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MINDSET

HUMAN RIGHTS IN  
THE SUPPLY CHAIN

IN-HOUSE IN THE  
DIGITAL AGE

THE INTELLIGENCE  
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THE IN-HOUSE  
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WHO WILL TRAIN  
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#### ACC Hong Kong

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# PRESIDENT'S REPORT



**Lin-Shi**  
**ACC Hong Kong President**

The Hong Kong Corporate Counsel Association (HKCCA) became the Hong Kong Chapter of the Association of Corporate Counsel (ACC) on September 1, 2017. As President of ACC Hong Kong, I'm delighted to introduce the newest ACC Chapter.

HKCCA's humble beginnings can be traced to a time when, 14 years ago, a handful of representatives from the then embryonic Hong Kong in-house legal community came together over a glass of wine or two; to network, share ideas and discuss the profession and shared challenges. Ralph Ybema, our first president, established HKCCA as a society. Six years ago, HKCCA further formalised and became an incorporated entity. Under the leadership of our second president, Jasmine Karimi, HKCCA grew from 300 to 800 members.

The growth of HKCCA has been driven by the benefits and resources provided to members for a membership fee that equated to the cost of a decent dinner out in Hong Kong! As a member of the Hong Kong legal community, I'm proud of what we've achieved on a shoestring budget. Of course, we couldn't have maintained the low cost of our membership fees without the generous and ongoing support of our sponsors, who have graciously hosted seminars and conferences and supported the Hong Kong in-house sector.

We are a different organisation than we were all those years ago and indeed the world is a very different place. Globalisation has led our organisations to new levels of sophistication, regulations have become more complicated, cross-jurisdictional issues more common, and despite it all, our profession is constantly expected to deliver more with less. As a result, the skills required of in-house counsel go far beyond being a good lawyer – they span across being a business partner, risk manager,

strategist, moral compass, a multi-national whiz and more. How then, do we help our members continue to succeed in their roles? In response to this transformation, HKCCA needed to step up to meet the evolving needs of our members.

This brings me to our alliance with ACC. ACC's global reach means that ACC Hong Kong members can now access a breadth of resources that a small volunteer run organisation like HKCCA simply couldn't match. With this alliance, our members will benefit from engaging with the global in-house legal community, gain insights into global best practice and access thousands of resources that speak directly to our evolving sector. ACC will strengthen its presence in Hong Kong, one of the most dynamic business centers of the world. In turn, this will allow the global membership to better collaborate with the Hong Kong in-house community.

I see a tremendous amount of synergy in this partnership and a further strengthening of the Hong Kong in-house community. I hope all ACC Hong Kong members will invest the time to discover the additional resources available and take advantage of this gateway to the global in-house community. 

# ASIA PACIFIC REPORT



**Tanya Khan**  
**Vice President and Managing Director,**  
**ACC Australia and Asia Pacific**

The alliance between the Hong Kong Corporate Counsel Association (HKCCA) and the Association of Corporate Counsel (ACC) is the result of a great deal of hard work by two organisations sharing common interests and values. I'd therefore like to acknowledge HKCCA's (and now ACC Hong Kong's) President Lin Shi and the ACC Hong Kong Executive Committee for their hard work and leadership in helping to make this alliance happen.

As a former in-house lawyer, I'm proud to work for ACC, an organisation that represents and seeks to advance the interests of the in-house legal profession globally. I also believe strongly in the power of association. Associations hold a unique place in the global business community as advocates, educators and thought leaders. I believe professional membership to be fundamental to strengthening individual capacities, and also strengthening and advancing the interests of professions.

ACC is proud to represent the common professional and business interests of in-house counsel around the world. Though in-house lawyers may work across many industries and organisations, their concerns, challenges, and goals are more alike than different. Peer-to-peer networking opportunities, education focused specifically on the needs of working in-house, and resources tailored to corporate practice are invaluable in helping in-house counsel do their jobs.

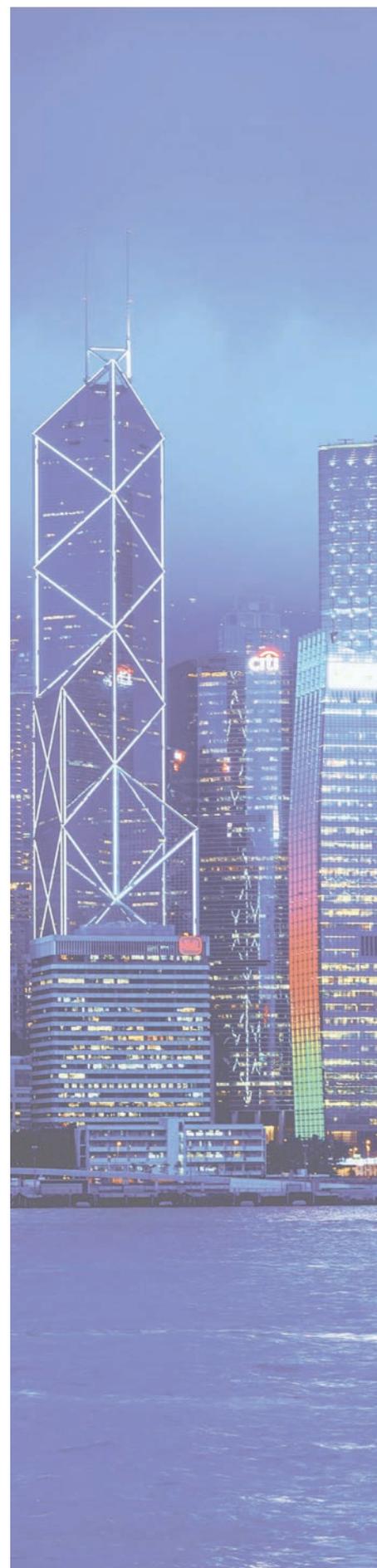
The alliance with HKCCA will strengthen the ACC network by broadening our membership and connecting our members with one of the most significant global business hubs. Our new Hong Kong members will provide an important perspective on legal issues and business challenges in Hong Kong and the broader Asia Pacific region. Similarly, it is my hope that this alliance will further strengthen the Hong Kong in-house legal community

through improved links with the ACC global in-house network.

Over the coming weeks and months, we look forward to introducing the continuing and new ACC Hong Kong members to the expanded range of benefits and services available under the alliance. Similarly, we look forward to listening to members and stakeholders and better understanding how we can serve the in-house community in Hong Kong. I truly believe this move to be a win-win for both organisations and our members and we look forward to working with the Hong Kong industry to make this alliance successful.

A critical aspect of the alliance is the offer of a free three-month trial of full ACC membership and we look forward to connecting with the ACC Hong Kong membership to ensure this trial is utilised as widely as possible. Of course, if ACC Hong Kong members would like a demonstration of the membership services, we'll be happy to connect with you either via an online screen-share or in person.

Finally, I'd like to acknowledge and thank the HKCCA in-house community for your support of this alliance and for your willingness to engage with ACC. Associations are strengthened through the involvement and engagement of their members and we look forward to working with you to strengthen not only the vibrant and diverse Hong Kong in-house community but indeed the global in-house legal community of which you are now part. [a](#)



# A DAY IN THE LIFE – GORDON CHAN

Vice President, Legal – Asia Pacific, Hyatt



Gordon Chan

*In addition to serving at the Vice President – Legal, Asia Pacific of Hyatt Hotels and Resorts covering the company's business and development projects in Asia Pacific, Gordon also leads Hyatt's Corporate Social Responsibility committee for the Asia Pacific region. Gordon has previously held roles in Beijing and London and had studies at the University of Hong Kong, the University of British Columbia and the University of London.*

**Gordon is a member of the ACC Hong Kong Executive Committee**

**6 am** Wake up and **check for emails** from the US office. I have a home cooking webpage ([www.facebook.com/gordonkwc](http://www.facebook.com/gordonkwc)), and I respond to comments about my slow-cooked pork belly recipe.

**7 am** Prepare breakfast for the kids while I **make sure I'm caught up with the latest global news**.

**8 am** Drop the kids off to school and **buy myself a Hong Kong-style milk tea** to boost my caffeine levels. Listen to the morning radio to stay up to date on the local Hong Kong political scene.

**8:30 am** **Emails and messages start arriving** from South Korea, Japan, and Australia.

**9 am** Attend a **Hyatt Asia Pacific legal team meeting** with colleagues from both our Hong Kong and China offices. We go through our monthly priorities.

**10 am** A new project in South Korea requires another version of the hotel management agreement. I **communicate with our South Korean hotel team to confirm certain operational issues** and provide an update to external local counsel in Seoul who are helping to sort out a translational matter.

**11 am** Hyatt's commitment to Corporate Social Responsibility (CSR) — called the "Hyatt Thrive" program ([thrive.hyatt.com](http://thrive.hyatt.com)) — provides me with an opportunity to **meet with colleagues from other departments to discuss potential CSR activities**, as well as assess the charity organisations with whom we may partner. We review the status of the recent donation drive.

**11:30 am** **Plan my travel schedule for the next several weeks**. I mark down my team members' schedules and reorganise them to ensure consistent legal support for other departments.

**12 pm** **Arrange for execution of various contracts** in both English and simplified font Chinese languages.

**12:30 pm** Catch up with other legal counsel who work in the hospitality industry over a dim sum lunch. We **talk about the latest seminars organised by the Hong Kong Corporate Counsel Association** — where I currently serve as a board member.

**2 pm** Make sure my children are on schedule for their afternoon activities. I **chase down updated timetables from their various schools** to plan ahead for the next term.

**2:30 pm** A problem arises at a Chinese property and I **try to resolve it by reading through the relevant government directions on the subject matter** and advising the business units accordingly.

**3 pm** Another **telephone conference, this time with opposing counsel**, to go through hotel documents for a project in Japan. This drops another outstanding issue from my to-do list.

**4 pm** **Work with our corporate communications team on the latest social media and marketing initiative** that will be rolled out in the Asia Pacific region. Add comments to the related vendor contracts.

**4:45 pm** **Receive a call from our Singapore office** about a guest incident in Vietnam.

**5 pm** **Finalise a memo** summarizing the legal and financial implications of changing the room inventory in a hotel in Central China.

**6:30 pm** Arrive back home and immediately **start baking the kids' favorite Organic Maple Syrup Apple Cake** for tomorrow's afternoon tea. I check out what the kids learned at school today.

**7:30 pm** **A simple dinner with family**. Tonight we enjoy the double-boiled pigeon and dragon-eye fruit soup. Then bedtime reading with the kids.

**8:30 pm** Browse the latest interior trends on the internet and check Architectural Digest. I'm **planning future home improvements** and am trying to work out the budget.

**9 pm** **Telephone conference with the Chicago office**.

**10:30 pm** **Pack for a two-day trip to China**, which begins tomorrow morning. Quickly check and clear some emails before going to bed.



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*"As a solo in-house attorney, and the first one for my organization, I often feel as if I'm practicing on an island. Having the ACC eGroups available has been invaluable to me - whether it's getting an answer to a question with which I am struggling, collecting best practices, getting referrals to resources, or the ever important "gut check," someone in the group has usually been there done that and is able to provide that support. And every once in a while, I am able to return the favor, which is nice, too." – Terri Robins, Senior Attorney, Accreditation Council for Graduate Medical Education*

To join the discussion, or for more information,  
**VISIT [WWW.ACC.COM/EGROUPS](http://WWW.ACC.COM/EGROUPS)**



# LEAD YOUR ORGANISATION TO SUCCESS IN ASIA-PACIFIC WITH A GLOBAL MINDSET



Şirin Köprücü

*Having lived and worked in Turkey, the UK, Switzerland, and Germany and gained degrees in two countries, Şirin is fluent in three languages and is a true citizen of the world. As the owner of StrategicStraits, Inc., an international business training and consulting firm in Washington, DC., she has facilitated programs to help internationally growing clients achieve fast, efficient and lasting growth through the development of a global mindset and effective business skills.*



Deborah Vaughn

*Having worked in the US, Europe and Asia, Deborah is the head of Whirlpool Corporation's legal function in the Asia Pacific region. She is a member of Whirlpool's Global Legal; Asia North and Asia South Executive Leadership teams and sits on the Board of Directors of the Shanghai-listed Whirlpool China Limited. Deborah is admitted to practice in New York, England and Wales, Singapore, and Malaysia.*

As organisations increasingly pursue opportunities in the Asia-Pacific region; how can the legal department participate in leading the organisation to fast, efficient and lasting success?

The consequences of missing the legal perspective in market entry and growth situations early on or well into establishing the international presence are well known to many famous Western businesses ranging from Mattel and Glaxo Smith Kline in China to Apple in South Korea. Some of these businesses failed to enter the expected growth, others faced many painful legal battles costing their businesses as well as their countries unacceptable amounts in the form of financial and reputation cost, and others again had to leave the market either due to local legal issues or conflicts with the home legal mentality and laws. Clearly, the in-house counsel has an essential leadership role to play in organisations wanting to grow in foreign markets.

## Cultural Understanding Builds Trust

Working in countries like Indonesia, Singapore, Malaysia and China where many companies have growth aspirations requires an understanding of the regulatory landscape, the factors that may put the company at risk within the local market as well as in the home country of the company, and the culture in these markets.

Although one needs to be very aware of diversity factors especially in Singapore and Hong Kong as in each specific Asian country, cultural studies indicate that people in Asia value long-term relationships and observe social hierarchies significantly. They also value group harmony and may express themselves much more indirectly than in Western cultures. "Communication is culture" said Edward Hall, an American anthropologist, and internationally working executives need to be aware that much of communication happens in the nonverbal sphere in all cultures. A symbol, ritual or tradition may have totally different meanings in a foreign culture compared with the home culture. The Australian fans may not have had the intention to offend the Malaysian people or authorities when they wanted to celebrate Daniel Ricciardo's success at the 2016 Grand Prix but found themselves having done so leading to having to face legal consequences. Culture influences how we communicate

and hence many business skills ranging from selling to conflict management and negotiations. But most critically, it influences how we build trust. In her book the "Culture Map", Erin Meyer differentiates between cognitive and affective trust building. She writes "Cognitive trust is based on the confidence you feel in another person's accomplishments, skills and reliability. It is often built through business interactions: we work together, you do your work well, and you demonstrate through the work that you are reliable, pleasant, consistent, intelligent, and transparent. Result: I trust you. Affective trust, on the other hand, arises from feelings of emotional closeness, empathy or friendship. This type of trust comes from the heart. We laugh together, relax together, and see each other at a personal level, so that I feel affection or empathy for you and sense that you feel the same for me. Result: I trust you." Meyer's research shows that task-based operating cultures like Australia and the U.S. tend to rely mainly on cognitive trust building in work relationships. Relationships are built around tasks, projects, new ventures. They tend to be practical and are often summarised in contracts. People in China on the other hand may perceive the inability to build trust in cognitive and affective ways at the same time as a lack of sincerity and loyalty. The deep personal relationship may be the contract, the "yes" to a new venture or the insurance policy in case of a crisis.

## Whirlpool approached the Asia Market with a Global Mindset

"The adoption of a global mindset begins at home for multinational corporations as colleagues interact across borders and therefore cultures," said Deborah Vaughn, the Chief Legal Officer of Whirlpool Corporation. She continued "Our Asia Pacific law department based in Shanghai and Delhi has a team of 15 lawyers and non-lawyers with the capability to speak six languages. In search of the next learning, our dispersed and diverse team is curious and open to the differing views across our region".

Unlocking the innovative potential of the team is also a matter of navigating cultural sensitivities. Although it varies from company to company, compared to the West, the relationship between supervisor and direct report in India is generally more formal and hierarchical; and decisions being



more top-down. Additionally, employees not comfortable to say 'no' to the manager, may instead adopt the softer 'may be' to avoid conflict and loss of face. It is therefore essential to nurture a comfortable and trustful space for employees to express their views and unlock synergies.

Such an approach has reaped rewards. Most of our legal work in the India office is done in-house. Nevertheless, our legal team have come up with several ideas to optimise time and costs – ranging from competitive fixed fee arrangements with a panel of outside counsel for litigation; customised software to track regulatory compliance; and optimised use of outsourced paralegals; and outsourcing providers for certain legal processes. The strength in these solutions lies in their simplicity – the tapping of local but world-class IT and outsourcing services at competitive local rates.

When dealing with other parties, knowledge and appreciation of the other's culture provide a strong platform for building trust. And, in fact, this knowledge and appreciation of other cultures can be effectively leveraged

to achieve both parties' mutual goals. In designing a compliance program for our newly acquired China subsidiary based in Hefei, we proposed branding based on unique local and national cultural elements.

So, our Compliance program drew on images of Justice Bao (999 to 1062)- Hefei's most famous son known throughout East and Southeast Asia as a cultural symbol of justice. We were also able to tap the unique talents of the CEO of our new subsidiary, who is one of the top calligraphers in China. His calligraphy gracefully anointed various media bearing images of Justice Bao with his famous words "Integrity is the basis for managing one's life". To this legendary cultural element, we overlaid China's current campaign with videos and news clips of President Xi's anti-corruption drive.

Our Compliance program was well received by our new China leadership and colleagues with good attendance at training and strong sponsorship from leadership because at its core was a recognition and respect for the local culture. Concept to implementation was successful due to a number of factors.

We partnered early and we recognised that our Chinese colleagues had the appropriate cultural and employee insights. This perspective enabled us to fine-tune and strike the balance between global consistency and local customisation to achieve our mutual goal of advancing the company's values.

It is also clear that culture influences negotiations; and that citizens of Asia-Pacific countries tend to place a premium on building a relationship before concluding a deal. Perhaps this is most clearly seen when dealing with those of Japanese origin where the negotiations may be characterised as a courtship to build trust and a relationship. It is therefore important to build in time to allow the parties to get to know each other. Negotiations tend to be formal and may be punctuated with long silences.

In protracted and challenging negotiations to license a well-known international Japanese brand – a critical plank in a larger strategic transactional framework – a breakthrough in my relationship with the opposing in-house counsel was forged by an unexpected and ordinary connection. The negotiation teams

of around 12 made up of business partners, in-house and external counsel had taken a time out for coffee. My team was made up of 6 persons – each of us of a different nationality: American, British, Canadian, Chinese, French and Singaporean. As we gathered for coffee, the opposing outside counsel was next to me. She made a remark about how diverse my team was and asked where I was from. We struck up a conversation sharing our background. I told her of how I had known of her product brand growing up in Asia. I told her how when I left home at 16 to begin college in Singapore, my mother had bought me a little pink rice cooker. It was well used (especially by my dorm mates) and while I have lived in different places since college, my mother still had the rice cooker in our family home.

My personal sidebar recollection of my first experience of her company's brand was the unanticipated opportunity to connect emotionally and build trust. The brand currency in this commonplace article bridged a connection and paved the way for collaboration. From that point, we were comfortable enough to call each other on cell phones to express concerns; brainstorm solutions and ultimately play our part, along with the rest of the team, to shepherd the deal to a successful conclusion. And the relationship continues with calls from time to time as we manage the legalities of the license together.

