boat go faster.

Now is my time, your time, our time to stand up, be counted and make a difference.



VERED KEISAR

**Vice President and General Counsel,
ResMed**

The recent statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia regarding allegations of sexual harassment against a former Justice is a call for action for in-house counsels.

The #MeToo movement challenges social and cultural norms and seeks to effect global change to the attitudes and laws around sexual harassment. Organisations in Australia and around the world are not spectators in the face of the #MeToo challenge, but the rate of change has been disappointingly slow.

Sexual harassment claims continue to be a catalyst for investigations into allegations spanning inappropriate to criminal behaviour. Whether a wider change for good can be achieved will depend on how the corporate world adapts to the spotlight that has been cast by #MeToo. In-house counsel are often at the centre of this challenge.

According to the Australian Human Rights Commission’s fourth national survey on sexual harassment in Australian workplaces, published in August 2018, women were more likely than men to have experienced sexual harassment at work. The 2018 National Survey revealed that almost two in five women (39%) and just

over one in four men (26%) have experienced sexual harassment in the workplace in the past five years.

The Victorian Legal Services Board and Commissioners also conducted a profession-wide study surveying more than 2,300 lawyers. According to the study, 61% of female respondents and just over one in 10 men had been sexually harassed while working in a legal workplace in Victoria. 81% of those who experienced sexual harassment did not report their most recent incident of sexual harassment.

These statistics demonstrate that organisations cannot ignore #MeToo not only in their approach to sexual harassment claims advanced by employees, but also in seeking to ensure that the organisation has the right culture to achieve its corporate goals. The statistics also raise the question of whether sexual harassment is a contributor to anxiety and work-related mental health issues that have become prevalent and increasingly are a work health and safety issue for organisations.

Under the Sex Discrimination Act 1984 (Cth), “a person sexually harasses another person if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed, or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed

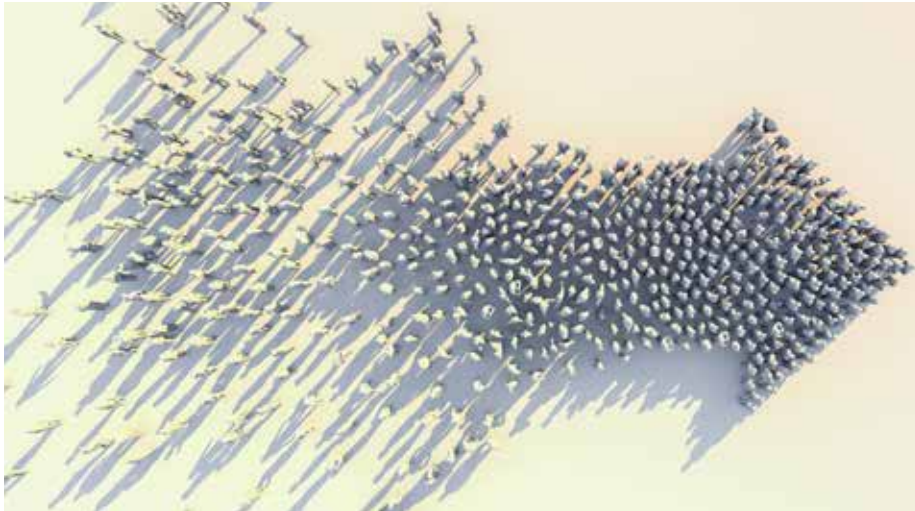
in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.”

In March 2020, the Sex Discrimination Commissioner, Kate Jenkins, published the Respect@Work report. One of the key recommendations in the report is that the Sex Discrimination Act is amended to include a positive duty requiring employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

While the law has not yet changed, the sentiment has. In-house counsel are now required to reconsider what conduct should be classified as sexual harassment. The advice of an in-house counsel is critical in determining the bounds of their organisation’s approach to sexual harassment.

Against this background, in-house counsel are uniquely positioned to play a role in enabling society to embrace the #MeToo cultural shift through their organisations. Simultaneously, they have to mitigate the risk that sexual harassment allegations could be used unfairly and create a culture of fear, avoidance, and limited personal interactions in the workplace.

In these circumstances, the in-house counsel’s role first and foremost requires courage. Courage to call out behaviours that previously may not have been classified as misconduct but are unacceptable. Courage to drive change, especially when issues are deeply ingrained, and there is a significant reputational and financial risk to the organisation. Courage to implement policies that not only deal with the conduct but also ensure a fair process for all involved. And importantly, courage to surface these issues and influence boards and senior management to act as role models and create the right culture.



“the in-house counsel’s role first and foremost requires courage.”

At a fundamental level, the #MeToo movement provides in-house counsel with an opportunity to review internal policies and practices to ensure their organisations provide a safe workplace. Organisations should ensure that employees have access to channels for reporting harassment. Non-retaliation must be a key part of policies and training, and policies should also address how the organisation deals with a complaint made in bad faith.

An organisation must be positioned to investigate complaints promptly and fairly in a methodical and consistent manner to avoid a predetermined outcome. A consistent approach is crucial to ensuring employees are treated fairly, regardless of position, seniority and contribution to the organisation.

In addition, in-house counsel must evaluate what types of allegations should be escalated to the board’s attention.

However, and less obviously, in-house counsel should also have the courage to identify that while a cultural shift is required, organisations need to go about this change in a considered manner. The consequences of judging too quickly, not following a fair process, and changing policies without considering long-term impact could unintentionally adversely impact the organisation and our society.

Many relationships that start at the workplace begin well but go astray. In some circumstances, there could be a risk that employees will use sexual harassment to exploit other employees or gain a financial advantage over the organisation.

There is also a risk that an organisation’s disproportionate fear of a sexual harassment complaint could hinder practices that are beneficial for promoting diversity, inclusion, and belonging, such as mentorship and sponsorship.

Most importantly, we ought to keep listening, keep learning and dare to be inconvenient when there are no easy answers. ^a

Lori Middlehurst



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Vered Keisar



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An original version of this article by Vered Keisar was published in the Legal Affairs section of the Australian in March 2019. It has been modified and updated for this publication.

TEAM MANAGEMENT DURING COVID-19

Remote working for a day or two a week is one thing – but how do you adjust when your team is suddenly working offsite en-masse for an unknown period? What are some ways to maintain and deepen team connection, and what positives might come from this experience?

Vicinity Centres, like many other organisations, has found itself in the eye of the storm in the months since February. We are the owner and operator of more than 60 shopping centres around the country, including centres in the CBDs of Melbourne, Sydney and Brisbane. Retail has been particularly hard-hit by COVID-19 and there has been intense political and media focus on our sector – a focus that we were not necessarily accustomed to.

My team encompasses legal, risk, compliance, safety, company secretarial and retail lease transactions; all parts of the team have been impacted in similar and different ways.

Working from home was not a stretch for us. We already had high uptake of a variety of flexible working arrangements in place across all parts of the team, which meant we were accustomed to working away from the head office, and had the technology to enable us to do so. We rapidly identified a small number of roles where working from home was not an option and accommodated these team members with case-by-case approvals to work from the office.

What was apparent from the start of working-from-home in mid-March was the need to maintain connection and a sense of team, which has always been our hallmark. We have worked hard to build a distinct culture of inclusion, professionalism and fun, and I did not want to lose that.

I started what I thought would be a couple of months of sending an email to the team at the end of each day, updating them on developments around the company, team news, what we were seeing externally, or just sharing what was happening for me during this period. I also used (and still use) these notes to encourage people to seek help if they need it, whether it be contacting our Employee Assistance Program (EAP), calling me, or speaking with their people-leader.

As the prospect of a return to the office, even on a day-a-week basis, receded, the end of day check-ins have evolved, with team members now taking turns to share their thoughts, observations on how they're managing through this time, photos of bad childhood haircuts and new puppies, and much more. I have learned things about my team that I would never have discovered while I was seeing them in the office every day. It has been funny, heart-warming and very human.

Team meetings in person were not an option so, rather than abandon them, we transitioned to online meetings. Whole-of-company Town Halls, at first on a weekly basis, and now fortnightly, have kept us updated on what is happening in other teams and, in particular, on the ground in our centres. My senior leadership team started catching up for an end-of-week debrief over a drink and being educated about hipster beer by our company secretary. And we're still holding out hope for that massive win for the Pandemic Powerballers' syndicate that we formed early on, although I have advised the team that if this happens, they cannot all resign at once.

Of course, it has not all been easy and there have definitely been challenges we have had to deal with. For some team members,

working from home is not ideal for any one of a number of reasons, whether it be a small apartment, an unreliable internet connection, the demands of home-schooling, or just the need for in-person connection with others. We have encouraged people to let us know if they need to spend time at the office for any reason and have tried to accommodate these requests wherever possible, in a safe way.

Checking-in regularly through formal surveys, with follow-up discussions to explore those issues that appear to be of concern, and regularly asking people how they're doing during catch-ups has helped us to identify what people are anxious about and how we can help them. It could be communicating in more detail about safety measures in place for when people do need to attend the office, offering extra flexibility to help manage the demands of home-schooling, or just making some suggestions about how to break the monotony of days spent in the same environment.

We have also had to implement stand-downs across parts of the team, which really brings home the human element of this pandemic. The level of care shown by our people-leaders, first in making decisions regarding stand-downs, then in the communication and follow-up with those affected, has been exemplary. Providing support to people-leaders in advance of, and following, these difficult discussions has been vital to helping them maintain equilibrium. Despite these tough discussions, our team engagement scores have actually increased to well over 80% through the period, with communication and team leadership scores that I am incredibly proud of.

At the same time, other parts of the team have experienced an increase in workload to levels well in excess of anything we have previously encountered, potentially in our careers. This is particularly due to the majority of our 7000+ tenants requiring some form of rent-relief, all of which is bespoke and all of which has to be documented.

This policy occurred against an intensely politicised backdrop and constant media scrutiny. Regulation has played catch-up, the Federal Government announcing its high-level *SME Commercial Code of Conduct and Leasing Principles During COVID-19* in April, with the detail as to how that was to be implemented being left to each of the states and territories. Rent-relief discussions could not wait, so while we worked to provide input to each inevitably different piece of implementing legislation through our industry body, we also provided guidance to the business as to how they could keep progressing discussions with tenants without falling foul of legislation that we had not seen as yet, making educated guesses about what was likely to be enacted.

Manuals, process maps and pro forma documents have been created from scratch, regular education and Q&A sessions held for leasing and centre teams, and manual deal-trackers implemented as our systems are not configured for these new documents. The Risk team has assisted with process reviews and guidance on managing the risks arising from the implementation, at speed, of an almost entirely manual process that needs to handle a high volume of transactions within a short space of time.



The work that we have done over the past few years to increase the commerciality, confidence and agility of the Retail Lease Transactions team has paid off during this time. The team rapidly adjusted to the new demands being placed on them, suggesting process improvements as they worked their way through these new types of deals, and helping the centre and leasing teams to deliver clearer instructions to minimise the internal back-and-forth needed before a deal can be documented.

We have also had to think laterally about how to find back-up resources in case of further peaks in demand, illness or people just needing a well-earned break, bearing in mind that retail leasing is a very specialised area. Burn-out is a real risk given workloads and the likely duration of the pandemic. The second round of lockdowns in Victoria has shown us that there is a very real possibility that some deals will need to be done more than once.

Spending time well in advance thinking about where we will get hit, and whether existing resources (internal or external) can absorb more work, has been time well spent, as was proven when a team member needed time off to recover from an accident. A combination of internal and external secondments, cajoling a former team member out of retirement, and targeted recruitment for contract roles has so far proved successful and allowed us to keep on top of the deal flow.

The team has also been in high demand across areas such as procurement, with advice needed regarding the scaling up and down of services across the portfolio. Safety issues have required a great deal of thought, as they are vital for us to get right for our teams on the ground, retailers, their staff and customers, and have required constant and evolving input as circumstances change around the country. We have also played a role in helping to shape our communications approach across a wide range of channels, with constant media interest in all aspects of the business and a high level of customer anxiety.

Board interaction has been at an all-time high throughout this period. Understandably, our directors are keen to understand the impact of the pandemic on the business and guide the organisation's strategy and response. Weekly board meetings have placed extra demands on the company secretarial team, which intensified during our recent equity raising. Substantive and focussed agendas, timely information flows and meaningful reporting are more important than ever.

These are just a few examples as there is much more the team has been asked to do and will continue to be asked to do as we

work our way through COVID-19 responses. Despite the personal and professional challenges that we are all experiencing, there are positives. While we had good existing relationships across the business, these events have given an opportunity for the team to deepen those relationships and to become key members of decision-making and advisory groups. Collaboration has always been one of our team strengths, and this has been more vital than ever, both in the work we do across the business and in problem-solving across the different disciplines we represent.

The chance to shape the company's response to new and changing circumstances, and exposure to senior decision-makers, has allowed the team to develop in ways that are invaluable – ways which may not have been available in the absence of this crisis. We have also all had to stretch ourselves into new areas and develop new skills, and have learnt more about ourselves as individuals, leaders and as a team. This has given me a chance to take another look at the team and how they have responded in this time, seeing a number of team members really coming into their own.

