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# PRESIDENT'S REPORT



**Justin Coss**  
National President

I am not one to make New Year's resolutions, or indeed to keep them. However, at this time of year most of us start to think about the year ahead, maybe set some personal or business goals, and generally do some 'life planning'. With this in mind, I would like to offer you both a proposition and a challenge. The proposition is as follows:

I have gained both personally and professionally significantly more than I have contributed to my professional association, the Association of Corporate Counsel.

Let me put this statement in context. I have been involved with the ACC and its predecessor, ACLA, since about 2008 when I attended a CPD session and then ended up talking to some fellow in-house lawyers who were members of the NSW Executive Committee. I had not heard much about ACLA at that point, but as a sole in-house lawyer, it seemed like a great way to meet other in-house lawyers, share information, get all my CPD points for little or no cost, and maybe also hear about job opportunities. All these things would ultimately prove to be true, but after that first conversation, I was invited to attend and observe the next NSW Executive Committee meeting, with the offer of an open spot on the committee if I was interested.

Well, as you can probably guess, I did end up attending that meeting and 13 years later, I am still an active member of the NSW Executive Committee. Following in the footsteps of Adrian Goss, a former National President who now sits on the ACC Global Board and who invited me to attend that meeting 13 years ago, I have over the years invited many others to join the National Board, the NSW Executive Committee, and the Committees in their respective States. I am pleased to tell you that those individuals would absolutely support the proposition I have cited above.

I look around the table at our National Board and NSW Executive Committee meetings, and I see professionals who completely understand the difficulties, complexities, and rewards of being an in-house lawyer. I see colleagues

who have supported me through some ups and downs, both personally and professionally and, most of all, I see many peers who will also likely be lifelong friends. In this group, I see individuals who have the jobs they hold today due to a referral from an ACC colleague, or perhaps a casual conversation with a sponsor at one of our National or State conferences. I also know of instances where our members have met their future spouses at our events!

My previous role and indeed my current position as Group General Counsel and Company Secretary at Freedom Foods Limited followed a referral from close ACC friends. In fact, after commencing at Freedom Foods, I learnt that one of the key attributes that distinguished my candidacy amongst a highly qualified field was my demonstrated leadership ability through my involvement with ACC.

I am now in my second year as National President, and unlike another President who shall remain nameless, I will be quite happy to leave office in November this year for a well-earned rest! However, before I do that, I want to build a legacy of inspiration to other in-house lawyers to get involved with their professional association and experience the same support and friendship that I have enjoyed over the many years of my involvement with ACC.

I hope that from my story, you will understand that ACC is not just a professional association. It's your association, and to the extent that you decide to get involved, I can pretty much guarantee that you will gain much more from ACC than you might think. My experience is not unique, nor are the experiences of the many amazing and dedicated people who serve as ACC staff and volunteers.

Therefore, the challenge that I set for you is this:

If, as an ACC member, you know a fellow in-house lawyer who is not an ACC member, and you think like me that your ACC membership is central to your career as an in-house lawyer, then tell them why you believe that and encourage them to join.

If you are an ACC member and have not thought about getting more involved in your professional association, contact the ACC staff at head office or one of your State Executive Committee Members to find out how you can participate. You can find all the relevant contact details you need at <https://www.acc.com/chapters-networks/chapters/australia/join-acc/get-involved>

Taking up my challenge will be the best (hopefully tax deductible) investment in your career you will ever make. Apart from the tax deductibility part, I can promise you that. **a**



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# PERSPECTIVES

## DAVID FIELD

While the COVID-19 pandemic is still with us, and the ongoing lockdowns in Australia in December and January highlighted the risk of letting our guard down too early, it feels like we are finally starting to see glimmers of light at the end of a long, dark tunnel. As the prospect of a slow return to greater 'normality' becomes more realistic, I've found it valuable to pause and take stock of what I've learnt, what worked well, what could have gone better, and where I need to update my worldview.

For the last decade or so, a significant part of my role has involved business continuity and crisis management, and the pandemic has provided a rich vein of learnings on business continuity — a (hopefully) once-in-a-lifetime opportunity to observe the effectiveness of crisis management and business continuity techniques and approaches over an extended period. So, what are the take-outs?

- Your understanding of the situation is always imperfect:** businesses, organisations, markets, economies, and even more so global pandemics are intensely complex systems, and it is simply not humanly possible to have a completely accurate view of what is happening. Obviously, you need to form a working model of these systems to inform your decisions and actions, but it is critical to keep testing that model against observed reality and updating it as new data arises. Last year, I heard Rob McLean, Director Emeritus of McKinsey, talk about the importance of 'epistemic humility' in leadership. It's a great expression — you are less likely to be blindsided when you are conscious that you don't know what you don't know, you know that some of what you think you know is wrong, and you are constantly testing your worldview against the incoming data.
- But keep moving forward anyway:** an awareness that your information is imperfect can be paralysing, particularly for lawyers who are trained from an early age to be terrified of having missed something. In a crisis, you must keep moving forward — if you wait for perfect information, you

will likely sustain a lot of damage that you could have avoided with a few well-judged bets on what was happening and what was needed. Dr Michael Ryan, Executive Director of the World Health Organization Health Emergency Services Programme, captured it well in comments last year when he said, 'Perfection is the enemy of the good when it comes to emergency management. Speed trumps perfection ... The greatest error is not to move. The greatest error is to be paralysed by the fear of failure. If you need to be right before you move, you will never win.'

- Manage the stakeholders' expectations:** people like consistency, and there can be a tendency in organisations and the broader community to think that if a plan had to be changed, then errors were made in the original formulation of the plan. If I'm embarking on a major project during 'peace time', the stakeholders have a right to expect that plans will be comprehensive, consistent and well-designed. However, no-one on the planet has the prescience to build systems and plans that will anticipate all changes and developments in a dynamic and uncertain environment like a global pandemic. You can buy yourself a lot more space with your stakeholders by unashamedly naming up-front that reality will inevitably diverge from the plan, and that the plans will inevitably pivot based on the latest developments.
- Complex reality can be overwhelming — keep breaking the problems down into bite-sized pieces:** situations like pandemics don't come as neatly packaged problem-statements — they come as an intertwined, overwhelming mess with lots of different issues clamouring for attention. One of the most valuable skillsets from legal training is the ability to stop, tease an issue apart, prioritise the issues that need to be solved, and solve them in a logical order. When you're faced with a problem you can't solve, take it apart and work out which bits you can solve.



David Field

*Having started his legal career with Mallesons, working in Taiwan, David has since enjoyed a twenty plus year in-house legal career working for Telstra and now as the Chief Legal Counsel and Director, People & Finance at Canon Australia. As a keen photographer, he is one of the founders of the **Laws of Creativity** portrait project, exploring the role that creativity plays in the practice of law. David also serves on the board of the Minds Count Foundation.*

- Taking-on other people's problems takes a toll — look after yourself:** sometimes the legal role can involve being the repeat-player in some of the worst bits of everyone else's lives, trying to absorb the fear, uncertainty, and doubt, and turn it into calm, measured decisions. That takes a toll, and that toll is only exacerbated in a situation like a rolling pandemic over many months, where you also have to worry about your own economic situation and the health and safety of your family. The key take-out for me here is to allow yourself to be a vulnerable human as well and make sure you consciously build time and habits for recovery. As the expression goes, 'fit your own oxygen mask before helping others'. It's natural to want to help, and lawyers are trained to solve other peoples' problems, but you won't be any use to anyone if you don't invest in keeping yourself functioning. [a](#)





# A DAY IN THE LIFE

## MICHELLE SMYTH

Regional General Counsel, EY Oceania



### Michelle Smyth

*As the Regional General Counsel for EY Oceania, Michelle's team of 20 lawyers manages the legal needs of EY across Australia, New Zealand, Fiji and PNG. Prior to EY, she spent over 16 years working in Senior Legal and General Counsel roles with AMP. Michelle has lived in Sydney all her life and is often seen early on Saturday morning's kayaking near Balmoral Beach.*

**6.00 am** **The quiet tinkling alarm on my Apple watch goes off.** I have to have a gentle alarm; I don't need the adrenalin rush at that time of the morning. I have a ten-second look at my phone, to ensure there have been no overnight emergencies from global that need to be attended to, then it's a cup of tea while reading the AFR and a pat for my two brown Burmese cats, Milo and Brownie.

**6.30 am** **I say good morning to my son, who is in third-year uni and doing a summer internship with an investment manager.** He tells me he will be home late as he is coaching sailing after work. My daughter, who has just finished the HSC, is still in bed. I make lunches, then get ready for work. An espresso from our coffee machine, in the car and off to the office. My partner is working from home today, so he will be here when we get a rug delivered. We have just moved to a new house, and there are a few things we need to do to this old place.

**8.30 am** **I am excited to be in the office today, our team has been slowly returning to work after our COVID lockdown year in 2020 when most of us worked from home full time for nine months.** Today is Tuesday, and most of the team are in. How fabulous to see everyone this

morning, say hello in person, and catch up face-to-face. We work in an agile working environment, although the General Counsel's Office (GCO) has its own space, which makes it easier to have phone calls and discussions on confidential matters. I grab a desk and set up my laptop for the day. I chat to one of the team sitting next to me, and we agree that we are so lucky to have the opportunity to come into work in our magnificent building in George St, Sydney, after so long at home. On my way to make a tea in the kitchen, I have a quick corridor chat with one of the lawyers concerning one of our current matters, and we agree to meet later in the day to discuss.

**8.45 am** **I spend 15 minutes at the start of the day reviewing and writing my to do list in my diary.** Yes, I still have a paper diary, which I use to prioritise my day. I write down my top three 'must do's' (one of them is a carryover from yesterday), and jot down a few things in my longer to do list for today and tomorrow. As part of our 'COVID Normal' work routine, the legal team has agreed to a set of guidelines on working, with days in the office set aside for face-to-face meetings, and days working from home for focused work. That means I have a lot of meetings today.

- 9.00 am** **A call with global in the US to discuss a refresh of the EY global terms and conditions.** We'll localise them and then socialise them with the business over the next few months. There have been quite a few changes, so it will be important to get the communications right. My head of commercial will lead this project. We get off the call and discuss our plan of attack.
- 10.00 am** **It's 10@10 time.** Every Tuesday at 10, the team gathers around in our space (and on Teams video), and we have a standing meeting for 10 minutes. It's usually an update from me, some team recognition, and other team news. Today, I remind everyone to get their feedback providers into our performance system, as the cycle closes in a few weeks. There are some admin announcements from our legal operations associate, including reminding everyone to record all their matters into our matter system so she can generate her monthly report. We have been reporting for six months now, and it's been really interesting to see data on the volume, range, and scale of legal work we do in this team.
- 10.30 am** **It's quiet on the floor as most of the teams are having their team meeting today.** I take time to file some of my emails and check in with my colleague on the matter we discussed this morning. I receive a call from a partner keen to work through a complex engagement that we are doing with a key government client. I grab my morning piccolo from the EY café.
- 11.30 am** **I join the legal stream call on one of our current acquisitions.** Things are going well, and the project is on track, including external legal costs. Our stakeholders are happy with the progress so far, and we are looking forward to the next stage in the deal.
- 12.00 pm** **Time to grab some lunch.** I generally make my lunch in the morning and eat at my desk. Today, it's my go-to salad of brown rice, tuna, avocado and tomato, with heaps of chilli, salt, pepper and lemon juice. I munch at my desk while catching up on and filing emails.
- 12.30 pm** **We have a monthly hour-long call with one of our external law firms for one of our big litigation matters.** We unpack several issues, both legal and procedural. I catch up with my head of disputes afterwards for a debrief and we agree to update the CEO and COO this week.
- 1.45 pm** **A quick walk down to Circular Quay and back for some air and to clear my head.** My daughter texts me to let me know that she is heading off to work now.
- 2.00 pm** **It's the weekly acquisitions team meeting.** We run through the current deal, and progress on a couple of other matters and issues. We check in on recruitment; we have a couple of vacant roles, and it's good to hear that we've had some good applications and interviews are progressing well.
- 2.30 pm** **Time for another weekly meeting, this time for legal operations.** I meet weekly with our legal operations associate to catch up on the legal operations strategy for GCO. Today, we are focused on a customer satisfaction survey we just closed. We have asked for feedback on GCO experience levels of satisfaction and suggestions for improvement. The results are pleasing, and the feedback has been constructive and useful. I'll do a presentation to the team on the results in a few weeks.
- 3.00 pm** **Time to chug a glass of water and check my emails again.** I check the GCO monthly training schedule. We have a gap in March, so we'll need to find something for that slot.
- 3.30 pm** **Time for the APAC region General Counsel monthly call.** Today, we talk about a return to the office (or not) and unpack a few pressing issues for the area, including the EY's global terms and conditions refresh, and some proposed developments in the managed services space.
- 4.30 pm** **Second interview with a candidate for a role in our commercial team.** It goes well, my team lead, and I decide to make an offer. We chat with the recruitment team about the next steps.
- 5.00 pm** **The day winds down, and the team trickle off home.** The day of meetings is not quite over for me. I start to read a draft advice one of my team has sent me for review while waiting for a 6.00 pm call.
- 6.00 pm** **Regular call with our captive insurer to discuss our key notified litigation matters.** As it's the first call for the year, we talk for an hour.
- 7.00 pm** **I head home in the car.** No traffic at this time of the evening!
- 8.00 pm** **Dinner at home with my partner.** We chat about a few things we need to do around the house on the weekend. My kids are both still working, so it's a peaceful evening at home. We roll out the new rug in the dining room. Looks great.
- 9.00 pm** **Check a few emails and decide that it is a Netflix night.** We sit back and watch another episode of Lupin and, sticking to the French theme, a recording of Rick Stein's Secret France and lament the lack of travel in the foreseeable future. I order a box of fruit and veg to be delivered tomorrow morning when I am working from home.
- 11.00 pm** **Set up my home office ready for tomorrow.** I have some printed documents and advices to review. After a day of meetings, it's a day of reviewing advices and expert reports tomorrow.
- 1.00 am** **The global team are presenting a session on governing law, jurisdiction and enforcement.** Luckily, these sessions are recorded, so we will watch this session as a team during our monthly training session in March. Problem solved. [a](#)

# BRINGING THE FUN BACK IN 2021

An action plan to help you find more fun in life and at work in 2021.

It was a bright, warm summer day outside, but the office on the floor where most of the Telstra legal team in Melbourne usually sit together was dark and quiet.

The sign on the door told me the level was closed, but I scanned my pass and the electronic chirp and green light told me I could push open the door and enter the stuffy silent level.