In conclusion, cultural intelligence – the ability to identify and interpret cultural signals – is a key element of the global mindset. And this cultural competence is a journey not a destination."

### The Global Mindset® – a Comprehensive Guide to Global Leadership

How can the global mindset be defined and measured objectively to help improve business performance? This question was the starting point of one of the most extensive studies in the international business field. This is how the "Global Mindset®" leadership model was identified by researchers at the Thunderbird School of Global Management. "This model is excellent because it covers all skills and attributes needed to succeed comprehensively," says a global association executive. Leadership can be defined as the ability to demonstrate people, results, thought and personal leadership. Validation studies in 62 countries showed that the concept was positively correlated with all of these independent leadership performance indicators.

The Global Mindset is a set of individual attributes that help leaders to better influence individuals, groups, organisations and systems

unlike their own. The 36 Global Mindset® attributes were identified through extensive research with professionals and academicians. The attributes of this concept can be taught in organizations through assessment, training and coaching, and comprises three key areas:

**(1) The Intellectual Capital** is our capacity to understand how our business might work on a global level. The key attributes related to this area are "global business savvy" which is about our understanding of our customers, competitors and risk at international/regional/global level, "cognitive complexity" which is our ability to analyze and problem-solve and "cosmopolitan outlook" which is our knowledge of different cultures, history, geography, political and economic systems around the world.

**(2) The Psychological Capital** relates to our receptiveness to new ideas and experiences. The key attributes are "passion for diversity" which is about intense curiosity about other parts of the world, experiencing different cultures and trying new ways of doing things, "thirst for adventure" which is about an appreciation for and an ability to thrive in unpredictable, complex environments and "self-assurance" which is self-confidence, a sense of humor, willingness to take risks in new contexts also requiring high levels of energy.

**(3) The Social Capital** relates to our ability to build trusting relationships with people who are different from us. The key attributes are "empathy" which is our ability to emotionally connect with people from other parts of the world, "interpersonal impact" which is about being able to bring diverse perspectives together, maintain credibility and develop networks in unique ways, and "diplomacy" which is about our ability to listen to what is said and not said in conversations, our ability to start conversations with strangers and an inclination to ask rather than answer questions.

The Global Mindset® levels can be assessed with the Global Mindset Inventory® (GMI), an online survey tool. Professionals can identify their strengths, capitalise on these and then help others develop themselves in these areas. They then can focus on their development areas as well and come up with strategies to improve these.

#### Recommendations:

- Define your leadership value as in-house counsel early internally within your organisation.

- Utilise Global Mindset skills not only to succeed internationally or externally but also to build relations and results internally across internal sub-cultures, teams and departments.
- Consider helping form a "risk and trust committee" that tracks potential risk situations as well as opportunities in foreign markets. This may be critical for building credibility early on and responding to crisis as market conditions can change quickly.
- Consider initiating a global organisational culture campaign that communicates key organisational values. Utilise various channels of communication to gauge how well it is understood and receive feedback being prepared to learn and change.
- Communicate by engaging to ensure you are being understood (if necessary via intermediary individuals) and to receive feedback.
- Remember that trust can be built in different ways across cultures. Reflect on how you can relate to others at a personal level in addition to through a written/ formal agreement.
- Build your networks to understand and navigate legal landscapes and relations. Consider relationships long-term. A relationship may prove to be very valuable at an unprecedented time. This mentality also means that each relationship can be a conduit to many other relationships rather than the border to other relationships as in other cultures.
- Invest time and resources in significant research to understand goals, market conditions and emotions prior to international negotiations or any type of conflict.
- Understand the role of social media and the way public awareness is built in foreign markets to pre-empt crisis situations and possibly deploy information to build public trust.
- Integrate global mindset insights into your brand and all your communications.
- Be prepared and practiced for when to walk away from your negotiations while continuing to respect and maintain the relationship.
- Consider diversifying your team and raising its Global Mindset® levels by hiring professionals from different cultures and with different language capabilities. Ensure they have the opportunity to learn to work effectively together. Importantly seek to develop confidence in leading a multicultural team as research suggests that multicultural teams can underperform if not led with a global mindset. 

# RESPECTING HUMAN RIGHTS THROUGH GLOBAL SUPPLY CHAINS

It's likely you enjoyed your cup of coffee this morning.

Can you confidently say that the beans in your coffee were collected and shipped to Australia free from the use of slavery?

And that's just coffee...

What about the production of parts in your computer or smart phone, the extraction of minerals and metals or the sourcing practices in the seafood industry?

With an estimated 45.8 million women, men and children living in modern slavery today<sup>1</sup>, it is difficult to determine if any supply chain is slavery free.

'Freedom from slavery' is one of the 30 basic rights and freedoms that the United Nations Declaration of Human Rights defines as applying to everyone. Slavery isn't the same as simply poor working conditions or low pay. Modern slavery refers to situations where one person has taken away another person's freedom so that they can be exploited. This includes their freedom to control their own body and to choose to refuse certain work or to stop working. It's important to recognize that slavery is often accompanied by other human rights abuses and poor labour standards, hidden behind systemic corruption and bribery.

With 45.8 million slaves worldwide, it affects almost every sector, region and company.

## About South32

South32 is a globally diversified mining and metals company with operations in Australia, Southern Africa and South America. We mine and produce bauxite, alumina, aluminium, energy and metallurgical coal, manganese, nickel, silver, lead and zinc.

South32's supply chain is large and complex, with over 6,000 active vendors (FY16). In order to function, we source a wide variety of goods and services including mining and industrial services, travel and camp services, light vehicles, plant and equipment, logistics services and bulk materials, technology, information technology, fuels and electricity and human resources services.

## Why is South32 committed to addressing modern slavery within our supply chain?

South32's purpose is to make a difference by developing natural resources and improving people's lives now and for generations to come.

We are trusted by our owners and partners to realise the potential of their resources. To maintain this trust, we recognise the need to operate with respect and care for our environment, employees and communities, including through our supply chain.

## Who is responsible for addressing modern slavery in companies' supply chains?

As a values driven company that respects fundamental human rights, South32 recognises the important role our company can play in addressing modern slavery within our sphere of influence.

Given the scale of modern slavery, we realise that sector collaboration is necessary. Only by joining together as individuals and as businesses can we diminish the demand for goods and services made using slavery, ultimately driving slavery out of our collective supply chains.

## Why is global momentum building around modern slavery in the supply chain?

Laws in the United Kingdom (UK), the United States and the European Union are all examples of the rise in mandatory reporting laws for companies around modern slavery, especially for high risk sectors.<sup>2</sup>

In 2015, the UK introduced the Modern Slavery Act (MSA), which contains a 'transparency in supply chains' mandatory reporting requirement for companies who carry on a business in the UK.<sup>3</sup> This requirement imposes obligations on companies to understand how their suppliers operate. Companies are not required to guarantee there is no slavery in their supply chains, but rather to accurately report the steps, or absence of steps, they have taken to ensure their supply chains are slavery free. It is then up to the market to determine what is and what is not acceptable. The statement must be approved by the board, signed by a director and there must be a prominent link to this on the company's website.

Australia may soon follow suit by strengthening our existing legal framework. The Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade is currently conducting an inquiry into the establishment of an Australian MSA.



Robyn King

*In her role as a Human Rights Specialist at global resources company South32, Robyn manages the implementation of the company's human rights strategy. Robyn has a core focus on assisting Australian companies to be more 'human centred', rethinking the way they do business as a lever for broader social transformation. A former Disputes lawyer at Herbert Smith Freehills, Robyn went on to lead the Fogarty Foundation, a West Australian Not-for-Profit focused on advancing social change through education, before joining South32. She is extensively involved in the social sector and community initiatives, including the Centre for Social Impact at UWA and the JDRF State Management Group and is recognised by the World Economic Forum as a Perth Global Shaper.*

Recent legal cases also show that modern slavery and applicable laws are real issues affecting modern companies. There are increasing obligations to protect against these abuses that can, if appropriate, be enforced in court.<sup>4</sup>

Organisations are also stepping up more proactively in this space due to increased pressure from stakeholders about ethical sourcing practices in supply chains.<sup>5</sup> Organisational risks may also come from using goods created through the use of slavery. Quality can be low and production delays may occur due to the inevitable and harmful consequences of an unstable work environment with human health and safety risks.<sup>6</sup>

### Modern slavery has no place in South32's operations or supply chain

It will take the combined efforts of clear legislation, steps to address risks and resolve issues by organisations globally, a focus on non-punitive intervention for perpetrators of slavery (within reason) and the empowerment and support of victims to fully combat modern slavery.

South32 has embarked on this journey by shifting our emphasis away from compliance auditing towards a collaborative, partnership based approach.

By working with our suppliers to assess gaps, review high risk areas, build capacity and incentivise sustainable improvements, we can begin to achieve a unified solution to modern slavery in our shared supply chains.

### With large and complex global supply chains, where do you start?

Given the scale and complexity of many global supply chains, the first question for most large companies is: "How can we realistically conduct due diligence on our dynamic, geographically diverse supply chain containing thousands of suppliers, often multiple tiers removed from contractual obligations with us?"

Modern slavery due diligence can be an ongoing risk management process that aims to identify, prevent, mitigate and account for how a company addresses any potential adverse human rights impacts. It may include assessing actual and potential human rights impacts, integrating and acting on the findings, tracking responses, and communicating about how impacts are addressed.<sup>7</sup>

Research shows that an approach based on policies and supplier on-boarding procedures alone, if completed with a focus just on compliance, could be insufficient to deliver

improvements and promote truly responsible sourcing. Companies should go further and develop comprehensive approaches that influence day-to-day decision making within the company.<sup>8</sup>

In most cases, it is unrealistic for a company to conduct meaningful modern slavery due diligence on its entire supply chain on its own. At South32 we realised that conducting due diligence on every supplier in our supply chain would result in our company incurring extra costs that would not necessarily benefit those most affected by slavery.

To focus on our highest risk areas, especially suppliers conducting business in weaker regulatory environments, we engaged in a number of targeted actions with our supply teams.

### Which practical actions is South32 taking to address modern slavery in our global supply chain?

South32 has company-wide policies in place to manage the risk of human rights and modern slavery abuses within our own company and operations, and in those of our suppliers and business partners.<sup>9</sup> Our Sustainability Policy describes our commitment to respecting internationally recognised human rights and this informs

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our approach to addressing modern slavery in our supply chain. Our standards state our minimum human rights requirements and our supply contracts and on-boarding documentation requires counterparties to adhere to our policy and standards.

While this governance is in place, we aim to continuously improve our processes through increased transparency and effective due diligence aimed at minimising modern slavery risks in our supply chain.

In 2016, South32 published its first 'Modern Slavery Statement' under section 54 of the UK MSA.<sup>10</sup>

In 2017, we have taken positive steps to address modern slavery risks in our supply chain by focussing our efforts on the highest risk goods and services we source and actively working with these suppliers to address any issues further down the supply chain.

To achieve this, our sustainability and supply teams have worked together to define who our 'high risk' suppliers are by designing and applying a 'high risk goods and services framework' to our direct suppliers, resulting in a list of our highest risk categories. We then hosted in-person workshops with the subject matter experts in our supply teams to identify, within each highest risk category of goods and services, which suppliers were most likely to be high risk. Workshops were intended to provide valuable insight into why addressing modern slavery is important to our company, provide a deeper understanding of our suppliers and generate ideas around future process improvements. South32 now also provides specific modern slavery training for our employees.

In undertaking this program of improvement work in FY17, we gained a number of insights into how our culture needs to support an objective such as addressing modern slavery risks in our supply chain. We will continue to focus on improvement in the following areas as we mature on our journey:

- It is equally important to spend as much time on the 'why' as on the 'how'. We are working to ensure that all employees in our company understand why we are working on eradicating modern slavery from our supply chains and that our messaging resonates with all audiences.
- Conducting 'tick box' compliance exercises and mandating contracting suppliers to disclose their supply chain practices is only a first step. Companies should shift to more of a relationship based approach for supply chain management, founded on dialogue and partnership. This will also enable us to build our commercial understanding of inherent risks in different supplier industries.

- The severity and likelihood of potential modern slavery risks and impacts are rarely occurring among direct suppliers of large global corporations. Instead issues are more likely to be several layers deeper in the supply chain, and sometimes even several steps removed from a direct relationship with the supplier company from whom the final goods are sourced. Lack of visibility and leverage in these situations makes it challenging to authoritatively assess goods as 'slavery free'.
- A challenge that is particular to South32 as a geographically bound operator, is the need to incorporate local suppliers around our operations in our supply chain to encourage local economic development. However, many of our local suppliers have less sophisticated management systems in place regarding human rights and modern slavery standards and compliance. Capacity building approaches therefore need to be embedded in our supply chain management.
- To embed these processes in our supply chain management, we need to work in cross functional teams, drawing on the expertise in our supply, legal, community and sustainability teams.

### Working together to create slavery free supply chains

South32 is engaging in discussions around the creation of a shared modern slavery audit database between mining companies who are likely to have a high degree of cross over in their suppliers. As each entity seeks to clarify the ethical practices of suppliers, they are likely to duplicate requests with other entities seeking the same assurance. Therefore, the potential for an extensive overlap in supply chains amongst goods and services for all Australian (and global) companies, regardless of sector, is high. We are exploring options for focussed due diligence and auditing efforts that avoid duplication.

### How can in-house counsel play a role in addressing modern slavery?

We have found that working in partnership with our supply teams, in-house counsel, our sustainability team, our executive committee and our Board has led to greater maturity in understanding our supply chain and any modern slavery risks. In-house counsel are critical in providing advice, updating supply contracts to ensure that we conduct due diligence, keeping abreast of legislative changes, and ensuring we are able to appropriately manage competition issues regarding supplier audit sharing options. Human rights and modern slavery are now firmly on the risk map for modern companies. Large organisations with complex global supply chains can take a number of steps to

proactively address these risks, including:

- Getting board and executive level support to address modern slavery within a company's sphere of influence.
- Ensuring organisation-wide policies are in place to manage modern slavery risks.
- Working with internal and external stakeholders to identify areas of high risk in an organisation's supply chain. If modern slavery issues are identified, working in partnership with suppliers to address issues in our joint supply chains.
- Cultivating an organisational culture that supports objectives such as addressing modern slavery risks in supply chains. 

### Footnotes

- Walk Free Foundation: The Global Slavery Index 2016*
- Modern Slavery Act 2015 (UK); California Transparency in Supply Chains Act, 2010; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, section 1502; EU Directive 2014/95/EU on disclosure of non-financial and diversity information*
- Section 54 Modern Slavery Act 2015 (UK)*
- In the landmark ruling of Galdikas v DJ Houghton Catching Services Limited and Others [2016] EWHC 1376 (QB), the English Court awarded damages against a company in relation to modern slavery for the first time, broadening the scope of a company's responsibility. There is also a growing trend towards cases being brought against Canadian mining companies for severe human rights abuses overseas, including Nevsun Resources, Hudbay Minerals and Tahoe Resources.*
- Even allegations of modern slavery can be debilitating. This was seen when Malaysian company Pure Circle was raided in the US due to allegations that their "Stevia" shipments, a plant used to make sweeteners, were produced by forced labour. Pure Circle is currently refuting these claims but harm has already been done, with the allegation wiping millions of dollars off Pure Circle's market value and affecting its share price: <http://expertinsights.eversheds-sutherland.com/post/102dx12/m-a-hot-topics>*
- Examples include the tragic collapse of the Rana Plaza Bangladeshi textile factory in 2013 with a death toll of 1,134 people; the Nike forced labour scandals in the 1980s; and Apple's admissions to discovering a total of 91 underage workers across 10 of their supplier facilities in 2010: [https://images.apple.com/supplier-responsibility/pdf/Apple\\_SR\\_2011\\_Progress\\_Report.pdf](https://images.apple.com/supplier-responsibility/pdf/Apple_SR_2011_Progress_Report.pdf)*
- The United Nations Guiding Principles on Business and Human Rights: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)*
- Beyond Compliance: Effective Reporting under the Modern Slavery Act, A civil society guide for commercial organisations on the transparency in supply chains clause, February 2016: [http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO\\_TISC\\_guidance\\_final\\_digitalversion\\_16.03.16.pdf](http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO_TISC_guidance_final_digitalversion_16.03.16.pdf)*
- This includes our Code of Business Conduct and Sustainability Policy. The sustainability and business conduct supplier requirements can be found on South32's website at: <http://www.south32.net/suppliers>*
- South32's Modern Slavery Statement is available at: <https://www.south32.net/getattachment/sustainability/Sustainability-Reporting/Modern-Slavery-Act-Section-54-Statement-for-the-Financial-Year-Ending-30-June-2016.pdf>*

# ABOVE AND BEYOND

How a high-performing legal team can deliver value



Craig Katerberg

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



Megan Comerford

*As the Better World & Legal Manager for Asia-Pacific South Zone (Australia, India South-East Asia) for Anheuser-Busch InBev, the world's leading global brewer with well over 500 brands and one of the world's top five consumer goods companies with approximately 200,000 employees, Megan manages projects that align AB InBev's environmental, social and alcohol responsibility efforts.*

In global business, pace, demand and innovation are constantly increasing. This is pushing in-house lawyers to be more flexible and engaged - an integral part of commercial operations. The question is how to build an in-house legal team (across all levels of seniority) to answer these demands and be more to their organisation than a consultancy. At AB InBev, as a global, leading beer company our iconic brands, passion for brewing and the breadth of opportunities available to employees provides us with a unique foundation for answering this question.

**Dream, People, Culture: a simple lens that we apply to everything we do, including team development.**

Our organisation works to a common framework of values that guides us toward a shared dream, enabled by people with the right culture. As a global company, issues and opportunities often cut across regions, regulatory environments and cultures. Team inclusiveness and respect for each other's views and experience is facilitated by the critical foundation of a united vision/dream.

So how does the legal team at AB InBev deliver value to the wider organisation?

## **Step 1: Build a team focused on business strategy and a united dream**

Buy-in from the senior management of the business on the importance and value of the in-house legal function is critical to achieving maximum engagement and integration. Leadership and buy-in start from the top and having the team focussed on the right objectives and opportunities for the business is essential to turning those efforts into tangible value that is meaningful for the business as a whole.

At AB InBev we are fortunate to have an incredibly strong culture focussed around growth and always stretching for more. It's that positive drive that allows people in our function to push themselves out of their comfort zones and into areas they can thrive. We work in a challenging business in a highly regulated, high pressure, competitive industry, but we see that as thrilling, rather than

daunting. We're clear on where we're going and eager to contribute to getting there.