While we certainly do not want COVID-19 to last any longer than it needs to, I certainly hope that the gains that we have made during this time are not lost once the crisis abates. What I am taking from this is, never to underestimate the power of regular, open communication, even when it feels like you're saying the same thing over and over again. And, that investing in your team, getting to know them, and building trust and the right culture, will pay off time and time again when it really matters. ^a

Carolyn Reynolds



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LEGAL ETHICS AND AI

Legal ethics will continue to be challenged by the continuing rapid advance of artificial intelligence. Moral and human judgment will always be needed by lawyers when faced with questions about their ethical obligations in legal practice. This cannot be replaced by artificial intelligence.

In Henry VI, William Shakespeare's character Dick the Butcher says: "The first thing we do, let's kill all the lawyers." Whilst originally meant to be complimentary of honest lawyers in the context of Dick plotting treason to install a new English monarch, ever since the 1600s the world has regarded the words as a worthy pursuit for wider society, especially in the USA. In recent times, there has been much written about the possible role for Artificial Intelligence (AI) in the practice of law and the administration of justice. There is much to commend this approach from an efficiency and cost-saving viewpoint, but it does have some significant limitations, especially in the area of lawyers' ethics, including their paramount duty to the court and administration of justice, which attaches to all lawyers including in-house counsel.

History of AI and the law

The use of AI in the law in Australia really came of age in the early 1980s in the *Royal Commission on the Activities of Federated Ship Painters and Dockers Union*, conducted by Frank Costigan QC and assisted by Senior Counsel Douglas Meagher QC.¹

In its Final Report, Volume 1, published in October 1984, the Commission outlined the course it had taken to use AI to efficiently and effectively manage the huge amount of information and documents which it had gathered in the course of its far-reaching investigations across Australia:

"The Commission commenced its hearings in the first week of October 1980. In the first few weeks, its main task was to travel around Australia to each capital city and obtain from the Union all of its records. This exercise produced a massive number of documents. It became apparent in the first week of the Commission that the documents which would be acquired would be so large in number that no manual filing system could sensibly cope with them, and they would be impossible to analyse without the use of modern management systems..."

Since the 1980s, there have been far-reaching advances in the use of AI both in society generally and the administration of justice in particular. There is no doubt that in the 'info-world' in which we now live, the use of AI and a raft of other ever-increasing technology solutions is essential for democracy to function in a time when effective communication between governments and citizens is so essential. The rule of law is one of the basic pillars of that system of societal government.

Internationally, lawyers' ethical duties regarding technology have been explicitly outlined in professional conduct rules, imposing on lawyers an obligation to "keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."² Whilst Australian lawyers are not subject to such an imposition, the rate at which technological changes are being implemented as a result of our current climate may make this subject to change.

The present-day

Less than a year ago, a career columnist and former general counsel in the United States, Elizabeth A. Colombo, put AI into the context of today's world:

"When I first saw Terminator 2: Judgment Day in grade school, August 29, 1997 seemed so far away. When I first heard Billy Joel's 'Miami 2017' as a child, 2017 seemed so far away. Now, 1997 and 2017 have come and gone. Thankfully, Skynet has not become self-aware, but technology is way beyond where I thought it would be by 2019..."

...2029 may feel far away right now, but all of this makes me wonder what in-house law might look like in 10 years. What will in-house law be like in an age of artificial intelligence (AI)?"²

The author went on to predict, that with AI handling simpler processes and reviews, lawyers would be freed up for more challenging jobs that require human brains, including reviewing complex contracts, managing strategic planning, handling multifaceted legal matters, developing creative solutions, collaborating across departments, negotiating with external clients, applying knowledge of corporate policy to devise and implement legal strategies, and fostering tactical associations across internal business functions and hierarchies, as well as with key external stakeholders, to facilitate optimum solutions and advance corporate objectives. She opined that these complex tasks are more fulfilling than the mundane tasks that AI can perform, so a lawyer's workday will become more rewarding thanks to legal tech.

At the time this article was written in September 2019, no-one could have foreseen that within a few short months the world would find itself in the midst of a global pandemic causing widespread devastating illness, death in the hundreds of thousands, and financial chaos in the world's economies.

With the speed of light, the legal world (including in-house lawyers) has had to adapt to find new and clever ways of working in order to survive and serve their clients. The response has involved the rapid rise in lawyers, support staff, and even the courts in many instances, working from home or attending meetings, conferences, directions hearings, and mediations conducted on electronic platforms such as Zoom. There has also been increased use of technology for remotely signing and witnessing legal and business-related documents. In the midst of this maelstrom, where will legal ethics sit? This is a critical question for all lawyers, especially in-house counsel who are often regarded as the moral gatekeepers for their employer organisations.

For example, Ms Colombo addressed her view of the future of remote-working for in-house lawyers in terms which reflect the new employment world in which we find ourselves living:

"Remote work, either entirely or in part, is becoming more the norm in corporate legal departments. I anticipate the continuation of this trend and possibly an uptick in remote work possibilities for in-house legal departments.

Some companies employ an entirely remote legal department. It saves the organisation overhead, and in 2019, and certainly in 2020, productivity does not suffer. We are in an era in which work can be done anywhere by a motivated and conscientious employee.

In traditional physical employment locations, I foresee more flexible working arrangements given that technology allows for work to be done outside of the office. Look for more flexible schedules and remote work options even within a legal department located in a brick and mortar.

Additionally, technology will bring more methods for employees to communicate outside of work (for example, through texting applications and social media). Communicating using different kinds of technology will bring benefits, but could also cause problems."²

In a speech given to in-house government lawyers in the United Kingdom earlier this year, the Deputy President of the Supreme Court sounded a word of warning in the context of new technology used within the law for effectively delivering commercial results:

"In all this, ethical considerations, the interests of the consumer, and the need for privacy and data integrity will have to be balanced carefully against the potential benefits the new technology brings in terms of lowering transaction costs, broadening access to commerce, increasing market efficiency and enhancing consumer choice. It will be a most challenging task with important ramifications for the well-being of our societies in the years to come."³

AI and ethics – the future

Whatever the outcome of this growing debate, one area that will continue to resist the advance of AI in the law is the field of legal ethics. In teaching ethics to solicitors, we always make the point to our audiences, that very often there are no black and white answers to ethical questions – only lots of maybe yes, maybe no answers.

There is no doubt that much of the learning and research upon which we rely in legal ethics could be harnessed usefully in a digital format to save time and make us focus on what is relevant; however, in the end, human personal and moral judgments will need to play a significant part in the final outcome.

The former Law Council of Australia President, Morry Bailes AM, relevantly made comparisons between a human lawyer and an AI lawyer in a 2017 speech.⁴ Specifically, he emphasised that a human lawyer considers all possible options so as to avoid failure and find a solution that suits the needs of an individual client. Conversely, an AI lawyer requires failure to adapt and learn, failure which the client will likely not appreciate. This further exemplifies that the moral judgment of a human lawyer is required where an answer is not definitively black or white.

We must always remember that, as officers of the court, our paramount duty is to the court and the administration of justice. Unless and until our judges are replaced by robots, we will need to continue to apply moral judgments in fulfilling our paramount ethical and professional obligations.

Even if our judges were replaced by robots, the ethical and professional obligations owed to clients cannot simply vanish. Responsibility must be attributed for any breaches of ethical or

professional obligations to the lawyers behind the robots. We must remember that we are responsible for any AI or technology that we utilise in practice and ensure we do not over-rely on this to the extent our moral judgment ceases to exist.⁵

The last word

As much as Dick the Butcher may have wished to rid society of lawyers to further his own nefarious ends, it is doubtful that he will ever be placed in the situation where his plea will be: *"The first thing we do, let's vaporise all the robots."*⁶

Footnotes

1. Royal Commission on the Activities of Federated Ship Painters and Dockers Union, 1984. <https://www.parliament.vic.gov.au/papers/govpub/VPARL1982-85No175.pdf>
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Michael Dolan



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CRISIS COMMUNICATIONS FOR THE COVID-19 ERA

In recent years, executives have found themselves confronting a fundamental shift in the risks facing business and how to handle these risks ... then came 2020. The founding partners of MorrisBrown explore what has changed in crisis communications.

As Australia went through its worst bushfire season for many years at the start of 2020 and investors globally called for corporates to take action on environmental, social and governance (ESG) it seemed certain that 2020 would be the year of climate change and ESG more broadly. We expected to spend most of the year advising clients on how to tell a compelling story on ESG, i.e. using data to demonstrate progress and avoid any accusation of words instead of actions.

By the end of January, Australia had its first case of Coronavirus and by February it was already clear that 2020 was set to be a year unlike any other. COVID-19 entered the lexicon, as did 'lock down' as we watched other countries implement strategies to manage this new virus. By March, the fabric of our days for a major section of the working population was altered; office life, social outings and coffee catch-ups with colleagues were replaced by the home serving as both office and school, time recovered from non-existent commutes and Zoom calls.

While we adjusted to life at home, companies were suddenly facing a crisis unlike any other; one that impacted every single person globally.

For lawyers and other executives alike, adapting quickly has been imperative.

While the risks have changed, the principles of good communication remain the same

Risk management is a key feature of operating large corporations and the list of potential risks has been well-trodden: serious or fatal workplace injuries, industrial actions, supply chain issues, corruption and bribery and executive misconduct. Corporations have prepared to deal with each of these, while at the same time responding to changes in the environment in which they may be happening such as the implications of social media on the speed at which information travels and public access to information.

The risk register is always an evolving document. At the outset of 2020, the renewed (and arguably overdue) focus on ESG meant further revisions and hard thinking about the impact of the climate crisis on operations, under pressure from global investors. Then came COVID-19 and the revisions to the risk register were no longer sufficient. COVID-19 almost instantly created an entirely different environment in which to operate and dealing with communication in this environment has required a different approach.

Notwithstanding this, the principles of good communication remain the same: values matter, don't manage reputation for reputation's sake and over-communicate with your stakeholders.

Values matter: have you operationalised your values or are they just words on the page? Do you and each of your team know what living those values at work looks like day-to-day? If integrity is a corporate value, how do you behave in a way that shows this? Unless you, and each of your team, have done the work to understand how your values work in practice (for example, being able to list five of your behaviours in the workplace for each value), then it's unlikely your values have really landed within your organisation.

Values matter because they are the filter through which your organisation needs to make decisions: what do we stand for? If we take a certain action, is this consistent with our values? At a time of crisis, even more so than business as usual, values provide the anchor for how the organisation is going to operate.

The reputation trap: if you find yourself wondering about the impact of a decision on your reputation, stop. The red flag is up. Managing reputation for its own sake is never going to end well. Start over, start from the facts and be honest and upfront about failings. A good reputation is an outcome of good culture. Do the right thing and a good reputation should follow. In the short term, what appears to be good for a company's reputation may inflict lasting damage if short cuts have been taken to preserve reputation.

And the final principle: **over-communicate**. Communications professionals have consistently advised clients to tell their story or to set the agenda to avoid creating a vacuum that others will invariably fill. Social media and rolling news coverage globally have set the bar high in terms of information consumption, so it's paramount that companies set their own agenda, even before any crisis. Provide regular updates; whether or not there is material new information, don't assume your stakeholders are as close to the issue as you are, stay visible, be present and keep people updated.

In the absence of consistent and clear communication, stakeholders may create their own narrative and make decisions independently of you; employees may become anxious and concerned about their jobs. Failing to communicate adversely impacts everyone.

Another hallmark of good crisis management is getting the CEO, or executive responsible, to front the issue as soon as possible. Being present is a powerful form of communication. In the current time, it may not be feasible for an executive to fly into a crisis-hit area and so visibility needs to be evident in other ways. Over communicating on Zoom, personal calls to affected employees or stakeholders and frequent written or verbal updates will help establish that someone is present and managing the situation proactively.

Today, companies will most often find themselves needing to communicate with the market or with broader stakeholders before they have the full facts. As a company, what you say, and how you say it, lays the foundations for really good crisis management. A classic and often repeated example in cases of a corporate misdemeanour is an early announcement that cites a 'bad apple' as the cause. When it invariably emerges that there is a broader issue, the original announcement starts to look like complacency and willful ignorance. But instead of declaring an 'isolated' incident, set out the facts and what is known at this point, detail the steps you are taking to fully investigate the current situation and be clear on when you will next communicate with stakeholders.

“the principles of good communication remain the same: values matter, don't manage reputation for reputation's sake and over-communicate with your stakeholders.”

In this way, you are taking control of the situation rather than setting yourself up for a 'gotcha' moment when broader misdemeanours and/or a systemic issue is uncovered.