As I made my way towards my locker for the first time in over 9 months, the sensor lights above me flickered to life. Now brightly lit, the muted office level was even eerier. I had been in this office many times over the past four years, many times early in the mornings, more times late at night.

Without thinking, I called out 'Hello?' I obviously got no response.

While intellectually I had known *'The office is empty'*, thinking it and then seeing and feeling it were very different things. The weight of the absence of my work colleagues struck me even more when I was here, looking around at where they should all be typing away.

I knew I missed being around my colleagues, but it surprised me that I hadn't realised the extent of this until I was in the presence of their empty desks. As much as we love our friends and family, many of us build a strong support network in our jobs.

Like me, you might not even realise the importance of the multiple mini-interactions we used to have. I missed the jokes in the kitchen, the random after work catch up invites, the team lunches, the social get togethers!

## I missed the fun!

You know the saying, *'All work and no play makes Jacqui a dull girl.'* Well, at the end of last year (and, let's be honest, even the start of this year), I was feeling some serious lack of play!

This year I am planning on turning that around.

And so, I propose that together we make 2021 'The Year of Fun'.

More fun with our family and friends.

More fun projects and achievements for ourselves.

More fun making a meaningful difference on issues we care about.

And, perhaps even more fun at work!

Below, I'll give you some tips and a planning guide to creating more fun in your daily, weekly, and monthly life.

## Why is fun important?

Why bother with fun, I have work to get done...

While there are always difficulties and once in a lifetime problems, research consistently shows the importance of play and having fun for grown-ups, as well as kids. Importantly, for lawyers, there are many benefits in the areas of mental well-being also.

## Benefits of fun

- Less stress and more energy
- Better sleep
- Better relationships
- Lower blood pressure and cortisol levels
- Lower levels of depression
- More confidence
- Greater quality of life
- More intrinsic motivation
- Positive attitudes towards the workplace or job satisfaction
- More creativity, spontaneity, and better problem solving
- Better writing skills

See page 12 for sources and further reading on the importance of playfulness.

Apparently, you can even laugh off a little of your latte. It might take a while, but laughing for 10 minutes can burn up to 40 calories, so perhaps make stand-up comedy your new exercise routine.

There are so many benefits for work, life, and family to seek out and cultivate fun and playfulness!

## What kind of fun is your fun?

We each have different tastes in food and different tastes in fun. One person's favourite activity might bore another person to tears.

You might have some ideas that instantly spring to mind. Perhaps you have always wanted to learn to dance salsa, or you used to paint but stopped.

One type of fun I am looking forward to (tentatively) this year, is seeing live gigs, especially comedy, again. I am starting to look at the different shows and options available and planning around them.

*“Enjoy your kind of self-care. Self-care is sensible maintenance for the engine and body of the vehicle you've got to drive for a long time.”*

## What if I don't have any 'fun' hobbies?

You don't have to be a professional athlete or be an expert in crochet to have hobbies you find fun.

For me, fun is also re-designing a contract so that it's easy to read (sometimes even enjoyable to read). In the legal team at Telstra, there are so many opportunities to explore ideas in legal innovation, making the 'not as fun' parts of the day-to-day work more enjoyable. I also have a boutique law firm where I work with amazing female founders and help legal leaders innovate. While technically it's 'work', it definitely energises and re-ignites my passion for the law and legal practice.

Work through the below list and start to generate ideas of 'fun for you' things.





**Activities**

What are you doing when you feel in 'flow'? What gets your creative juices going? What activities could you do for hours? What skills do you have that others marvel at?

**Examples:** Sewing, painting, baking, DIY renovating, car maintenance, podcasting, writing.



**Physical**

What physical sports or exercises do you enjoy? Have you always wanted to try something new? Does a friend do a physical activity who you could ask to show you the ropes?

**Examples:** Salsa dancing, Pilates, power walking, surfing, stretching.



**People**

Who do you miss? Who makes you smile when you think about them? Who would love to talk to you? Who could you help?

**Examples:** Family, friends, current colleagues, past colleagues, extended family, mentors, mentees.



**Places**

While the globetrotting opportunities at present might be limited, there are lots of ways to find fun in your own backyard. Do you prefer warm or cool places? What suburbs do you love? Where have you not been in ages? Where have you never been before in your town... city... state.... country? Where would you love to live? Where can you go so that you'll be surrounded by trees?

**Examples:** Find a forest (or any greenery) to walk through, go to the library, stroll through an old neighbourhood you used to live in, visit a 'touristy' place in your own town, try out a co-working office, go to the beach... the river... a lake... a mountain... a valley!



**Self-care**

Enjoy your kind of self-care. Self-care is sensible maintenance for the engine and body of the vehicle you've got to drive for a long time. What relaxes you and makes you feel refreshed? What have you been 'putting off' that you know you 'should' do for yourself?

**Examples:** Get a massage, grooming (pedicure, manicure, haircut), book in multiple physio appointments, meditation, breathing exercises, create a medical fun day and get all your doctor, dentist, etc appointments done on the one day and then have a massage to top it off.



**Work tasks**

What parts of your workday do you enjoy? Who do you like working with? What do you wish you could 'fix' about your work or workplace? How social is your workplace? Who would you like to learn more from at work?

**Examples:** Create a new project idea in an area you love, do the thing you like most about work first thing in the morning, get the thing you like least out of the way first thing, create or join the social club, start or join the diversity and inclusion committee.



**Wish list**

Big dreams time! What is a BIG fun thing that you wish could happen? It might be unrealistic or hard or completely out of reach (for now), but write it down anyway! If money or time or family commitments were no issue, what would be an amazing way for you to have fun?

**Examples:** Perform in a musical, run a marathon, change jobs to work in your dream industry, start a not-for-profit organisation, volunteer, live on a beach, a fortnight-long extended family holiday.

**Making work (more) fun**

Lawyers work a lot. In 2019, the ACC In-House Counsel Trends Report found that **20%** of in-house counsel worked between 51 hours and 60 hours, and **40%** worked between 41 hours and 50 hours per week, whereas **7%** worked over 60 hours each week.

Given we spend so much time at work, perhaps we could dedicate some of that time to fun!

**Fun meetings**

A fun meeting might sound like an oxymoron but ensuring that meetings are efficient and effective with a dash of fun can leave team members feeling refreshed instead of drained:

**Purpose + Agenda:**

A purposeful meeting is always more enjoyable. Even for a short meeting, it only takes a moment to set out the purpose and a few dot point agenda items, but this can help people prepare, so the meeting will progress better.

**Deliberately start late:**

Deliberately set meeting times 5 or 10 minutes past the hour to give people a chance to refresh between meetings instead of rushing.

**Themes:**

With the ability to change backdrops or add headgear, themes can add an element of fun to more informal team meetings.

**Put fun on the agenda:**

Leave a spot on the agenda for a playful activity of some kind, this could be a dedicated joke space, an amusing discussion topic, a cat video, etc, something that the entire team can enjoy and contribute to.

**Explore the law**

There are so many exciting areas of the law emerging and old areas of law that need dusting off and re-examining. Legal operations, client experience, and legal design are all fascinating areas to investigate.

Often, we get caught up in executing our work, and we forget we used to read and learn about things because we wanted to.

Are you drawn to particular areas of law or legal practice? Perhaps you have always wanted to learn more about a particular area of law or would like to look into evolving spaces such as automation or contract design.

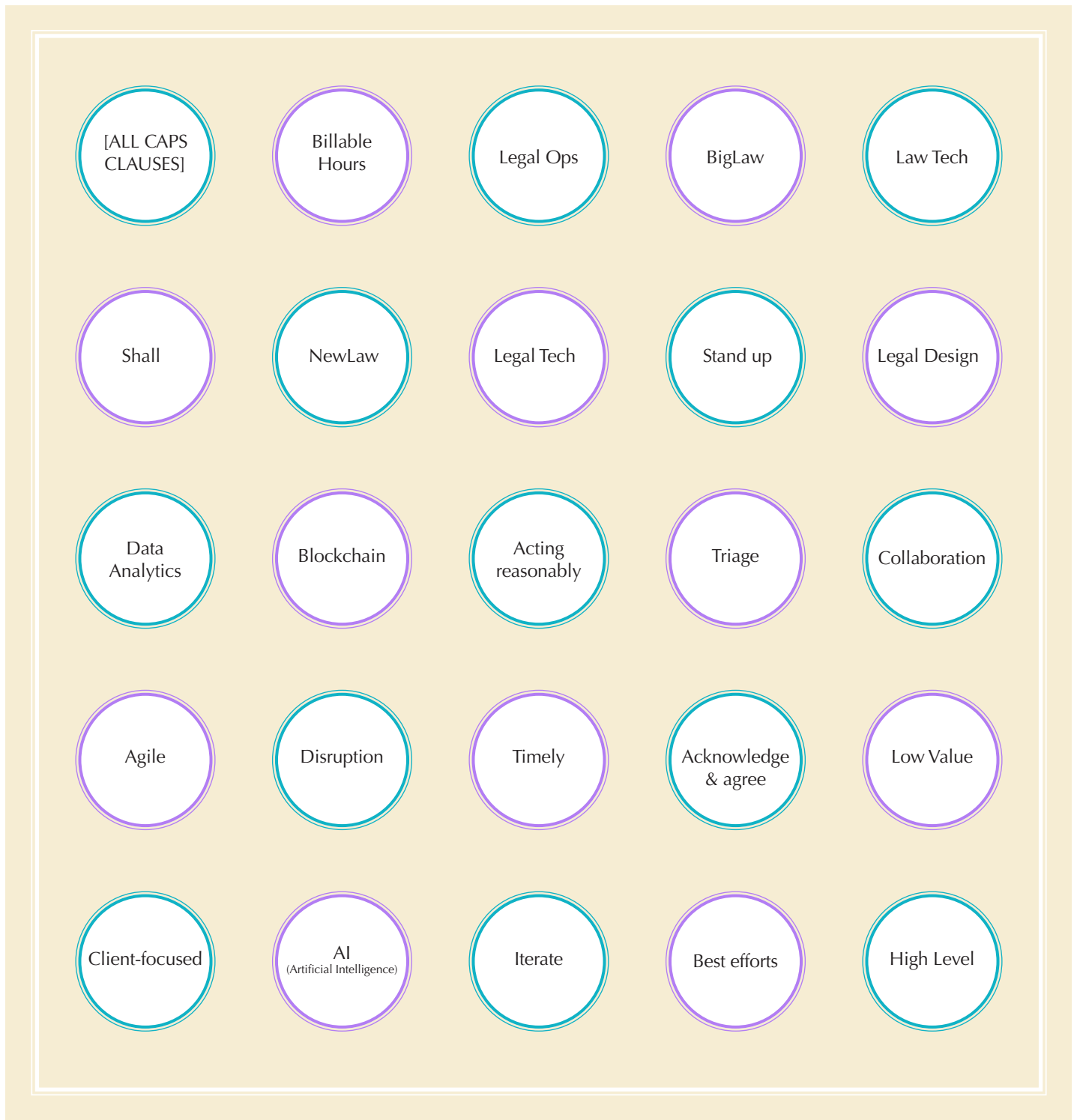
Explore the law without a specific end purpose in mind. Read and learn or attend an ACC event on an area of law that calls to you.

**Buzzword bingo**

Corporate and legal jargon fills the contracts we read and the emails we write. Jargon can confuse readers and frustrate clients. If jargon is a killjoy in your team, think about creating a Buzzword Bingo.

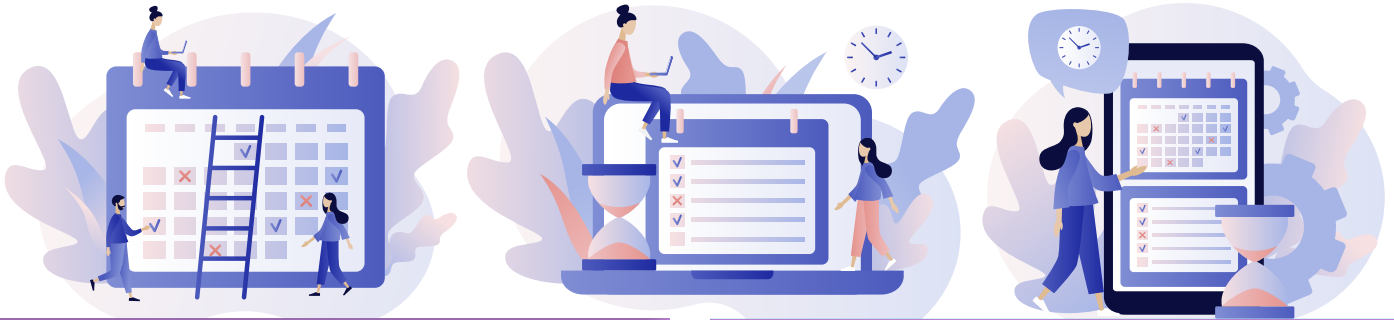
Use the **Fun Planner** on page 12 to help spark ideas of the things you find fun.

## Buzzword Bingo



### Other ideas

- Put a recurring task in your to do list with a quote or joke that makes you smile
- Start a monthly activity with work colleagues — sports, reading, wine tasting; there are lots of options depending on what your fun is, and it can involve just two people to begin with
- Try to reduce the amount of time you have to spend with 'unfun' people and increase the time you spend with playful, fun people
- Refresh your feed! If you have professional or work-based social media, like Yammer or LinkedIn, mix up your feed by seeking out fun, playful accounts (eg Legal Cheek, Very Legal Problems, or whatever fun things you want to focus on this year)



*“If someone asked you what you wanted to be when you grew up, we didn’t say ‘I want to be busy’*

Dara Simpkin, Play specialist in workplace playfulness

### How to plan for year-round fun

If you fail to plan, you’re planning to fail to have fun!

I’ve made the planning easy for you with the 2021 Year of Fun Planner.

## 1. Why is fun important to you?

Think about the benefits of play and laughter. Consider some of the previous stresses you’d like to avoid this year. Write down a few reasons why fun is important to you.

Example: Work gets serious so I need to take a break to lighten my mood. To enjoy time with my family.

## 2. Secret recipe for fun success

As I mentioned earlier, you have your own special combination of activities that creates fun for you. It might change over time, but it is up to you to know what you enjoy and to try new things if you aren’t sure.

Look over the different categories and think of things you like doing in each category. Then list how often you’d like to do that activity.

Once you have your special combination of activities that make up a fun year, month, week, day, **add** them to your to do list and make specific time for them on your calendar.