In our structure, the Legal team is combined with Corporate Affairs (across government relations, external and internal communications, and corporate responsibility). Some team members even work across both these functions, as well as even our most specialised team members getting involved in each other's work where possible. This cross-functionality helps lawyers realise their potential for different types of work (legal and otherwise) and think outside of their 'day job' – we ask ourselves, *what am I good at? What am I interested in? And how can that help our business?* It also means we have many more touch-points with other functions and can add value even where stakeholders may not realise it's available. The AB InBev culture is focussed around dreaming big, and that is lived by everyone in the organisation. The legal team can buy into that overall positive drive and also motivate with our own dream for the function. Being linked with the communications function also pushes the team to buy in – we need to walk the walk as well as talk the talk, and set a personal example for our stakeholders in doing so.

Legal teams are often forced out of individual comfort zones by urgency and capacity, but it's also important that the team can learn from each other on a more regular and educational basis. At AB InBev our lawyers get involved in all sorts of projects and matters across disciplines, utilising each other as resources for technical knowledge and different types of problem solving approaches. This also means when it's time for one of our lawyers to move to their next role in the business, the gap is easier to fill.

For example, a young lawyer working in compliance is provided the opportunity to gain exposure to the creative campaign launch for a new product as part of an integrated team. This means that the team member will be able to provide valuable input into elements of the brand outside the usual remit of corporate law while also expanding their own skills and experience in the process. Imagine being a lawyer and being able to point to your beer with your mates at the pub and say, "I'm a part of that. I made this happen." It's really exciting to see young team members getting excited about new projects and engaging in positive business achievements; we celebrate each other's wins.

## Step 2: Make the effort to understand and be involved in all parts of the organisation

A huge benefit of having a strong in-house legal team is that the lawyers are an integral and valued part of the overall team and are invested in the success of the business.

Highly specialised lawyers may be used to staying within the four walls of the legal specialty, providing a high level of support and advice in that area. But being part of a corporate counsel function also requires a willingness to understand how that advice impacts the commercial reality. The best way of building that understanding is to integrate as much as possible. Go visit the brewery, go meet customers at their pubs and order a Great Northern. Go to another team's workshop, ask questions, read everything you can get your hands on and most importantly, share with each other within the legal function as much as possible. At AB InBev, happy hours are essential for this informal interaction, communication and knowledge transfer. Team members are genuinely curious and excited about each other's work, and this positive communication informs us about different interests and skills that can be utilised across the function and the business.

Pushing this type of 'mental investment' from lawyers also helps retain talent - ambitious and intellectually curious people thrive in environments where they learn at a steep pace and contribute to the business in real-time. They want to be challenged and they want to proudly demonstrate their knowledge and understanding of commercial operations, both internally and to colleagues outside the business. In our case they want to be able to hold a conversation on brewing techniques, not just legal matters.

## Step 3: Set clear goals for progression within the team, and train and support each other to grow and succeed

In leading teams, we are always preparing our successors for their next role. Even at junior levels, in-house legal teams can train each other in different specialties and roles in order to provide full business service and to equip each other for whatever role or business function (or country!) may come next.

It's crucial for leaders to set challenging goals for our teams and support them as they lead in driving those results. Good leaders define goals and allow high-performing individuals to step up.

Leadership is also critical for making sure those goals are accomplished the right way – no shortcuts. The pressure of business timeframes and commercial reality can create an intense environment, but high-performing



legal teams will understand the *how* as well as the *when*. In rare instances legal restrictions will prevent commercial goals from being achieved. However if we have built credibility and trust as a value-adding team member, as opposed to a roadblock, then that advice will be respected and adhered to.

Many lawyers will be familiar with a ladder-style hierarchy, with straight-up-the-line promotions on offer. But working in-house allows lawyers to expand well past that and think not only about what sort of lawyer they want to be, but the sort of business person they are.

**AB InBev has a culture of career progression enveloping all relevant business functions, and we celebrate when other functions pull our people into their areas.**

It's not a matter of losing a lawyer, but rather that the legal team has helped train and support a high-performing person to succeed. We want to be talent exporters and it leads to greater connectedness to the legal team and awareness of issues throughout the organisation.

## Step 4: Create value, not just protect it

In-house legal teams are, of course, risk managers – that comes with the territory. But there is also potential for us to be opportunity managers. Lawyers can see enormous potential for value creation when given the opportunity.

We've put a lot of thought into how we can create *measurable, recognisable* value for AB InBev's top and bottom lines, and have seen this recognised by other functions of the business. Take contract drafting for example.

Legal teams will draft and execute a contract as a matter of course. But we can also be the function that helps ensure that we as a business are getting maximum return-on-investment for that contract, both during negotiation and afterwards – *Does the drafted contract tick all the commercial boxes as well as legal? Once in play, are we making the most of what has been agreed? Are there gaps we can fill? How can we help fill them?* This all feeds into the 'Dream Big' attitude we take when setting goals and assessing how the legal function can contribute more. AB InBev is committed to delivering consistent, superior top-line growth and we can help build that with our everyday actions.

Legal teams have to earn a seat at the table, just as any other business function does. Sometimes that can mean more promotion than lawyers are typically comfortable with, but communication is key to helping the business understand that we can, with our unique combination of skills and understanding, create and add value, including in terms of dollar figures.

## Result: The team is regarded as a contributor to the bottom-line in quantifiable terms, managing risk and also seeking out opportunities to grow the business

Early engagement by internal stakeholders means being able to participate and be involved in development of projects, instead of being brought in to consult when matters are already well-progressed. Instead of relying on *'should we run this past legal?'* before the final hurdle; build relationships that encourage people to ask *'who's the best person from legal to help get this done quickly?'* at the beginning of projects. Stakeholders do this when they see the legal function as a path to outcomes in the right way. It means we can keep growing and understanding outside the strict legal space, making our advice much more relevant and impactful. 📌

# THE FUTURE OF CONTRACTS – AUTOMATION, BLOCKCHAIN, AND SMART CONTRACTS



Dan Puterbaugh

*Boasting experience across all phases of legal product support from license support, go-to-market strategy, to end of life issues, Dan serves as Legal Director supporting Adobe's Document Cloud and Adobe Sign, Adobe's electronic signature solution. His writing on streamlining legal and business workflows has appeared across a range of legal and IT publications across the United States and North America.*

In-house counsel are under pressure to do more with less, while working with legal processes that don't always allow for shortcuts. We juggle urgent deadlines, shifting priorities, and putting out fires, and we do it with little administrative support. Sometimes it seems the only way to serve the opposing demands of business productivity and legal excellence is to spend more hours on the job. But working longer hours isn't a sustainable path. Instead, in-house counsel can look beyond the doors of the legal department to find technology to help them streamline their work.

That creates another challenge: keeping up with a rapidly evolving technology environment. The good news is you don't have to be a technologist to automate your work – you just need to understand the concepts.

At Adobe, we transitioned from using traditional NDAs to using mutual NDAs that are pre-signed and executed electronically. Our plan was to create modular content accessed via a customisation workflow that would allow a sales rep to grab the pieces of an NDA relevant to her work, a financial analyst to grab others, and an office administrator to grab yet others. A visitor, partner, or vendor would only have to click on the signature field to electronically sign the NDA, via Adobe Sign, and then it would be archived. All this would occur without the legal department ever having to handle the NDA.

As in-house counsel, our lawyers did not have a lot of experience in leading technology efforts. We had one big advantage, however – as a software company, we had experienced people in-house that helped us reach our goal. And while the project generally went smoothly, we did learn some important lessons we will apply to our next project.

## **Start simple**

Preparing simple agreements like NDAs and small vendor contracts eats up a lot of time for in-house counsel. Because these types of agreements are low risk and high volume, they're a good place to start a streamlining initiative.

## **Assemble a development team**

The transition from conventional to

automated NDAs involved a lot of stakeholders, so our team included a project manager who worked with vendors and in-house counsel, and in-house counsel who worked with departments across the enterprise. Internal teams of web designers and testers also aided us.

The lawyers were on board right away; as the people responsible for processing over 1,000 NDAs annually, they were receptive to tools that would make their jobs easier. Working with the IT department also went smoothly. Adobe has an IT team dedicated to meeting the needs of its legal department, so our engineers were already familiar with legal vocabulary and compliance issues. If we'd lacked that technical resource, the experience of working with the IT team would have been similar to that of working with third party vendors – and that didn't go so smoothly.

## **Lead your vendors to your vision**

The third party content management system vendors had trouble understanding what we were trying to achieve. They had difficulty grasping the reasons behind our requests for certain functions and were hesitant to push the technology as far as we wanted. At the same time, the legal department was new to the process of developing applications, so we had to learn to ask for what we wanted in ways that made sense to the people who were actually building our tool. We had to teach lawyers how to talk to engineers, and we also had to teach engineers how to talk to lawyers.

## **Remember, digital is different**

We modelled the first version of the digital NDAs on our paper agreements, which were up to 12 pages long. We were still thinking in terms of a traditional approach, but to achieve real streamlining, we had to do more than simply replicate a paper process. We had to question everything, examine each section of the NDA template to see if it was really necessary, and evaluate the risk of leaving it out. We also had to translate every section from legalese to plain English so users could easily scan the agreements and sign them with confidence.

## **Involve users early and often, and be prepared to revise**

Users quickly let us know that the new tool was too long and complicated, so we cut out

all questions that weren't absolutely necessary. The user acceptance numbers rose, proving that the fewer the questions, the more likely people were to answer them all accurately.

The use of mutual, pre-signed, and automatically executed NDAs has improved efficiencies for both our company and partners significantly, so now we're now looking for other ways to use technology to increase our efficiency.

Discussions about increasing the efficiency of a legal department usually raise questions about smart contracts. There's still a lot of skepticism about this new type of contract. After all, many legal departments are still entirely paper-based. However, as an innovative company, we believe in staying focused on the next generation of technology. So an investigation of smart contracts is a worthwhile use of our time.

### Contracts by code

A smart contract is generally a contract between parties recorded as a series of if/then statements. When a condition is met, an action is performed. The smart contract software will interact with other enterprise systems to conduct or enforce transactions without human involvement.

For instance, a smart contract may exist between trading partners Widget Corp and Giganto, Inc. The smart contract says that Widget Corp must deliver 1,000 widgets to Giganto by the first of the month in exchange for \$1,000. When Giganto receives the shipment and enters it into their inventory software, the smart contract triggers Giganto's payment software to automatically release \$1,000 to Widget Corp.

The smart contract can be used for more complex transactions as well. Perhaps Giganto has a further agreement to sell those widgets to Micromart. Once the widgets are entered into its inventory software, Giganto's smart contract triggers its invoicing system to send Micromart a bill. When that payment is received by Giganto's accounting software, the order is automatically sent to the warehouse for shipping.

If at any time a condition is not met – for instance, if the widgets never arrive at Giganto – all actions stop, and Giganto never releases payment for the missing items. At that point, a human has to become involved.

### Smart contracts won't steal your job

Smart contracts are not perfect in every situation. Currently their use is limited to agreements that can happen automatically, like a simple exchange of goods for money or certain types of purely financial transactions. Some agreements that pass through an enterprise's legal department fit this description, such as those with the coffee

service vendors, office supply dealers, and IT manufacturers. These types of transactions can all be automated, or "self-executing."

Some parts of contracts require litigation to enforce, such as indemnity clauses that protect a reseller from claims arising from faulty products. Obviously, agreements like these cannot self-execute, so a smart contract cannot cover the entirety of such an agreement (although it may be used for pieces of it).

### LESSONS LEARNED

**Focus on the result.** Don't get hung up on how the paper process worked. Think about the end product and let your IT staff and vendors figure out better ways to get you there.

#### Write your requirements in plain

**English.** Your vendors, IT staff, and users need to understand what you're asking them do.

**Ask for everything.** Don't limit your expectations, especially when dealing with a vendor. You haven't lost anything if they say no, but you can win big if they say yes.

**Engage all along.** Be clear that you want to see the work in progress. Seeing the mockups can inspire creativity, and it's easier to make changes to drawings than to a final product.

**Remember that you're a professional debater.** Lawyers are trained to win arguments, but a streamlining project isn't an argument. Listen and consider other viewpoints when stakeholders push back.

### From cryptocurrency to commercial contracts

A contract is an agreement on terms between two parties – and while a smart contract can easily be used to describe those terms, how does an automated system prove exactly which parties agreed to them? Only recently has there been a technological way to answer that question: blockchain.

A blockchain is most often defined as a public ledger of bitcoin transactions. It is constantly growing as 'completed' blocks are added to it. The blocks are added in chronological order. Together, the chain of blocks can contain a large amount of information, and a block can only be changed if all the preceding work is changed as well. In addition, the blockchain is shared across multiple computers, each of which can correct and update blocks in the others. That makes tampering difficult, at best because any computer that is hacked will be automatically corrected by the others.

Blockchain technology was originally developed as part of bitcoin transactions. The financial world quickly saw the potential for mainstream applications of blockchains, and tools based on the technology began to emerge. Now, blockchain adoption has spread beyond the financial arena and is being deployed by businesses that perform services as varied as tracking luxury goods and managing land titles.

But blockchain can store any kind of data – not just bitcoin transactions. One intriguing application for blockchain is as a form of digital signature. Each party can create a digital signature within blockchain. When a transaction is created, these digital signatures are combined into a unique string of encrypted characters that validates their identities. So, smart contracts may support digital signatures for added assurance, and this form of digital signing doesn't require a third party clearing house to handle the signature encryption and validation.

### The lawyer's role in implementing smart contracts

When we developed our automated mutual NDAs, our legal department was heavily involved in the entire process. Launching a smart contract system is different. While the project will require a sponsor in the legal department to get rolling, the real work is accomplished by the IT department.

The engineers can use one of several programming languages to write the code from scratch, or they can choose to install a platform, which is a collection of tools and services that simplify the implementation of a technology. Platforms are emerging rapidly. Today, according to Angellist, there are 315 startups offering some flavor of blockchains. The most established include Ethereum, SmartContract, and Eris Industries. Eris Industries is particularly interesting to legal professionals because it was founded by lawyers and uses a markdown language called Legal Markdown that is specifically designed to handle legal citations, numbered lists, font changes, and other elements of legal agreements. As for the underlying block chains, they can be coded manually, purchased from a vendor and customized, or procured as blockchain-as-a-service.

Clearly, this phase of a smart contract project is outside the wheelhouse of the legal department, but there are plenty of activities for the legal team to handle before, during, and after the code is written.

**Analyse.** Is a smart contract pilot program worth your company's time and money? The answer is yes if your company:

- Has trading partners who are also moving toward using smart contracts

- Executes a lot of simple contracts with these partners
- Operates on lean business principles
- Positions itself as a technology leader

If smart contracts seem like a possible fit for the enterprise, the next step is the same as for any project intended to streamline a legal process – identify the types of agreements that will present the least risk if they fail and the greatest benefit if they succeed. Once you've identified a good candidate for the project, the next question is whether the cost benefit of a successful implementation will be worth the investment in resources.

**Network.** Reach out to peers in the legal departments of trading partners to find out who else is considering or already developing smart contracts. After all, a company can't use smart contracts unless it has partners willing to use them as well. The investment in developing the smart contract system only makes sense if a significant number of contracts are being executed between the organisation and one or some of its partners. Otherwise, there will be no chance for return on investment, and if there are a lot of business-critical systems involved in a business's transactions, the complexity will add cost.

And today, not many companies outside the financial and insurance sectors have deployed the technology. An enterprise that wants to move in this direction will have the best chance of success if its trading circle includes an organisation that is already using smart contracts or is interested in a pilot program. Large financial or insurance organisations are the types of businesses most likely to be interested and knowledgeable.

If a potential partner is identified, find out:

- Which technology platform they are using
- How much of their solution is being developed in-house
- Whether they are using a hybrid model or not, and what their reasoning is
- How they gained buy-in from their own trading partners
- Whether there is an opportunity to share resources, such as by lending in-house technology expertise or sharing research

**Lead.** Your IT department certainly is aware of blockchain technology and maybe your CEO has been reading about smart contracts, but it is up to the legal department to decide whether to push the organisation toward a pilot program. If a pilot program is launched, someone from the legal department will have to act as an information clearing house between the engineers, executives, and leaders in the legal department.

The software developers will have a methodology they use to communicate with

a project's stakeholders; it will probably be a version of agile development, requiring frequent short meetings that the legal department's liaison cannot miss. Much of the discussion in these meetings will consist of strings of acronyms with the occasional verb tossed in, but don't hesitate to stop the torrent of techno-jargon to ask questions until the answers are clear.

**Test and suggest.** When the code is completed, your job is to try to break it – it's better for it to break during an in-house test than in the middle of a live contract with a vendor. Don't be alarmed if you find mistakes and glitches; no matter how thorough communication has been with the engineers; first versions are likely to reveal some glitches. Work with the engineers to prioritise fixes and jump back into the steps of the software development lifecycles – meetings, production, and testing.

### Uncertainties abound

Adopting a new technology always comes with a level of risk, which is even higher than usual for smart contracts. Programming isn't law, and their legal validity is unclear at this time, with the first question being whether a court would even consider a smart contract to be a true contract rather than just a mechanism of enforcement. Even if that answer were a broad yes, many other questions would remain.

- If a hybrid contract includes text as well as code, is the text a collateral contract?
- If an error in one party's code has caused a breach of contract, how will that be determined and adjudicated?
- Does a smart contract represent terms or conditions?
- Smart contracts are supposed to be self-enforcing; if the technology is corrupted or hacked in transit between the two parties, who is responsible for making the wounded party whole?

These questions just scratch the surface of the legal uncertainties surrounding smart contracts. However, as we've seen in recent years, technology is a juggernaut that may be slowed but rarely stopped by the legal system. These questions will be hammered out sooner than later, so lawyers working for enterprises that foresee a large potential benefit from the use of smart contracts should be prepared to offer guidance to their executives.

### Are smart contracts smart business?

Although there are many potential benefits to using smart contracts, the business case for their adoption is hazy. Even companies eager to use them will probably end up relying on hybrid versions that use natural language in the usual manner and the smart

contract code to automate enforcement. That approach would deliver the benefits of automation while still allowing for negotiation and providing assurance that the agreement would be litigable.

Another concern is that, while blockchains currently can be very secure if coded correctly, no software is invulnerable to hackers. Financial organisations are the most attractive targets, but any company moving large amounts of cash will also draw undesirable attention. That said, companies moving large amounts of cash or personally identifiable information are already attractive targets, whether they're using smart contracts or not.

Finally, smart contracts are designed to be executed dozens or hundreds or thousands of times in a purely automated environment. That means that any flaw in the coding or natural language that creates risk has the potential to create a serious liability in a short period of time. So it becomes more important than ever for in-house counsel to ensure contracts are bulletproof and buttoned-down.