The nuances of Zoom

Recent communication and leadership training sessions we have run with clients have focused heavily on how to be at your best on Zoom. Understanding the nuances of eye contact and when to stare at the screen or the camera, how to stay engaged and how to listen; all this requires a bit of thought. ... it comes naturally to very few people. In this environment, most executives do not have three days to spend on a communications skills workshop with a camera set up to record them, but focused, practical training can lift performance and the quality of interaction on Zoom.

Establishing some ground rules for team and meeting engagement on Zoom will help; a shared commitment to minimise external distractions and focus on those on screen can go a long way.

Of course, it's not just Zoom skills that we have found ourselves needing this year, leadership has been tested in new ways. Without the ability to meet in person, what sort of leader are you? How do you check in with your team? And are you sure it's working for them and not just you? How do you receive honest feedback?

Internal communication is more important than ever

Corporations have asked an extraordinary amount of their people over the last few months.

With the workforce spread out and dealing with fast-moving changes, internal communications are more important than ever; both from the very top of the organisation and from team leaders and managers. How are the team holding up? What can you do to improve connectivity? As team leaders and relationship managers, what about the relationships that 1:1 Zoom calls or phone calls have with the team?

And what about the newest members of your team or those who have just joined the organisation? Without the induction process of a lively office, is there a plan in place to maintain regular contact and keep them interacting with more people and learning the organisation so they start to feel part of the team?

Social issues

As 2020 has progressed, we have seen people rise and take visible action against social and racial injustice in ways that have been heartening and passionate.

Expectations of corporates have shifted in recent years; where previously corporations were judged almost solely on financial metrics, the community has much broader expectations today. In Australia, we saw this on the marriage equality debate, on climate change and the response to the bushfires. Now the community is questioning what corporates are doing to actively address the inequalities of racism. The debate has shifted, organisations and individuals need to show how they are being anti-racist and attest to their focus and contribution to equality and inclusiveness.

As with ESG, the true test is whether you and your organisation are taking meaningful action. What do you do to support your black, Indigenous, people of colour employees (BIPOC)? Are you amplifying the voices of BIPOC employees and addressing the systemic causes of under-representation? What about your stakeholders and suppliers?

This is new territory for many corporates, but the global experience is showing that the most important step is not to be complacent. Fear of doing or saying the wrong thing is very real but acknowledging that there is much learning and change required is an important part of companies stepping forward. Having conversations with your people and revisiting your values in this context is core to developing an action plan for how your organisation can move forward and make genuine changes culturally and operationally for the benefit of your people, policies, suppliers and customers.

Conclusion

Before COVID-19, corporations were already under a much higher degree of scrutiny than ever before and the onus on companies had moved from their financial results to a broader expectation of corporate citizenship that required companies to explain how they conducted themselves, their ethics and how they fulfilled their social contract.

Now, the environment has evolved further. Companies need to keep their employees safe and motivated, their teams together in the face of a pandemic and their suppliers, clients, customers and other stakeholders engaged in their day-to-day business operations as well as their broader contribution to society, justice and equality.

Silence is not an option. Transparent and consistent communication focused on your organisational purpose is at the heart of success. Proactively taking control of your messaging and facing challenges openly will help generate the trust that companies and their legal advisers need to maintain a constructive dialogue with all stakeholders. In uncertain times, the only thing you can control is how you respond. Actively owning your response will help shape the outcomes within your control.

MorrisBrown essentials

Best practice is to have these up-to-date at any point in time:

- 1 A strong sense of your corporate values and how these work in practice
- 2 A crisis management plan: who is going to be point contact? Who will ensure limited disruption to business as usual activities? What scenarios can be planned for?
- 3 Crisis media and communications training for key executives
- 4 Relationships: have you invested in your stakeholder relationships? Have you made an effort to invest in media relationships? Have you got a track record of doing the right thing and being a good corporate citizen? [a](#)

Hayley Morris and Olivia Brown



As the principals and founders of MorrisBrown Communications, a strategic communications firm, Hayley Morris and Olivia Brown advise clients on authentic, transparent and realistic stakeholder communications. As a trusted, long-term adviser on all aspects of communications and corporate affairs, including strategic planning, communications, values and leadership training and media management, their approach is built on substance and helping organisations navigate issues with transparency and fairness.

SITTING DOWN FOR WHAT YOU BELIEVE IN

It has been a crazy time in the toilet paper world (now there's a sentence no one thought they'd ever say), but good business is about more than just making money. Businesses can (and should) play an active role in making the world a better place writes Kate Sherburn, Legal Beagle at Who Gives A Crap.

Picture this, you're at a conference and someone asks you where you work. You reply "Who Gives A Crap..."

"... Pardon?"

Despite a few people thinking me rather rude (I've learnt to reply, "a company called Who Gives A Crap"), it is incredibly exciting that more often than not, the response is "oh, I love you guys!" It's amazing to see our growth at that human level—after all, more awareness means more growth, which means more impact.

Funny name, serious business

Our founders Simon Griffiths, Danny Alexander and Jehan Ratnatunga started Who Gives A Crap when they learnt how many people don't have access to a toilet. Right now, it's 2.3 billion. To put it into perspective, more people have mobile phones than a loo. Toilets are something that we all take for granted, yet imagine what life would be like without a toilet. Not a nice thought. Without toilets to filter waste, sewage can end up in waterways. Drinking contaminated water can cause a plethora of terrible diseases, many of which can be fatal. That's why we have committed to a profit for purpose model (sometimes called a social enterprise) and donate 50% of our profits to organisations that work to provide proper sanitation to people in need. We love toilet paper, but our business is actually about something bigger than loo roll.

"To put it into perspective, more people have mobile phones than a loo."

It all comes back to toilets

We are a social enterprise, which means that in everything we do, we are driven by our mission to make sure everyone in the world has access to a toilet.

Every decision that we make comes down to whether it will support our mission to make sure no one lives without a toilet. The more successful we are and the more we grow, the more of an impact we can make. This means that our financial incentives are always aligned with our impact incentives. We've doubled in size nearly every year since our CEO first sat on a toilet for 50 hours in a cold Melbourne warehouse as part of a crowdfunding campaign (yup, he actually did this!) We hope to continue to grow as fast as possible to scale both our business and our impact. We always have our eye on the prize—toilets for everyone.

"We are a social enterprise, which means that in everything we do, we are driven by our mission to make sure everyone in the world has access to a toilet."

The law and the short of it

Like most startups, Who Gives A Crap didn't have dedicated legal support until I started 12 months ago. My role has certainly been embraced by the business, but I've also had to approach it differently to my previous roles. Working in a business that is on such a steep growth trajectory means that speed is key—legal can't be seen as a roadblock. I make sure my role is less about having to 'get legal signoff' and more about being a part of the decision-making process from the beginning.

Because everything moves so fast, a big part of the legal team's job is to assess the risks of different strategies and approaches, rather than providing the most conservative solution. What might seem 'right' from a strictly legal perspective is not always the best approach for the business to take (obviously while still making sure we aren't doing anything that we shouldn't be doing). This involves thinking out of the box and staying creative. The more innovative we are as a company, the faster we'll reach our goal: toilets for everyone. It is incredibly rewarding to see that what we are working on makes a real difference to people's lives. Most of us can't believe that this is our real job; we get to do amazing things and have fun while doing it.

"The more innovative we are as a company, the faster we'll reach our goal: toilets for everyone."

Big times for toilet paper

In March, we watched in disbelief (along with the rest of Australia) as supermarkets inexplicably started selling out of toilet paper. Our sales increased by 4x on Monday, which then spiked to 12x on Tuesday. By Wednesday morning, we had to mark our store as sold out to make sure that we still had enough stock for our subscribers.

During this craziness, we decided to close our 'hubs' and for everyone to start working from home. Being a company that began as a remote first workforce, this was less of a transition for us than for most businesses. Most of us had already worked at least partially from home, I was only going into the office one day a week. We are a relatively small team of incredibly passionate and dedicated people, who were suddenly thrust into some of the busiest times we'd ever seen. With the removal of boundaries between home and work and with many of us having our kids now at home with us as well, there was a huge potential for burn out. Therefore, our first priority was to work out a way to look after our people.

We did this in a few different ways, one of which was introducing some agenda-free Zoom chats and allowing time in meetings to chat and get that banter in that we'd been missing since working exclusively from home. Another was making sure that people were given space to take some time for themselves (and in some cases making sure that they actually took it!) We introduced Slack statuses to reflect our situation—taking the dog for a walk, taking some time for myself, homeschooling! People could feel comfortable blocking out chunks of their calendar for 'parent duty' and not only were our tiny humans welcome on Zoom calls, but there were also competitions over whose kids interrupted in the cutest way. We were all incredibly busy, but taking the pressure off all of us to be in multiple places and performing multiple roles at once meant that we could be fully present in whatever we were doing at that time. We also tried to inject fun into our catch-ups with random dress-ups appearing and experimenting with Zoom backgrounds. Despite being physically distant, these little changes brought us closer together.

We also wanted to make sure that our customers were OK during this unprecedented time. There was a lot of panic occurring during those early days and we tried to encourage kindness via our socials. We took opportunities to try new things, taking out our first newspaper ad, giving people a (somewhat scratchy) alternative to toilet paper.

While this has been a challenging time for everyone, it has been gratifying to see others embracing our message of kindness and sharing. We were overwhelmed with messages about people who were paying it forward or sharing their toilet paper rolls with friends and neighbours. One example of many was the story of someone who had advertised in a community group that they had a spare box. A district nurse took them and shared them out with her elderly patients who had been unable to buy any because of the panic buying.

When we started to get stock again, the first thing we did was brainstorm how we could make sure that the people who needed the toilet paper the most received it. Foodbank Victoria was working with the Red Cross to pack and distribute personal care hampers to those at risk, so to support their efforts we donated almost 10,000 toilet paper rolls to them. We then rolled up our sleeves to figure out how we could get toilet paper to as many people as possible on our huge waitlist—over half a million people! We repacked rolls from our 48 roll boxes into 24 roll boxes so we could get the same amount of toilet paper out to more people. We found and trained 25 freelancers in less than a week to help us respond to triple the number of customer enquiries. We also broke our inventory management software for a day. Whoops.

Share the love

A big roadblock for many organisations is that taking an active role in making the world a better place often doesn't provide an immediate benefit. It can be hard to put forward a business case when the impact won't be felt straight away. We are hoping that by taking these steps ourselves, we will provide a good example to other companies who follow in our footsteps.

We are passionate about the environment and reducing the impact that we make on it and wanted to put solar panels on our Australian warehouses. We discovered it was very difficult to get solar panels on a

building we don't own and that someone else leases. This raised curly questions not covered under existing contracts, including working out who pays for the panels, who receives the commercial benefit from it, what happens at the end of the lease and who takes responsibility for the structural integrity and maintenance. This is why most commercial buildings don't have solar panels even though the return on investment and environmental benefits are incredibly compelling. To help remove some of these barriers, we are funding the installation of the panels via a loan, which will be paid back out of the savings delivered on future energy bills. Australia is our test case, but we are hoping to roll this out at all our warehouses globally.

The good news

Because our impact is always linked to our success, we were able to make some pretty amazing donations as a result of this epic year. First, we made an emergency donation to our charity partners to assist in their high-impact emergency work. This donation helped education efforts to spread awareness and train community health volunteers, increase infection control, establish handwashing stations and distribute soap and hand sanitiser. We're proud that we could help support some of these amazing initiatives. After all, it's pretty hard to have clean hands without clean water.

More recently, we made our largest donation to date—\$5.85 million to five amazing organisations, Sanergy, WaterAid AU & US, Lwala, SHOFCO and iDE. We're so pleased to prove that a small business like ours can make such an enormous difference. Our first donation in June 2013 was \$2,500. At the time, our 'warehouse' was our CEO's dad's garage. Now it's a mind-blowing \$5.85 million (sorry, just had to say it again!). This is why we are so passionate about what we do—businesses can make a real difference. We hope that other companies take note and even copy us. Doing good can be very good for business. It's about so much more than us and it's a whole lot more than just toilet paper. 🇦🇺

“More recently, we made our largest donation to date—\$5.85 million to five amazing organisations, Sanergy, WaterAid AU & US, Lwala, SHOFCO and iDE. We're so pleased to prove that a small business like ours can make such an enormous difference.”

Kate Sherburn



As the Legal Beagle for Who Gives A Crap, Kate has arguably the best title of any lawyer in Australia. She has a background in corporate law, but embraces her creativity in a fast-paced startup environment. She is passionate about lawyers having a positive impact on the world and has recently been juggling working from home with homeschooling two children. Plus, she probably gets to use puns more at work than most people.

Kate also wants to give a massive shout out to Lori Goldman for her help in finessing this article.

THE SHAPE OF LAWYERS IN THE FUTURE – T, O OR DELTA?

Living and working as a lawyer in the US, Asia, Europe and Australia for over 30 years, my legal knowledge and skills were the foundation of my career. But, more than anything, it was a range of non-legal skills and competencies that really helped me to change the way I worked. They allowed me to make more of an impact, enjoy my work more and ultimately be more successful. I'd like to say that it was all part of a master plan, but it wasn't. It was largely opportunistic and unstructured.