Example: Dance cardio (once a week), Contract design (once per week), Massage (once a month), Work drinks catch up (once a month), Beach holiday (once a year).

## 3. Explore the law

All of us have CPD points we need to get. Why not spend your CPD points exploring a new area of the law? Write down the areas you have always been interested in, but that might not be your current practice area or even an area you will ever work in. There could be lots of fun waiting for you to explore the law and your career from a different perspective.

Example: Learn about current approaches to Intellectual Property around collaboration.

## 4. Fun at work

How can you make work more enjoyable for yourself? For your colleagues? For your clients?

What aspects of your work are painful or ‘unfun’ at the moment? How could you tweak them to make them more enjoyable (or stop doing them altogether)?

**Write down your ideas for making work fun.**

Example: I will start a monthly themed catch up with my female work colleagues.

## 5. Lights, camera, action it!

Huzzah, you have a list of fun ideas to fill 2021 with mood-boosting endorphins and create better relationships at home and work.

So, how will you action your new list of fun ingredients? Do you need to research different exercise classes or look up the events on the ACC website and register?

**Add that very next action item to your to do list.**

Example: Ask Melanie if she wants to present on contract design with me; Put the time in your calendar to reach out to work colleagues past and present.

## 2021 Year of Fun Planner

<b>Why is fun important to you?</b>		
<b>Your secret ingredients for a fun year</b>		<b>How often?</b>
<b>What do you find fun?</b>	Activities:	
	Physical:	
	People:	
	Places:	
	Self-care:	
	Work tasks:	
	Wish list:	
	Other:	
<b>Explore the law</b>		
<b>What new area of law or legal practice will you explore for fun this year?</b>		
<b>Fun at work</b>		
<b>What will you do at work this year to make weekdays more fun for you, your team, and your clients?</b>		
<b>Actions</b>		
<b>What is the very next step you will take to kick off the Year of Fun?</b>		

### Share the fun!

One of my fun activities is making and testing (and testing!) different cocktails. So, here is a virtual 'cheers' to you and the year of fun you will have, as well as the many benefits that playfulness and enjoyment will bring the rest of your colleagues, family, and friends!

I can't wait to hear the fun you will have this year and share your ideas for a 2021 filled with fun.

Let me know about your #2021yearoffun! [📢](#)

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#### Verity White



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

For more of Verity's practical legal innovation ideas, visit [www.checklistlegal.com](http://www.checklistlegal.com)



# PRIVACY AND DATA PROTECTION FOR IN-HOUSE LAWYERS

Arguably, one of the most significant challenges facing businesses the world over is privacy and data protection. Lawyers supporting businesses facing this challenge need to be cognisant of the fact that threats are ubiquitous, and we need to be prepared for the less obvious threats while simultaneously protecting against the known ones. A technical expert provided me with an analogy. He said, *'if software is a house, it's important to ensure that the doors and windows are secure, but you always need to be able to detect if someone is coming through your roof or floor too'*. This demonstrates the high stakes that data security teams face.

**T**his challenge is significantly more complex for multi-national companies that have to stay ahead of the curve on the ever-changing legal and regulatory framework across borders and operationalise compliance in a way that works for the business.

In addition to balancing complex legal and regulatory compliance, businesses must manage and respond rapidly to the constantly evolving threat profile of external security threats.

Managing this challenge from a legal perspective and operationalising it means in-house lawyers need to effectively partner with their technical and security teams, keep ahead of legal and regulatory developments, and provide solutions that allow for business efficacy.

## Data Security Landscape

One of the most crucial teams, and areas of growth, in multi-national corporations is the security team. The emergence of new threat agents, coupled with the growth of existing threat agents commoditising the activities, creates a dynamic requiring constant evolution in security measures, procedures, and goalposts. Through necessity, the data security of corporations must be ahead of the law when it comes to responding to the evolving risk vectors to ensure the safety of customer data, and not solely as a means for legal compliance.

Some prominent data security breaches have been generously unpacked by the companies that experienced them. They demonstrate the truth of data security requiring not only vigilance but agility and the means of detection must be constantly responding to the changing nature of attacks.

By partnering with the technical and security teams, in-house lawyers can understand the unique risks associated with the IT assets of the business, allowing lawyers to understand how best to support this security through policy and legal documentation. Additionally, lawyers can support their technical and security teams by ensuring they are aware of relevant legal and regulatory developments that affect the compliance framework relevant to the business. This is something we work to continuously improve at WiseTech Global. As the market and framework itself change, we need to ensure we are sufficiently agile to respond and also embed the principles in our strategy so we can future proof.

As a logistics software company with customers that include global logistics service providers, the global regulatory framework for privacy and data protection is at the forefront of our operations.

We partner with our technical teams to ensure the principles that underpin the regulation are embedded operationally. In software development, our technical teams manage many factors from form and function of customer experiences to complexities involved with embedding customs law into operations. Therefore, early support from legal allows these teams to troubleshoot different build strategies, and ensures principles such as privacy by design are embedded without compromising any of the features that provide a good customer experience.

Customers need to know that their data is secure to discharge their own obligations to their customer base, while safeguarding what is a valuable commercial asset, and obtaining the advantage of the software they are using for operational benefit.

## Legal and Regulatory Framework

Globally, there is a patchwork of different privacy and data protection laws and regulations that differ, sometimes conflict and often overlap.

Although organisations that do business in the European Union (EU) would be aware that the General Data Protection Regulation (GDPR) is one of the strictest, if not the strictest, data protection regimes globally, there continues to be local law nuance that adds additional layers of complexity, particularly when it conflicts with the GDPR (ie certain domestic laws pertaining to discovery and litigation). Balancing the compliance with local law while ensuring that such compliance does not fall foul of the GDPR is not a simple task for any business. Therefore, understanding the laws and regulations in each jurisdiction is essential for in-house teams to manage this risk.

Balancing the current legal and regulatory framework in light of the recent reforms under way, along with those proposed, is a very fraught task for in-house lawyers. The privacy and data protection scope of legal compliance is burgeoning. Between the emerging enforcement action in the EU, the situation with Brexit, and the proposed reforms in Australia and India, in-house teams need to remain abreast of these emerging challenges.

In the EU, we are awaiting the new Standard Contractual Clauses, which are expected this quarter and will likely impact on agreements on foot for companies worldwide that conduct business in the EU. We have yet to see the full implications of Brexit



for the UK; although currently in a grace period, it remains to be seen what the new UK legislation will look like and if and when the European Commission will issue an adequacy decision for the UK.

There are reforms proposed for Australia's privacy law with specific intentions regarding user data protection; however, this has been delayed by recent world events. Proposed data protection legislation yet to be passed in India is intended to align with the GDPR concerning personal data, but goes further in respect of non-personal data. This will be an interesting reform to watch to see whether there is true alignment. The California Consumer Privacy Act (CCPA) also has the most robust data privacy law in the United States, adding complexity for any organisation doing business across the United States.

By understanding the in-force obligations and examining the proposed reforms and anticipating emerging trends, lawyers can support business agility. Additionally, by staying on top of these trends, in-house teams can help predict where laws are moving and start preparing their businesses for future compliance needs regarding privacy and data protection. An example of this would be to look to the most robust obligation and embed compliance with this into the operations of the organisation as a means of 'best practice'.

This provides operational benefit, particularly where there is global reach for an organisation because having to silo operations reduces operational efficiency. By examining the trends, lawyers can support best practice benchmarking across the organisation and provide sound legal rationale and a business case for efficiency. This consistency of approach means it is easier to operationalise and standardise, which is more efficient and certain for global organisations compared to disparate approaches.

Maintaining compliance with the most robust law provides a seamless way in which a business can continually improve, and lawyers can also be more efficient in their advice to the business.

However, the most valuable gain from this strategy is operational gains. Technical teams will not need to rewrite code time and time again to respond to changes across geographies or implement certain security features for some locations but not others. This best practice strategy will also prevent remediation steps needing to be taken down the track once certain jurisdictions 'catch up' to other data privacy regimes.

### **Our Role**

The nature and role of the in-house lawyers in responding to privacy and data protection complexities has changed over time. With the increase of cross border data flows, our understanding of data and our role in ensuring its protection has become more important. Although there are hefty sanctions across different locations that provide compliance incentives, this is not the only reason for compliance. Ultimately, we are all part of the data economy and, by holding ourselves and our organisations to the high standards the market expects, we contribute to the integrity of the data economy.

We are not here to simply document the corporate compliance in contracts and policies, which, although important, does not demonstrate the significant value a lawyer holds in business partnering—providing knowledge to the business and providing solutions.

### **Knowledge**

Keeping abreast of amendments to legislation and regulation is a pivotal part of in-house lawyers' value. With this knowledge, lawyers can advise businesses on live issues. There is also value in lawyers following developments of not only additional laws and regulations and reforms to same, but also trends in litigation and enforcement. Understanding how issues and responses to these issues are viewed by regulators and courts is essential for providing sound advice and recommendations that have been rigorously tested.

We also need to maintain our fingers to the pulse of market trends and what this means for global operations. It's a hefty task but one that makes in-house lawyers valuable.





The emergence of the GDPR as a global framework rather than an additional compliance measure is a great example. An in-house lawyer watching this would have anticipated the current global reforms and set GDPR as the best practice benchmark for the business they support and, in doing so, would have little to do with additional compliance because additional geographies align their laws and regulations with the GDPR. They can now efficiently respond to any adjustments to the most robust law or regulation and roll these out across all geographies of operation.

**Partnering and Solutions**

By partnering with our technical and security teams, we embed privacy principles into the measures taken to keep data secure and to the design that the infrastructure data is housed in and transferred through.

Legal and technical partnering allows for an exchange of knowledge and influence that advances the partnership, understanding, and business operational efficiency beyond risk mitigation in contracts and other externally facing legal documentation. Therefore, there is organisational take-up of the principles that led to the enactment of the law and, where principles like this are embedded, compliance follows with ease.

In partnering with the business, lawyers are being afforded enhanced opportunities to provide solutions that support business strategy and efficiency, creating downstream opportunities for in-house legal teams to reduce reactionary issues.

**Summary**

In-house lawyers play a crucial role in privacy and data protection, particularly in partnering with technical and security teams to maximise effectiveness in upstream processes that protect data and implementing protection against data breaches that are becoming more prevalent with the emerging and expanding external threat agents. By partnering with the business, embedding principles into the process and infrastructure, and maintaining an efficient best practice model, in-house lawyers can effectively mitigate the numerous risks associated with a disjointed international legal and regulatory framework.

**PRACTICAL TIPS**

- Check-in with your security team to engage with them and understand current protected risk vectors and implemented measures.
- Understand any technical projects in the pipeline and find ways to support strategy and embed protections.
- Conduct regular training on privacy and data protection so all staff, organisation wide, understand their role in supporting the organisational compliance strategy.
- Periodically review and update any internal and external policies to ensure they keep step with the prevailing law and regulation together with market conditions.
- Check your internal data transfer documentation for all group entities (if multi-national) and the extent of any EU overlap to ensure it contains the relevant (and updated) references to any Model Clauses and effectively enunciates the nature and purpose of any processing for each entity within the group.
- Check your suppliers, particularly any software suppliers that have operations outside the EU, and ensure their privacy and data protection compliance is sufficiently robust (particularly because the privacy shield is no longer a valid mechanism).
- Keep watch for the upcoming release of the final Standard Contractual Clauses from the European Commission. It is expected, upon coming into force, that companies will have a limited window to adopt them into their relevant agreements. [a](#)

**Natalie Cromb**



*As an in-house lawyer at WiseTech Global, Natalie works across the global business on a range of commercial matters. There she applies her specific interest in privacy and data protection, partnering with the business to provide proactive and innovative advice.*

# POETRY – WHAT IS IT GOOD FOR? ABSOLUTELY EVERYTHING!

*Roses are red  
Violets are blue  
There’s a lot poetry can do for you*

**P**oetry is both beautiful and instructive. It captures sensations, and shows us the power of language. I use poetry for pleasure, mental health, and work.

I initially considered poetry an arcane language used by sadistic English teachers to punish students. Poetry at school was like the dissection of a beautiful butterfly; I lost sight of the beauty, and all I could see was the scalpel, tweezers, forceps, metaphors, alliteration, and pentameter. Although, in my opinion, we were also looking to dissect slugs... ugly poems for a different era. Not to mention that poetry was viewed as a distinctly un-masculine pursuit back when I was at school in Tasmania — the State where homosexuality was illegal at the time too.

Having my anti-poetry prejudice questioned in my 30s was confronting; my opinions were solid and long-held. However, my friend was persistent and patient and over beers (yes, you can drink and discuss poetry), he gifted me an anthology of contemporary poems, *Staying Alive – real poems for unreal times*. He had highlighted some of the poems and asked that I take it home and read them. I read the first couple of poems out of a sense of duty to our friendship and then I finished the entire 450-page book of over 200 poems a few days later out of pure delight. It was a revelation; contemporary poetry spoke to me, it could reduce me to tears, make me roar with laughter, and transport me to places from my childhood. It changed the way I looked at the written word — words have power!

## Legal Drafting vs Poems

A lawyer uses words to bring order to chaos. To provide guidelines, policies, procedure, and legislation, and to reduce ambiguity and emotion. Language open to different interpretation is to be avoided and to make sure it isn't misinterpreted, we had definitions and guidelines for interpretation; golden, mischief and literal. It didn't matter how many words you needed to achieve those goals; just keep typing until it is done - ten, one hundred, one thousand pages if necessary. None of this is wrong, but just like you can use ink to create a technical blueprint or an impressionist painting, so too can words be used to create a contract or a poem. They each have their place, and in law you need to use both. While a contract tries to remove gaps for imagination, a poem asks you to draw on it, to fill the gaps with your experiences.

That is not to say there isn't beauty in a piece of legal drafting. There is beauty in efficiency and precisely meshed gears, and every so often I see drafting that is so elegant in its simplicity and precision that it is a work of art. Turning the complexities of law into simple language is an art form in itself. It does not, however, touch me emotionally or utilise my imagination in the same way a poem does.

## Go Off-Piste

To me, poetry is an extension of the use of language. It's like a ballet dancer performing a contemporary dance, a classical musician playing jazz, a skier going off-piste — mastery of the basics is essential before improvisation. Poetry is an extension of

the classical rules of English; before you can break the rules, you need to understand them. I know I can affront most lawyers with a simple word, but I'll tell youse later. Made your toes curl, didn't it?

## Formatting

Formatting makes a difference and if you think it doesn't then you're wrong. Poetry shows us that formatting can induce an emotive response.