### Automation is here to stay

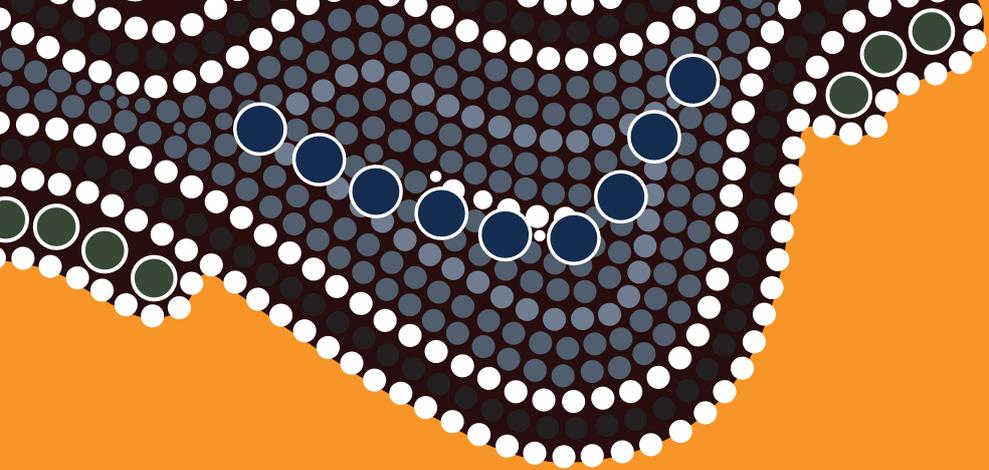
Just as the PDF transformed the way we transmitted and consumed information, automation represents the next frontier in how legal teams will capture contractual data and execute agreements. In-house counsel may not choose to blaze trails with smart contracts, but even the most traditional legal department would be wise to establish a methodology for evaluating emerging technologies now – because smart contracts are the bellwether for the direction corporate law is heading.

And while we are constantly evaluating new technologies, smart contracts don't yet make sense for my company. The business case just isn't there for us right now. We are not heavily involved with automated financial transactions, we don't work with cryptocurrency, and we don't have a volume of the types of transactions that would be improved by the use of self-executing agreements. Maybe our situation will change, or maybe blockchain technology will become more ingrained in the broader world of business – and if those things happen, we'll reconsider.

On the other hand, we continue to look for other ways to automate the work of our legal department and provide more streamlined services to our workforce and partners. Our NDA project resulted in better interactions with our customers and vendors while also easing the workload of our legal team. That's a success we want to repeat. 

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An original version of this article appeared in the December 2016 issue of the *Docket*.



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*"I look forward to attending the National Conference each year and encourage my team to attend. The presenters specifically tailor the subject for in-house corporate and government lawyers, which makes the content more relevant and applicable. The sessions provide time to reflect and learn; I always come away with new techniques and practices to implement back at the office. The professional contacts and friendships I have developed through the ACC Australia network continue to encourage and inspire me."*

- **Rachel Saunders**, General Counsel, Royal Agricultural Society of NSW

# FUTURE-PROOFING CORPORATE LEGAL DEPARTMENTS



Eric Chin

A co-author of the 2017 Benchmarks and Leading Practices Report. Eric works with senior management in law firms on corporate strategy, mergers & acquisitions, market entry strategy, Asia strategy and business model innovation across Australia, New Zealand, Hong Kong, Singapore, USA and other major markets in the Asia-Pacific region.

The Australian and New Zealand (ANZ) in-house legal community stands at a pivotal point in the history of the legal sector. The ACC Australia 2017 Benchmarks and Leading Practices Report provides insights into the increasingly complex in-house legal sector. This article highlights some of the key findings from that report and introduces a framework developed to help general counsels future-proof corporate legal departments.

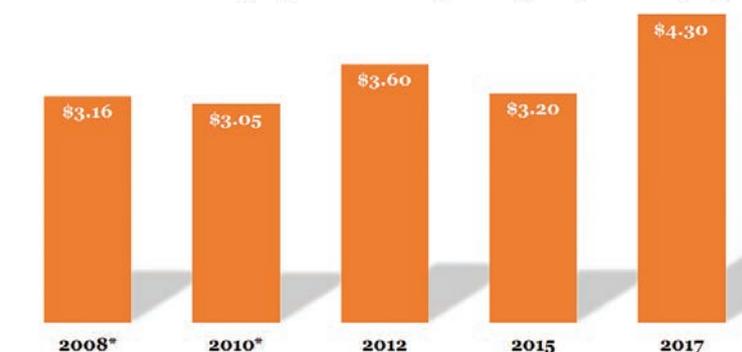
In 2017, two-thirds (60%) of ANZ in-house lawyers reported pressure to reduce legal costs while one quarter (25%) reported pressure to minimise cost increases. As pressure on external legal expenditures mount, the internal pressure to reduce internal legal spending has also intensified. Nearly 80% of ANZ in-house lawyers report they are under pressure to reduce external legal spend; while close to half (49%) report they are under pressure to reduce spend on internal staffing. Much of this emphasis on cost reduction

is driven by general cost saving programs within the organisation (67%), operating environment/general market conditions (58%) and economic conditions causing the business to operate more cautiously (32%).

As highlighted in Figure 1, in the face of the mounting pressure on legal expenditure, ANZ's corporate legal departments have seen their total legal spend increase from \$3.16m in 2008 to \$4.30m in 2017. A breakdown of this increase reveals external legal expenditure as legal bills ballooned to \$4.30m in 2017. Some of this increase is attributable to a greater proportion of unbudgeted external legal expenditure (6% reported spending \$1m+ on unbudgeted external legal spend compared to 1% reporting an unbudgeted internal legal spend of \$1m+). Recognising the need for enhanced cost certainty, only 1% (compared to 7% in 2015 and 4% in 2012) of general counsels report that charging by the hourly rate is the best approach.

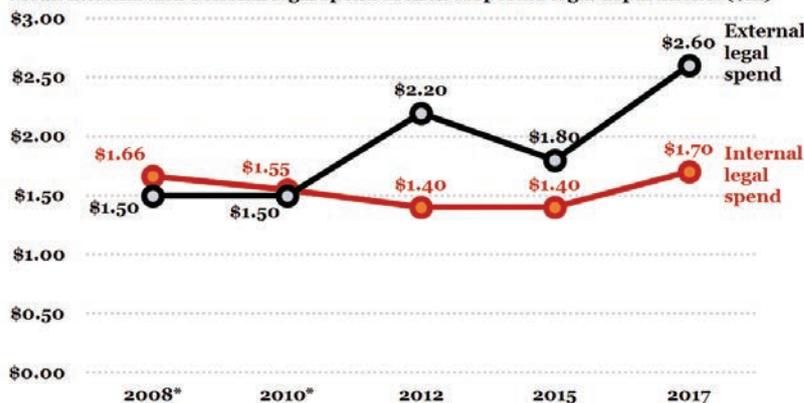
The ACC Australia 2017 Benchmarks and Leading Practices Report is available for purchase via the ACC Australia website: [acla.acc.com](http://acla.acc.com)

Figure 1: Mean total legal spend of ANZ corporate legal departments (\$m)



\*Australian respondents only

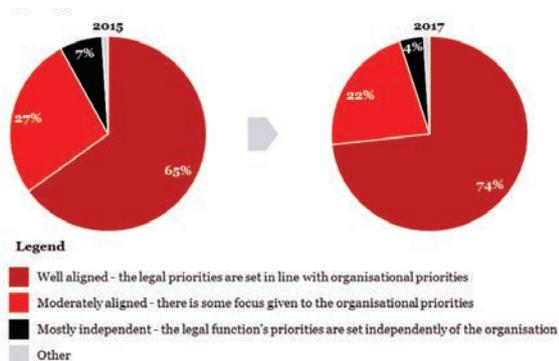
Mean internal and external legal spend of ANZ corporate legal departments (\$m)



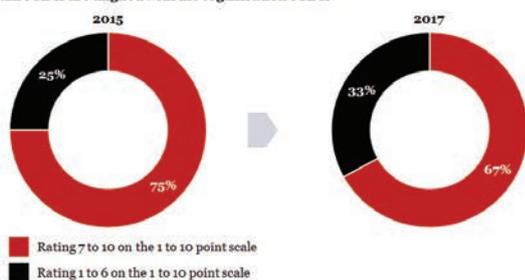
\*Australian respondents only

Source: 2017 Benchmarks and Leading Practices Report

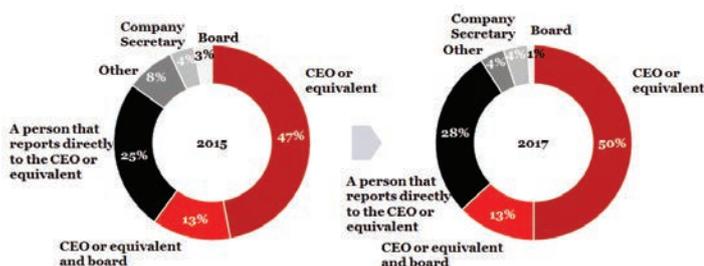
Figure 2. Level of Strategic Alignment



The legal team's KPIs are aligned with the organisation's KPIs



Head of Legal's reporting line



Source: 2017 Benchmarks and Leading Practices Report

## Improving the role of legal in business

General counsels have inherited a business model characterised by a remedial approach to legal issues that traditionally relegated the legal function to proverbial fire fighters to put out legal fires with little time allocated to strategic issues. However a fundamental paradigm shift is underway and high performing corporate legal departments are shifting from a remedial to a preventative approach to legal issues. The 2017 report reveals high performing corporate legal departments have a clearly defined role in the business that promotes strategic alignment by setting KPIs in line with organisational KPIs. Once the role of the in-house legal department is crystallised, it is important for the head of legal to have direct access to the c-suite. This is an important indicator of the corporate legal department's ability to influence the organisation.

As highlighted in Figure 2, the 2017 report reveals 74% of ANZ's general counsels (up from 65% in 2015) believe their CEO or equivalent would consider their corporate legal department to be well aligned with organisational priorities. In addition, 67% of corporate counsels report that the legal team's KPIs are aligned with the organisational KPIs, although this represents a decrease from 75% in 2015. Meanwhile, direct access to the c-suite has improved as 50% of respondents' head of legal report to the CEO or equivalent.

## Defining and refining the legal department's service portfolio

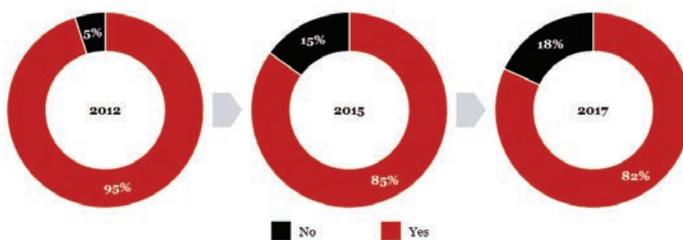
High performing corporate legal departments excel at instilling the right demand management principles to satisfy their internal constituents and manage legal costs. The report reveals high performing in-house legal departments have a well-defined service portfolio that sets out their service levels on the type of legal work they conduct and the type of work they outsource. High performing legal departments also demonstrate an ability to focus on what is strategically critical to the organisation.

As highlighted in Figure 3, the 2017 report reveals that 82% of ANZ's corporate counsels (down from 85% in 2015 and 95% in 2012) will determine whether external expertise is required when determining whether matters should be insured or outsourced. In addition, respondents reported their heads of legal spend 51% of their time on high importance/highly strategic work that is urgent. The in-house legal community continue to be technology laggards, with only 4% (or \$68,000) of the \$1.7m internal legal budget allocated to technology.

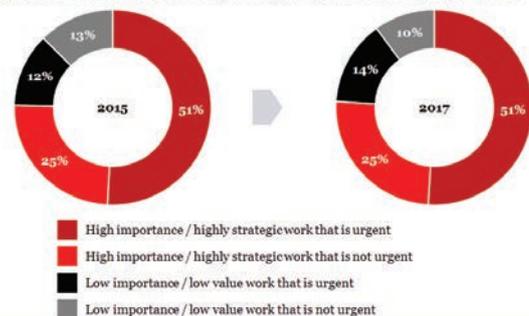
## Fine-tuning the legal department's operating model

Legal operations have become du jour in the in-house legal community. For high performing corporate legal departments, an optimal operating model is characterised by the adoption of a formalised workflow management system to automate service and legal project management to dissect matters into its constituent components to ensure the right internal or external resources are leveraged. This will enable the in-house legal function to adopt flexible work arrangements to create a leaner function that utilises a secondment service during peak periods.

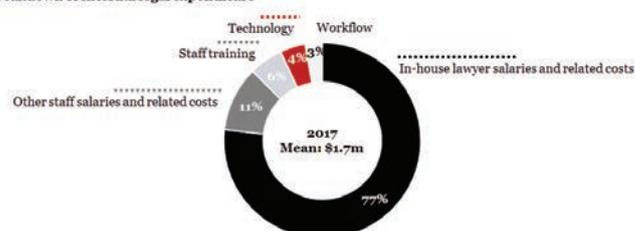
Figure 3: Determinants for outsourcing: Whether external expertise is required



Heads of Legals' time allocation on matters by strategic importance and urgency over time

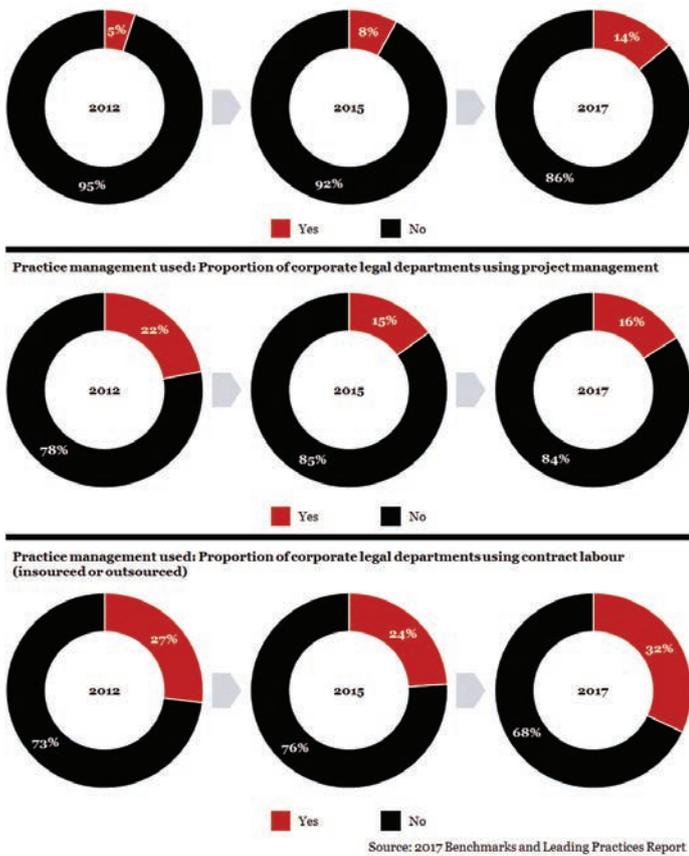


Breakdown of internal legal expenditure



Source: 2017 Benchmarks and Leading Practices Report

**Figure 4: Managing workflow: Proportion of corporate legal departments adopting specialist legal workflow software based system(s).**



As highlighted in Figure 4, the 2017 report reveals only 14% of corporate legal departments in ANZ (an improvement from 8% in 2015 and 5% in 2012) adopt specialist legal workflow software based systems. While about two-thirds (61%) of respondents reported that they do utilise formal workflow management systems. Furthermore, only 16% of in-house legal functions use project management in their practice management systems. Meanwhile, 32% of in-house legal departments use contract labour (insourced or outsourced). These findings point to a strong need to improve legal operations across ANZ's corporate legal departments.

**Optimising the legal department's sourcing model**

Unlike other support functions in the corporate sphere, the legal function has always embraced outsourcing. This is best illustrated by the fact that 60% (\$2.6m) of the \$4.3m legal wallet is spent with external legal service providers. For high performing corporate legal departments, a sophisticated sourcing model uses a triage system to strike the right balance between insourcing and outsourcing components of the legal work and to determine the optimal mix of external legal service providers. It also means the pool of external legal service providers expands beyond law firms to NewLaw firms, LegalTech firms and Big Four firms. High performing in-house legal departments also adopt alternative fee arrangements for cost certainty and to maximise value.

While the study does not ask whether corporate legal departments adopt a triage system, respondents were asked whether they adopt procurement management software. The 2017 report reveals only 14% of ANZ's in-house legal departments (an improvement from 8% in 2015 and 5% in 2012) adopt procurement management software. The study

also reveals 78% of corporate legal departments (an improvement from 76% in 2015 and 77% in 2012) are outsourcing matters to different providers based on type of work and cost. Adoption of alternative fee arrangements is also on the rise as 40% reported using such arrangements (an improvement from 34% in 2015 and 28% in 2012).

**Corporate legal departments of the future**

In a more-for-less world, the new reality for general counsels and in-house lawyers is the increased pressure to reduce legal spend and the need to work smarter. So what can general counsels do to future-proof their corporate legal departments? Figure 6 represents a framework that sets out the role of the legal function in the business, the legal department's service portfolio, operating model and sourcing model - crucial cogs within the in-house legal function machine.

The self-diagnostic tool is the first place to start for in-house lawyers looking to transform the corporate legal department. For general counsels and in-house lawyers reading this article, you can use this tool to take stock of where your corporate legal departments are today and to identify crucial deficiencies requiring improvement. As the late Hans Rosling of TED Talk fame once put it, "the first way to think about the future is to know about the present". High performing corporate legal departments are those that outperform on all attributes, whereby their ratings are skewed towards the right of the scale.

The insights from this article are derived from the Association of Corporate Counsel (ACC) Australia's 2017 Benchmarks and Leading Practices Report. <sup>a</sup>

**Figure 5: Use of technology: Proportion of corporate legal departments adopting procurement management software.**

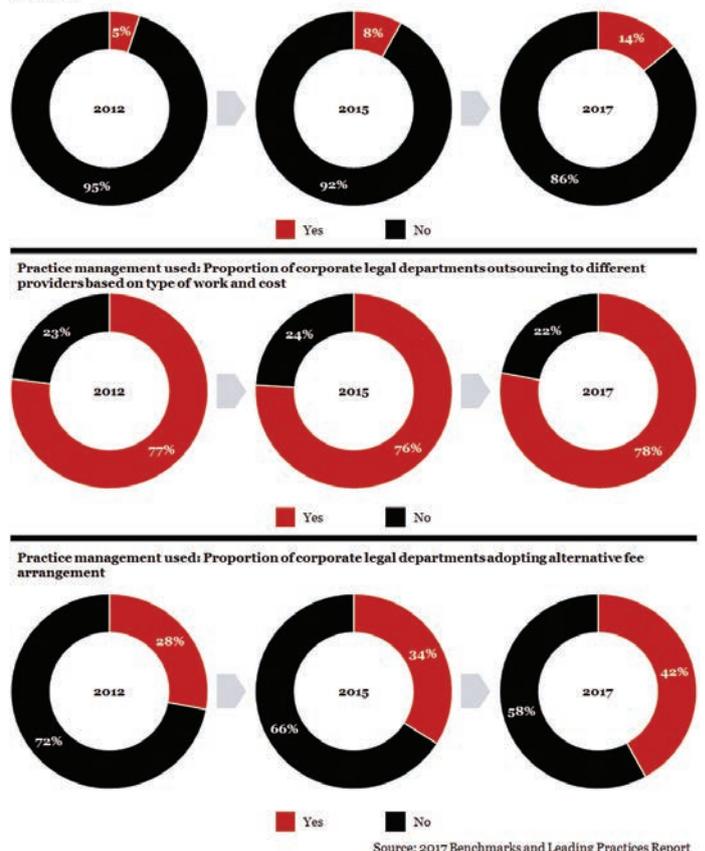


Figure 6: Self Diagnostic tool.