I thought to myself that it doesn't need to be that way for other lawyers. So, in 2015, I decided to form AlternativelyLegal and share my experiences through a program that I initially called *Everything But The Law*. Back then, only a few people were talking about the importance for lawyers to develop, and to know how to use, non-legal skills such as process improvement, design thinking, business partnering and change management.

A lot has changed over the last five years and especially the last twelve months.

At a macro level, there has been a general recognition of the importance for all workers to develop what are often referred to as 'soft skills'.¹ Also, as the World Economic Forum's Report on the Re-skilling Revolution² highlights, there is a critical and widespread need to re-skill and up-skill to anticipate the advance of technology and adapt to new roles and ways of working. Re-skilling involves learning new skills and competencies for potential new roles and up-skilling involves learning new skills and competencies for career progression within the same role.

Does this apply to lawyers or are lawyers somehow exempt from all of this?

Many tasks that lawyers did in the past—such as legal research, document due diligence, contract review and, even, assessing the prospects of success in a dispute—can today be done, or facilitated, by technology. As Richard and Daniel Susskind point out in their book, *The Future of the Professions*,³ increasingly capable machines relentlessly encroach on tasks performed by lawyers and other professionals and, over time, no task is off limits.

Looking at this up-skilling imperative from a different angle, there have been many studies of late that confirm the critical importance for lawyers to develop non-legal skills and competencies. For example, The Foundations For Practice: The Whole Lawyer study in the US, based on surveys of over 24,000 lawyers, found that characteristics and competencies were more important than technical legal skills. As the report states, "We no longer have to wonder what lawyers need. We know what they need and they need more than we once thought. Intelligence, on its own, is not enough. Technical legal skills are not enough. They require a broader set of characteristics, professional competencies and legal skills that, when taken together, produce a whole lawyer."⁴

It is now no longer controversial to say that focusing just on your legal knowledge and technical skills might have got you where you are today, but it won't get you to where you want to be in the future. The debate now is about what specific subject areas are critical and how best to provide education, training and development in these areas.

Many universities around the world now offer various non-law elective subjects such as design thinking and technology-related topics. Others offer more comprehensive undergraduate and postgraduate courses⁵ that are typically framed around innovation or technology that include a variety of non-legal subjects.

Universities and other tertiary institutions can, and should, be a key part of the solution to this up-skilling and re-skilling challenge. However, in a world where lifelong learning is now essential and where different types of more applied training and development are required for different career paths, other organisations must also contribute.

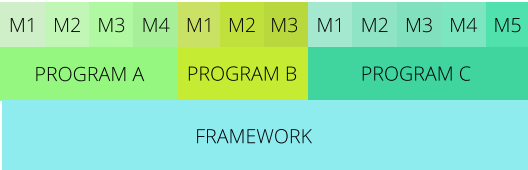
Historically, law firms have played a valuable role in continuing the development of lawyers after they graduate but that role may diminish somewhat as the focus shifts to non-legal areas and as more individuals don't work in firms as part of their career path. Firms will no doubt continue to provide legal updates, and in some cases legal training, to clients. Recently, I have even worked with a few firms to extend this training to non-legal skills.

To supplement these traditional sources of training, a range of businesses, centres and associations have emerged in recent times offering training courses on non-legal subjects in many countries. In these countries, lawyers now face a different challenge: how to choose between an ever-growing range of training offerings from an ever-growing number of organisations? My clients tell me that this challenge can be quite daunting and, given the limited time and budget available for training and development, they want to be sure they achieve maximum impact from their investment.

One problem with a lot of the training on offer is that it is largely ad hoc, focusing on one or two supposedly critical skills or an apparently random combination of skills. How can you know whether what is covered in any program is sufficient and really going to make a difference?

One solution to this problem is to develop a holistic *framework* that forms the basis of, and provides the structure for, more focused *programs* and, for each program, a series of detailed *modules* or *courses*. Ideally, frameworks targeted at the same audience - for example in-house legal teams and individual in-house lawyers - should align with, and complement, each other. That should also be the case for the individual programs and modules forming part of a framework.

A STRUCTURED APPROACH



So far, three main frameworks or models have emerged for training and development of lawyers that focus on non-legal skills: *The T-shaped Lawyer*, *The O-shaped Lawyer* and *The Delta Model*. This article will now explain each of these and highlight some key differences.

1. The T-shaped Lawyer

The vast majority of professionals, such as lawyers, engineers or accountants, are referred to as *'I-shaped'*. They typically have deep expertise in one area but little to no skills, knowledge or experience beyond that specialist domain. Lawyers, for example, have deep knowledge of, and expertise in, certain areas of the law and their training and development has historically focused on honing that knowledge and expertise. They might have undertaken some general leadership, business or soft skills training but their primary purpose has largely been to enhance their ability to do traditional legal work.

THE I-SHAPED LAWYER



As noted in a Cambridge University study,⁶ the problem with I-shaped professionals is that organisations increasingly need people to work collaboratively in cross-functional teams to innovate and problem-solve for the organisation as a whole or their customers. The study highlighted that the main obstacle for service innovation through cross-functional collaboration is a skill or knowledge gap. To address that issue, this report recommended that organisations should actively develop more T-shaped professionals throughout the organisation. This becomes especially important for the increasing number of companies that are transforming to an agile way of working but it remains important even for those that are not.

What does a T-shaped professional mean?

A T-shaped professional refers to someone who has deep domain expertise in one discipline, together with various competencies and skills and knowledge from other areas, that helps that person collaborate with specialists from different disciplines to innovate for the organisation as a whole, not just one department. However, the benefits of becoming a T-shaped professional extend well beyond enhanced collaboration to include, for example, being more adaptable and resilient.

THE T-SHAPED PROFESSIONAL

BOUNDARY CROSSING COMPETENCIES

Teamwork, Communication, Networking, Critical Thinking, Project Management

MANY DISCIPLINES

DEEP IN AT LEAST
ONE DISCIPLINE

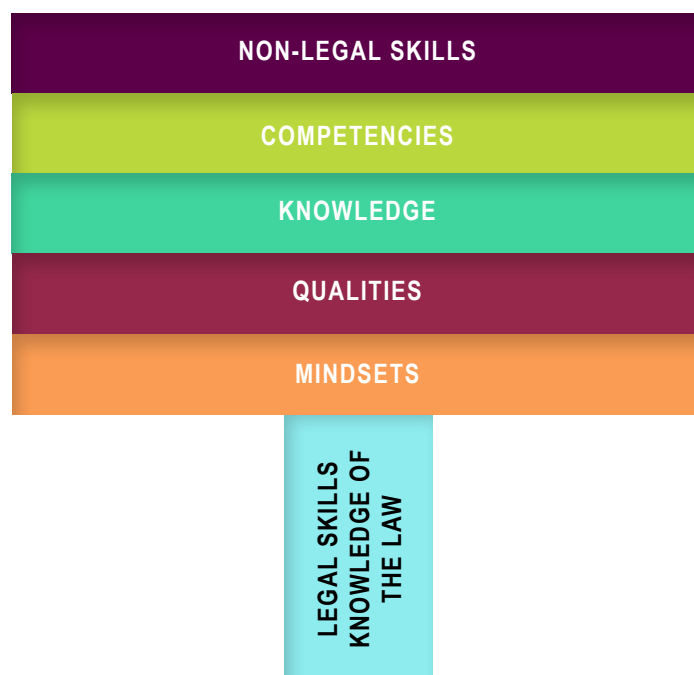
References to T-shaped professionals and skills have been around for many years.⁷ Recently, various derivatives have been suggested including the Key-shaped, X-shaped or Pi-shaped professionals. Each of these concepts has some merit. However, the T-shaped concept is by far the most widely recognised and adopted globally throughout the corporate and academic⁸ world. For example, others have taken the high-level T-shaped professional concept depicted above and applied it in more detail for T-shaped individuals, university graduates, employees, engineers, designers, accountants and IT, HR and marketing professionals.

The fact that the concept is so widely used is one of the reasons I chose to adopt it. I believe that lawyers should stop thinking of themselves as special, especially as one of the main objectives of developing non-legal skills is to collaborate with non-legal professionals. However, the main reason I decided in 2016 to use the T-shaped branding is that it provides the perfect basis for my vision and programs for transformation, not just improvement, of individual lawyers and also for legal teams and law firms.

At the same time, I wrote an article called 'The T-shaped Lawyer' that was published in various international publications.⁹ I thought that I was the first to make the connection between the T-shaped professional concept and lawyers. However, I subsequently found out that someone—R. Amani Smathers—had written an article and spoken at a conference about it a year earlier. Since then, a number of people have written or spoken about the T-shaped Lawyer.

However, as far as I know, I am the only one who has progressed from talking about it as a concept to actually developing comprehensive frameworks and programs for legal teams, law firms and individual lawyers and delivering these programs to over one thousand lawyers worldwide for the last five years. At a high level, the generic framework is as shown below.

THE T-SHAPED LAWYER FRAMEWORK™



There is a lot of detail within each layer of the framework and to explain that is beyond the scope of this article. So far, I have only shared details of the frameworks and program with my clients. But I have decided to make information about the T-shaped Lawyer Framework available more broadly in a book that I plan to publish soon. Stay tuned or get in touch if you'd like to find out more beforehand.

2. The O-shaped Lawyer

Dan Kayne, general counsel of regions, Network Rail UK recently came up with the idea of the O-shaped Lawyer to develop more well-rounded lawyers by focusing beyond technical legal skills. Late last year he assembled an impressive working group from across the legal profession in the UK and formed *The O-shaped Lawyer Program*.¹⁰ According to their website, they aim to 'show that with a greater emphasis on a more rounded approach to the formation of our lawyers, the legal profession will provide its customers with a better service in a more diverse, inclusive and healthier environment.'

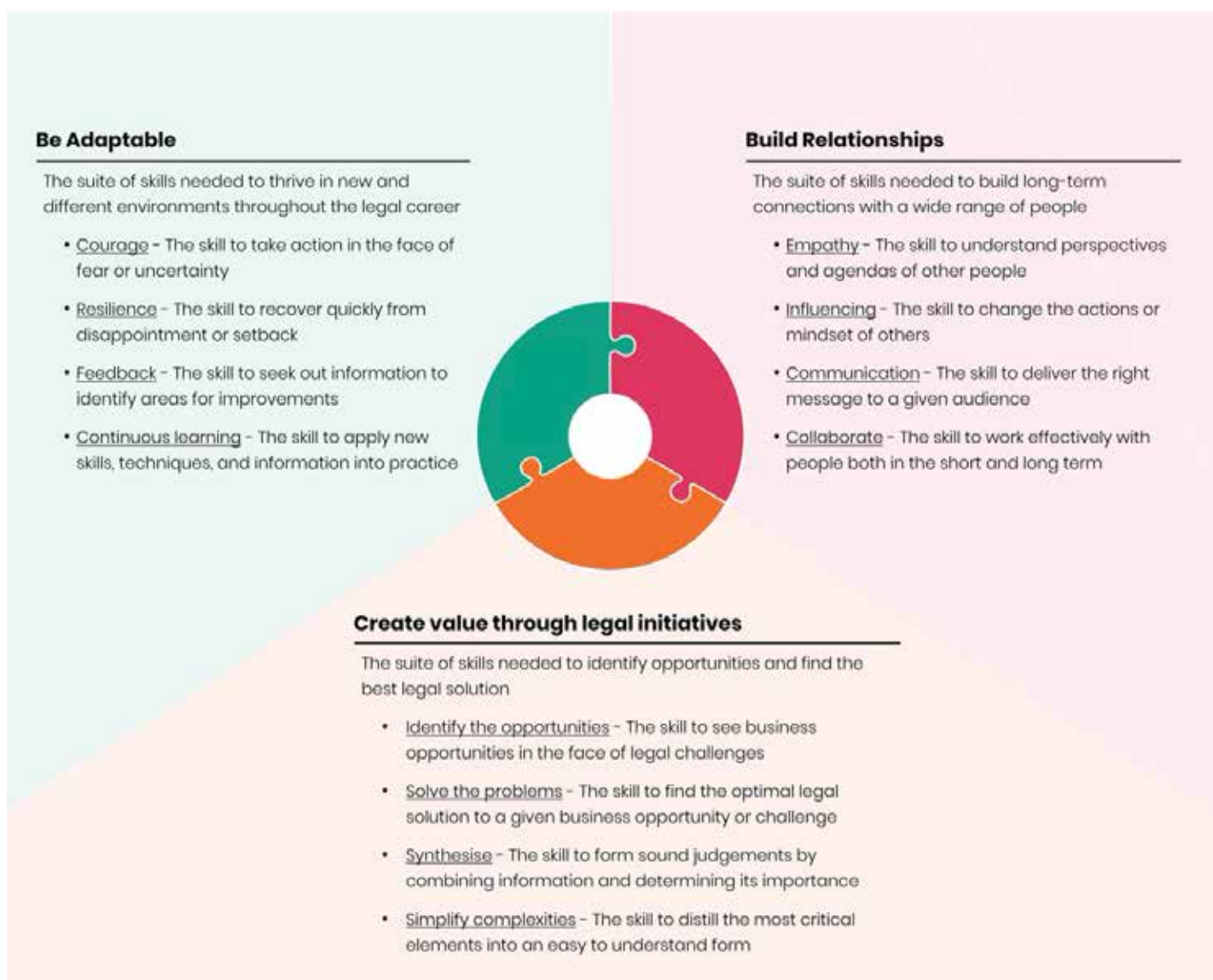
The group is seeking to have the O-shaped Lawyer Framework (see below) adopted in two main areas. First, in the early stages of a lawyer's education at university and in the new Solicitors Qualifying Exam program in the UK. Second, in the 'practise stream' specifically to adopt the O-shaped Framework in the engagement between law firms and in-house teams. As I understand it, they are currently attempting to kick start the initiative with some pilots between firms and in-house teams in the UK.