It can be as simple as a *font* or a *colour*

*They can make you feel all at sea...*

cOnFuS d.....      c a l m  
e

## SHOUTED AT!

How do you want the person to feel as they read your contract? The way you format can alter the way they feel about your content and you. Use it wisely, stop thinking of it as an admin task and start thinking of it as a way to communicate.

## CVs

Your CV is a sample of your drafting ability. Is your CV a series of dense blocks of impenetrable text in **comic sans**, 9 point font, or is it set out in a calm, structured, accessible manner? Your drafting ability will be judged based on your CV, and rightly so. Why should anyone think your contract drafting style or skills will differ?

It is often overlooked that your CV also needs to present a human element. It is likely that you will spend more time with your work colleagues than your spouse. People want to know if they are going to connect with you on a personal level. Algorithms solve an increasingly larger number of our issues; however, the human connection is one that is beyond them, and emotional intelligence (EQ) is becoming a highly sought-after capability. To connect with your audience and demonstrate EQ, your vibe must come across in your CV. Read some poetry first to get into the mood and then give it a shot.

## Respect



*'If I had more time, I would have written a shorter letter'*

**Blaise Pascal, 1657**

People value different things; some value antique French clocks (hat tip to Paul Keating) many value money, others value





family, or fast cars, but there is one commodity that everybody wants, and no one has enough of... wait for it ..... a little longer... here it comes ... it's time. See, you even found that slight delay frustrating, didn't you? Now, imagine one of your contracts/pleadings. If you really want to engage with your audience, respect their time. To know whether your writing is concise, try comparing it to a Haiku. This one is a title and eleven words:

*Endless: Text rolling  
paragraphs grow as pages turn  
Still cursor blinks on*

**Charlie Smirl, 2021**

How long was your last e-mail? When was the last time you used 'sic' when referencing the other party's drafting? Move on, your life and that of your audience are too short.

### Persuasive Writing

While there may be little room for poetry in legal documents, the same cannot be said for persuasive writing. And (conjunction at the beginning of sentence freakin' you out?), in my view, a lawyer needs to be just as skilled in persuasive writing as legal drafting. After all, you need to connect with your audience and persuade a person to sign, convince judge and jury that your opinion is worthwhile, and ultimately that your time is worth your salary.

Any marketer will tell you that to persuade, you need to appeal to emotions as much as logic, which is where poetry can teach us a thing or two. Martin Luther King Jr. didn't say 'I have a spreadsheet and a PowerPoint' nor did the White House turn to a list of 'pros and cons' or 'stats and data' when it sought to unite a divided country — they used our imagination and poetry to appeal to our better nature.

### Excerpt from 'I Have a Dream'

*I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident; that all men are created equal!'*

**Dr. Martin Luther King Jr.  
28 August, 1963. Lincoln Memorial, Washington D.C.**

### Excerpt from 'The Hill We Climb'

*...even as we hurt, we hoped,  
that even as we tired, we tried,  
that we'll forever be tied together, victorious*

**Amanda Gorman's Inauguration Poem, 2021**

I was asked to write 1,800 words, but I'll respect your time, finish here and leave you with a couple of final suggestions:

- If you haven't heard it yet, listen to poet Amanda Gorman's full reading of 'The Hill We Climb'
- Dip into a poetry book and see where it takes you [a](#)

### Andrew Murdoch



*Initially a lawyer in Australia and then the UK, Andrew later moved into legal recruitment. Since 2012 he has worked within "new law" in Sydney. He is passionate about the legal profession and its need to innovate and show value. Andrew's core values are honesty, efficiency and the desire to leave the world a little better than when he entered – and Dovetail Legal Solutions has been designed with those aims in mind.*

# FIVE STRATEGIES FOR BUILDING YOUR PRESENCE IN THE BUSINESS AND BEING AN IMPACTFUL GC

The new year has given lawyers cause for celebration and the chance to ponder future opportunities after a challenging 2020. Whether you are a General Counsel (GC) emerging from a COVID 'hangover' or a senior lawyer looking to step up, here are five strategies you can adopt to establish your value and influence as a GC.

## 1. Be authentically you

Being a lawyer is rewarding, but it is not an easy role. Carrying the weight of the law and the risk of your business can be a daunting experience, no matter how long you've sat in the chair or the size of your legal team. That burden is much heavier when you are pretending to be somebody else or constantly upholding the idea that lawyers are robots.

While we must always be professional and courteous, the tide has shifted to enable lawyers and GCs to embrace more of themselves outside of the law (including through the ACC's #morethanalawyer movement).

During my first week at work, the leadership team hosted a quarterly town hall with the ANZ business, and I was called up to introduce myself. After giving my usual spiel that I'm Zoee with a double 'e' and speaking about my experience, I decided to go a step further and share a few more personal facts about myself, including that my favourite movie is Terminator 2 and I'm tragically obsessed with Arnold Schwarzenegger.

Apart from being a great icebreaker, sharing helped me forge a great bond with my colleagues, especially my General Manager, who is also a huge Arnie fan! For my birthday that year, my colleagues took me out for a celebratory lunch. The Outlook invitation was a picture of Arnold from the movie, and the caption said, 'Come with me if you want a Happy Birthday'. It doesn't get much better than that!

On a more serious note, being authentically you could mean embracing and sharing other aspects of your life, including your health conditions. I openly share that I don't drink caffeine because of my heart condition. Simply acknowledging I have a condition means it is just one of the many facets of being 'Zoee'. Although that facet is a big part of my 'why' as a lawyer in healthcare — I care deeply about patients, because I am one.

I know from my own experience that being authentic and vulnerable takes time. It's not immediately comfortable to share your personal side. However, I encourage you to embrace who you are beyond the law as best you can. It may help you find the right cultural fit when seeking new opportunities, enable meaningful connections with your leadership team and clients well beyond your legal advice, and reduce some of the stressors that come with wearing a mask (and I don't mean the COVID kind).

## 2. Invest in development

GCs are expected to have an extensive breadth of knowledge, but it can be hard to invest in your development when the organisation needs you every day. It's true — they absolutely need you! But they need you to know what's coming to help them anticipate new risks and to be able to manage the pace of those new requirements alongside the day-to-day challenges.

I assume that you have held good intentions to attend many a lunch-time seminar but found yourself sending apologies on the day as you couldn't break away from meetings. This is disappointing, but you can adopt different strategies to help you with your development journey:

1. Nominate one of your team members to attend in advance and ask them to present a summary of the learnings at the next team session. As an added bonus, you'll give them a platform to help develop their discussion and presentation skills.
2. Organise a buddy or mentor through the ACC who can share the training load with you. It's an excellent opportunity to catch up for a coffee and the discussion will likely cement things in both your brains more than merely listening.
3. Use proximity or a new location to your advantage. It can be hard to leave the office to make it to the sessions. Pre-COVID, I would travel to the CBD and work there for the morning before any development sessions. A new location helped ensure I was setting myself up for attendance success.

Lastly, drop the guilt and remember that learning is part of the job and a requirement to maintain your practising certificate. You are still working by attending a session!

## 3. Support, encourage, empower

How often have you heard in your career that legal is a handbrake? Change hearts and minds, and establish your seat at the table, by positioning yourself as the supportive, encouraging, and empowering GC.

### (a) Support

Forget hiding in the corner and cheer on your clients loudly and proudly! There are so many ways to do this that involve very little time. Be seen to support the business by responding to the all-staff email chain to congratulate completing a major project and commenting on, liking, and sharing celebratory LinkedIn posts.

### (b) Encourage

Encourage positive behaviour as often as you call out what shouldn't be done. Clients have told me in the past that they get such a boost when they hear they have done something right from their lawyers, rather than only

hearing when something goes wrong.

You can recognise a client through your company's rewards and recognition program, send a 'thank you' email (or even better, a handwritten note), or call it out on team calls you join. Better still, establish a quarterly lunch or dinner opportunity with the leadership team to thank people for their efforts and enable them to pick your brains in an informal setting.

### (c) Empower

Help your clients need you less by creating resources that reduce the requirement to come to legal and provide practical training.

#### (i) Resources

Enabling clients to self-serve is a great way to foster ownership and accountability and free you up for riskier activities. You don't even need to spend thousands of dollars on automation software and chatbots (although, if you have the budget, go for it!). It's easy and inexpensive to build intranet pages, checklists, playbooks, and interactive guides. If you are particularly creative, you can film and edit how-to videos on your iPhone — the possibilities are endless!

However, don't forget to engage your clients before you change processes and build self-service resources as their insights will be valuable. You can do this by creating surveys, interviewing them, and conducting process-mapping exercises (I call these 'whiteboard sessions').

#### (ii) Training

PowerPoint presentations are so yesterday! You'll truly empower your clients by making training sessions practical, engaging, and relevant. Invest your time in creating training that suits the individual business unit. A few years ago, I launched a compliance program by taking my clients through 'a week in the life' of the sales team. I built fake meeting agendas, hospitality receipts, scripts, and games based on the characters from the TV show 'The Office'. The team walked away with an appreciation for compliance without even needing to open the guide (although, of course it was highly recommended!)

Some very smart cookies have established great tools to help take the strain off if training isn't your forte. If you have the budget, jump on the Kahoot bandwagon or trial new text message training capabilities.

Kahoot tip: You won't regret splurging on the top subscription tier for the boost in variety and functionality.

## 4. Understand your clients to understand your business

It's so important to get to know your clients beyond the contract or project, and outside of a burning crisis. Stressed lawyers and clients do not make for a happy work marriage, and one poor interaction can damage the relationship and lead to negative outcomes for the business.

Getting to know your clients as people, and taking the time to understand what their role entails, can go a long way to building your credibility.

### (a) Open up the communication lines

Don't stay closed off in your lawyer lair. Even if you are working in a virtual environment, you can easily join your clients' team meetings, host a virtual morning tea, or arrange a platform for legal at the national conference.

### (b) Take a road trip

Make sure it's COVID-safe, but don't hesitate to join your clients 'on the road'. Often our expectations of what they experience is very different to their reality. Having first-hand knowledge can help you provide more tailored and appropriate advice and win over clients who will appreciate you taking the time out to walk in their shoes.

## 5. Enable trust — Be a safe harbour

Confidentiality and privilege are the cornerstones of any lawyer's practice, but an impactful GC does more than maintaining confidentiality and privilege. They act as a safe harbour for all within the organisation, especially their leadership team.

I have found it helpful to set good boundaries with clients when they need my safe harbour.

### 1. Be present –

In most situations, clients are going to need your undivided attention when they are calling on the safe harbour. You will either need to let what you were working on take the backburner (if appropriate) or schedule time with them where you will not be interrupted. Turn off Skype or Slack, mute your phone and close your door. If necessary, find a different location that will put your client more at ease.

### 2. Walk them through the process –

Clients appreciate when you explain what to expect from a safe harbour conversation. I've found better results when I over-communicate. Share that you are there to listen and provide advice, not to judge. Tell them if you are taking notes, especially if you are on a call and they can't see you or you need more time to write things down. Be genuine with them if you don't understand something or wish to confirm the facts.

### 3. Clarify consent and establish the 'vault' –

Since the introduction of whistleblower protections, it's more important than ever to confirm whether you have the person's consent to identify them if you have to take the matter further. In other examples, consent may not be needed, but it can help put the person's mind at ease to reiterate that what has been discussed stays between the two of you unless you have their permission to discuss it with others — I call this the vault.

### 4. Withhold judgment –

Be aware of your tone, body language and your verbal response to what people share with you. You can think what you like after they leave the room or call, but now is the time to listen before reacting.

By setting clear boundaries and expectations, and strictly maintaining confidence, you will position yourself as a trusted GC. They will know not only to call on you when the crisis happens, but when they recognise a crisis is forming.

### Where to start

Rather than implementing everything at once, I recommend starting with one suggestion and making that work for you before moving to the next. Continuously investing in your development and building on these strategies over time will make it feel more natural to you, which in turn will come across more authentically to your clients. You will encourage your clients to approach you willingly and transparently for advice, which in turn enables you to troubleshoot issues legally, practically, and proactively. Building your presence will enhance your relationships, increase your voice and influence, and cement your legacy as an impactful GC. <sup>1</sup>

### Zoee Bradley



*Now serving as ANZ General Counsel and Compliance Officer for a pharmaceutical company, Zoee eschewed the traditional law firm training pathway and started her legal career in-house. Throughout her in-house career she has supported clients across Asia-Pacific, Japan, the Middle East and Europe across a variety of practice areas including marketing, distribution, privacy and competition law.*



# BUILDING A RESILIENCE MINDSET

I never thought I would consider my diagnosis of Multiple Sclerosis (MS) as a blessing. Don't get me wrong; I wish I did not have MS, but, looking back on the last 13 years since my diagnosis, I cannot help but reflect on the positive changes it has made to my personal and professional life.

**H**ow I got to this point from the depths of despair and devastation when I was told I had MS comes down to one skill, resilience, and how I re-learned and harnessed this powerful tool.

Obstacles and setbacks come in all shapes and sizes. They can affect us in our personal and professional lives, and they can be minor or significant. They have the ability to kick you in the backside just when you think things are going well and no one is immune from them — it does not matter who you are, how wealthy you are or your profession.

*“Resilience is the innate ability to overcome these obstacles and setbacks.”*

Resilience is the innate ability to overcome these obstacles and setbacks. I say 'innate' because I believe we are all born with resilience, otherwise we would never learn to walk, talk, eat, and so on. It is the ability to get up again when we fall or fail that shapes us as humans. Some people through their life nurture and harness this skill, and go on to achieve amazing things. Others, primarily due to their upbringing, learn to suppress it and every setback has debilitating consequences.

The beauty of resilience is that you can build or re-build it, no matter what life has thrown at you so far.

## Life's curve ball

In 2008, I held a senior role as an in-house lawyer at MIGA, a professional indemnity insurer for the health profession. I was married with two young children under four. I would describe my life to 2008 as pretty normal but great.

I began to develop blurred vision and then pins and needles in the lower half of my body that persisted for about six months. After my wife forced me to go to the doctor and following numerous tests and MRIs, I was told I had MS two days before my 34<sup>th</sup> birthday.

MS is a disease where your immune system starts attacking itself, particularly the brain and spinal cord and damages your nervous system.

It is difficult to describe the sense of hopelessness and despair that I felt at the time. The next eight months were a psychological hell that I fought very privately. I battled alone through the devastation of the diagnosis, the shame that I felt, and the fear of what I thought my future would look like.