1. Role of legal in the business					
1.1 Strategic alignment	Not aligned	2	3	4	Well aligned
1.2 Legal team's KPIs are aligned with organisation's KPIs	Not aligned	2	3	4	Well aligned
1.3 General counsel reports directly to CEO or equivalent	Disagree	2	3	4	Agree
2. Legal department's service portfolio					
2.1 Well-defined legal work that is insourced	Not Defined	2	3	4	Well defined
2.2 Focus on what is important to the organisation	Disagree	2	3	4	Agree
2.3 Technology enabled	Disagree	2	3	4	Agree
3. Legal department's operating model					
3.1 Workflow management system	Not adopted	2	3	4	Fully adopted
3.2 Legal project management	Not adopted	2	3	4	Fully adopted
3.3 Flexible work arrangements	Not adopted	2	3	4	Fully adopted
4. Legal department's sourcing model					
4.1 Triage system	Not adopted	2	3	4	Fully adopted
4.2 Outsourcing matters to different providers	Not adopted	2	3	4	Fully adopted
4.3 Adoption of alternative billing arrangements	Not adopted	2	3	4	Fully adopted

# IN-HOUSE LAWYERS IN THE DIGITAL AGE – USING TECHNOLOGY TO RESTRUCTURE THE IN-HOUSE LEGAL FUNCTION



Heidi Li

*Leading a team of eight legal professionals in her role as Transaction Contracting Lead for Accenture in Australia and New Zealand, Heidi boasts extensive experience in managing deals spanning the Asia Pacific region. Prior to her role at Accenture, Heidi served as legal counsel at a global investment bank supporting its technology and operations division and its assets and private wealth management businesses.*

*The article was written in collaboration with Amanda Mason, Legal Counsel, Accenture.*

In-house legal teams are under pressure to reimagine how they work and provide legal support to their internal clients to ensure they remain relevant in the digital age. To do so, in-house lawyers need to move towards an agile way of delivering legal services and be responsive to the needs of their business stakeholders, including using technology to potentially restructure the legal function.

As growing workloads are accompanied by shrinking budgets, technology for in-house legal teams can be harnessed to support:

- deeper collaboration – composition of teams more fluid and customised with work allocated amongst a more diverse group depending on complexity, capacity and experience, and subsequent work transferred more easily.
- faster processing – reduction in manual processing, and the ability to link, store and retrieve information from multiple records.
- greater visibility – detailed tracking and analysis enabling faster and more accurate changes and reporting.

As with any technology, the user experience remains paramount. While many tools might promise amazing outputs once information is collected, there will be little voluntary uptake and reduced value if they involve increased administration effort for time-poor lawyers to input. Another key consideration is how the technology impacts interaction between different stakeholder teams. It is important to keep front of mind whether the tool enhances or detracts from engagement between internal business teams and the legal team.

Here are some suggested technologies for in-house teams to explore:

## **Workflow management and allocation**

Work flow management tools are widely used by organisations as part of project management processes or otherwise. They can provide a clear audit trail on ‘who’ has worked on ‘what’ and ‘when’ and ‘for whom.’ They also provide visibility on a transaction’s status at any single point in time, which is potentially accessible by the relevant legal manager, each in-house team member and even the relevant business stakeholder. As a corporate function, in-house legal teams need to be able to demonstrate value to

management, and whilst the facts and figures of deal support are not the only measure, a digital tool that allows in-house legal team members to record their transactions and pertinent deal details or legal advice delivered, provides powerful analytics on the in-house legal team’s value add to the business.

With ever growing pressure to control the cost of the in-house legal function, budget holders may find it inadequate to rely simply on recorded overtime in staff timesheets to assess the head count needs or justification of existing numbers. Rather, they may ask questions such as: “how many transactions has lawyer X closed in month Y?”, “what are the deal values compared to time to close?”, “how many of the Z transactions can be classified as ‘non-complex,’ such that they can be supported from lower cost offshore resources or be eligible for self-service?” Without a tool that generates such metrics, a legal manager will find it quite difficult to answer such questions with any great confidence.

Work flow management and deal tracking can provide greater visibility and be useful in many ways:

- Deal volumes and types – Allowing for detailed tracking of matters and analysis of the information captured. If the tool has end-to-end application, at the other end of the spectrum, the tool could even facilitate electronic execution and contract storage.
- Team development – As a snap shot of the type of work each member of the in-house team is working on at any point in time – is it the best use of their capabilities? Are the types of deals consistent with their priorities for how they want to grow their careers and develop?
- Team fluidity – Automatic alerts for subject matter experts based on the information captured, and central repositories that can be made available to all relevant team members across geographies can make it easier to engage a more diverse yet tailored legal support team for each deal.

In the context of an in-house legal team, the focus is on receiving the initial request for legal support, then determining the relevant details from the business stakeholders and then for the legal support of the transaction to be allocated to the appropriate lawyer having regard to the nature of the work.

To ensure agility, an effective work allocation tool or system must facilitate legal managers to quickly ascertain the status of a matter. Mobile enabled functionality is also key to making such a tool effective. It enables the lawyer to review the deal details and legal support requests even when they may not be logged in on their laptops or computers and to then be able to allocate work from their mobile phone to ensure that no valuable time is lost between receipt of the instructions and ultimate allocation.

One of the key requirements for the provision of effective legal support is to have received detailed instructions with the requisite information. If certain deal details are repeatedly requested, such 'questions' can be digitally embedded into the tool in a standard form. Such forms must allow for appropriate tailoring to avoid a 'cookie-cutter' approach. Where these tools also act as the first step in business stakeholders engaging legal support, it is crucial that the tool works to enhance this experience; making it as quick and easy as possible and consistent with the way the in-house legal team wants to present legal support to the organisation.

### Self Service Opportunities

Lower risk transactions may well benefit from 'self-service' by the business stakeholders. Simple service agreements attaching standard terms of contract, non-disclosure agreements, proposals for non-complex services and non-negotiable software or as-a-service agreements are all candidates for self-service by the business stakeholders. In some cases, incorporating a 'click-wrap' functionality may also be appropriate. A proviso to industrialising this type of work would be to ensure that appropriate training is provided by the in-house legal team to the business stakeholders on addressing all the variables. These include guidance on clear drafting of proposed services or product description, pricing and/or permitted purposes, entering entity names and their ABNs accurately, and to have in place clear parameters so that the business stakeholders are aware of when a transaction is not of a type that should be subject to the 'self-service' model. The clear benefits here include agility – lightning speed to contracting and resource efficiencies – freeing up of limited in-house resources to focus on value add activities and higher risk and more complex transactions.

### Business engagement

An obvious role of an in-house legal team is to stay connected with their business stakeholders and have open communication channels with them to ensure that the business teams are well equipped with

knowledge of the contracting process, client proposal drafting, approval procedures, contract execution rules and internal policies. Guidance and reminders may need to be provided regularly and on an "ad hoc" basis in addition to any scheduled training. A customary approach would be to send out an "Important Notice" company-wide (or targeted) mailer on the said subject matter. However, such messages can be lost in the sheer volume of email most people now receive, or pushed aside by more urgent deal work to be read "tomorrow".

**In the age of YouTube, Ted Talks and audio books, written instructions can hold little appeal compared to audio visual messages, which also have the benefit of being easily consumable whilst commuting.**

Other options may involve short video-bytes designed and stylised to really capture the interest of the audience or the creation of a legal dashboard targeted to business stakeholders. Multinational companies frequently have in-house digital design or marketing teams able to help create impressive client and other presentations. It's therefore worth considering whether the in-house legal team could contemplate leveraging the same resources to help with their own communications with to business stakeholders.

### Precedents

Most legal in-house teams will have an impressive precedents collection. However, it is not uncommon to find such collections stored disparately and haphazardly on individual in-house team members' local drives. A good precedent library that is categorised in a logical manner and regularly reviewed and updated on a dedicated precedents site is a powerful tool for any in-house legal team.

A subset of such precedents made accessible to business stakeholders (as appropriate, whether to facilitate self-service or at the very least, allowing them to complete a first cut of the document and then submit for legal review) would also allow for a more agile collaboration between the in-house legal team and their stakeholders. A tool that allows for such usage by business stakeholders would ideally embed guidance notes in

the relevant precedent in the form of clear drafting notes and drop down menus to address variables.

### Contract Management system

A centralised repository for the various legal documents material to a transaction is crucial in managing the lifecycle of the transaction. Ideally, such a repository would not only be limited to the 'executed master contracts' but extend to statements of work, work orders and relevant internal approvals. Of course, an effective repository relies on the diligence of those tasked with submitting the documentation for uploading. A clear document retention and records process must be in place and enforced to ensure the quality of the repository.

### Uptake of online tools, systems

To determine the success of an online tool or system, whether involving workflow management or allocation, precedent or contracts storage, deal tracking etc, such a tool or system needs to achieve the following:

- reduce manual processes
- shorten time to closure from the initial legal support request to execution
- enhance collaboration through integration
- facilitate a sensible and logical storage of precedents and contracts accompanied by an effective search functionality
- enable reporting and analytics, as applicable.

A difficult scenario would arise if different parts of the organisation roll out multiple separate online tools and systems in a piecemeal attempt to solve for various objectives. Alignment of the organisation is key when rolling out new technologies to achieve agility in reality and to minimise the administrative burden. If an online tool or system fails to achieve its key objectives, then there will either be no or very limited uptake.

### Conclusion

A successful roll out of technology will help measure growth and capacity demand, facilitate the collection of vital metrics to determine appropriate resourcing for deals and validate headcount requirements. The industrialisation of repetitive and non-complex work and optimisation of the instructions from the business stakeholders to the lawyers will allow for improved communication lines with the in-house legal team and streamlined processes. Ultimately, if an in-house legal team successfully uses technology to restructure its function, their capacity will be freed up to enable the in-house lawyers to focus on providing high-end, value add, quality legal advice to their business stakeholders. 

# THE DATA JOURNEY

How general counsel can help the company be successful in its data journey.



Axel Viaene

*Based in the Netherlands, Axel has served as general counsel and company secretary at GrandVision, an optical retailer with stores in 44 countries since 2013. Previously, he served as legal director for Europe/Middle East/Africa for Starbucks and he has also held senior legal roles for Dell in Europe and with the Coca-Cola Company in Atlanta.*

**A**s general counsel of a publicly traded company based in Europe, I work hard to strengthen my company's internal controls and compliance framework. Not a week goes by where I don't receive alarmist newflashes about the European Union's impending General Data Protection Regulation (GDPR). These messages arrive immediately after the latest sensational news story about a peer company falling victim to a cyber-attack. The board responds by requesting a compliance roadmap for privacy, data protection and cybersecurity. A subsequent investigation uncovers terms like opt-in, privacy by design, data breach protocol, the right to be forgotten, the cloud, big data, and the internet of things, on top of an impressive alphabet soup with acronyms like DPO, BCR, CSO, and PIA. Then a newsletter from an activist shareholder arrives highlighting cybersecurity as one of the key topics during the upcoming annual shareholder meeting. The audit committee inquires whether the company should obtain cyber insurance. Your company's data journey has started in earnest and general counsel should play a valuable role during it. This article provides a practical perspective on the key challenges and suggested tactics to solve these problems.

The current technological revolution, fueled by tablet and smartphone technology, is taking innovation a step further than last decade's e-commerce platforms. Customers are demanding the ability to shop using a number of interconnected physical and virtual platforms, including tablets, smartphones, physical stores, and social media. The changed customer expectations require companies to communicate differently with their customers by offering a so-called OmniChannel customer journey. An OmniChannel customer journey permits the customer to move seamlessly between the various shopping channels including physical store, online store, digital and social media. This is changing the face of retail. The traditional store concept is disappearing and morphing into experience shopping, complete with coffee corner, online appointment booking, absence of a physical cash register, payment by smartphone and tech savvy sales staff equipped with tablet and smartphone.

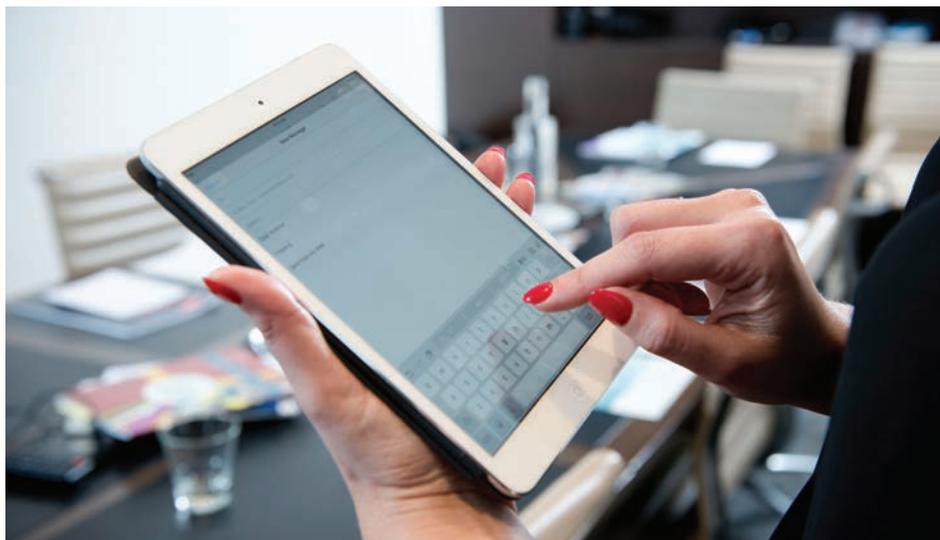
This has sparked a data revolution that processes huge quantities of personal data. Initially most customers or "data subjects"

did not really mind sharing personal data on the internet and welcomed the subsequent pop-ups. However, a series of embarrassing data leaks have made the pendulum swing the other way. Customers are increasingly sensitive about the responsible use of their personal data by businesses and government. It has once again inspired lawmakers to try and bring legislation in line with the ongoing data revolution including initiatives like the EU's GDPR and ePrivacy Regulation.

This is where the general counsel comes in. General counsels operate best where business and legal intersect. The key message you will need to keep reinforcing is that protecting personal data is not a legal exercise. It is also not an IT thing. It is certainly not a "Check the Box" exercise. It is not a compliance project. It is not a project or even a series of projects. It is a company journey that will span many years. Neither legal nor IT can bring this journey to a successful completion. Data protection belongs to everyone. It should be an integral part of the organisation's business model and a prerequisite for long-term success. Customers are demanding responsible use of their personal data and organisations that master this will secure a competitive edge over their competitors. Soon there will be absolutely no room for data security slip-ups as customers simply disconnect from such companies and loudly advertise their decision on social media.

## **Key challenge one: Understanding the issue**

In-house counsels tend to have a degree of comfort around insider trading, code of conduct, whistleblower procedure, and competition law. The past few years have seen many developments in these areas, particularly in the area of competition law. The area of privacy, data protection, and information security is not that new but it is not yet fully clear how to apply the updated rules in the wake of the ongoing technological innovation. In addition to understanding the legal issues in-house lawyers also need to understand the technology. Spending time with the IT department is time exceedingly well spent. Although in-house lawyers are generally not considered progressive techies by any stretch of the imagination, they do generally possess good analytical skills to help demystify, simplify, and operationalise a complex issue.



A good place to start is to understand the rights of the data subject. The rights of the data subject can be summarised as the right to information, the right to correction or amendment, the right to objection and the right to be forgotten or erased. An important case to know is the Costeja case. The Costeja case is the 2014 European Court of Justice's decision confirming the data subject's right to be forgotten by requiring internet search engines to consider requests from data subjects to remove links to freely accessible web pages resulting from a search on their name.

In-house counsel also need to know the concepts of personal data and sensitive personal data. Personal data is all data identified or identifiable to the natural person or data subject. Personal data that is encrypted or hashed is still identifiable and therefore remains personal data. Personal data that is anonymised according to applicable IT security standards no longer qualifies as personal data. Sensitive personal data is defined in the applicable data protection acts and includes medical data. It is also important to know the principles for processing personal data, which includes data economy, specific and legitimate purpose, transparency, accuracy, special protection for special or sensitive data, limited access and security.

### **Key challenge two: Exploring the market**

Once you have a working knowledge of the legal issues and technology you can start exploring the market. You should be prepared to face a multitude of advisors offering a wide array of jargon, products, services, and price ranges. It seems that everyone holds a small piece of a very large puzzle. This makes the one-stop shop an elusive target. Businesses, advisors, and lawmakers continue searching for a complete understanding of the issues

and the right balance between the interests of businesses, government, and individuals. In the selection of external advisors you shouldn't lose sight of the ultimate reality that your organisation will need to do most of the heavy lifting. You cannot outsource the creation of a data protection culture as it is the company that needs to establish that working data protection culture.

### **Key challenge three: Sensitising the organisation**

Companies often lack a sense of urgency in the area of data protection. This is generally different from other compliance areas like competition law where sensational news stories including reputational damage, huge fines, and even imprisonment have caught the attention of the wider business community. We are yet to see a high-profile case where a company has received a huge fine although there is a growing body of case law in addition to a seemingly endless series of cyber-attacks.

The sense of urgency will skyrocket in the event of a data crisis. A data crisis can occur in the form of a data protection authority investigation following customer complaints. It can be a data breach incident with the theft of the laptop of a senior executive. It can be a case of so-called "social engineering" where a hacker assumes the virtual identity of the company CFO instructing the finance department to make an important payment to a third party account.

How can general counsel increase the level of urgency of the business without having to go through a real data crisis? A number of tactics can be applied. You can share reports of data breach incidents in the market. You can refer to recent decisions like the Office for Civil Rights (OCR) of the US Department of Health and Human Services issuing a HIPAA civil money penalty of US\$3.2 million to a company that issued unencrypted laptops

and mobiles to its staff. You can organise a data breach exercise. You can work with internal auditors and endeavor to hack your ecommerce platform. You should also grasp every opportunity to speak at the company leadership forum and conferences on internal controls, compliance and risk management to keep emphasising the importance of this area for the company's continued success.