The O-shaped Lawyer Framework

The work of The O Shaped Lawyer Programme is driven by a framework of five behaviours and mind-sets which guide our actions:

- **Optimism** - Traditionally, lawyers are trained to find fault which means they are often labelled as blockers. Creating a positive mindset will allow lawyers to be seen as business partners, not business blockers.
- **Ownership** - A technical based training means lawyers provide advice and step back from the difficult business decisions. Lawyers need to be schooled in taking more accountability for outcomes.
- **Open-minded** - Lawyers need to develop an open, growth mindset. Unmitigated success in technical education leads to a defensive, fixed mindset when it comes to practising law.
- **Opportunistic** - Lawyers are trained to view things through a lens of risk avoidance. The focus on technical excellence is often at the expense of business opportunity.
- **Original** - Lawyer training is steeped in precedent and is largely backward looking. Future lawyers will need to be more creative and innovative in their approach to problem solving.

According to this framework, lawyers can develop these 'O' behaviours by having a proactive mindset, together with legal, business and customer knowledge and the skills outlined below.



3. The Delta Model

Last year, a diverse group of academics in the US¹¹ conducted some empirical studies that confirmed the critical need for lawyers to develop non-legal skills and competencies. They formed a group to devise a competency model that could be used by anyone in, or planning to enter, the legal ecosystem irrespective of whether the role is a legal or non-legal one and also irrespective of the stage of their career.

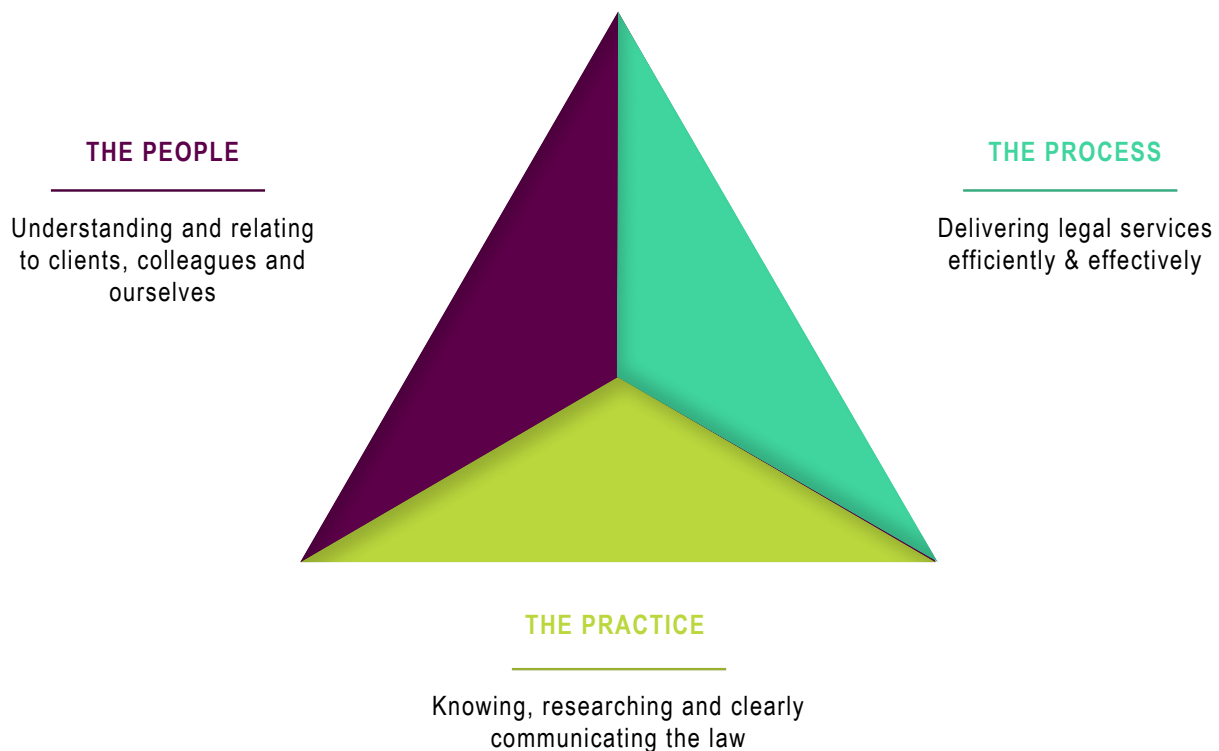
The group were attracted to the T-shaped concept, but they perceived that it lacks what they originally referred to as the *personal effectiveness dimension* and what they now call the *people dimension*. It is true that Smather's depiction of the

T-shaped Lawyer—which is what they were using as their reference point—did not highlight these so-called personal effectiveness aspects. However, these aspects are indeed covered in the general T-shaped professional concept, being explicitly referred to as *boundary crossing competencies*, and in my T-shaped Lawyer Framework.

The group decided to take the T-shaped concept and modified it into what they refer to as the Delta Model. The model has evolved through several iterations but the latest version at the time of writing this article is as shown below.

THE DELTA MODEL:

An agile competency model for the modern legal professional



Because the Model is still being developed, the details are still evolving. However, we can gain some insight into what is intended to be covered by noting that in the penultimate version of the Model, known as Version 3, the:

- practice dimension was referred to as the *Law* and was stated to include subject matter expertise, legal research, legal analysis and legal writing
- process dimension was referred to as *Business and Operations* and was stated to include business fundamentals, project management and data analytics
- people dimension was referred to as *Personal Effectiveness* and was stated to include relationship management, entrepreneurial mindset, emotional intelligence, communication and character.

Further insights into what is intended to be covered can be found on their informative and helpful site (<https://www.designyourdelta.com/>) where they refer to some specific competencies as follows:

- **People competencies** - business development, character (accountability, common sense, integrity, professionalism,

resilience, work ethic), collaboration, communication (active listening, conflict resolution, interviewing, managing change, speaking/writing persuasively), creative problem-solving, emotional intelligence (empathy, self-awareness, self-regulation), entrepreneurial mindset (adaptability, proactive problem-solving, taking initiative, strategic planning, curiosity), human-centred design, leadership, and relationship management (feedback, coaching)

- **Process competencies** - business development, business fundamentals, data analytics, data security, human-centred design, process selection/design/improvement, project management and technology
- **Practice competencies** - case analysis, case framing, issue-spotting, legal analysis, legal judgement, legal research, legal writing and subject matter expertise.

Their site also refers to the current effort to develop playbooks that they plan to make available for use by different groups within the legal industry.

So which framework is best?

Although it is obvious where my preference lies, it would be difficult at this time for you to reach a conclusion on this question because details of the programs that underly the O and Delta Frameworks are not finalised, and details of my programs are yet to be broadly publicised.

However, it is worth noting the following points of difference between the three frameworks:

- the primary aim of the T-shaped Lawyer Framework and associated programs is to offer a solution for human transformation, which has so far been overlooked in the current preoccupation with digital transformation. In other words, it outlines a comprehensive vision and means for lawyers to develop new skills, competencies, capabilities, knowledge and mindsets to truly transform what work they do and how they do it, not just improve their current way of working. It is not clear to me whether the same can be said for the other two frameworks that appear to have different purposes
- the T-shaped Lawyer Framework takes a well-known and established concept that is widely used by a range of professionals in the business world and applies it to lawyers. The other two models are being developed by lawyers or legal academics just for those working in the legal industry
- the T-shaped Lawyer Framework and associated programs have been refined, tried and tested over many years and in many countries throughout the world for in-house lawyers and in-house legal teams and I am now, in conjunction with a leading firm, in the process of developing it for lawyers working in firms. The other two frameworks and associated programs are still under development and, as far as I know, not yet tested or applied in the real world
- unlike the O and Delta Frameworks, the T-shaped Lawyer Framework was not originally designed with law students and graduates in mind, although it would be possible to develop such a version
- the O-shape is symbolic of the well-rounded person its programs are intended to produce. The three sides of the Delta Model are intended to symbolise change and the three dimensions of education and training essential for anyone working in the legal industry. The T-shape is symbolic of the specific shift that I believe lawyers need to make from narrow/legal to broad/business and from specialist to expert generalist
- the founding group of the Delta Model are high profile academics in the US, which is likely to help their efforts to have their model adopted. The O-shaped Lawyer movement has the support of some general counsels and a few law firms in the UK and that, too, will likely assist their efforts to have their model adopted. The T-shaped Lawyer Framework is not that well known other than to the legal teams and law firms around the world that have participated in my programs. That is one of the reasons why I have decided to 'open source' a lot of the information about it in my upcoming book.

Conclusion


Whatever differences there may be between the three frameworks, the one thing that they have in common is that they all emphasise the crucial need to focus training and development beyond legal knowledge and skills.

Having a framework and associated programs is important because it can convert an otherwise random grouping of theoretical courses on non-legal skills into something capable of being applied in various practical contexts more broadly and consistently. It also facilitates credentialing or certification that will eventually help to validate qualifications in this previously opaque area of professional development.

Ultimately, it is not the name of the framework that matters but rather the extent to which the framework, and the detailed programs and modules,

meet your objectives, whether that is to just learn a few more skills to be better at what you do today or to truly facilitate human transformation to complement any digital transformation programs. The other critical factor is the qualifications and experience of the person delivering the program and how well they understand and can explain the application of the theory, to your unique work situation.

In a way, it is a bit like when you look in the mirror and ask yourself are you in the best physical shape for whatever it is you want to do. Once you've decided on your objectives, you then have a choice. You can pick a few exercises that you think are going to achieve your goals and do these on your own. Alternatively, you can sign up to a program designed by a health and fitness professional. You can then do the program on your own or with the help of a personal trainer to make sure that you are doing the exercises properly and keep you focused over the long term.

For something as important as your health or career, it is crucial to be clear about your objectives and take the time to become better informed about the different options to help you achieve your objectives. This article is intended to raise your awareness of the three primary options so that you can find out more about each one and make an informed choice about what shape you'd like to become. 

Footnotes

1. See, for example, The World Economic Forum 2018 Future of Jobs Report
2. <https://www.weforum.org/press/2020/01/the-reskilling-revolution-better-skills-better-jobs-better-education-for-a-billion-people-by-2030/>
3. The Future of the Professions: Richard Susskind and Daniel Susskind, OUP Oxford 2015
4. Foundations of Practice: The Whole Lawyer study of over 24,000 lawyers in the US. <https://iaals.du.edu/publications/foundations-practice-whole-lawyer-and-character-quotient#tab=what-makes-a-good-lawyer>
5. See for example Suffolk University's Legal Innovation and Technology Certificate, University of Calgary's Legal Practice: Innovation course, <https://www.artificiallawyer.com/legal-tech-courses/> and the report compiled by Andrea Perry-Petersen on Innovation courses in Australian Universities - <http://www.andreaperrypetersen.com.au/wp-content/uploads/2018/09/Legal-Innovation-Education-Sep-2018.pdf>
6. 'Succeeding through Service Innovation' - http://www.ceri.msu.edu/wp-content/uploads/2010/06/Cambridge_T-Shaped.pdf
7. See David Guest, "The hunt is on for the Renaissance Man of computing," The Independent, September 17, 1991. The concept was popularised by Tim Brown, CEO of Ideo, when referring to the type of person his famous design studio seeks to recruit.
8. See for example T-shaped graduates such as <https://www.uow.edu.au/about/learning-teaching/academic-portfolio-update/april-2019-issue/what-will-a-uow-graduate-look-like-in-a-world-beyond-2030/> and <https://www.studyinternational.com/news/leading-law-schools-that-produce-t-shaped-graduates-with-global-talent/>
9. Peter Connor, "The T-shaped Lawyer" ACC Docket July Edition 2017. <https://www.legalbusinessworld.com/single-post/2017/12/22/The-T-Shaped-Lawyer>
10. <https://www.oshapedlawyer.com/>
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Peter Connor



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POSITIVE TEAM MEETINGS: WHY THEY ARE NOT AN OXYMORON AND HOW SMALL AND CONSISTENT PRACTICES CAN HELP YOU AND YOUR TEAM HAVE FUN AND THRIVE

Whether you are a team leader or it is your turn to lead the weekly meeting, consider introducing some of these positive practices into your agenda. While they inject some fun and curiosity into your team, they are also scientifically proven to increase wellbeing and success.