## Resilience building skill #1 – Surround yourself with positive people

In late 2008, I stumbled across the work of Professor George Jelinek and the overcoming MS (OMS) program. The OMS program is a series of lifestyle modifications that aim to improve the lives of those with MS. My wife and I attended an OMS retreat in the Yarra Valley, Victoria. At first, this was very confronting for me because there were a few people attending who were quite disabled by MS, but by the end of the week, I felt deeply inspired by their courage, determination, and resilience to do whatever it took to improve their lifestyle or remain active.

The support of my family and friends has profoundly impacted how I have managed this illness. I also significantly reduced and, where possible, eliminated my exposure to negative people, particularly MS chat forums, where people told their stories about how MS had ruined their lives.

Surrounding yourself with people that support and inspire you, who pick you up when you're not firing on all cylinders, and check in on you from time to time is a crucial resilience-building tool.

## Resilience building skill #2 – Work out what you need to do and get busy doing it

The OMS program and the inspiring stories of those who had adopted it gave me a sense of newfound hope and helped ease my fears about the future I had originally anticipated. I embraced the OMS program wholeheartedly.

My health became my priority, and I made decisions about my lifestyle accordingly. That meant changes to my:

### 1. Diet -

I switched to a plant and seafood-based, whole-food diet that is rich in omega-3 while excluding dairy and animal fats. Minimising saturated fat intake is critical in recovering from MS symptoms and living a long, healthy life.

### 2. Vitamin D intake -

getting out in the sun (safely) and taking vitamin D supplements when there is not enough sun.

### 3. Daily exercise routine -

I wake up at 4:30 most mornings, and I am either at the gym or going for a run before most people even think about waking up.

As a busy professional in a stressful job, it was clear that my work style also needed to change. My MS diagnosis was something I kept very private, and despite my initial reluctance to discuss it with my employer I confided in a few key individuals who were entirely supportive. Together we decided to reduce my work hours to a nine-day fortnight, which allowed me to maintain a better work/life balance.





**Resilience building skill #3 – Manage stress**

Eliminating stress is impossible. However, I have learnt to manage the stress of my work and life better, principally through meditation. I meditate once or twice a day for about 20 minutes at a time. At work, I often stop whatever I am working on and sit mindfully observing my breath for a few minutes or I go for a short walk outside to centre myself.

I have also engaged the services of a professional psychologist from time to time to help me work through some of the stressors in my life. Although sceptical at first and something I would not readily admit, the input of an impartial, professional third party has benefitted me greatly.

*“ I now look at my life differently, and I have an extraordinary sense of gratitude for so many aspects.”*

**Resilience building skill #4 – Practice gratitude**

I now look at my life differently, and I have an extraordinary sense of gratitude for so many aspects. Simply by focusing on what’s good in my life, the very basic things, gives me a very different perspective. With gratitude in mind, I wanted to find a way to give back to Professor Jelinek and the OMS team for what the OMS program has done and continues to do for me. I decided to run the New York Marathon to raise awareness about the OMS program and raise much-needed funds for the OMS Charity, an independent charitable organisation that does not accept any financial support from pharmaceutical or other third-party companies. They rely on the generosity of supporters

to continue their important vision, for every person with MS across the globe to be aware of the OMS recovery program.

I managed to convince 23 of my family and friends, most of whom had never run in their life, to train for the marathon. In November 2016, 23 of my family and friends joined me to run the New York Marathon, and along the way we raised over \$150,000 for the OMS Charity.

MS changed my life but not in the negative way that I had anticipated when I was diagnosed. It allowed me to rediscover and enhance my resilience, and along the way improved my outlook on life and the people in it. Setbacks and challenges are inevitable, and I know I will face more in the future, but I also know that I have the skills and mindset to meet those challenges head on.

I also firmly believe that the skills I have learnt to build my own resilience can be implemented by each and every one of us. I am committed to passing these skills onto my children to help them manage the challenges they will face throughout their lives and, with the encouragement of those close to me, I have also committed to sharing my story more broadly to, hopefully, inspire others to build their own resilience and overcome those obstacles and setbacks in their personal and professional lives, irrespective of how life may look like now for them. 🌍

**Anthony Mennillo**



*As the Manager – Legal Services at MIGA, a professional medical indemnity insurer, Anthony has represented medical practitioners, health care practices and midwives with respect to a range of matters including claims, complaints, coronial investigations, Medicare investigations and employment related issues.*

For more information about the OMS program, visit: <https://overcomingms.org/>

# BEYOND COVID-19: THE FOUR STEPS TO SUSTAINABILITY IN THE 'NEXT NORMAL'

COVID-19 has sent shockwaves through the global economy — causing an estimated 94% of the world's organisations to impose workplace closure measures at its height.<sup>1</sup> Analysts and commentators believe what started as a health crisis has changed the business landscape permanently.

**F**oreign Policy's spring 2020 issue asked 'Is this the end of globalization?'<sup>2</sup> World Economic Forum Founder and Executive Chairman Klaus Schwab and Thierry Malleret, co-founder of 'Monthly Barometer', titled their new book *COVID-19: The Great Reset*.<sup>3</sup> Additionally, analysts have explored the most likely scenario for the new normality.<sup>4</sup>

## Five legal trends accelerated by COVID

For legal and risk management functions, the pandemic has changed how emerging trends are viewed by the business. Where requests to embrace change may have been met with a shrug before — if a reaction at all — COVID-19 has magnified those trends and elevated them. As drivers of a low-touch-high-efficiency 'next normal', general counsel and compliance officers will need to adapt the way their teams work.

### 1. Working from home (WFH)

Demands by young legal professionals for home-office solutions and a better work-life balance increased steadily prior to COVID-19. The requests were commonly attributed to millennials in Western economies. WFH during the lockdowns not only revealed that, on average, it worked unexpectedly well, but also caused professionals across all age groups, jurisdictions, and corporate cultures to appreciate the flexibility and desire for a permanent and more flexible workspace.

Companies globally — including those that, not too long ago, declared an end to homeworking models — announced they would not bring their entire workforce back to the office but make flexible working solutions part of their corporate culture. Even departments reluctant to follow that trend will have to work with customers, suppliers, and clients that do — necessitating new workspace and behavioural adjustments.

### 2. Digitalisation

On 11 April, 2020, the *Economist* predicted 'Less globalization, more tech.'<sup>5</sup> While 'legal-tech' has been hyped for some years, corporate legal and risk management teams have been slow to embrace digitalisation when compared to other functions. The need to switch from office to remote support, literally overnight, put legal and risk management teams that had already incorporated digital solutions into their support models at an advantage. They were able to rely on working collaboration tools, seamless digital contract management flows, and electronic signatures.

Digital components for legal and risk management support were once viewed as expensive gadgets but have been increasingly recognised as business enablers. One example is the use of electronic signatures. While not surprising that their use skyrocketed during the height of the lockdowns, the interesting

observation was that, even after we (and our customers) eased back into the offices, usage remained in our case at a constant 800% compared to before the crisis. In addition to the potential to rationalise by automation, digital collaboration tools will become a precondition for effective legal, regulatory, and compliance support.

### 3. Becoming 'green'

Not only since the 'Fridays for future' movement, corporations have been working on models to save costs and reduce their carbon dioxide footprint to become more 'green'. When the COVID-19 crisis brought international business travel almost to a complete standstill, it fuelled the question on how much travel is really needed. The undeniable impact on the travel budget, paired with the reluctance to meet experts coming straight from an airport and even a reduced willingness by employees to undertake international travel, will likely have a noticeable impact on the ability of legal and risk management functions to fly experts to where they are needed. This may result in a re-evaluation of support levels, together with a shift of responsibilities from central to regional functions and the re-assessment of whether the corporate support structures are fit for purpose in the 'next normal'.

### 4. Increasing budget pressure

The budget pressure to reverse the trend (which began in the late 1990s) to build larger legal departments and respond to growing corporate demands, by simply adding resources, has (since the credit crunch of 2008) been mounting on legal and risk management functions. The COVID-19 crisis that sent entire industries into turmoil at an alarming speed and caused even healthy organisations to review their costs, accelerated budget pressure rapidly. As the lockdowns dragged on, many CEOs came to realise that certain low-risk areas that were routinely supported by their legal and risk management departments did not receive the same level of attention. This was either because companies were not set up to facilitate support remotely or because the emergency measures put in place took more time and did not allow for coverage of the entire scope of responsibilities. General counsel and compliance officers, who are often under-resourced anyway, will be under a post-COVID 'next normal' pressure to keep prioritising and save costs.

### 5. Managing the data growth

The global trend of ever-increasing regulations and the resulting challenge for legal and risk management functions to digest more data at warp speed into knowledge and risk prevention programs were not caused by COVID. However, the crisis made deficits painfully visible and the accessibility of information its first victim. The access to information and the meaningful distribution of it became more difficult and, in some cases, came to a halt.

For example, legal seminars, frequent exchanges with legal experts, and training for our teams and clients, which in the majority of cases were still undertaken through on-site training and meetings, were suddenly no longer possible in these 'old normal' formats. In addition to such structural knowledge management programs, the often underestimated (yet vital) internal information flow at the sidelines of meetings, corridor interactions with clients, and coffee machine chats fell away.

Newspaper knowledge, office gossip, the quick question or comment that appears not important enough to cross the materiality threshold that would, in times of increased workload, justify picking up the phone or drafting an email, turn out to be, more often than not, of utmost importance. As meetings decline in the 'next normal', physical contacts generally reduce and the random gaining and sharing of information in canteens and at coffee machines become less frequent, information flows and data management that are key to successful risk management will need to be more structured in the 'next normal' — at least on the same level as pre-COVID, ideally better than before.

### The four steps to sustainability in the 'next normal'

Like many of my peers, I was impressed and excited to experience the dedication, professionalism, and good spirit with which our 100+ legal, regulatory, and compliance professionals (working in 17 locations across 14 time zones) maintained the support levels without interruption during the lockdown periods. It was also clear that the extra commitment and mobilisation that COVID generated cannot be a constant ask. Sustainability in the 'next normal' (beyond the obvious requirement of keeping our teams safe in an efficient workspace) necessitates the optimisation of collaborative processes and structures, improvement of data management, and development of new soft skills. Fortunately, we didn't have to start from scratch as many transformation projects were already in motion but we had to make adjustments to prioritisation and implementation. In the context of ease-of-implementation and inter-dependency, the transformation steps follow a four-step approach, which we believe will ensure sustainable legal support and risk management in the 'next normal'.

#### Step 1: Fixing the basics — The new workspace

Flexible working (including WFH) has been part of our strategy to attract talent in many markets for years. When COVID struck, we found ourselves in the comfortable situation of already having the essential technological requirements in place. Most of our staff and clients were familiar with WFH. To work efficiently in an expanding scope in the 'next normal', the *new workspace* requires *collaboration tools* and a *behavioural framework*.

##### Collaboration tools

Irrespective if used at a fixed workplace, a flex desk, or WFH, collaborative tools and digital enablers are the precondition of the 'next normal' workspace to increase productivity and reduce the burden of email. When we began our digital transformation, we were intentionally not looking at sophisticated AI solutions specifically targeting the legal or compliance market but, with the interoperability with client tools in mind, we sought to build on existing tools in use by other departments. Fixing the basics, we considered the minimum requirements as:

- Secure video conferencing systems, enabling internal and external calls
- Instant messaging to supplement phone and email to ensure fast response times
- Contract management tools automating approval flows, cross-referencing to billing tools, facilitating electronic signatures, and providing document retention
- Cloud-based access to data, templates, information kits, etc
- Global matter management tools facilitating resource allocation and optimisation, and providing tracking and basic data analytics

##### Work schedules

Remaining productive in a distracting home environment, coupled with many customers and partners implementing new workflows, makes the workday a flexible concept that requires employees and managers to adopt a potentially unfamiliar time management regime. While goal orientation has clear advantages over mere presenteeism in the office, the downside of flexibility means that the boundaries between work and private lives tend to blur in times of intense workload. The 'any-time-anywhere' availability (already driven by mobile devices) intensifies, leading to feeling frustrated and overloaded. To avoid that, we encouraged our teams to maintain a sense of normalcy by keeping normal business hours, avoiding overtime, and facilitating collaboration and planning by setting boundaries (like scheduling meetings in the middle of the week, avoiding sending emails late in the evening — just to get team members away from their 'desks').

##### Direct communication

It may be stating the obvious, but communication has become more important than ever. Isolation and email have a tendency to slow things down. Emails sent at the end of a long business day, multiplied by the same behaviour by multiple recipients, can easily delay even simple matters by a few days. We encourage our staff to use video instead of phone and phone instead of email wherever possible.

##### Distinct meeting types

As direct interaction with peers and colleagues in the familiar setting of an office space declines, engagement and purpose become more significant. Distinct meeting types can help. To promote direct engagement, we are institutionalising monthly strategy calls with management and the teams to directly share developments and focus on selected topics of general interest (presented by the responsible professional). During the lockdowns, we held weekly 'coffee catch-up' video meetings in small groups, intentionally forgoing an agenda, and open to any topic whether work related or social (seeking to virtualise the coffee machine chat). Although requiring a certain effort to take time out of a busy schedule, mixing people who don't usually work in the same office and seeing them in the unfamiliar private home environment, ironically, brought us closer together while working remotely than when we were working side-by-side in our office space. Lastly, we increased the frequency of team meetings (without necessarily increasing the overall time invested) by shortening the duration of the meetings. Our aim was to keep the communication flow up. Switching from audio to video where possible helped build the connection.

#### Step 2: Implementing agile corporate structures

Even with the best tools and processes in place, remote work takes longer and requires better planning. Additionally, the ability to maintain the high support levels during the lockdowns was, at least partly, the result of having teams in place that knew each other on both a professional and personal level. Maintaining sustainable support structures in an evolving 'next normal' with fewer interactions, while also providing legal support and integrating new team members will be an entirely new challenge. It is difficult to develop trust with a chatbot or a voice six time zones away, and even more difficult to call an unfamiliar voice when trying to evaluate a suspected risk. In the 'next normal', legal and risk management functions need to adopt a new style of working where cross-functional teams use methods that promote flexibility and speed, while simultaneously keeping the client proximity that builds trust.

##### Global vision – Local care

The reduced ability to fly experts worldwide and greater budgetary pressure will likely lead to a decline of central support functions and a push for stronger regional teams. Not only will such teams provide expert advice, but they will have the necessary proximity to their

clients — as well as understanding the local market and culture — that builds the trust essential to deliver results. This requires skilled and empowered regional legal and compliance teams with more autonomy, but operating within the framework of a clear global vision and culture.