### **Key challenge four: Timing, scoping, and resourcing**

A compliance roadmap including important milestones needs to be developed. Just as technological innovation will continue, your company's data journey will remain an ongoing journey. The legal world will need to keep updating the legal framework just as organisations will need to keep updating their compliance framework.

An important first step in order to adequately scope the work is to establish a data map identifying all data and data flows in the business. This is a painstaking but crucial exercise. Do you know what data is processed by your company? Do you know where it flows? What personal data is processed? What data is processed centrally and locally? If data is transferred outside your immediate jurisdiction, you will need to explore a range of model clauses, the end of safe harbor and emergence of the privacy shield. It is tempting to outsource this crucial first step but the company is best placed to map its data flows.

As part of this exercise you should also make a privacy assessment asking the following questions:

- Is the organisational leadership aware that the privacy of individuals must be respected?
- Do you restrict the processing of personal data for the purpose for which it is collected and are the goals in line with the purpose for processing personal data?
- Do you make clear to the data subject how the personal data will be collected, including any passive data collection of which the data subject may not be aware? In other words, are you applying an opt-in policy?
- Do you check personal data for accuracy and completeness? Also consider less is better, shorter is better and apply data economy (no collection for future purposes and retaining of data which is no longer needed).
- Have you classified data into sensitive personal data, personal data and non-personal data?
- Have you granted powers to employees so that only authorised employees have access to personal data?
- Do you apply sufficient security standards for storing and processing personal data?

- Have you implemented a data breach protocol?
- What do the operating organisations do to protect sensitive personal data? Is the business diligent in the use of passwords and regular resetting of passwords, privacy screens, secure printing, authorisations for access, logging?

In an ideal scenario, your organisation company has a high sense of urgency, adequate budget and a company-wide network of dedicated data protection officers and information security officers. Furthermore, it is an efficient and highly integrated organisation where the business model and policies are deployed consistently across the many jurisdictions where the company operates. In a more realistic scenario there is some level of awareness without clear leadership. The work is loosely sprinkled over the legal, compliance, IT, internal audit, and finance departments, typically without a clear responsibility assignment matrix. Many organisations operate as conglomerates of relatively independent operating entities moving at different speeds.

This presents an opportunity for general counsel to bring his or her organisational qualities to bear. As general counsel typically touches all areas of the business, he has a good feel for the company's identity and can help tailor a charter, roadmap and governance structure that works. Is the company localised or does it have a large geographic spread including developing economies? Is the company US headquartered and transferring personal data between the sales offices overseas and the US headquarters? Is the work force white collar or blue collar? Does the work force consist of engineers or sales people? Is the data centralised or decentralised? Is the company going through an IT overhaul or is it still relying on a number of legacy IT systems?

**Key challenge five: Making operationalisation work**

Although a lot of tactical work needs to be done you should also spend adequate time to define the company's data vision. This will force you to make a number of important decisions. What data protection standard will you apply? Will you apply this standard consistently or will you be more lenient in developing economies? Will you be legalistic in your approach or practical? Is this a legal, compliance, IT, or business issue and who will be held accountable at the end of the day? The answer to the last question is crystal clear. Privacy, data protection, information protection, and cybersecurity are not legal, IT, or compliance tasks. Data protection belongs to everyone.

The goal should be a clear policy and contractual framework and this presents an opportunity for general counsel to deploy their skills. This can be written as an all-inclusive policy or divided into shorter policies, however, at a minimum, it should cover data privacy, information protection and cybersecurity, data retention, social media, data breach protocol and an IT end user policy. Your policy localisation philosophy is also an important success factor. Do you want the group policies rolled out in identical fashion across dozens of jurisdictions or will you adopt a "freedom within a framework" approach allowing local color? The latter philosophy tends to be more effective. You should also make sure your third party agreements, notably with suppliers or franchisees, contain the required clauses on data protection. So often important third party agreements contain detailed provisions on price, service levels and intellectual property but barely provide for data protection and data transfer issues.

**Data protection belongs to everyone. It is an integral part of the company's business model and a prerequisite for the company's long-term success**

A prerequisite for embedding policies within the organisation is to economise on legal and technological jargon and demystify the issues. One of the ways to do that is by building your compliance effort around a limited number of data protection principles. Such principles typically include data economy and accuracy, extra protection of sensitive personal data, limited access and security.

An effective governance model includes a core team consisting of legal, finance, internal audit and IT supporting the data protection officer. The data protection community is led by the central data protection officer who keeps the audit committee abreast of the progress in this area. This also requires an important reporting and measurement component. General counsel can play a valuable role in helping develop a number of assessment and measurement tools to help visualise the company's data journey progress to the board.

It is not enough to appoint data protection officer's and leave the pulling and pushing to them. Data protection belongs to everyone. It is crucial to establish a true data protection community involving all stakeholders at the right moment. Once you have established that community, it is important to keep this community alive. You can do this through

continued education using live sessions, newsflashes, e-learning and webinars. You should also use awareness campaigns with posters, hand-outs and gadgets. Webinars are an excellent platform for sharing challenges and solutions with a large international audience.

**Data protection culture**

A critical skill for an effective data protection officer is the ability to promote a data protection culture in an organisation. This is excellent guidance but easier said than done. A data protection culture effectively embeds data protection in the company. It ensures that all people at all levels deal responsibly with personal data. Before you can achieve the goal of establishing a data protection culture, you typically require tone at the top and leadership commitment, clear policies and internal communications, effective training, measurement and reporting, responsible interventions, and accountability.

In order to accomplish this data protection culture, you need to establish a behavioral change in the organisation. The above elements are stepping stones toward that change. All your efforts will be useless if the people do not embrace the lofty goal of a data protection culture. This mostly happens when people do not understand the issue, are unable to digest the e-learning, and do not know what they should do differently. Your planned quantum leap in data protection should not detract you from the importance of baby steps. These baby steps are very practical tips that explain what people can do differently every day. Making a number of small changes can make a big difference. These changes include requiring privacy screens for desktops and laptops, instilling password discipline, providing guidelines on data carriers (e.g., USB keys), and emphasising the use of VPN and caution with using public networks, as well as encrypting all devices.

**Future**

Irrespective of where companies are in their data journey the end is not yet in sight. The ongoing technological innovation, with the lawmakers in hot pursuit, will stretch that journey over many years. An organisation can never consider itself as "arrived." The world is digitalising ever more and increasingly impacting organisations' vital legal processes. Privacy, data protection, and information security will for many years remain an area where general counsel and the in-house legal community can and should provide valuable support. General counsel can help demystify and operationalise a complex issue and help ensure the organisation's continued success. a

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2017

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# THE “INTELLIGENCE” OF THINGS – HOW THE INTERNET OF THINGS CONNECTS THE SPACES



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It is the year 2020, and Shalini is relaxing during her weekend at home. She needs to plan her day and catch up with a few friends later in the evening. She has various errands to run before she can go to the health club for her daily workout. She remembers that the refrigerator needs to be fixed. Shalini pushes the blue button on the side of the refrigerator and requests a service call from the refrigerator company. Within the next two minutes, the service engineer calls back to set up an inspection for the following day. This is what we call the Internet of Things (IoT) and, if you may, the Intelligence of Things.

Over the past few years, the IoT has captured headlines across the world, with newspaper and magazine articles describing its potential to transform our daily lives. Historically speaking, the origin of the expression (without any guesses) is in two words and concepts: “internet” and “thing” – where “internet” is the communication protocol, including the internet suite (TCP/IP), while “thing” is “an object not precisely identifiable.” Therefore, semantically, the IoT means “a worldwide network of interconnected objects uniquely addressable, based on standard communication protocols,” but are these protocols really standard, and are they governed by standard environmental rules?

Based on Cisco IBSG’s definition,<sup>1</sup> the IoT didn’t exist in 2003, because the number of connected things was relatively small. Smartphones were just being introduced. Refining these numbers further, Cisco IBSG estimates that the IoT was “born” sometime between 2008 and 2009.

The LED screen on Shalini’s refrigerator, which she ordered online last year, shows the availability of her favorite avocados at the South City mall. Shalini selects the quantity of her favorite fruits on the display unit and places her thumb impression on the biometric reader adjacent to the flashing LED. She places the order and makes the payment all in a few seconds.

It is already noon, and the beeping from her phone alerts her to a message – as does the reminder displayed on her wristband. Shalini checks the band and realises that her personal trainer asked her to do a 30-minute warmup sprint session, based on her activity schedule before her workout. After which she clicks

a few buttons on her wristband and, which instantly records her heartbeat and sends the information to her trainer.

In its simplest form, the IoT is a state where “things” will have more and more information associated with them and may have the ability to sense, communicate, network, and produce new information, becoming an integral part of the internet – thus enabling anytime connectivity for anything and anyone. The wearable devices are just one such aspect of IoT, which has the ability to astonishingly improve health outcomes, particularly in the treatment of chronic diseases that now take an enormous human and economic toll.

As explained earlier, the IoT is the internetworking of devices over a network. Such devices or small equipment could be pasted or fitted on various other objects. The devices are powered with sensor chips, software applications, and interior electronics. Imagine a half-thumb-sized device that has all these features and functionalities included. These super smart devices connect with other electronics, software, and sensors via network connectivity that enables each device to virtually speak to one another.

Software instances and applications that form part of the IoT package receive billions and trillions of bytes of data and analyse what needs to be done to give the desired output. Network connectivity plays one of the most important roles in this chain and can be made available in the form of multiple connectivity options such as WiFi, 3G, 4G, 5G, and LoRa WAN network technologies.

Imagine a world where objects use their own intelligence (artificial intelligence) to work with each other automatically over distances. The water starts to pour the moment you step into the shower. Devices respond to your questions and read out the itinerary of the day while you prepare breakfast. Your two-wheeler drives you to work via the best available route. Your office laptop turns on the moment you switch on your workstation lights.

Thus, “things” are expected to become active participants in business, information, and social processes as they communicate among themselves as well as with the environment.

With advancements in technology, these objects exchange information “sensed” about the environment, while reacting

autonomously to “real” or “physical world” events – with or without direct human intervention.

The IoT could eventually form part of multiple segments and verticals, which could include smart city solutions, security, the tracking of human life/body, physical security, smart metering, supply chain management, and retail/consumer durables asset tracking. The devices could also be connected over the web, which collects, processes, stores, sends, and takes action on the data that is collected, processed, or stored from its surroundings. The IoT lets these devices do most of the work with minimal human intervention.

All these connected devices further generate huge amounts of internet traffic, including loads of data that can be used for various purposes such as analytics, data mining, marketing, or reaching out to potential consumers for a service or product – that could cause both security and privacy issues. The IoT will provide real-time information on various things that we’ve never thought of before. It will bridge the gap between

long distances, and in some instances, do away with physical presence of people or objects. It will also help improve the real-time monitoring of business processes in order to avoid downtimes, while keeping our homes and families’ safe remotely.

Shalini’s lifestyle explains the kind of changes that IoT could bring to our daily lives. Her refrigerator has a mounted device that is connected to a central network base station, which in turn is connected to the company’s backend platform. The backend platform is connected through an application programming interface with the company’s call centre. When Shalini pushes the button on the refrigerator, it sends an alert in the form of a message through the network. The company’s service engineer receives the call from the call centre representative, who informs him or her that Shalini requires a call back for service. In this case, to enable a better customer experience, the service engineer calls the customer to understand the product issues, eliminating the need for the customer to follow up with the company for support.

This kind of a mounted device could be configured with any other consumer durable product. Further, the biometric reader on the refrigerator could be linked to Shalini’s bank account, making it easy for her to pay for groceries. Similarly, her wristband is linked to various other over-the-top providers in the back-end. The wristband comes with a set of embedded functionalities that could detect and keep a count of a person’s heartbeat and pulse rate. Such medical diagnostic data could be pushed to the medical practitioner for analysis – as illustrated in Shalini’s planned workout.

Although IoT is still a nascent phenomenon, with many aspects of the regulatory environment under development, security may be the most important issue for in-house counsel to address. Since the IoT industry verticals differ in many respects, their security challenges will also vary.

As in-house counsel, it becomes pertinent to understand more than just the legalities around the IoT. Where does your organisation fit in the IoT solution and to what extent will it either affect or be affected by the IoT

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elements? With the onset of IoT products and services, operations should not remain limited to the review of contractual forms.

Creative thinking, much earlier in the entire value chain, needs to occur. A good amount of handholding will be required among in-house counsel, external subject-matter experts, external counsel, organisations, government institutions, businesses, and salespeople – who will form an integral part of the stakeholder community responsible for its inception. Some of the key questions that legal counsel should think about for their organisations, either as sellers or buyers of an IoT solution are:

- Does the IoT solution require an in-depth regulatory check (if any) for components that could possibly be regulated in the near future? What should organisations watch for when working toward compliance? For instance, is the deployed network within the ambit of any applicable telecommunication regulations under the local applicable laws, does the seller of the IoT solution comply with those regulations? Does it have the relevant licenses or permissions to offer such a solution? Is the buyer required to observe a certain minimum standard to be able to use such a regulated network?
- What are the applicable compliance regimes that may have to followed in terms of supply or use of the object? Are there any legal or regulatory sanctions that need to be observed or adhered to when using a specific object in a specific location? Who are the end users or individuals who may be a touch point in the IoT solution? Are there any applicable data privacy laws that govern the personal or sensitive

personal information of such individuals that travel over the network? Are such networks and infrastructures compliant with the minimum security and safety standards prescribed for the protecting personal or sensitive information under the applicable legislation?

- Who is responsible for seeking local permissions, including right-of-way permissions and applicable security and access clearances for the use of specific objects at specific locations? These could either be under certain national security surveillance legislation or could be significant from a national security perspective.
- Does the manufacturing of the objects require specific permissions, such as depositing the source code for the objects used as part of the IoT chain – which may be responsible for legal interception monitoring?
- Is there a seller obligation or buyer remedy in case of any claims, issues, and defects with respect to components forming part of the IoT, allocation of liabilities, and commercial and legal recourses?
- What is the applicability of local or international laws depending on the type of cross-border or regional solution?
- Are there any specific intellectual property rights issues given that the solution could be global in nature? Consider the naming of the product, the granting of rights and sublicenses, as well as who owns the data, is generated in real-time.

These questions are very basic and may change or require more introspection among think tanks, including legal counsel within

and outside an organisation. This story paints an interesting picture over the years to come, as big and small developments mix together, and some old developments return. By blending physical reality with virtual reality, the IoT vastly expands the reach of the digital revolution. The multitudinous possibilities that arise from the ability to control things in the physical world through technology have inspired a torrent of innovation.

Of course, we may need to slow down the pace of IoT development or pick up the pace of standards and security. The IoT has been growing and spreading rapidly across the world, but there is one big chunk of ice that still needs to be cracked – one small incident that could cause a tsunami.

Why the IoT? Imagine a world where every human is connected to a device, which is connected to a daily health monitoring device, that's connected through the internet. In case of a natural or unnatural mishap, an alarm is raised for healthcare units to rush immediately for aid. No phone calls are required, no delay in aid occurs, and as a result, lives are saved. That is the kind of world the IoT is capable of creating.

Applying IoT technologies to human activities is already showing potential for massive change in people's lives. From giving people with chronic diseases new tools to manage their conditions to increasing fitness to avoiding disease, the IoT is beginning to demonstrate its potential to improve human health. With regard to the IoT technology that we see around us, people are the major beneficiaries – reducing commuting times, making it easier to manage domestic chores, saving money on energy, getting greater value from products designed with information obtained through the IoT, and enjoying life in safer homes and cities.

However, for every advantage, the IoT brings a unique set of challenges. For example, most technology experts feel there needs to be more legal framework or policy regulation around the IoT network. The question remains as to whether the onus lies with the network provider, the device manufacturer, the monitoring authority, or the end user. Countries such as the United States have created a loose regulatory framework around such technologies. The security framework for such an extensive transmission of data over the network will need implementation for protection from cybercrimes and identity theft.

With the vital infrastructure connected to the internet, security threats will multiply, and governments will need to take notice. Policymakers will also play an important role in enabling the IoT by leading and encouraging standards that will make interoperability and widespread adoption possible.

A combination of a lack of standards and a lack of security about the “connectivity” of “things” has made this phenomenon more ubiquitous over the past decade. Further, if you think the trend might be starting to overload us, this is only the beginning.

Smartness comes at a cost. In its current state, the “things” in the IoT are expensive. A great example of this is the lack of outreach to the masses. The IoT is not currently a household term.

For the IoT to deliver its maximum impact across the board in all arenas, certain conditions need to be in place, and several obstacles need to be overcome. Some of these issues are technical, some are structural, and some are behavioral. Consumers, for example, need to understand and trust the IoT-based systems, and companies need to evaluate and adopt the data-driven platform that the IoT promises. In addition, regulatory issues need to be resolved, such as determining how to report incidents, what insurance needs to be in place, what part of the system must be regulated, and what can be left unregulated.

Certain IoT applications cannot proceed without regulatory approval. Even though the technological side of things is evolving rapidly, and many companies are investing in this area, it remains unclear where, when, and how certain technologies will be allowed to operate. In addition, regulators must establish rules about liability. Policymakers have a role to play in shaping the market rules that affect IoT adoption (i.e., creating appropriate incentives for the consumer to adapt to the ever-changing landscape). Governments can play a role in setting rules for practices regarding the collection, sharing, and use of IoT data – which seems to be the paramount concern for consumers in adopting any change. It is always advisable to start early in the process. In-house counsel can contribute in multiple ways to ensure that organisations are able to provide relevant input in the legislative process.

In-house counsel need to work closely with the business in framing the relevant input to such proposed policies that could affect the organisation’s business interest. A lot of organisations use “policy advocacy” as a significant tool to have a relevant say in the decision-making process so that they are heard before any major legislation is released.

Clearly, the IoT offers substantial benefits for consumers, as well as a new set of risks. IoT technology has the potential to drive down the costs of goods and services and contribute to greater consumer convenience and time-saving. As they travel, consumers may benefit from IoT-managed roadways,

self-driving cars, real-time transit information, and planes that land and take off on schedule. At home, they can offload housework to smart appliances, save money on energy, and improve their health. However, privacy concerns will only grow as the IoT spreads.

Consumers will need to be cognisant of the data being gathered and how that information is used. When consumers sign up for services, they should bear in mind what kind of data permissions they are granting and push third parties for transparency. Given the additional value that interoperability can unlock, consumers can take that into account as they consider purchasing IoT systems.

Finally, with all of the devices and services that the IoT enables, consumers might be overwhelmed by the proliferation of information. When data is plentiful, the scarce resource is attention. Finding ways to manage this potential information overload will become increasingly necessary for consumers.

Every new sector or opportunity brings its technical, commercial, regulatory, and legal challenges. The new age of computing will give rise to issues that deal with personal data privacy, including security, data ownership, contractual arrangements and their validity in electronic world, patents, consumer interests, service provider liability, and other services, especially when they touch the human element. Further, jurisdictional issues, given that boundaries are increasingly blurred due to global connections, and commercial competitiveness, given that there are different taxation regimes in different geographies around the world, will create challenges.