Team meetings are a (not always welcome) part of an in-house lawyer's week. They facilitate the passing on of important team and business information but can be more than ticking off agenda items while team members continue to check their emails (or their Instagram). The consistency of team meetings allows you to try out (or embed) regular practices that are scientifically proven to rewire the brain in a positive way for long-term wellbeing and team connection and, ultimately, set the team up for wider success in the organisation. Shawn Achor, one of the world's leading experts on happiness said "People who cultivate a positive mindset perform better in the face of challenge." I call this the 'happiness advantage'.¹

In-house teams are often faced with challenges—small teams stretched beyond their capacity, never-ending work, the pressure to be an expert on a wide range of topics in a short space of time and the need to pivot quickly to keep step with changing business decisions. In addition, legal teams are expected to show good judgement and creative thinking and quickly build relationships within the business. Team meetings are an opportunity to allocate an agenda item to trying out some positive practices with long-term benefits well beyond the small amount of time allocated to them.

Tanya Caldwell, Positive Psychology Practitioner and Director of *Relativity4* says that leaders make an immense difference by incorporating simple, consistent practices into their team meetings. "Leadership today is about understanding what drives human behaviour and by making small changes in our thoughts, actions and interactions, it's possible to change the activity and chemistry of the brain to increase engagement, drive performance and productivity and to facilitate creativity and fulfilment."

Three positive practices you can try out in your next meeting are gratitude, social connection and mindfulness.

1. Gratitude – the benefits of giving thanks

The Oxford English dictionary defines gratitude as "the quality or condition of being thankful; the appreciation of an inclination to return kindness." Robert A. Emmons,² describes gratitude in two stages. First, acknowledging the goodness in one's life and, second, recognising that the source of this goodness lies at least partly outside the self.

While easy to criticise this as not being valuable at work, Caldwell warns not to let the simplicity of a gratitude practice lead you to underestimate its power. "Gratitude is an essential tool in the toolkit for life – it literally changes our physiology."

Emmons' research on gratitude found that grateful people experience higher levels of positive emotions such as joy, enthusiasm, happiness and optimism. His research shows that willpower alone does not make you more grateful; the benefits come from long-term, dedicated practice. Continuously practising this skill helps people to rewire their brains to scan for things or people in their daily lives to whom they are grateful.

In a weekly meeting, it can be as simple as asking people to state what they are grateful for. In my experience, these practices have included:

being grateful to a team member

- positive emotions are increased for both the giver and receiver of the thanks.

being grateful to someone outside of the team

- this fosters an opportunity to feel connected to others in the business. This can be an opportunity to invite that person to be a part of the team meeting (even easier with current Zoom meetings!) and thank them in person. Some organisations provide teams with budgets for thank you gift vouchers for work appreciated outside of your team.

being grateful to someone (or something) outside of yourself

- this could be to identify family, friends, pets, sunshine, holidays or even the morning coffee.³ People are forced to constantly and mindfully think of something worthwhile until it becomes a habit. People who do this often start to use the same practice in their daily or home life, which expands its effect in the community.



2. Social connection – celebrating the wins or the fun of using Houseparty

Given the need to partner so closely with the business, other than the occasional work drinks, in-house lawyers often know more about their business colleagues than their team members. Including an agenda item in your meeting that is intended to increase social connection can have a positive, long-term effect on team morale, as well as improving team support and communication. Some effective strategies include:

Asking questions beyond “how are you?”

- Adam Grant⁴ and Jane Dutton⁵ suggested strategies for connecting with colleagues at work could include questions such as “what did you do this week that you loved?” or “what went well for you today?” Jane also described a Zoom meeting where people were asked to tell one story of a silver lining that happened that week. She said, “talking about silver linings acknowledges that something negative has happened, but it also touches on the positive that you’ve made of it or that you’ve understood something positive coming out of it.”

Celebrate success (even the small ones)

- as a leader, you can identify individual successes for your team in the past week or ask them to do this. This could include successfully influencing someone in the business, finishing an advice or might be a team-wide success. Tim Ferriss⁶ uses a ‘jar of awesomeness’ to savour his successes—big and small. He says, “if you only have achievement and you never appreciate the small wins, or the big wins for that matter, and they have no duration, then it is a hollow victory.” You can ask people to write down their achievements and post them on your team board (physical or virtual).

Savouring (looking back)

- his helps take a positive moment and mentally stretch it out to make it last a little longer. It can be as easy as asking people to describe a favourite holiday or experience. For the bolder, there are more structured



activities including eating a chocolate or raisin and discussing with the team what they smell, taste and even hear!

What are you looking forward to

- Shawn Achor⁷ describes a study which found that people who just thought about watching their favourite movie raised their endorphin levels by 27%. As well as asking people to look back on their favourite trips, a standing item could be to check in when people are going away. This serves a practical purpose to know where people are but can also allow people to talk about their upcoming holidays or even weekends away.

Social sessions

- don't underestimate replacing the lost drinks catch-ups with playing games on apps such as Houseparty. Half the fun is how long it takes for an intelligent group of people to work out how to log in, why someone is always in the 'lobby' and why no one knows how to start (and then stop) the games.

Finding meaning

- this is a powerful tool you may want to use on a semi-regular basis. Help your team find meaning in their day-to-day work by identifying how their work is valuable and the practical effects of their day-to-day projects and advice on the organisation, to customers or the wider community. It may also include identifying the core values of each team member and working through how they can align their work to their own sense of value and meaning.

3. Mindfulness – more than sitting cross-legged and chanting

Jon Kabat-Zinn,⁸ describes mindfulness as paying attention in a particular way, on purpose, without judgement. He believes that our lives have become "so driven" that we are "moving through our moments to get to better ones" and living to check off things on our to-do list, in danger of becoming "a human doing rather than a human being."

Lawyers are often sceptical of mindfulness.⁹ Being proud of their ability to work fast and multi-task, they worry that meditating will mean they lose their mental 'edge' or 'sharpness'. Entertainer

Ruby Wax¹⁰ makes a sharp observation that, while we pride ourselves on our ability to multi-task, it is “not only what keeps us from being in the present but also what burns us out.” Kabat-Zinn suggests that meditation reminds us of the value of staying present and shifting out of the doing mode. Meditation increases our ability to pay attention, improves productivity and decision-making and enhances our interpersonal skills. These are all skills that we should cultivate in-house.

ABC anchor Dan Harris, the host of 10% Happier, has drawn the analogy between scepticism towards meditation and scepticism people used to have about physical exercise before it was scientifically proven to have health benefits. Harris uses the analogy that in the 1940s if you told someone you were going running, they would ask “who is chasing you? Scientists then showed physical exercise is good for you and now all of us are doing it and feeling guilty if we do not.”¹¹ The same can be shown for mindfulness.

Achor cites studies that have found that minutes after meditating, we experience feelings of calmness and contentment, as well as heightened awareness and empathy. Regular meditation permanently rewires the brain to raise levels of happiness, improve immune function and lower stress. Neuroscientists have found that meditating grows the pre-frontal cortex. The pre-frontal cortex is often referred to as the CEO of the brain and is in charge of problem-solving, strategising, self-regulation, impulse control, attention and empathy. In addition to calming us down and strengthening the pre-frontal cortex, meditation pulls us away from the cycle of stress we can get stuck in, which keeps us in our limbic system. We know that when we are stuck in the limbic system (through cortisol and adrenaline often caused by stress), we are often more emotional and irrational, feeling so stressed that we fail to remember things and can over-react. This cycle is often referred to as being stuck in fight, flight or freeze—none of which are helpful in the workplace.

Meditation is very personal. What works (or even appeals) to one person does not to another. Some purists say meditation only works if you do it twice a day for 20 minutes. I believe any time taken out of the day to meditate and start a practice is a step in the right direction. Ways to incorporate this into your team meetings could be to start with a meditation, perhaps using breath-based meditation, for example, Thich Nhat Hanh¹² suggests a simple inhalation of three and exhalation of three breaths “while maintaining the half smile.” There is a myriad of apps (for example, Headspace, Breathe or Dan Harris’s 10% Happier app) that use different modalities including the more classic breathing through to imagery or genres, such as loving kindness meditations. While not everyone in the team may want to meditate together, another strategy could be to invite the team to go on a four- or eight-week challenge asking people to choose their own meditation and then discuss their progress or what is stopping them from meditating during the meeting.

Positive practices – have fun with it and reap the benefits

Small, positive practices embedded in team meetings encourage lasting wellbeing and social connection. Even practices that don’t resonate with your team as a whole may resonate with an individual and they may continue to pursue this outside of work alone or in their home environment.

Try out some of these practices in your team or, if you are unsure what to do and want some help, you can engage a consultant to help you embed some small but powerful practices into your weekly meetings or ask the team what they practise at home and what they might like to do. An advocate of tools that are simple in application to ensure consistency, Caldwell notes, “just as we don’t train our bodies with one trip to the gym, positive practices train our brain and when engaged in consistently, can make a lasting impact on your wellbeing as a leader and the wellbeing and success of your team.”^a

Footnotes

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4. Adam Grant is an American psychologist, professor at the Wharton School of the University of Pennsylvania and author of books including *Option B*, *Give and Take* and *Originals*.
5. Professor Emerita of Business Administration and Psychology at Northwestern University and author of books including *How to be a Positive Leader*.
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Caterina Cavallaro



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With special thanks to Tanya Caldwell, director of Relativity 4 for her contribution to this article.

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LEVERAGING SILVER LININGS

It's fair to say 2020 will be remembered — and not fondly. What is particularly unique about this year and the pandemic that will be forever associated with it — is the collective global burden. Every single person in the world is, in some shape or form, feeling the effects of COVID-19. The pandemic has forced everyone out of their routine behavioural patterns — both at home and at work. Everyone has changed how they plan for, think about, react to, and approach daily tasks. We all know change is uncomfortable — let alone change spurred on by a sudden health crisis. But with change comes growth and opportunity. Consider how you might take this situation as a chance to improve your connectedness with your teams? Or try out alternative ways to motivate others? Embrace new working habits? Supercharge team morale? While difficult circumstances can cause gloomy sentiment, they also have a way of unifying people under the right leadership.

“Though you might not be talking to people 24/7, you know you can — the feeling of knowing your team is there is sometimes all you need.” — Niki Haralambidis, Legal Counsel, HESTA

It is a delicate path to traverse. Right now, emotions are heightened and varied; some of the most common adjectives describing how people are feeling are unsettled, anxious, concerned. Scott Berinato for Harvard Business Review aptly pointed out that processing the new landscape is akin to experiencing the key stages of dealing with grief: denial, anger, depression, and acceptance. In many ways, we are certainly grieving over the loss of our ordinary ways of life. That however doesn't mean going overboard and inadvertently conveying a manufactured, clichéd proliferation of empathy and understanding to our teams. Be sensible. Be sensitive. And recognise everyone is dealing with their very own unique situation. Easier said than done, I know. It is worth exploring some of the opportunities to lift our spirits, ensure longevity through social distancing, and enable us to emerge from lockdown enhanced and energised.

Put effort into positive connections

Most of us office ants have now swapped walking into work, post detour via a favoured coffee haunt, with rolling out of bed to a desk at home — sans makeup and suits. Working remotely has the benefit of enabling greater focus on tasks without interruptions (rejoiced by all the introverts), although those interruptions are often a key part of gelling as a team. Whether it's important communications, throwing around ideas, or sharing the discovery of a new amazing bagel place — the interruptions add value. Don't underestimate the value of debating which bagel is the best lunch option. It is straightforward enough to use Zoom for all formal and necessary work communications, but what happens now to those valuable, fun (albeit sometimes unwanted) interruptions? How can that connection be re-created? Every team and organisation is going to be different, but think about what can be done to ensure positive interactions still occur with everyone working from home. It isn't about implementing something arbitrary. Be assured, forcing hour-long Zoom video meetings with 30 people who wouldn't ordinarily chit-chat or interact with one another is not going to produce social or even valuable professional connections. Be sure to consider your team members and reflect on how they derive and perceive positive interactions with their peers. In particular, have regard to the

mix of introverts and extroverts and the myriad of needs that should be juggled and balanced.

One very simple and unobtrusive tool that has been adopted by the HESTA legal team has been to maintain a running Zoom team chat that has naturally developed to include things from quick callouts to one another for work questions to sharing memes and cookie deliveries. People are naturally logging on at the start of the day and saying good morning, just as they would when arriving at their desk in the office. Additionally, having the ongoing team chat has fostered a heightened level of inclusiveness as all the former in office hallway tête-à-têtes are now with the whole team — although perhaps sometimes to the chagrin of others. When you implement ways of fostering connections that work well, make sure to add them to your list of things to continue doing when we all head back into our more usual workplaces; they may be just as effective or more so than what you were previously doing when physically congregated.