**Vertical integration**

One of the first steps we took during the lockdowns was integrating the legal, regulatory, and compliance functions. By building a mutual understanding, aligning objectives, and developing joint risk mitigation strategies, we moved from the traditional focus on legal, regulatory, compliance matters to a holistic enterprise risk program and approach, which also enabled us to expand our geographic footprint and client proximity — without increasing the headcount.

**Cross-functional alignment**

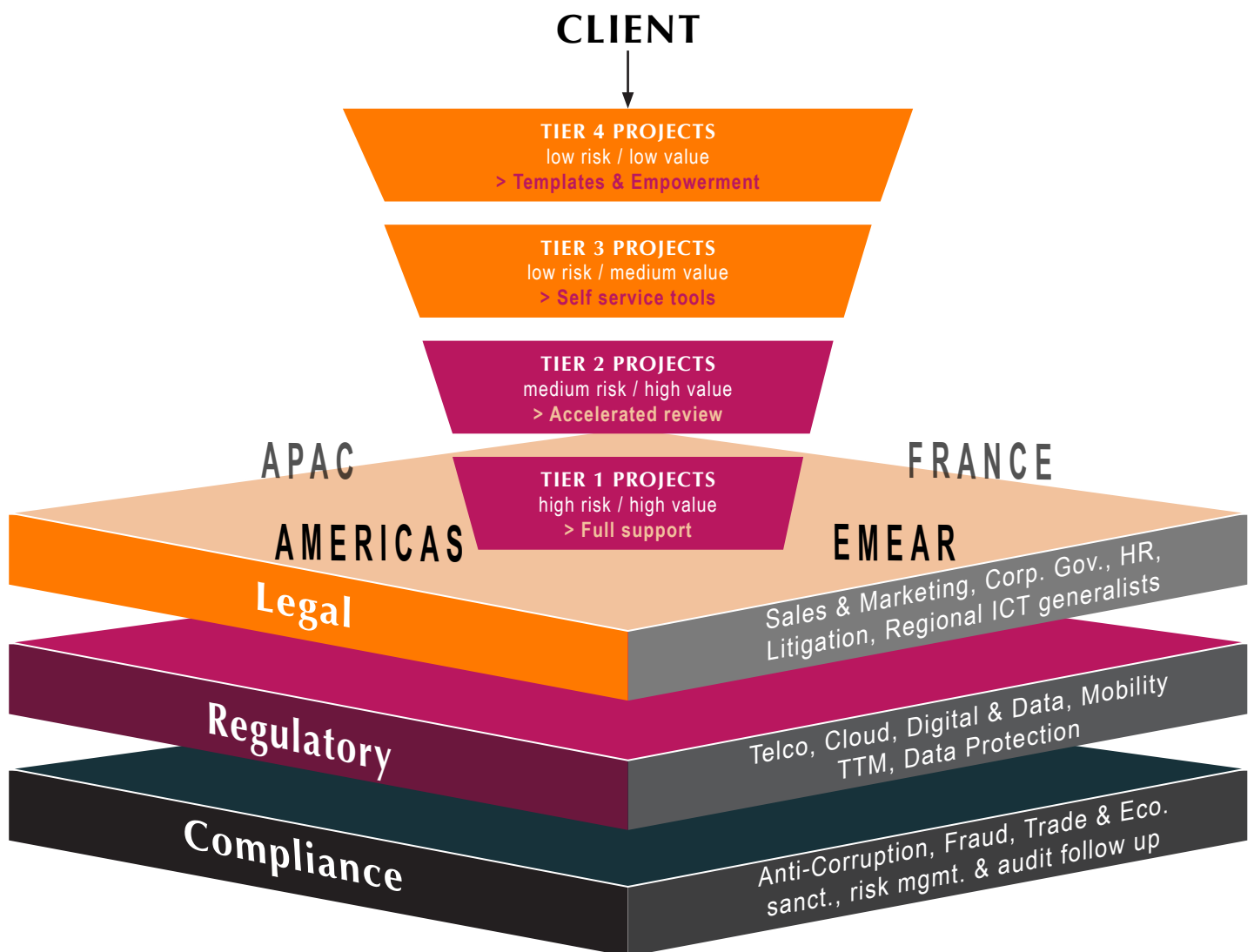
Furthermore, we intensified relations (including periodic reviews) with the service delivery, customs and trade, and operational teams — and the network of compliance and data protection officers not functionally reporting to the legal, regulatory, and compliance

department — to raise awareness and create a closely knitted safety net to capture risk, without increasing resources.

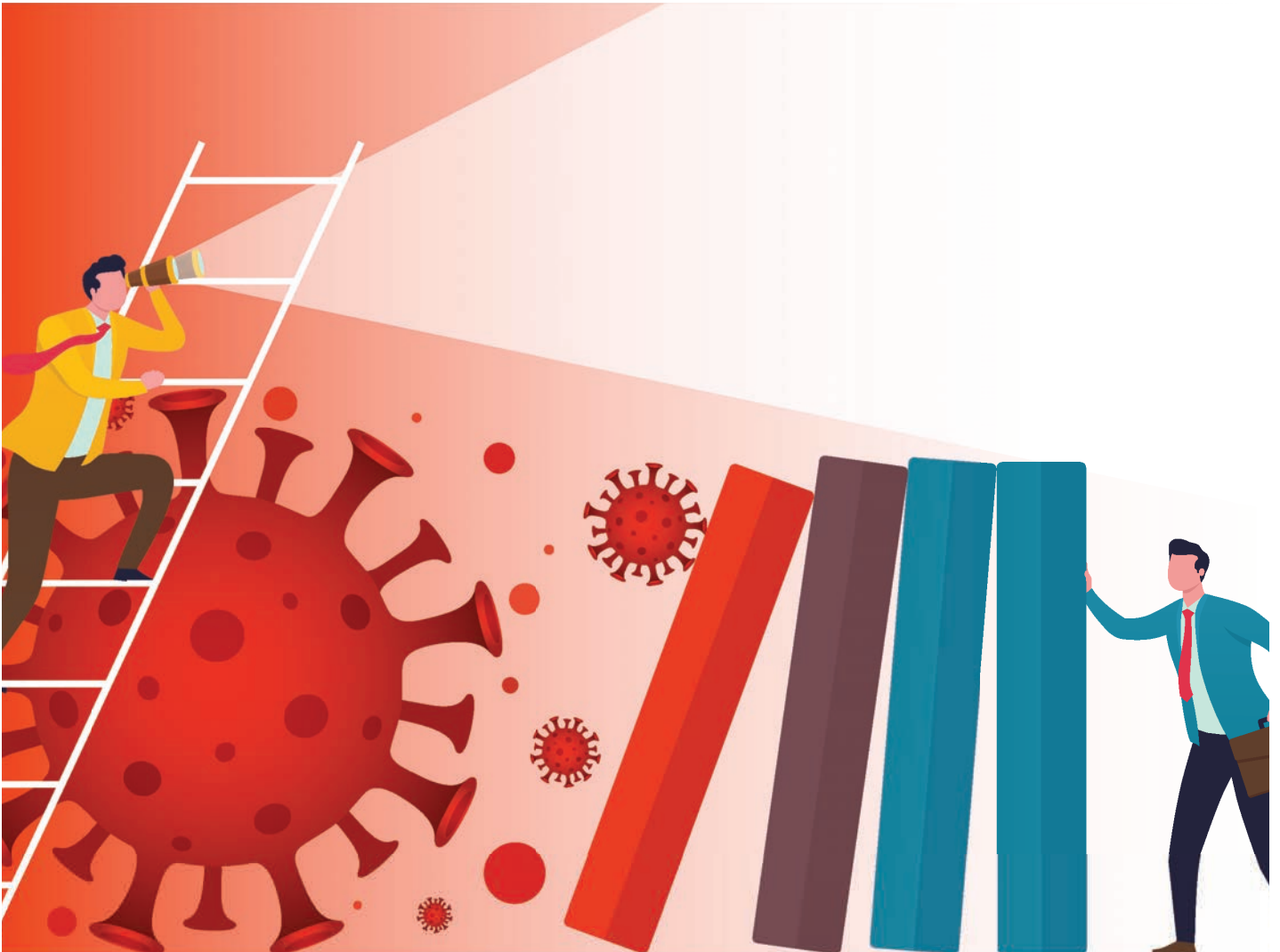
To further reduce the workload pressure for the legal, regulatory, and compliance professionals, we started promoting a support model driven by associated risks, no longer just by functional responsibility. What sounds easy in theory provided some adjustment challenges in practice. For example, not everything dubbed as ‘legal’ requires a qualified lawyer, which triggered a culture change for clients and lawyers that did not happen overnight.

For the ‘next normal’, we are envisaging a risk-focused 4-Tier F.A.S.T. support model, pursuant to which we intend to provide Full legal support for complex Tier 1 projects, followed by an Accelerated light review of only key terms for Tier 2 projects for which we consider the risks to be medium and, finally, a combination of Self-service tools and simplified Templates utilised by empowered clients concluding low-risk projects — without the direct involvement of the legal, regulatory, and compliance department.

**F.A.S.T Support Model**







A precondition for the model to work is the simplicity of contract templates, which we simplified and shortened by 50%. We further launched a promising trial with a self-service tool enabling clients to create simple contracts and NDAs, which we long held do not require lawyers and can best and faster be managed by empowered staff outside of the legal department.

### Step 3: Data and knowledge management

According to a 2012 McKinsey report, the average knowledge worker spends 19% of their time (1.8 hours) just looking for information.<sup>6</sup> While tools and processes might have improved the search for information, regulation density has increased at least at the same pace. Even with the most elaborate tools and processes, it is challenging to keep abreast of legal, regulatory, and compliance developments globally. Processing data into knowledge and meaningful risk prevention programs to ensure understanding and appropriate governance throughout the organisation will be one of the key challenges for legal and risk management functions in the 'next normal'.

#### Data lake

The first step to data analysis and knowledge management is a working data lake. While it would be nice to have a fully operational data lake with e-research and alert functionalities, for starters, any central, safe, and globally accessible 'data pool' (in the form of a cloud-based data repository — based on standard software) will do. The important points are that it has

the necessary capacity and access is fast enough to resist the temptation to default to unconnected local storage and has an easy structure and the necessary discipline to use it as one central source of information.

#### Decentralised knowledge building

Combing through the vast amount of information and singling out the critical and the relevant is still labour and resource intensive. As the volume of legislation and regulation grows with each year, central knowledge management teams, unless equipped with means most companies are unwilling to invest, are fighting an uphill battle. We believe that the most efficient way for the 'next normal' is decentralised knowledge management — where data gathering, the analysis of legal newsletters, leveraging local value partner relations, and advising on legal and regulatory developments, becomes a regional responsibility of everybody and not just for a central regulatory or knowledge management team.

#### Centralised risk management

By contrast, a centralised proactive risk management model — fostering a consistent approach to management briefings, providing weight, importance and prioritisation of risks and corresponding mitigation programs — will become more important in the 'next normal.' We dubbed our centralised program **RADAR: Risk And Development Anticipation Repository**, with the ambition to provide a holistic view, beyond

the perimeter of just the legal, regulatory, and compliance functions, to establish a transversal and proactive approach to risk evaluation, prevention, and management.

### Digital learning company

The 'next normal', with fewer meetings, less ability for conventional classroom training, and lower ability to pull in the lawyer next door, also requires new ways to share, maintain, and improve knowledge — not only among the legal, regulatory, and compliance functions but also with our client base — by creating the culture of a learning company. This necessitates new ways of transporting knowledge and making it available on demand (ie by videos, podcasts, webinars, ideally all accessible from mobile devices) and requires the skills to translate complex topics into easy-to-understand messages. The goal is not to impress clients with our mastery of complex matters but to raise knowledge and awareness so they can do things without having to consult the legal department.

### Step 4: Soft skill development

In the rapidly evolving 'next normal', with increasing automation and the resulting shift to higher-value work in cross-functional teams (paired with stronger individual and regional empowerment), the race to keep up with an increasing amount of data and information — with technical legal, regulatory and compliance expertise — has become a basic requirement. In hiring and training, the development of soft skills will gain in weight and make the difference between a good legal, regulatory, and compliance team and a great one.

### Cognitive skills

The evolution from a 'subject matter expert' to a 'wider project and result-oriented legal and risk advisor' demands creativity, critical thinking, language and complex information processing skills, and the ability to make decisions. We experienced that a constant focus on the overall project result, beyond just the legal or compliance aspects; a corporate culture aiming for simplification and clear communication; and the setting of clear objectives to complete specific projects within a certain timeframe beyond a vague 'provide good support to the business', encourages the development of cognitive skills.

### Empathy

Despite being a subject of debate, we believe that empathy is also a skill that can be learnt and is gaining importance in the 'next normal'. Empathy will (with less interaction and potentially less direct contact) become more important for managers in the legal, regulatory, and compliance functions to balance the teams' performance with accommodating individual member's needs and expectations.

As empathy comes more natural for some and is (in some corporate cultures) even seen as a sign of weakness, setting some guidelines that foster empathy, whatever you want to call it, will improve the teams' performance. Among those guidelines can be the expectation for regular bilateral feedback rounds, structured periodic or ad-hoc 'emoticon' employee satisfaction surveys and behavioural guidelines such as not sending work assignments after business hours; empowering by setting clear objectives; trusting in the execution of tasks (including turning down escalations); and providing clear feedback when a task is done.

### Ability to learn and re-learn

Finally, and maybe among the most important skills, is the ability and willingness to learn and re-learn. Not only in the health and safety context of COVID, but in conjunction with

*“Promoting a corporate culture that puts innovation at its heart, is open to change, accepts and excuses mistakes as part of a learning company, and encourages the ability to give and receive critical feedback will be essential.”*

the rapidly changing geopolitical landscape and evolving and disappearing industries, will legal and risk management functions need to adapt to changes and adapt faster than ever before. Learning new laws, new technologies, and new ways of working will likely demand lifelong learning beyond the fashionable use of the word. Promoting a corporate culture that puts innovation at its heart, is open to change, accepts and excuses mistakes as part of a learning company, and encourages the ability to give and receive critical feedback will be essential.