The IoT has transformative potential for the world in general. This will not only create new sources of revenue and lines of business but will also present an opportunity to develop new and valuable systems. Even though there are areas that need attention and security standards that need to be streamlined, the general public will have the most to gain. The potential is endless: longer lives from IoT health applications and safer transportation, greater convenience and time-savings, less costly goods and services, and more. The IoT completely redefines how we engage with the physical world.

To sum up, IoT integrates three main ingredients: devices, connectivity, and software applications. Devices collect data from their surroundings or from the environment where they are placed or installed. The data are then either collected or processed to another device or application connected over the cloud. Once the data travels to the cloud, the software applications further process them and provide the desired output. The software applications are

designed in a way that they have an interface to the user of such output, where such interface could be in form of a text message, email, or other notification.

In-house legal departments are no longer considered to be a shared support services but an integral part of the line of business, where business leaders look to general counsel and their teams to work with the sales and products folks to provide a pragmatic solutions-oriented approach to regulatory compliance and legal concerns, while keeping the business interest in mind. In-house counsel now not only support the business but advise the company in the development of employees, the organisation, and the external environment. In-house counsel must put in place dedicated compliance working groups within the organisation that are responsible for identifying the introduction of new laws, rules, and regulations that could affect the organisation’s business and practices. Such work groups could comprise leaders from each line of the business, external consultants, counsel, and subject-matter experts from within the organisation.

Lastly, policymakers and governments need to recognise the growing footprint of IoT and start to update and tighten existing rules and standards for not only protecting IoT data from being stolen or abused but also to balance the needs for data privacy and intellectual property protection with the demands of national interest and security aspects related to individuals and the nation as a whole.

The digitisation of machines, vehicles, and other elements of the physical world is a powerful idea. Even at this early stage, the IoT is starting to have a real impact. By examining the proliferating uses of the IoT in specific settings, we have been able to estimate the magnitude of potential economic impact from IoT applications over the next 10 years. Capturing that potential will require innovation in IoT technologies and business models and investment in new capabilities and talent. With policy actions to encourage interoperability, ensure security, and protect privacy and property rights, the IoT can begin to reach its full potential. <sup>a</sup>

#### Footnotes

<sup>1</sup> White Paper by Cisco on *The Internet of Things, “How the Next Evolution of the Internet Is Changing Everything”* – Author Dave Evans in April 2011.

# THE IN-HOUSE JOURNEY



Richard Dammery

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

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It is well-recognised that in-house counsel, in corporate and government, are a significant and growing branch of the legal profession. Thirty years ago, this was not the case. The profession saw in-house as principally suited to those not capable enough to pursue careers at the Bar or in leading law firms. Back then, when partners' names crested their firms' letterheads in order of seniority - which usually meant tenure - chairmen and CEOs had senior partners on speed-dial (some even sat on company boards with the chairmen they advised). Now, Boards, CEOs and senior teams rightly turn to their general counsel and in-house legal teams for guidance on the toughest problems. They are aware, of course, that in-house lawyers have access to specialists from the firms. But rarely do you see senior executives in major corporations saying that they don't trust the work undertaken by quality internal counsel and rely instead on external advice. Given this evolution, it is unsurprising that in-house roles are much sought after and highly valued.

Business can be seen as a process of complex problem-solving. Boards and CEOs realised long ago that lawyers who are close to their businesses are best placed to assist the decision-making process. Being "close" doesn't happen by accident: you need to be embedded in the issues of the day; know about the industry and its dynamics; have the ability to deal with legal issues through a broader business lens; and you need to operate as part of the team. In addition, good in-house lawyers place a high priority on retaining their independence and objectivity. Many in-house lawyers bring the best of all worlds: strong academic backgrounds, large law firm training, and a curiosity and willingness to learn the many facets of what creates value in businesses. Some have training in finance, engineering, accounting, MBAs and other relevant disciplines, as well as law. It's a compelling formula.

Of course, most in-house lawyers work closely with external firms. Capacity and capability constraints are the most likely drivers of external engagement. At Woolworths, we think about our chosen external advisers as an extended part of the team, and we manage issues accordingly, choosing to work with firms that 'walk in our shoes' and partner with us. From an economic perspective, we manage total legal cost, internal and external, and don't place artificial constraints - like

headcount - on how best to deliver the most efficient outcome to our clients. In a future article in this series, I will explore the changing dynamics and business models of the big law firms and the ways in which companies can leverage their external legal relationships to mutual advantage.

Before moving from this theme - what I would call the recognition of in-house counsel as a true and invaluable third branch of our profession - it is appropriate to touch briefly on the question of independence. One opinion, sometimes voiced, is that in-house counsel are not truly independent. This view owes to the argument that in-house counsel are employed by the companies they advise, that they may have financial incentives based on their employer's performance, and that in-house lawyers will be more concerned about the negative career implications of giving unpalatable frank and fearless advice than behaving with professional independence. It is easy to see how each of these things *could* threaten independence; but without evidence that they actually do so, these issues are no more than potential risks at worst.

My experience has been quite different from these negative assertions. General counsel, and their teams, are uniquely positioned within organisations to give objective and independent advice. Corporate governance principles, well applied, support an in-house counsel's ability to say no (or, better still, to say: "I wouldn't do it that way. But what about..."). Good boards have an expectation that the company's lawyers will be independently minded and objective, and it is increasingly common to have the general counsel report to the board, as well as to the CEO. In my experience, most in-house lawyers - even those aligned to particular businesses, business units or divisions - understand clearly the difference between the interests of the company, and the overriding need to protect its interests, compared to supporting individual clients or business units.

Compare this with the incentives facing partners in law firms. The business model for "Big Law" places significant pressure on partners to meet large, recurring revenue targets. This can only be achieved from a reliable stable of clients; and, in a fiercely competitive market, the loss of a major client can have a major impact on a partner's revenue contribution to their firm, and hence their income. Given this new reality, which



didn't exist to the same extent a decade or two ago, which branch of the profession faces the greater challenges to independence: the in-house lawyers who are encouraged to 'do the right thing' by their organisations, or the outside solicitors whose livelihoods depend on maintaining and growing revenue from client relationships?

One of the perennial questions facing general counsel, particularly in large corporations, is whether to centralise or decentralise their functions. At a recent meeting of the ACC Australia GC100, this issue was canvassed, and differences of opinion surfaced. My own view, having operated both models at different times, is that there is no "right" answer. The better approach depends on a range of considerations, including:

- The maturity of the organisation
- The client-focus of the lawyers
- The systems and processes in place to manage the use of external advisers, and associated costs
- The clients' wishes
- The organisation's operating model at the time.

A centralised model has certain advantages. It encourages a strong collegiate network within the legal team. It can allow information to flow more quickly and freely. It may support the efficient redeployment of resources to pressing issues and projects. However, there are trade-offs. It can be more difficult to create strong partnering relationships with business areas, and the business areas may be less likely to see lawyers as part of *their* team. It can compromise clear accountability for service delivery to different parts of the company.

It can also lead to negative perceptions: of over-lawyering; too many lawyers generally; or a sense that the lawyers are remote from the issues of the day. At worst, centralised legal groups can be seen as bureaucratic, the 'Department of No,' a community of outsiders. In either model, these trade-offs can be managed by identifying them explicitly and putting in place mechanisms to address the shortcomings of each approach.

At Woolworths, over the past few years, we have moved from a strongly centralised legal model to a more devolved one. The legal team no longer sits together in a secured area to which the clients have restricted access. General counsel roles have been created for each of the main businesses, the property lawyers have been allocated to each business team, and we have created clear delineation between trans-group roles – such as claims management and competition/regulatory advice – and the commercial legal advice to each of our main business areas in Australian Food, Endeavour Drinks, BigW, and Countdown in New Zealand. Increasingly the lawyers sit physically with the businesses they support, but we keep central space for team members to work together when they choose. Flexible working has become the 'new normal', as people work from different sites across the company, from home, and from offices in the city on days they need to be away from the Support Office. These changes have been well-received by the clients, and by the legal team, and reflect the changes occurring in the organisation more generally.

To combat the risks of decentralisation, principally the risk that lawyers 'go feral' and lose objectivity and independence, we ensure

that we operate a centralised recognition and reward program. We manage the legal costs of the team and external lawyers centrally (although budgets are largely held at the BU level) and we meet regularly as the legal services group for continuing education and other matters of mutual interest. My direct reports also meet each week as a legal leadership team, from which strategy and change initiatives are driven.

The most important consideration in all of this, in my opinion, is how to balance effective 'partnering' with the businesses, while maintaining appropriate independence and professional standards. This can never be 'once and done'. It takes ongoing awareness and vigilance to ensure that equilibrium is maintained.

In 2016, the Law Society of NSW commissioned a report titled "National Profile of Solicitors 2016." For those interested in how our profession is changing, I commend it to you. The Report contains a wealth of information. It indicates that 26% of solicitors – some 19,023 people – are now employed as corporate and government solicitors nationally, an increase of over 5,000 in five years. Importantly, 50% of the profession is now female, which underscores the obvious need for gender equity in all our practices. Increasingly, in-house lawyers are going to be called upon to play a broader role in the legal community, including by creating pathways for those entering the legal profession.

At Woolworths, we are particularly excited about the launch of our Graduate Legal program, and following over 550 applications, we are looking forward to welcoming our two outstanding new graduates in 2018. 

# AVOIDING THE ETHICAL PERILS AND PITFALLS OF BIG DATA



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The increased connectivity of people and things is creating previously unimaginable amounts of data. This volume, coupled with the rapid pace of data generation, provides unprecedented real-time insights into the habits, statistics, and patterns of people and processes. The ability to leverage data into actionable intelligence is now critical when making strategic business decisions.

Through the use of data analytics, businesses can understand consumer behaviour to refine marketing efforts<sup>1</sup> and predict future personnel behaviour,<sup>2</sup> as well as profile individuals to forecast their behaviour and drive decisions based on data provided voluntarily or gleaned from behaviour.<sup>3</sup>

As businesses employ algorithms to gain actionable intelligence, the nature of the data – and the resulting outcomes – can expose the business to ethical challenges where the line between appropriate action and misuse is unclear. With this lack of clarity, it is no surprise that, according to the research firm Gartner, by 2018 half of business ethics violations will occur through the improper use of big data analytics.<sup>4</sup> As your company adopts or continues to use big data analytics, how will you effectively navigate this ethical quagmire?

This article examines various stages of the data analytics process, where the decisions to move forward or exercise restraint are key factors in the ethical equation.

Before you can take action on data, you need to collect data. This is the first stage where opportunities for ethical and legal missteps arise. Particularly in terms of data veracity and maintenance.

In the United States, there is no comprehensive federal law that regulates privacy, but instead privacy is generally governed state by state and by industry sector. For example, and related to the issue of data information collection, both the Fair Credit Reporting Act (FCRA) and the Health Insurance Portability and Accountability Act (HIPAA) contain mechanisms for individuals to access their personal information and rectify inaccuracies. Recently, the collection and use of inaccurate personal information under the FCRA came under scrutiny in both a class action lawsuit and a regulatory investigation.

Spokeo, Inc. operates a website where users can access and run queries about individuals by name, email, or phone number. When a query is submitted, Spokeo searches a

wide range of databases and provides a profile containing information such as the individual's address, phone number, marital status, approximate age, occupation, hobbies, finances, shopping habits and musical preferences. Thomas Robins alleged that at some point in time he became aware that someone submitted a Spokeo search for him and that his profile contained inaccurate information, stating that he was married, had children, was in his 50s, had a job, was relatively affluent, and held a graduate degree. Robins filed a class-action complaint claiming, among other things, that Spokeo wilfully failed to comply with the FCRA; particularly, its requirement for consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports.<sup>5</sup> As it currently stands, this case has been remanded back to the Ninth Circuit Court of Appeals by the U.S. Supreme Court for further deliberation on standing.

Spokeo was also the subject of a Federal Trade Commission investigation for allegedly violating the FCRA by, among other items, failing to ensure the accuracy of information collected and conveyed. The FTC and Spokeo settled the matter agreeing to the imposition of an US \$800,000 civil penalty, as well as barring Spokeo from future violations of the FCRA.<sup>6</sup> To ensure compliance with the order, Spokeo is obligated to submit compliance notices for twenty years with the FTC and is subject to other recordkeeping and monitoring requirements.<sup>7</sup>

The Spokeo case highlights the ramifications that can result from failing to properly assess data collection and use for an ethical perspective. More specifically, if information is being collected from sources that cannot be verified or processes are not embedded within the data collection workflow to account for accuracy of the data; it is then ethical to rely on that data? The failure to appropriately consider that question may result in reputational and monetary consequences.

In Europe, data privacy is a fundamental right and the European legislative framework<sup>8</sup> includes a variety of obligations for businesses and organisations to ensure data accuracy and safeguarding of individuals' rights. These measures include embedding privacy obligations within the design of business procedures (known as "privacy by design"), the need to respond in due course to any petition



from any individual to correct wrong data or to erase data, and the obligation to stop using personal data when not required for business or organisational purposes. Lack of compliance with such legal obligations may be subject to heavy fines – up to twenty million euros or four percent of annual revenue.

Additionally, members of international organisations such as the Organisation for Economic Co-operation and Development (OECD)<sup>9</sup> and Asia-Pacific Economic Cooperation (APEC),<sup>10</sup> along with jurisdiction-specific data protection schemes (i.e., the United Kingdom's Information Commissioner's Office's Data Protection Principles),<sup>11</sup> charge businesses with the responsibility to abide by certain data protection principles, which includes the obligation to maintain accurate personal data.

As the collected data and the purpose behind collecting that data come under more scrutiny, companies are taking a proactive approach by being more transparent in their public-facing privacy policies adopting verbiage that reflects aspects of applicable privacy principles, if not adopting them in their entirety.<sup>12</sup> But beyond this, data collection points and work process flows will also need to be assessed internally to account for these ethical pitfalls. Questions to initiate conversation regarding data accuracy include:

1. How often is data verified? (to the extent possible)
2. How "fresh" is the data, and what parameters reinforce this?

3. What steps are taken to vet mined and third party data?

Abiding by ethical principles, such as ensuring the accuracy of data through the entire collection lifecycle, will help protect the company from exposure to ethical and legal claims. It will also support effective decision making that will achieve organisational objectives.

The next stage in this process is the analysis and use of data. It presents ethical challenges ranging from the development of the algorithm or query and implementation of automated analysis processes to the interpretation and use of the results.

Precautions should be taken when developing search queries. Avoid queries where the responses, despite the anonymisation, will lead to the exclusion of certain races or classes. Remember, if it is illegal to do in person, it is illegal to do electronically.

In the 2015 case of *State of Wisconsin v. Eric L. Loomis*, data analytics came to the forefront with the use of the COMPAS assessment, an algorithm used to calculate the likelihood that someone will commit another crime. The results came from an analysis of past conduct that included data such as criminal and parole history, age, employment status, social life, education level, community ties, drug use and religious beliefs.

The pitfall of using such an algorithm to influence sentencing determinations is that the individual will be lost in group

characteristics. Eric L. Loomis appealed his sentence when he was subject to a higher prison term due to the COMPAS score indicating he was at "high risk" of committing another crime. Loomis argued that his due process rights were violated because the company that makes the test does not reveal how COMPAS weighs data to arrive at the risk score. He also argued that the evaluation treats men as higher risk than women.

The Wisconsin Supreme Court ruled that the decision regarding a longer or shorter sentence cannot solely be based on scoring systems (or the scoring system cannot be the only reasoning or factor to establish the length of the sentence), but sentencing courts are entitled to include scoring systems among the many factors used to determine lengths of sentences.<sup>13</sup>

While results leading to disparate impact should be avoided, the lines are not always so clear-cut. As more companies increase the use of data analytics to tailor experiences for consumers, questions about big data ethics will grow increasingly frequent. Take Orbitz Worldwide, Inc., which discovered in 2012 that people who use Mac computers were more willing to pay higher nightly rates. Based on this, Orbitz chose to alter the view of search results dependent on whether the consumer was using a Mac or a PC, listing the more expensive options first for Mac users.<sup>14</sup>

The retailer Target also experienced issues when applying big data and data mining analysis results in order to predict which of their customers were pregnant – a time when purchase behaviour is most in flux. This predictive effort was designed to identify these customers and deliver targeted and timely promotional offers when they are more likely to change existing spending habits and embrace new ones.<sup>15</sup>

When data analytics results in categorising customers and offering different products or prices based on those categories, problems can arise. Pam Dixon, founder of the World Privacy Forum, notes "[D]etermining whether someone is going to be a loyal customer is fine. But then if you're changing the way you treat your customer based on that, that's where the questions come in."<sup>16</sup>

From a European perspective, legislation specifically prohibits this type of analysis as well as the use of "automated individual decision making, including profiling." Data controllers are forced to introduce suitable measures to safeguard data subjects' rights and freedoms, including the right to obtain human intervention on the part of the organisation that has implemented such automated procedures – allowing individuals to express his or her point of view and to contest the decision.

Safeguards also include applying restrictions to automated decision-making processes based on sensitive information, such as health and ethnicity. In addition to the above described right of not being subjected to “automated decision making,” the legislative framework provides additional safeguards to individuals submitted to big data procedures: If any data controller wishes to use an individual’s data for purposes differing from those for which consent was provided, the data controller must consider several factors to ascertain whether the new purpose is compatible with the initial purpose.<sup>17</sup>

If this “test of compatibility” confirms the new purposes are incompatible with the ones consented to by the concerned individual, the organisation is forced to choose between two options:

- (1) anonymise the data; or
- (2) contact the individuals to obtain consent for the new purposes.

This requirement is prompting many European organisations to refocus their procedures related to personal data processing by obtaining blanket consent for targeting, profiling, improving the experience of clients, risk assessment and other data analysis measures.

Lack of compliance with such obligations may lead not only to the aforementioned heavy fines, but also to the obligation to indemnify the concerned individuals for any damages caused. As counsel, you will need to be prepared to offer legal guidance when developing questions in addition to guidance on the evaluation and use of results.

One final obligation introduced by the new European General Data Protection Regulation (GDPR), which applies to big data projects, is related to the implementation of Data Protection Impact Assessment (DPIA) and requires prior approval from data protection authorities for any data processing with a high risk of negative impact on the data protection rights of individuals.

According to the GDPR, which will go into effect in May 2018, the minimum contents of a DPIA must include the following:

1. a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;
2. an assessment of the necessity and proportionality of the processing operations in relation to the purposes;
3. an assessment of the risks to the rights and freedoms of data subjects; and,
4. the measures envisaged to address the risks – including safeguards, security measures and mechanisms to ensure

the protection of personal data and to demonstrate compliance with the law, taking into account the rights and legitimate interests of data subjects and other persons concerned.