Implement new working habits

Each person has a way of getting into their working rhythm. For some, it's blocking out a few hours with headphones in to draft that gnarly contract. Others need to discuss ideas with their colleagues on how to best advise on a regulatory change. The work processes underpinning those tasks have changed. Old habits serve us well, but maybe now is a good time to hit the reset button. Consider new ways of working effectively that could develop into new habits workable post-lockdown.

Right space for the right kind of work

This may sound trite or even silly, but certain kinds of work lend itself to being done in certain types of environments. Finding the right space for doing the right work can naturally increase productivity and quality of output — or may simply allow you to multitask. Working from home over a prolonged time period has made some of us inadvertently more willing to move around and work in different areas of the house to avoid distractions like television, children, pets, etc. And perhaps subconsciously we occasionally seek out those distractions. Using your laptop in the living room with some reality TV on in the background and the fun of your household bustling around you may not be a bad idea while going through routine administrative tasks like submitting

your expense form or other relatively low concentration items. You then naturally reserve the serious study set up for reviewing tedious legislation and other to-dos that need a lockdown in isolation to get done. There's absolutely no reason why you can't take this way of working back to the workplace. Ponder the different categories of work tasks you and your team members have and challenge people to consider what type of environment is best for doing it whether it be at their desks, in a borrowed executive office, downstairs in the foyer cafe, while out walking, etc. Analogously, if you're a 'white-boarder' in the office, then you may need to replicate some of your work environment in your home space to increase your productivity. Consciously turning your mind to your working environment can do a great deal to boosting your own morale and motivation.

Setting hard boundaries

Working from home during this extended timeframe means the professional bleeds more into the personal. Home is now also the office. It is hard enough for people to set boundaries to maintain work-life balance and well-being with the physical separation between the spheres of work and play. Now that work is invited into our personal spaces it is even more important to ensure you and your teams are setting clear boundaries to ensure the longevity of team morale and effectiveness. Without the boundaries, your team will find themselves losing hold of their valued and necessary home/ family/personal time. Respect the time and personal space of all your team members and model that behaviour yourself. While it may be tempting to finish reviewing that document straight after dinner, is it really going to make a difference if you pick it back up first thing the next morning? Now is the time to reset your personal boundaries. After dinner time may be better spent arguing with your partner on who is likely to win Masterchef. Eating at your desk also becomes easier when working from home. You're more inclined to work for longer without getting up to stretch your legs or take a decent break from the screen. Be mindful that when you find yourself less focused, then that is a cue to take a break from your screen and get some fresh air outside. While you start being more conscious of these work boundaries, this is an important practice to definitely take back to the office. Use this time to perfect what works best to separate personal and work time. It can become an enhanced habit when we are back at the office.

Zoom more!

For those leading multi-functional teams, it can be all the more challenging to maintain your relationships and communications across all your different team members. Upping the communication channels and regularly checking in is time-consuming but so important to ensuring people remain supported and motivated. But not every Zoom (or whatever alternative technology tool you're using) call has to be video-enabled. We have already started seeing commentary about how exhausting it is for some people to be constantly on camera. Mixing up the communications between video and voice-only Zooms replicates the pre-COVID workplace. It also facilitates increasing channels to connecting and discussing issues with your teams without overdoing the in-your-face stress that video-chats can cause. "From a project perspective, we are doing daily 'stand-ups' around the focus for each day, so we can connect outside of our ongoing project meetings," says Jason Kneebone, project manager of legal and commercial affairs at HESTA. In many ways, it has been quicker and more efficient to have a quick Zoom meeting to discuss issues that arise than it was in the office when a physical meeting needed to be booked days later to align calendars. This more agile way of working is one to maintain when we return to the office. On a wider scale, using Zoom check-ins to provide targeted communication and broader employee support on company-wide initiatives is very helpful to achieving a collective connection to the organisation's goals and purpose — which all still exist despite the changes to working environments. Maintaining a sense of

purpose for team members is vital to ensuring positive team morale and high performance. Make sure you are taking time with your teams to reflect on the impact their work continues to have on the organisational purpose and objectives. It is important for employees to see their leaders more in times of stress and for their leaders to be transparent about the challenges they are facing as well.

"From a project perspective, we are doing daily 'stand-ups' around the focus for each day, so we can connect outside of our ongoing project meetings," says Jason Kneebone, project manager of legal and commercial affairs at HESTA.

Test and strengthen organisational/ team culture and morale

Boards and management are notoriously trigger-happy when it comes to engaging external strategy consultants to formulate mission statements. But the challenge really lies in how these flowery statements of corporate virtue are genuinely brought to life through its people and measured through culture and morale. In times of economic crisis, actions speak volumes. Now is a time where if there are shaky foundations, cracks will start to show in a business. Strong team culture and morale are pivotal to repairing any cracks that appear. To that point, there are widely known things that test the foundational strength of a relationship. For a new romantic relationship, that may be the first overseas trip you take together. For a marriage, it's renovating a house. For an organisation and its relationship with its employees, the truth and authenticity behind its values and culture are certainly being tested by the coronavirus.

If team members were feeling disengaged or demotivated before, they will be more disengaged now. This can be observed by the level of effort individuals put into interacting with and supporting the rest of their team given the physical barrier of distance. When previously vocal employees are now silent soldiers, it's important to query and understand the impetus for the behavioural change. As a manager and leader, you should be using this time to observe your team to ensure the culture you have fostered remains healthy. As for morale ... not so much positive, but rather, stable. Listen carefully to the actions of your team and what picture they show of the underlying culture and morale. Make sure your team members know where they can get help if they need it. Teams and organisations with positive cultures will be operating as a united front. They will continue to work through business priorities, adapting fluidly to a changing environment. Clarity of organisational purpose is more important than ever in times of crisis. It is this clarity that fosters the unity of a team and builds resilience through challenging periods. This unity also ensures that individuals don't feel alone in their work since they are no longer physically sitting with others in an office. They can still feel like the work they're doing matters and makes a difference. "Being connected to what we are doing as an organisation makes me feel less like I'm riding solo, and more as though what we do is meaningful (especially as our members are so involved with community care at the moment)," says Nikki Howie, legal counsel of HESTA.



Furthermore, acknowledging and celebrating the contributions that do make a difference is a simple and important message. Acknowledge the success by sharing the details so that the acknowledgment is meaningful. Whether in the form of verbal acknowledgment or having a Zoom drink to celebrate together — embrace innovative ways of celebrating when physically separated to foster team well-being.

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Upskilling

With people adapting to a revised working norm, it may also be a good time to consider upskilling. That is, as a means of unifying a team, consider the collective strengths and

capabilities met across your team and consider what areas could be improved upon. There is an abundance of e-learning modules being released across all industries by a multitude of service providers for people to take advantage of. Investing in the development of your team has the added benefit of providing a commitment to their continued ability to contribute and add value — which nurtures team morale. There is a lot of corporate speak and communications circulating, with organisations asking employees to remain resilient and focused. Just as important is ensuring team members continue to feel valued and see a commitment from leaders in their continued growth with the organisation.


Don’t shy away from the professional development of your team if budgets are a constraint. You need to go to bat for your teams, and a key reason this is important from an organisational perspective, apart from building team morale, is for any potential deployments that may be necessary if your organisation does potentially require changes to resourcing and staffing levels. It may be daunting to try and plan too far into the future, but implementing team learning and upskilling individuals right now is going to cover a lot of bases in the foreseeable future.

Use your service providers for greater insights

Finally, on a slightly tangential note — external legal or legal technology businesses can be helpful in filling new gaps and needs. Use them. For example, many organisations have implemented hiring freezes, so those extra lawyers that were due



to join the team are now on ice. The work, however, is not. It's not a matter of simply briefing out the work to external counsel, but thinking about how you might invest in your relationships with external partners to bring some capability in-house to support the team in the interim. And again, if it's a matter of budget, don't let that deter you. The roles on ice are perhaps being deferred to the next financial year. Funds are fungible; if the workload has not been deferred then there is an argument to expend dollars on external assistance. One useful example of this was in a technology platform that had been built by a HESTA service provider for another client. As it turns out, HESTA had the same business need for a similar platform and was considering more manual solutions. The service provider has since been able to facilitate discussions between their other client and HESTA to share knowledge and consider what solutions have been and would be potentially appropriate. These types of engagements happen in the usual course of business but are adding greater value now by removing the need for HESTA to go through a tender process or develop their own solution. Reaching out to your service providers to broadly understand how they are adapting their service offering and what they can share about work being done with other clients can go miles in helping you short-cut the solution for issues you may be grappling with. The wider industry insight of external advisors is tremendously valuable right now as we all learn from one another in a difficult economic environment. Coming out of COVID-19 enhanced and energised Harnessing connectedness, communicating more, strengthening team morale, effective working habits, upskilling yourself and your team, using service providers better — it all sounds like an enormous list of things to do in uncertain times. The pandemic has created a new world for all individuals at a

global level. It can be hard to see a silver lining while many of us try to put out multiple spot fires. But the silver lining is there: a routine disrupted. Not for a day or two. But for a prolonged — and undetermined — period of time. And as we all have come to accept, disruption yields newness. Improvements. Innovations. This is an opportunity to leverage the current disruption to our routine working lives to practice some behaviours, observations, and reflections to come out enhanced, energised, and united as teams. 

Jorden Lam



As General Counsel & General Manager Commercial Affairs at Hesta Super Fund, Jorden regularly writes and speaks about professional development and the importance of lawyers embracing innovation and re-defining their value proposition. She has served as a non-executive director of various health service providers and has received numerous accolades for her achievements and thought leadership.

An original version of this article appeared in the July issue of the ACC Docket.

IF THERE IS A 'NEW NORMAL', DOES THAT MEAN YOU CAN TERMINATE YOUR COMMERCIAL LEASE?

As Australia emerges from its Coronavirus shutdown, there is much speculation about whether commercial life will return to the way it was before the pandemic or whether a 'new normal' has taken hold. A good deal of that speculation centres on the potential impact to the commercial property industry amid the prospect of tenants seeking to downsize office space for various reasons including that many employees have gained a taste for working from home and now wish to do so on a more regular basis.

It's to be expected that while many landlords have allowed generous 'rent holidays' (or reductions) during the shutdown period, they will ultimately be looking to exercise their legal rights if the tenant does not resume paying in accordance with the original terms of the lease. Where the tenant is a small to medium enterprise significantly impacted by the pandemic, any steps to enforce the original lease will have to await the expiry of the various government-imposed moratoriums and restrictions on landlords (see, for example, *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW)).

Notwithstanding the above commercial imperatives, many landlords and tenants are already party to long-term leases, which will no doubt lead to some delicate negotiations. Inevitably, in some instances, those negotiations will prove fruitless and the landlord or tenant will be looking to exit the lease entirely.

All of this means that, despite an abundance of goodwill on both sides, many parties will soon be interested in knowing when and how they can terminate their commercial lease.

A lease is a contract...

The starting point is that a lease is a contract. In those circumstances, the law applying to the termination of contracts applies to leases. So, what is that law?

In broad terms, there are two potential avenues for terminating a contract prior to the end of the term, namely:

- pursuant to the express terms of the contract; or
- by exercising a right to terminate which has arisen under the common law.

Termination pursuant to the express terms of the contract

In negotiating a contract, many parties choose to include a term which provides that the right to terminate will exist in specified circumstances.

Where they do so, the parties are free to stipulate the circumstances in which the right will arise and whether it will operate in favour of both, or only one, of them. They may also specify whether the termination provision in the contract is intended to operate alongside the rights to terminate that may arise under the common law or, alternatively, is intended to be exhaustive, so that any right to terminate that would otherwise arise under the common law is ousted.

If the express provisions of the contract are not clear in those respects and the matter is litigated, the Court will seek to ascertain the intention of the parties at the time when the contract was formed, based on the objective evidence.

There may be implied obligations which require that a party exercising an express right of termination must act reasonably and in good faith (see, for example, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd*; *TWT Property Group Pty Limited v Cenric Group Pty Limited* [2019] NSWCA 87).

Termination pursuant to the common law

In Australia, the leading authority on the right to terminate a contract under the common law is the decision of the High Court in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) CLR 115.

In that case, the Court confirmed that, under the common law, a party will have a right to terminate where the other party has:

- repudiated its obligations under the contract;
- breached an essential term (otherwise known as a condition); or
- committed a sufficiently serious breach of an intermediate term.

The Court held that the focus should be on the 'kind and degree' of the breach.

... But not like any other

Any contract may also contain provisions that set out a 'termination regime'; that is, requirements that must be complied with by a party who seeks to exercise a right of termination. Such requirements may include, for example, a notice period before the termination will become effective and an opportunity during that period to remedy the breach (and in so doing, avoid the contract being terminated).

In relation to leases, however, depending on the grounds for termination, compliance with certain notice requirements may be mandatory where a landlord wishes to exercise a right of termination arising under the express provisions of the lease, *even where the lease does not set out a regime to that effect*.