COVID-19 will not lead to the end of globalisation but it has triggered transformative steps that general counsel and compliance officers of globally active legal and risk management functions need to consider to ensure sustainable success in the 'next normal'. In that sense, the COVID-19 impacts may have been, borrowing the famous words from Winston Churchill, not the end, not even the beginning of the end, but perhaps the end of a beginning. <sup>6</sup>

### Footnotes

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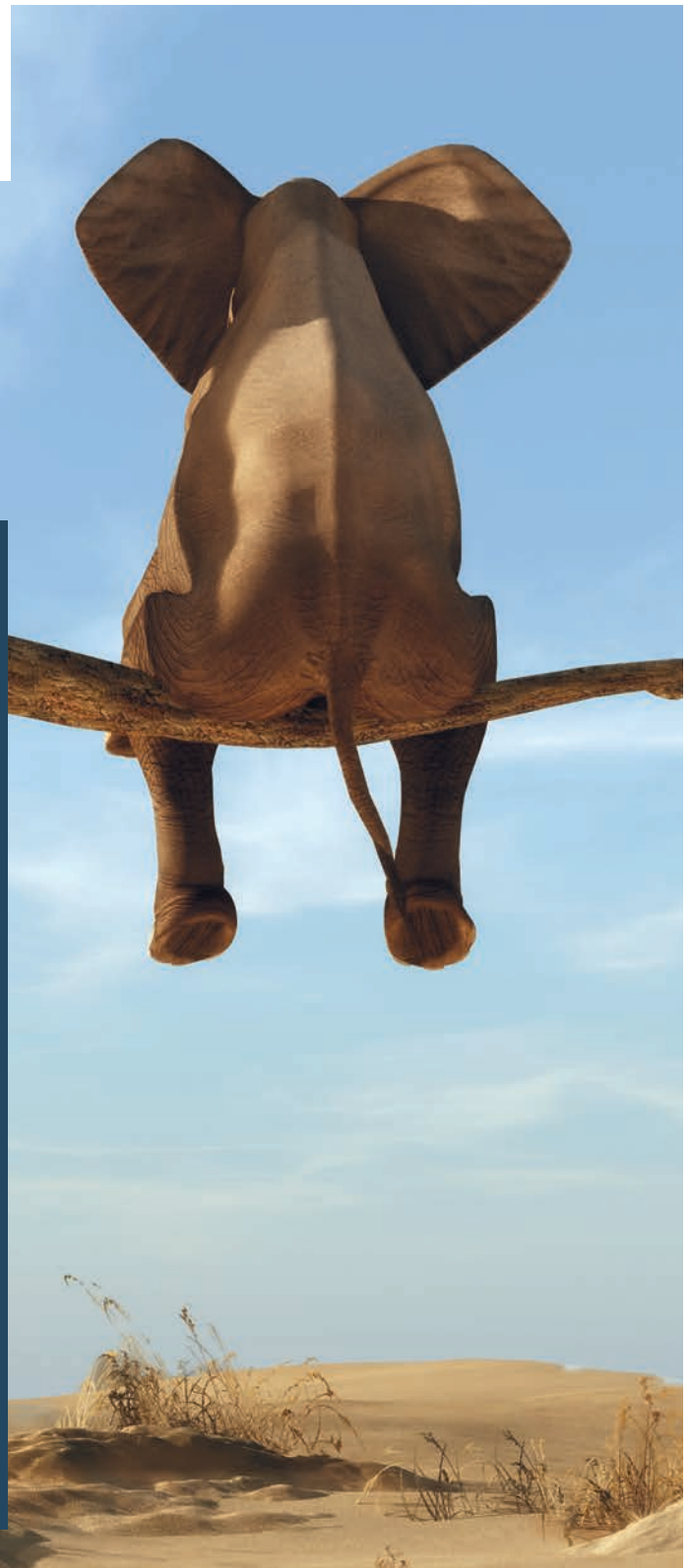
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# THE IMPORTANCE OF CULTIVATING GROUP HABITS – IF YOUR TEAM ISN'T WORKING TOGETHER, THEN IT'S NOT REALISING ITS FULL POTENTIAL

How can law departments better use technology to achieve their goals? Or, to coin a phrase: Work smarter, not harder. Much of the way we use technology is driven by the processes departments try to put in place. Critical to the success of those processes is how often individual department members comply with them. Systemic compliance, and ultimately the effectiveness of those processes, depend on making them habitual for the entire department.

Let's start with a common problem. Your department realises that requests for legal services are submitted in a myriad of inconsistent and inefficient ways. Some requests come by email, some from clients catching up with lawyers in a hallway or cafeteria, some by telephone, etc. The result is that lawyers often receive incomplete information regarding the request, or they fall through the cracks. Also, your department has no way to track turnaround times or outcomes.

## The potential solution

Accordingly, your department decides it needs to make requests for legal work more efficient and consistent. You could do this in a variety of ways, but for the sake of discussion, let's assume this is done by creating an interactive form that your clients can find on your intranet site. This form walks them through all the information your department needs to properly allocate and perform the assignment. After soliciting both department and, critically, client feedback, and ironing out the inevitable friction points, you try to roll out this new process.

## The roadblocks

The biggest failure point is likely to be in the realm of change management. In this case, it's acclimating your legal staff and their clients to breaking their former interaction habits and adopting the new one. Because, if clients slip into their old habits and begin dropping by or calling or emailing their requests for legal work to be done (and they surely will), and your team doesn't reinforce the new procedure by refusing to accept assignments outside the protocol, it will soon be dead in the water. On the other hand, if your staff consistently reinforces the new process until it becomes habitual on both sides, fewer and fewer people will attempt to sidestep the process. Eventually you will have changed their habits, and all participants will approach the process consistently.

As habits develop, they tend to become the default ways people behave. Now, obviously, there are both good and bad habits. Without training or guidance, individuals tend to develop their habits "organically," which is to say in an ad hoc manner. They will use a piece of technology in a certain way because of particular circumstances. If it works for them in that context, they will adopt that approach and make it a habit, even if slightly different circumstances might dictate a slightly different approach. That is not to say that people aren't smart enough to tweak their approaches if they see they clearly aren't working, but they often won't focus their attention on the approach they've been using until the need for an adjustment becomes glaring.

## Take email alerts

If you join a corporation and email alerts for all emails are turned on by default, it is easy to fall into the habit of clicking the alert every time one pops up, especially if the default alerts don't tell you much about that email. As I've mentioned in previous columns, this is a sand trap well worth avoiding.

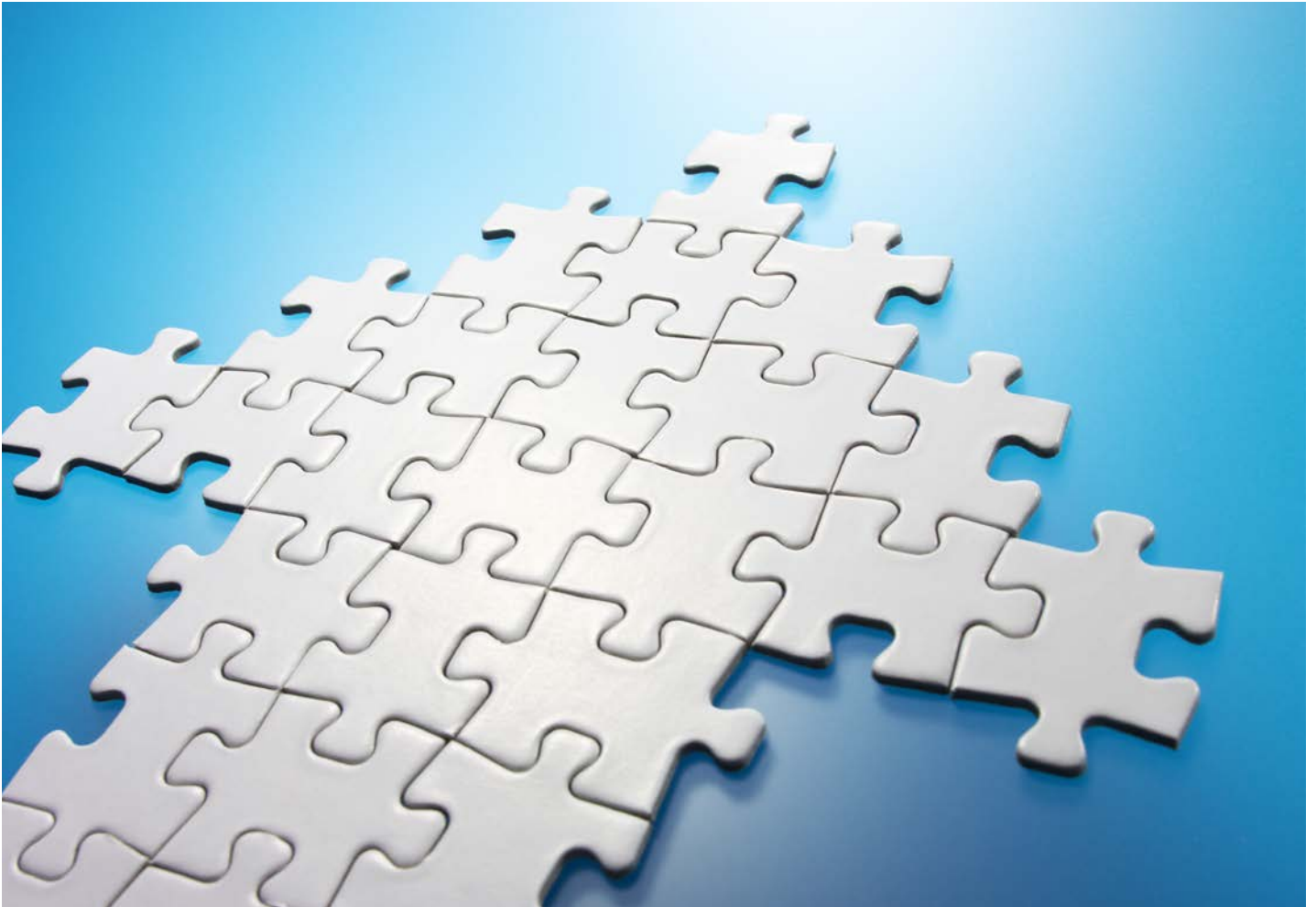
That's because every time you interrupt your train of thought by responding to an email alert - even if just to glance at it, delete it, and move on - you lose 15-30 seconds because of a process cognitive scientist call "fast-switching." If, like many of us, you get 200 or so emails a day, that potentially adds up to 50-100 minutes of wasted time every day.

And that's if you are super disciplined. If any particular email derails your train of thought and sets you searching through your emails or browser chasing some idea triggered by these time-wasting emails, you could wind up losing much more time.

So, efficient law departments will sometimes develop a more sensible and consistent approach to managing email. They will help their members set defaults so that only emails from certain managers, clients, or counterparties will trigger alerts. They will encourage staff to review other emails only at a set time during the day. They will suggest that staff periodically review subscriptions to eliminate ones that are unworthy, to eliminate junk mail, and so on. Not only will doing this help people avoid the cognitive load of fast switching, it will also help your staff produce better work because they will be able to better focus on the jobs at hand. And, if you can help make these behaviours habitual, your department as a whole will soon become even more productive.

*"The biggest failure point is likely to be in the realm of change management."*





### So, how do you begin to move individual habitual behaviours to better support departmental goals?

**First**, make sure you identify goals in ways that members can clearly relate to behaviours that can be modified. Departments often set goals in lofty but rather ambiguous terms like “achieve legal excellence,” or “provide superb client support.” Goals like those don’t suggest clear behavioural changes. But if you make your goal something like “increase performance and productivity while avoiding burnout and poor morale,” some of the behavioural implications become clearer. Goals like that suggest the need to periodically reevaluate and modify existing processes or adopt certain new ones, which in turn will dictate changing certain specific behaviours.

**Second**, identify existing processes that substantially impact those goals. For example, you may find that your staff spends a disproportionate amount of time drafting contracts from scratch because you haven’t implemented a precedent library. Or you may find that lawyers, paralegals, and admins collaborating on a document spend unnecessary time on formatting because you haven’t developed a standard template. Try to determine the things your department does a lot that give rise to pain points, and then figure out a way to eliminate them.

**Third**, when you set up a new process, make sure your team understands why you are implementing it and that they’ve had an opportunity to provide feedback. You will encounter enough friction just from the fact that you are trying to change habitual behaviour – you don’t want to create more because of passive or even active resistance.

**Fourth**, break the new process down into individual steps to the extent possible. You want to encourage uniformity, and the better the breakdown, the less room for personal interpretation.

**Finally**, when you roll out the new process, you must reinforce it until it becomes habitual. This means checking in on and correcting behaviours for at least several weeks. You can take advantage of this as an opportunity to reevaluate the new process and tweak it. This will not only avoid creating unintended friction points but it will also engage your members in a way that will tend to make them more accepting and more conscious of the habits that need changing.

These new habits will become second nature after a while, which is just what you want. If you can get your department to adopt certain habits around the technology and other processes they use, you will be amazed how much performance and attitude will improve. **a**

#### Greg Stern



*Following a 25 year in-house legal career within the insurance sector, Greg now works independently with legal departments guiding process evaluations and improvements to achieve measurable outcomes in efficiency and quality. He has written extensively on legal operations and on developing efficiencies for legal departments and also contributed to the ACC Legal Operations Maturity Model Toolkit.*



# SYNERGY OF THE CEO AND CLO

The evolving role of the General Counsel or Chief Legal Officer (CLO) from legal advisor to business advisor have been well documented. This article does more than describe what is happening; it explains why it is happening. Importantly, the Chief Executive Officer (CEO) and CLO need to act on the opportunities of this evolution. The underlying impetus of this positive development rests primarily with the concept of ‘common purview’— a holistic view of the business shared between the roles.

**E**stablishing the optimal C-suite is essential for any CEO. The successful CEO must create an environment that maximises synergy across the leadership team members and establishes each member as a true thinking partner. However, the role of the CLO is unique in that it can provide a degree of alignment with the CEO that is not generally present with other C-suite executives.

The leaders of an organisation’s various functional groups wear a corporate hat and their functional leadership hat. As such, the latter role inevitably influences their role as a corporate officer. This dual role is a good thing. What CEO does not want their Chief Technical Officer passionately lobbying for the funding of new R&D projects, or a Chief Commercial Officer advocating for more resources to drive corporate revenue? The Chief Financial Officer (CFO) Chief Information Officer (CIO) and other senior executives also have their own coveted initiatives — and potential blind spots. However, because the CLO should have the same corporate purview as the CEO, the CLO has a unique partnering opportunity with the CEO.

## A seat at the table

The CLO’s responsibilities span all departments at the company and typically also include the board of directors. Such a broad scope, which provides a window into strategy and operations across the company and its board, creates the opportunity for a CLO to have a perspective different from other C-suite executives and, in many ways, one that is aligned with the CEO’s perspective. It is this common purview/alignment, this synchronicity, that the CEO should leverage. Contrast this view with how others have described the CLO role as being more strategic, with the CLO presented as a *counterbalance* to the CEO in the now classic modern articulation of the CLO’s business partner/company guardian tension.