Under U.S. legislation, such assessments are not compulsory when dealing with personal data collected for commercial purposes. However, implementation should be considered. Besides showing proof of due diligence, it will be beneficial when extending the activity to European jurisdictions, or when considering certification under Privacy Shield, the new framework that replaces the Safe Harbor agreements that previously addressed the exchange of personal data between the European Union and the United States.

When undertaking big data projects, in-house counsel should consider the main challenges from an ethical point of view:

- Ethical lines are prone to be violated when objectifying or classifying the data of individuals.
- Likewise, data tied to personal aspects of an individual’s life, as opposed to aspects of customer behaviour, present greater risks.
- Even if managed ethically, using data to direct operations can backfire – tarnishing the organisation’s reputation with customers and stakeholders.

To mitigate ethical risks, here are some final recommendations:

1. Define and enforce rules for data collection of, to ensure veracity and accuracy;
2. Ensure data is obtained according to corporate ethical standards and with respect for individuals’ rights;
3. Do not misrepresent the quality or completeness of data;
4. Be transparent with individuals regarding the collection and use of their data, and;
5. Use data fairly to avoid objectification and manipulation. <sup>a</sup>

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- (a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
- (b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
- (c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;
- (d) the possible consequences of the intended further processing for data subjects;
- (e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

This compatibility test was firstly introduced in the European legislative framework by an Opinion issued in 2013, by the Data Privacy Working Party, on Purpose Limitation, [www.ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203\\_en.pdf](http://www.ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf)

# BOUND BY BORDERS; SEPARATED BY LAW – THE 7 NECESSITIES TO CONTINUE GROWING AS REGIONAL COUNSEL

As Confucius once said: “It does not matter how slowly you go so long as you do not stop” – the idea being that continued growth is essential to continued success. Asia Pacific is a diverse region that includes a number of both developing and emerging markets experiencing rapid growth. Being a legal counsel within such a dynamic region requires a constant desire to adapt to the evolving economic, industry and legal conditions.

Here are seven necessities for continuing to grow as a regional counsel:

## Understand the core business

I recall attending my first few internal town hall meetings and understanding only half of what was being said. I spent more time discreetly googling terms like reinsurance and gross written premium than actually listening to the dialogue. At that point, I accepted that to survive in the insurance industry, I had to understand the nature of the beast. When you truly understand the core business in which you provide counsel, you are in a better position to manage the legal risks of that business. By learning the lingo, you have more credibility and the business is more willing to involve you from the outset because you speak the same language.

## Know the local markets

With every in-house legal counsel role, it is critical to understand the local markets in which your business operates. In a regional role, this is more challenging because it usually involves several jurisdictions across a number of very different markets. Investing time to learn about more than just the legal and regulatory environments in which the businesses are governed gives both context and an appreciation for local challenges. It can range from learning the local currency to studying the local market practices specific to your industry.

## ‘Think global, act local’

Before relocating to Hong Kong, I supported the region from Sydney. Having now relocated, I have become more attuned locally and culturally providing the invaluable benefit of being physically present and able to meet face-to-face. This builds trust, expands internal networks and allows for proactivity as a result of being closer to the business. Apart from the

need to be local when part of an international organisation, it is necessary to connect and think globally. Whilst my main focus is on regional issues, I collaborate with my global legal colleagues and the wider business on a regular basis, in particular when working on global projects. This allows me to share knowledge, explain the legal considerations for my region and leverage the expertise of others. We become globally aligned and are better equipped to support the global business initiatives.

## Work closely with local compliance

Regulators and law-makers across Asia Pacific are developing, amending and implementing robust laws and regulations at a rapid pace. Whilst external resources and tools allow us to contemplate and prepare for the changes, overcoming barriers to mitigate legal risks is a constant challenge. The compliance teams within different countries have local expertise on a variety of issues in addition to deep knowledge of their respective regulatory environment, particularly on topical issues such as data privacy, anti-bribery, sanctions and material outsourcing. Engaging the local compliance teams on a regular basis ensures internal control of potential risks.

## Develop legal precedents

From my previous career in private practice, I learned very quickly that having legal precedents and a librarian available was a luxury. There is no doubt that an in-house legal role keeps you busy and constantly reprioritising your work. Every day brings with it new work challenges, so developing legal precedents often stays on the ‘to do’ list for some time. However, investing time into developing legal precedents and training the business on their use has resulted in efficient legal reviews and an effective use of my time. For complex legal precedents involving several jurisdictions, I have taken the approach of developing master terms with local schedules that cover specific jurisdictional requirements.

## Seek tailored solutions

It is common for regional in-house legal teams to be under resourced compared to the size of the business and workload. Depending on the organisation, general counsels are expected to be generalists and advise on a variety of



Maysem Elmaet

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matters. When I relocated to Hong Kong, I engaged an external law firm to provide a tailored part-time secondment to suit the needs of the business and the scope of my legal work. It has proven to be extremely cost-effective, particularly during busy periods and helped avoid the need to over-commit to a full-time secondment. I have also built relationships with external legal firms who continuously update me on legal changes in the region, which allows me to better advise the local stakeholders on emerging issues.

## Accept that uncertainty is the only certainty

Whether it's the law, an industry or an organisation, change is the only constant. The key to my continual growth is my mindset and attitude towards uncertainty. Developing and maintaining resilience is critical, just as being flexible and willing to adjust is part of succeeding as a regional counsel. [a](#)

# WHO WILL TRAIN THE LAWYERS (AND WILL WE EVEN NEED THEM)?



Ken Jagger

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In almost every discussion with Corporate Counsel about the changing landscape of the legal profession and the role of in-house counsel, the most frequently asked question is – who will train the in-house lawyers of the future?

To this day, almost all in-house counsel are still the product (at least to some extent) of the traditional in-house lawyer training model. That model relied on a symbiotic (and somewhat expensive) relationship between law firms and their clients.

For years now the process has been that law firms employ the graduates, and provide excellent training through a combination of dedicated in-house programs and on the job learning on client matters.

The law firms could afford to do this because they actually charged their clients for the graduate and junior lawyers work (at hourly rates arguably disproportionate to their skills). Then at a certain point, usually around the Senior Associate level, corporate teams would reach into the law firms and employ some of the best and brightest thereby guaranteeing themselves a pool of quality, ready to go lawyers. Usually all the in-house corporate teams then had to provide, was an injection of “commerciality” to these new recruits.

## The legal landscape has changed forever

The old model of in-house lawyer training is no longer sustainable nor more importantly, is it fit for purpose. A number of factors are at play.

## The death of law firm leverage

The graduate employment statistics don't lie. The GFC saw a significant reduction in the amount of graduates taken by the large commercial law firms and the numbers have never, and will never, recover. This outcome is structural not cyclical. There are three key structural changes.

- In-house counsel are directly responsible for the situation. There has been a mass revolt against paying law firms to train their own people. General Counsel are refusing to pay for juniors and some are going even further and insisting that junior lawyers not work on their matters at all. Ironically the law firms' insistence on hourly billing exposed the training payment to the daylight when in other industries, the use and training of juniors is hidden in the agreed fee.

- The commercial reality of a mature market for legal services, intense competition and a stronger in-house community, have placed significant pressure on law firm profitability. Most law firms refuse to allow partner profits to fall but are unable or unwilling to alter the commercial structures that might allow them to practice in a new and sustainable way. In those circumstances the only way to maintain profitability in a low growth legal market is to reduce costs. And the only significant cost lever in a professional services firm is the cost of labour. Consequently all law firms are trying to do more with less lawyers.
- The rise of sophisticated NewLaw providers with more flexible economic and billing models, and who use technology and people in a more efficient and cost effective way, has put significant pressure on law firm market share and required law firms to adopt more efficient (and less profitable) ways of doing business.

As a consequence of these three structural realities, there will be no return to highly leveraged law firms and no return to the mass production of highly trained lawyers available to in-house teams.

## Commoditisation, technology and outsourcing

The commoditisation of legal work is a not a new issue. The definition of a 'full service commercial law firm' has been contracting for decades. Before the turn of the century most firms in this category had large insurance and commercial leasing divisions which engaged and trained junior lawyers on the basics of risk and claims management, negotiation and dispute resolution, litigation, commercial drafting etc.

Clients eventually insisted on fixed deals for this bulk work, then put in place internal systems and processes to deal more efficiently with these matters themselves and briefed specialist lower cost boutique law firms who made significant use of paralegals and other non-lawyers.

The modern version of this trend is using technology, process improvement techniques and outsourced providers to undertake discovery, due diligence and the preparation and negotiation of standard contracts. Junior lawyers are no longer afforded the same opportunities to train on smaller contracts and disputes, get involved in the litigation process or sit in on deals as part of the due diligence team.



The consequence of these developments for corporate users of legal services, is that the opportunities for junior lawyers to acquire basic legal and commercial skills within law firms, is greatly diminished.

### The Millennial Lawyer

The much discussed Millennial Lawyer has no time for the traditional legal career path. In fact many law graduates are eschewing a legal career altogether. The ones who do engage have no time for slogging away in a law firm, making Senior Associate and then going in-house or becoming a Partner in their 30's and working for another 25 years. Frankly, they regard the previous generations as mad for going down this path.

Their expectation is that from day one, they will be provided with training, interesting work and regular opportunities. They want it all, they want it earlier, and they are prepared to back themselves. The Grad Australia 2017 Student Survey noted that 70% of graduates expected to spend less than five years with their first employer<sup>1</sup> and the 2016 Deloitte Millennial Survey<sup>2</sup> found that one in four millennials would quit their job in the next year.

So even if the traditional training was available in law firms, today's graduates would be unlikely to stick it out and acquire the skills that the generation of in-house lawyers before them possessed upon entry to the corporate world.

### Is the disintegration of the old training model actually a problem?

The changing and expanded role of in-house counsel has arguably made the old training model redundant, or at the very least, no longer entirely fit for purpose.

Not only are we seeing an increase in the number of lawyers employed by corporates (a 22% increase between 2011 and 2014)<sup>3</sup> but the role of modern corporate counsel now goes well beyond the provision of legal advice and the management of external counsel. The function is multi-disciplinary.

Traditional legal skill is just one component of what is required from a modern in-house lawyer. The role requires business acumen, proficiency in project and third party

provider management, skills in procurement, corporate governance, compliance, data analytics, process improvement, workflow delivery, human resources and importantly a significant IT capability and understanding of the potential role and scope for Artificial Intelligence and technology more generally. Traditional law firm training only provides an important, but small subset of these skills.

### Training the In-house Lawyer

So how is the in-house lawyer of the future likely to be trained? Larger corporates are beginning to reach directly into the universities to employ graduates and as a result are having to develop their own graduate training programs. Hewlett-Packard for example has a Legal Talent Development Project<sup>4</sup> which recruits three law graduates in the core areas of intellectual property, litigation and corporate/commercial. For companies without the resources of a Hewlett-Packard, a focus on industry specific training programs is perhaps more realistic and necessary.

Corporates also now recognise that training is a cost of doing business and have begun to look at cost sharing collaborations with their trusted legal service providers to develop the specific capabilities they require. These training programs are moving well beyond traditional one-hour continuing legal education sessions to something far more substantive.

However the training will need to move well beyond legal. For instance project management, negotiation and mediation skills, corporate governance, process improvement capabilities and technology application skills are all standalone professional disciplines in their own right. It will be the responsibility of individual lawyers (not just their employers) to ensure that they obtain the "non-legal" training most relevant to their industry, employer and role.

Will we even need the lawyers?

The scope of what is considered to require the legal judgement and skill of a trained lawyer has been shrinking for decades. The trend is most evident within law firms who have been pushed further and further up the

legal value chain.

The current debate about what Artificial Intelligence will mean for the legal profession and the workforce more generally, is simply the latest (and possibly scariest) manifestation of an inexorable trend and a particular worry for law firms who still do repeatable work. Artificial Intelligence is even likely to be able to provide much of what today is still regarded as the exclusive preserve of human skill and judgement. Bad news for law firms, lawyers and professionals generally.

The good news is that in-house lawyers are currently in one of the few sectors of the profession where their role is actually expanding into non-traditional areas. Corporate lawyers are being asked to take on roles that were not previously considered the purview of the legal function. Perhaps the only true growth area of the entire profession. But will this continue?

It is possible that the in-house legal teams of the future will not consist entirely or even predominantly of lawyers. As Jordon Furlong points out in *The Rise of the Millennial Lawyer*<sup>5</sup>, legal teams of the future are more likely to be disaggregated, collaborative and multi-disciplinary. A combination of lawyers, finance and business professionals, data scientists, systems analysts and programmers.

For the largest corporates it is probably more realistic to add non-lawyers to the in-house team than train lawyers to undertake or supervise these tasks. For the rest though, a lawyer with the broadest possible skillset will be a valuable commodity for years to come.

So happily we will still need lawyers (or at least in-house lawyers) for a while yet. But the in-house lawyers' role is changing quickly and the training available must change with it. Basic legal training remains fundamental but it is only one part of what a modern in-house lawyer will need. Corporate teams and individual lawyers will have to take responsibility for their own education, looking to a range of internal programs and external providers, and develop tailored company and industry specific programs covering a broad range of disciplines.

It is a considerable challenge but one that must be faced. 

### Footnotes

- <https://gradaustralia.com.au/news/what-students-want-from-their-graduate-employment-2017>
- <http://landing.deloitte.com.au/rs/761-IBL-328/images/deloitte-au-millennial-survey-2016-exec-summary-050216.pdf>
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# THE IMPORTANCE OF GRIT



Bjarne P. Tellmann

*As the General Counsel and Chief Legal Officer of Pearson PLC, the world's leading learning business, Bjarne leads a global legal team of over 170 people across six continents. Based in New York City, he is passionate about developing a proactive connected, commercially curious and metrics-driven team culture.*

Today's legal leaders need to possess a number of skills that they don't teach in law school. One of these is "grit." Angela Duckworth, a professor at the University of Pennsylvania, defines grit as "passion and perseverance for long-term goals."<sup>1</sup>

In essence, grit enables highly successful people to stay motivated to succeed over long periods of time, despite setbacks and hardship. If you knock a gritty person down, they just get right back up again.

As one study puts it:<sup>2</sup>

"Grit entails working strenuously toward challenges, maintaining effort and interest over years despite failure, adversity, and plateaus

in progress. The gritty individual approaches achievement as a marathon; his or her advantage is stamina. While boredom signals to others that it is time to change trajectory, the gritty individual stays the course."

Grit is not the same thing as talent, which is how quickly you can improve upon a skill. Grit enables talent to blossom by driving the person to invest the time and effort needed to achieve success.

According to Duckworth, moving from talent to achievement can be summarised in two simple formulae:<sup>3</sup>

**talent × effort = skill**

**skill × effort = achievement**

Notice how effort counts both in acquiring skill and in achieving something substantive with that skill. As Duckworth notes:<sup>4</sup>

"What this theory says is that when you consider individuals in identical circumstances, what each achieves depends on just two things, talent and effort. Talent – how fast we improve in skill – absolutely matters. But effort factors into the calculations twice, not once. Effort builds skills. At the very same time, effort makes skill productive."

Our culture has a tendency to focus on talent and intelligence over grit. However, when the chips are down and you are in the middle of a crisis, you definitely want to be surrounded by gritty people.

Some of the best lawyers out there achieved what they have achieved because they found ways to overcome seemingly insurmountable obstacles. Malcolm Gladwell, in his excellent book, *David and Goliath: Underdogs, Misfits and the Art of Battling Giants*, recounts the story of the renowned litigator,

David Boies, who has struggled with dyslexia.<sup>5</sup> As Gladwell has noted<sup>6</sup>:

"Here we have one of the greatest lawyers in the country, and he is profoundly dyslexic. He reads basically one book a year. He finds reading difficult and painful. Think about that for a moment, he's a lawyer! He's in a profession that has reading at its absolute core. When I talked to him, I said, 'How did you become such a successful lawyer in spite of this disability?' And he said, 'not in spite, I became a successful lawyer because of this so-called disability'... He learned how to listen, and he also developed an extraordinary memory. So he would sit in school, and he didn't take notes, he sat and listened to the teacher and remembered everything that was said."

One of the grittiest, and most successful lawyers I know personally is my mentee,

Haben Girma, a hugely successful disability rights activist and the first deaf-blind graduate of Harvard Law School. She has overcome a lifetime of challenges to succeed and, indeed, thrive despite her disability. Her hobbies include surfing and ballroom dancing.<sup>7</sup>

While grit is related to self-control and conscientiousness, it is not the same thing. A conscientious and self-controlled person may be able to perform a short-term objective (e.g., a task at work), but buckle in the face of a challenging obstacle that stands in the way of a long-term objective.

Grit can, in fact, be measured. Duckworth has developed a "Grit Scale" that will determine the level of grittiness in a person, based on their agreement or disagreement (ranging from "very much like me" to "not like me at all"). You can take the Grit Scale test yourself at [www.angela duckworth.com/grit-scale/](http://www.angela duckworth.com/grit-scale/).

While you may decide to spare your team members from actually taking this test, there is value in keeping an eye out for grittiness levels in prospective candidates. Grit counts toward success. **a**

The above has been adapted with the kind permission of Globe Law and Business from Bjarne's book, *Building an Outstanding Legal Team: Battle Tested Strategies from a General Counsel* (see: [www.globelawandbusiness.com/OLT/](http://www.globelawandbusiness.com/OLT/) for more information). ACC

## Footnotes

- 1 See [https://en.wikipedia.org/wiki/Grit\\_\(personality\\_trait\)](https://en.wikipedia.org/wiki/Grit_(personality_trait)); accessed 24 August 2016.
- 2 Angela L. Duckworth, Christopher Peterson, Michael D. Matthews, and Dennis R. Kelly, *Grit: Perseverance and Passion for Long-Term Goals*, 10 January 2007, p1087 (available at [www.dropbox.com/s/Oy545gn2withb5e/DuckworthPeterson MatthewsKelly\\_2007\\_PerseveranceandPassion.pdf?dl=0](http://www.dropbox.com/s/Oy545gn2withb5e/DuckworthPeterson%20MatthewsKelly_2007_PerseveranceandPassion.pdf?dl=0); accessed 24 August 2016).
- 3 Angela Duckworth, *Grit: The Power of Passion and Perseverance*, Scribner (an imprint of Simon & Schuster Inc), 2016, p41.
- 4 *Ibid*, p42.
- 5 *David and Goliath: Underdogs, Misfits and the Art of Battling Giants*, by Malcolm Gladwell, Little and Brown and Company, 2013.
- 6 See: [www.marketplace.org/2013/10/02/economy/big-book/malcolm-gladwellsdavid-and-goliath-tacklesunderdogs-arent](http://www.marketplace.org/2013/10/02/economy/big-book/malcolm-gladwellsdavid-and-goliath-tacklesunderdogs-arent).
- 7 Find out more about Haben at <https://habengirma.com/>.

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