In this respect, section 129 of the *Conveyancing Act 1919* (NSW) is of critical importance. In summary, subsection 129(1) provides that



a right of re-entry or forfeiture under any provision of a lease shall not be enforceable unless and until the lessor serves on the lessee a notice -

- specifying the particular breach complained of; and
- if the breach is capable of remedy, requiring the lessee to remedy the breach; and
- if the lessor claims compensation in money for the breach, requiring the lessee to pay the same,
- and the lessee fails within a reasonable time to remedy the breach, if it is capable of remedy (and where compensation in money is required, the lessee fails within a reasonable time to pay reasonable compensation to the satisfaction of the lessor).

Importantly, the effect of subsection 129(8) is that the above requirements do not apply where the re-entry or forfeiture arises because of the non-payment of rent. That said, there are many occasions where a lessor wishes to rely upon other grounds for terminating (sometimes in addition to the non-payment of rent) and will be precluded from doing so if it has not complied with the requirements of the section.

Moreover, various other Australian jurisdictions have provisions that are broadly analogous to section 129 (see, for example, *Property Law Act 1958* (Vic), s.146; *Property Law Act 1974* (Qld), s.124; *Landlord and Tenant Act 1936* (SA), s.10; *Property Law Act 1969* (WA), s.81; *Conveyancing and Law of Property Act 1884* (Tas), s.15).

Practical tips: What you should know before you attempt to renegotiate a lease

In the wave of attempted renegotiation of leases that will engulf the Australian commercial property sector in the second half of 2020,

there will be some instances where, despite the best intentions on both sides, agreement cannot be reached and one or both parties wish to consider terminating.

In those circumstances, before entering into the negotiation, both parties to a commercial lease should know:

- what, if anything, the lease says about the right to terminate;
- what, if anything, the lease says about the steps required in order that a purported termination will be effective; and
- if a prospective termination is by a landlord pursuant to an express provision of the lease and is not solely for non-payment of rent, whether section 129 of the *Conveyancing Act 1919* (NSW) (or an analogous provision in the relevant jurisdiction) has been complied with.^a

Luke Buchanan



As Solicitor Director of Buchanan Rees Dispute Lawyers, Luke represents blue chip corporate clients in high stakes, contentious matters. He practises in commercial litigation and disputes, with a focus on the financial services and commercial property sectors. Luke has spent over 23 years in litigation and dispute resolution at a top tier national law firm, with more than 13 of years as a partner.

THE UN CISG AND ITS IMPLICATIONS FOR AUSTRALIAN BUSINESSES DURING THE COVID-19 PANDEMIC

The United Nations Convention on Contracts for the International Sale of Goods (CISG) contains “uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems”. Its objective includes the “removal of legal barriers in international trade and the (promotion of) the development of international trade.”

There are over 90 Contracting States to the CISG; Australia has been a Contracting State for more than 30 years. The CISG is in force in each of the Australian States and Territories pursuant to equivalent uniform legislation (in Victoria, the *Sale of Goods (Vienna Convention) Act 1987 (Vic)*).

The CISG applies to many contracts of sale between Australian businesses and overseas entities, often without those parties realising. It is important in unprecedented times such as the COVID-19 pandemic for parties to understand if their contract is subject to the CISG and, if so, what rights and obligations arise from it.

When does the CISG apply?

The CISG applies to contracts of sale where the parties have a place of business in different Contracting States and those States are Contracting States or the rules of private international law lead to the application of the law of a Contracting State. The analysis is not always simple, potentially involving complex conflicts of legal principles. There is added complexity where a Contracting State has acceded to the CISG with an authorised reservation or declaration.

The CISG can also become part of a contract where the parties (irrespective of whether they have a place of business in a Contracting State) specifically choose the CISG to govern their agreement.

The CISG applies to a broad range of contracts, but specifically excludes contracts for the sale of goods bought for personal or household use, contracts for the sale of shares or other securities, contracts for the sale of ships or vessels and contracts for the sale of electricity. It does not apply to contracts for services. Under the CISG, “[c]ontracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.”

Party autonomy

Article 6 provides that parties “may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.” It is generally accepted that, where it would otherwise apply, the agreement by the parties to exclude the CISG must be recorded in an express term in the contract. Terms of the contract or agreement that are inconsistent with the CISG are one example of a derogation from the CISG.

What is the scope of the CISG?

The ‘rules’ of the CISG govern the formation of the contract and the respective rights and obligations of the buyer and seller under that contract. This includes delivery of goods, conformity of goods, third party claims, payment, the passing of risk and damages for breach.

Exemption from damages

Most importantly, in the current business environment, the CISG sets out the parties rights and obligations where there is a failure to perform. Article 79 provides a party with an ‘exemption’ from liability for damages in limited circumstances.

Pursuant to Article 79 (1):

“A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.”

There will be many millions of contracts falling within the scope of the CISG where performance has been disrupted by the global coronavirus crisis. Immediately after the World Health Organization declared COVID-19 a pandemic on 11 March 2020, contracts worldwide were scrutinised for their force majeure provisions. The doctrine of frustration was also considered, as international borders were closed and quarantine restrictions imposed at ports and airports. Conversely, very little, if any, attention was focused on the CISG.

It is unlikely (except for contracts concluded towards the end of 2019) that any business considered, at the time its global supply contracts were finalised, that performance of those contracts would be interrupted by a global pandemic. It is likely that many businesses, despite having turned immediately to the provisions of their contract to determine how it responded to this event, have overlooked the potential application of the CISG provisions.

Immediate steps

Businesses with cross-border contracts for the sale of goods need to take the following steps:

- Review the terms of the contract to identify whether the CISG applies. Look specifically at whether the contract contains a provision that expressly excludes the CISG (or derogates from it).
- Identify the country in which the parties to the contract have their place of business to check whether those countries are Convention States.



- Review the governing law clause (if any) in the contract. Identify whether the parties have chosen the law of a non-Contracting State, which might lead to the application of the CISG.
- Assess whether any failure to perform the contract is a consequence of the COVID-19 pandemic.
- If there is a failure to perform, assess whether this is caused by a third party's failure (and the third party's failure is due to the pandemic within the terms of Article 79).
- Check the date on which the contract was entered—if it was concluded early in 2020, there will be an argument that the parties "could reasonably [have been] expected to have taken the [pandemic] into account" within the terms of Article 79 (and where a third party is involved, this test needs to be applied also to the third party). In those circumstances, Article 79 may not assist.
- If the contract was concluded prior to the potential emergence of the pandemic (and neither party had special circumstances which meant that it ought to have been aware of it), consider whether Article 79 applies.
- If the CISG applies to the contract, the party who has failed to perform as a result of the pandemic must give notice to the other party of the impediment (being COVID-19 or restrictions imposed in response to it) to avail itself of the exemption from damages.
- If notice is not received by the counterparty within a 'reasonable time', the defaulting party may be liable for damages. The potential exposure to damages does not arise because notice has not been given, but because the other party does not receive that notice.
- The exemption created by the application of Article 79 applies only for as long as the 'impediment' exists.

The commentary on Article 79 of the CISG is limited and there are no reported cases, as far as the author has been able to ascertain, in the Australian courts. International commentators suggest that Article 79 has limited application, largely because most impediments would be foreseeable by the parties when they are

entering into the contract. The COVID-19 pandemic, however, might be viewed differently.

Professor Luke Nottage (*Who's Afraid of the Vienna Sales Convention (CISG) – A New Zealander's View from Australia and Japan*, 36 Victoria U. Wellington L Rev 815 (2005)) suggests that the framework of the CISG, including Article 79, "seems a distinct improvement on the English law of frustration."

As to how Article 79 might interact with an express force majeure provision in a contract, Joseph Lookovsky (*Understanding the CISG*, Fourth (Worldwide) Edition, 2012 Kluwer Law International) observes that:

"[n]ot uncommonly, an express force majeure clause in a contract will be interpreted as a modification of (or supplement to) the Article 79 default rule."

As a global instrument, the CISG is often misunderstood. However, it is now, more than ever, essential that businesses engaging in international trade come to terms with both its application and potential benefits. ⁴

Bronwyn Lincoln



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



ACC GLOBAL UPDATE

ACC Announces 2020 Value Champions...

In-house law has come a long way in meeting the pressures of global regulation and competition. Now, a constellation of well-leveraged data, streamlined processes, innovative technologies, and creative new operating models is thriving in law departments all over the world. The Association of Corporate Counsel (ACC) today announced its 2020 ACC Value Champions, recognising nine such innovative law departments and seven external partners as pioneers of optimised legal services.

Since 2008, the ACC Value Champions program has highlighted corporate law departments that continue to embrace creative, data-driven solutions to streamline operations. This year's Champions range from manufacturers to investment firms and include several alumni. Their strategic approaches made numerous processes more efficient, increased the speed of work, enhanced the value of legal service spending, and in several cases, cut costs dramatically.

"It's important to understand just how advanced these Value Champions are at implementing creative legal solutions, especially as technology and legal operations continue to gain traction in

corporate law departments," said Catherine J. Moynihan, associate vice president of legal management services at ACC. "The 2020 Champions think ahead of the curve, not only from an operational perspective for their department, but also incorporating it into a wider business strategy."

ACC COVID-19 Flash Poll Series Continues

ACC has kept its finger on the pulse of the worldwide in-house community through the COVID-19 pandemic; this has included a successful member flash poll series. A randomly-selected group of ACC members have answered questions on a wide range of topics, from work-from-home policy to budgets to mental health.

The second member flash poll examined how the COVID-19 pandemic is impacting members, focusing on education and training for the in-house community. The results show that a large majority of respondents had already been prevented from attending in-person education and training events. Nearly half were willing to attend events in the future if additional health and safety measures are enforced.

The third poll focused on the state of the in-house community's wellness and work habits

in the three months since the World Health Organization (WHO) declared COVID-19 a global pandemic. Results showed in-house lawyers working overwhelmingly from home, with those lawyers also reporting they are working more hours. While over thirty percent said they would rate their current level of burnout as "very high" or "high", a large majority reported feeling positive about their work at their company.

The fourth poll, the last to date but not last in the series, looked at work-from-home (WFH) policies, communication strategies, and collaboration efforts. Nearly half (46.5 percent) of respondents reported that they will keep the changes to their remote-working policy going forward. 44.1 percent say they will revert back to the old policy when we go back to a "new normal". Finally, 9.4 percent report that their organisation has not changed its remote-working policy due to COVID-19.

The fourth poll included an open-ended question, where respondents could add lessons-learned or tips for their peers. Overwhelming, respondents believed that remote-work is here to stay, and that the expansion of telework is likely to limit in-person meetings and business travel. ^a

Black Lives Matter to the Association of Corporate Counsel

On 2 June 2020, Veta Richardson, President & CEO, Association of Corporate Counsel released an ACC Global Statement and call to action for members worldwide.

"...Lady Justice may wear a blindfold symbolising impartiality but the unacceptable reality for millions of people...around the world proves that we have much work to do to achieve this ideal..."

Veta Richardson

The 2020 ACC annual meeting will no longer be held in Minneapolis in a silent and powerful protest against the senseless and brutal murder of George Floyd. All ACC members have been called upon to use their influence, power, and privilege to

better the lives of all people who suffer due to their race, colour or culture.

In Australia, we are all too familiar with the violent dispossession and colonisation of the indigenous population, the stolen generation, and the disproportionately high incarceration and poor mortality rates of Aboriginal and Torres Strait Islander people.

ACC Australia echo and wholeheartedly endorse the sentiments in Ms Richardson's statement. We have established a national Diversity, Equality, and Inclusion (DEI) committee and this committee is currently developing a strategic plan to ensure all ACC members are equipped with tools and resources to champion DEI causes in their organisations.

An important pillar of this plan is to bring greater awareness to how the in-house legal profession can better support our First Nations people. This will be delivered through resources, programming and

engaging with indigenous communities to better understand and contribute to their causes.

It is a well-worn phrase but if we are not part of the solution, we are part of the problem. Many of our members have been on this journey to racial equality for some years. Let us all join with them and cross the finish line together. We welcome any resources, ideas or introductions that can be made to help us make a difference.

Please direct any correspondence to programdevelopment@accglobal.com.

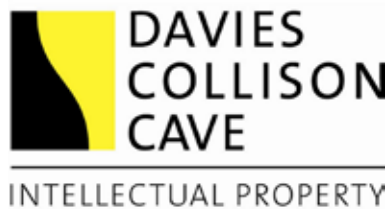
Get up, stand up! ^a

Footnotes

1. <https://www.acc.com/about/newsroom/news/acc-statement-death-george-floyd#>

Authors: Nick Willetts, Stephen Chang and Vered Keiser

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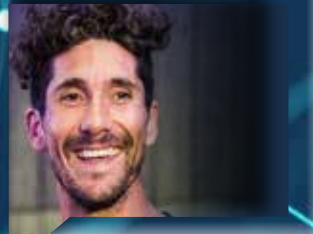
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