The CLO will typically be the only other C-suite member who resembles the CEO by having a seat at the table in all the company’s key decision-making bodies. By being ‘in the room where it happens’, the CLO can contribute to those discussions, challenge assumptions and, importantly for this discussion, gain a broader perspective on the company, one that closely mirrors that of the CEO. That unique perspective should allow the CLO to partner with the CEO in weighing business tradeoffs and priorities.

In addition to this common purview, the CLO has several attributes that enhance their value to the CEO and company, especially given the many uncertainties in today’s business environment.

First, lawyers are trained to be dispassionate experts in risk/benefit analysis, a paramount skill for all decision-making matters and especially critical during times of crisis. Nearly every decision a CEO makes includes an inherent risk/benefit element

and partnering with one’s CLO on potential high-impact issues regarding risk/benefit can be invaluable. The CLO can also teach other executive team members how to objectively weigh risks and benefits when making decisions. Over time, such lessons can contribute to building awareness (ie they ‘build executives’ antennae’) and result in a richer thinking process that more thoroughly considers potential outcomes and consequences of key decisions.

Second, as a lawyer, a CLO has been trained to be a problem solver and seek resolution. The most obvious target for this skill is resolving the many legal issues that develop at companies, especially publicly-traded ones. However, a CEO can deploy a talented CLO more broadly to resolve some of the complex, cross-functional conundrums that arise at all companies. The dilemma of how companies initially responded to the challenges of the COVID-19 pandemic was a problem that required firms to weigh HR, business, reputational, legal, medical, and practical concerns, with minimal precedent to provide guidance. Smart companies quickly assigned a leader to assemble a task force and determine which actions it would take in response. In many cases, that leader was the company’s CLO, who had the credibility, gravitas, in-depth knowledge of the company and, most importantly in such a novel case, the ability to weigh different options and come up with guidance for the organisation on what to do, even in the face of great uncertainty.

Last, the CLO is trained to present the ‘unvarnished truth’, even if it is unwelcome news. That quality is valuable to every CEO because other direct reports likely share the human tendency to avoid displeasing the boss, particularly if the organisation is under considerable strain. Other executives might portray a situation with too much optimism or delay in alerting the CEO to bad news, which blindsides the CEO and sets the company up for potential problems. This can be exacerbated if the situation requires the team to point out an error made by the CEO. These challenges are especially problematic for a new CEO, particularly if they do not have well-established relationships with executive team members. By contrast, the CLO knows that their role is sometimes to serve as the one who tells the emperor that ‘he has no clothes’. That ‘truth teller’ capacity, particularly when combined with a broad purview of the organisation and an ability to dispassionately assess a situation, means that the CLO, as truthsayer, may be able to support the CEO in a way that other executives cannot. Furthermore, in times of crisis management, this degree of transparency is absolutely vital.

## Maintaining and developing a seat at the table

These attributes — the common purview, expertise in risk/benefit analysis, problem-solving mentality, and truthsayer — contribute to the CLO’s ability to have and maintain a ‘seat at the table’. CLOs can increase their positive impact on a company by deploying these attributes in certain key areas: risk analysis/

management (eg financial strategy), regulatory interactions, business development, and onboarding other C-suite executives.

However, first and most important is the CLO's role with the board of directors and the value that relationship can bring to the CEO.

### Board of directors

Understanding, developing, and optimising the relationship with the company's board of directors is one of the CEO's most important responsibilities, and is especially critical for those who are new in the role.

The relationship between the CEO and the board is based on corporate governance concepts rather than traditional hierarchical relationships. Such a relationship can be particularly challenging for first-time CEOs who have had limited experience with or appreciation of governance, and who may often struggle to find the right balance between autonomy and collaboration with the board.

Further, although the CEO primarily communicates with the board through the chair or a lead director, the CEO reports to the entire board. Accordingly, establishing the appropriate communication framework is vital, eg one-on-one meetings/calls (especially with the chair or lead director), CEO updates between board meetings, interim conference calls, calls to key board members prior to board meetings, and interface with board committees and their chairs.

Considering these aspects, what role can the CLO play to support the CEO regarding their relationship with the board? The CEO–CLO–board triangular relationship has often been described in the context of the tension that such a relationship can create for the CLO. However, one could instead look at it as another opportunity for the CEO to positively leverage the unique role of the CLO and, in turn, strengthen the overall CEO–CLO–board relationship.

Within the overall governance structure, the CLO is the go-to resource for the board regarding the cadence of board activities and decisions, and the company's multiple compliance obligations. Conflict of interest and related party issues involving board members will require the CLO to navigate important legal issues with great diplomacy. CLOs at public companies will also need to weigh materiality and disclosure questions on a broad range of issues, and explain their reasoning to the CEO and others. In partnering with the CLO on these sensitive issues, a CEO has an opportunity to demonstrate to their board an ability to understand often complex compliance obligations and exercise thoughtful leadership.

Aside from the CEO, the CLO usually has the most interaction with the board of directors of any C-suite executive. These discussions range from questions on SEC filings, IP matters, litigation, D&O insurance, corporate governance, executive compensation, and general industry networking inquiries, eg recommendations for outside counsel in the context of board members' roles at other companies. The CLO can also assist in developing the essential communication frameworks the CEO establishes with the board. The CLO can support the CEO in maintaining those communications, which is especially important when the CEO becomes immersed in operational responsibilities such as what occurred when CEOs were dealing with the many challenges resulting from the COVID-19 pandemic. A CLO who has insight into the perspectives of various directors on different issues can be a valuable sounding board for a CEO debating how to best present a sensitive topic to the board.

It is during these interactions that the CLO gets to know the board members and, over time, identify 'the pulse' of various board members. This CLO/board rapport can be extremely helpful to the CEO in strengthening relationships with board members.

### Risk analysis and management

Risk management is a paramount responsibility of the leadership team, but it is also a key oversight responsibility for the board. Despite its importance, risk assessment and contingency planning are too often given only perfunctory attention by meeting minimum compliance requirements.

A public company's SEC 10-Q and 10-K filings devote considerable text to risk factors. However, much of the language does not differ significantly from company to company. Moreover, even when risk factors are specific to a company, the company drafts these risks in large part to address potential litigation. The firm's Audit Committee usually has responsibility for risk assessment, yet its focus is generally on financial controls and reporting. While obviously important, it is not a substitute for the leadership team's need to drive broad risk assessment and contingency planning regularly.

Assessing the inter-relationships of risks is critical. For example, for companies who need to access the capital markets, a financing strategy is often developed to capitalise on expected positive inflection points. However, the strategy must include contingencies for adverse events in the company's key value-driving activities. This is especially true in high-risk non-revenue companies, such as many early-stage life sciences companies. Due to the often-tenuous viability of emerging companies, its risks are highly interdependent. Early-stage companies benefit from an integrated risk assessment approach that considers these interdependencies, rather than the more traditional silo-oriented risk management framework. Because of the existential nature of many of these scenarios, the CFO often leads this risk management process, particularly given the formal responsibilities of the Audit Committee. However, due to the CLO's risk/benefit and truth-teller orientation, relationship with the board, likelihood of litigation if risks are mismanaged, and common purview with the CEO, the CLO should play an important role in or even lead the company's risk analysis/management initiatives.

Updating the board regarding risk assessment is essential, particularly because recent survey information suggests a critical gap between what boards think is going on and what is really happening regarding risk:

*'Boards are significantly overconfident when it comes to addressing the thorniest issues facing organizations today. Board members have greater confidence in their organizations' ability to manage key risks than members of management actually do, according to a breakthrough survey of board members, executive management, and chief audit executives released by The Institute of Internal Auditors (IIA).'*

This overconfidence may be because of the lack of sufficient board attention to risk or because the board members lack the experience needed to address the increasingly complex risks organisations face.

Regardless of the reason, the CLO can be a strong partner in helping the CEO ensure that the board is aware of and faces the company's most critical risks. From including risk topics in every



board agenda, to making sure that the annual board evaluation highlights the directors' abilities in this area, to providing feedback to the CEO on risks that the CLO has identified at the company, the CLO can help highlight the organisation's blind spots and garner support to address them.

#### Regulatory interactions

All companies have a range of interactions with regulatory agencies. In the United States, these can include the Food and Drug Administration, Federal Communities Commission, Securities and Exchange Commission, and the Federal Trade Commission. In Europe, such bodies include the European Commission and the European Medicines Agency. Given the complexities of regulatory law and the complex negotiations that often occur with regulatory bodies, regulatory counsel is essential. Even if this is an internal function, outside counsel is frequently utilised given the stakes involved. The CLO should play a critical role in determining the timing and extent of regulatory counsel involvement and play an important role in managing the relevant cross-functional activities.

#### Business development initiatives

Business development is broadly defined as creating long-term value for an organisation from customers, markets, and relationships, and is an essential activity for companies to achieve sustainable business growth. Identifying and maximising long-term value has its basis in the legal relationships established with the relevant parties. CLOs can provide invaluable guidance on the structure of these relationships.

The CLO contributes to this creation of long-term value in the following ways:

- As a general business executive who has a broad view of the company and its overall strategy
- As a technical expert who is skilled in structuring and executing legal/business relationships
- As a professional who is skilled in analysing and solving problems
- As an advisor to the board of directors and thus someone who understands what deals will resonate with the board of directors and what information they will need to make a decision

If outside counsel is used, in-house counsel is best positioned to partner with and leverage that resource. An experienced CLO can facilitate and help establish the appropriate relationships between the internal business development group and outside counsel that specialises in licensing, partnerships, M&A, and other forms of collaboration.

#### Recruitment and onboarding of C-suite executives

From a cross-functional perspective, one goal of the CEO is to develop the dynamics across the C-suite such that they are synergistic and not merely additive — and certainly not conflicting. The recruitment and onboarding of a new C-suite executive can entail several challenges, including the transition from a large to a small company (or vice versa), different corporate cultures, and changing from a functional expert to a corporate officer role.

Adding a new C-suite executive is obviously more involved than a straightforward hiring being led by the HR department. Also, in smaller or emerging companies, one of the last functions that is generally elevated to the C-suite level is human resources





because of the firm's size and its HR functional requirements. Therefore, more complex HR issues (employee terminations, a reduction in force, executive compensation, etc.) are generally addressed by the CFO and the CLO.

Regarding hiring and onboarding new C-suite executives, the CLO can also play an important role. In terms of recruiting a new C-suite executive, a CLO can be a persuasive member of the executive team, whose assessment of the company and its board is viewed as credible and trustworthy. After hire, a CLO can be a useful partner to the CEO in helping the new executive become operational by providing the 'big picture' of the company, explaining how to work effectively with the CEO, and how to present well to the board. In conjunction with the CEO, the CLO can monitor the onboarding process and provide helpful insight and guidance for the new executive's onboarding.

### Final thoughts

The CLO role is unique in that it has a seat at virtually 'every table' and, therefore, can provide a degree of alignment with the CEO that is not generally present with other C-suite executives. Because the CLO should have the same corporate purview as the CEO, the CLO has a unique partnering opportunity with the CEO. In addition to this common purview, the CLO has several key attributes — expertise in risk/benefit analysis, problem-solving mentality, truthsayer — that can be invaluable to the CEO. These skills can be especially helpful in developing and strengthening the CEO's relationship with the company's board of directors. For all these reasons, companies are recognising the value of the CLO. [📌](#)

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*An original version of this article appeared at [www.accdocket.com](http://www.accdocket.com)*

The 2021 ACC Chief Legal Officers Survey is now available at [www.acc.com/clo2021](http://www.acc.com/clo2021)



# CLIMATE CHANGE: ARE MAJOR INFRASTRUCTURE CONTRACTS FIT FOR PURPOSE?

This article considers the standard fit for purpose warranty and asks, how will it stand up to climate change challenges? It considers the practical importance of standards in framing expectations of what fit for purpose means. Such standards are not determinative of this question legally and, more troublingly in several cases, backward-looking. They are unlikely to be fit for the task in the face of an unprecedented and unpredictably changing environment.

**A**s of early 2021, we continue to work through the dislocation of COVID-19 across all sectors of the economy, including the major projects sector, using contracts negotiated with little consideration of the possibility of a global pandemic.

There is another systemic shock bearing down on us that will relegate COVID-19 to the minor leagues — namely climate change. Yet we continue to struggle to adequately think through the implications of climate change for major infrastructure, and thus major projects contracts remain rooted in the past.

## What is the fit for purpose warranty?

Most Australian design and construction contracts for major infrastructure will include an express fitness for purpose warranty.<sup>1</sup> A typical formulation may be that the contractor warrants that as at the date of completion, the works are fit for purpose by reference to the purposes, functions, and uses that are current and apply as at completion and comply with the requirements of the contract and all applicable laws and standards.<sup>2</sup>

## Reliance on standards

In practice, contractors lean heavily on standards as a proxy for fitness for purpose.

Contractors may be forgiven for thinking that if they have managed to design and construct to the most demanding of standards applicable to the works, they cannot be criticised. However, this is not the case.

The UK Supreme Court decision of *MT Højgaard AVS v E.ON Climate & Renewables UK Robin Rigg East Ltd (Højgaard)*<sup>3</sup> supports the proposition that it is not necessarily sufficient to simply comply with a standard. If there is some more general purpose for which the works are to be designed and constructed, then that further purpose needs to be satisfied, even if it is more onerous or different to the standard. Further, the onus is on the contractor to discover that mere compliance with the standard will not meet that purpose.

In a unanimous judgement, the UK Supreme Court held that compliance with a standard (which unfortunately contained a critical error) did not dilute the absolute terms of the separate fitness for purpose warranty. In addition, it was not relevant that the contractor had exercised due care and professional skill and complied with good industry practices.<sup>4</sup>

## Systematic error

Future litigants may seek to dismiss *Højgaard* as a rare case where there was an error in the standard. The vast majority of standards will not contain such errors. Therefore, on this narrow and optimistic view, it remains a reasonable

strategy for contractors to look to meet standards and assume there is minimal risk of their works not being fit for purpose.

However, this approach is highly problematic in the face of climate change. There is genuine concern that the impacts of climate change will make standards systemically unreliable. In many respects, standards are based on historical information, in particular, climate data. They assume a relatively stable external environment and are updated only slowly. In Australia, for example:

‘Climate files based on weather data as old as the 1980s are still being used in buildings designed in 2020 and expected to have a lifetime up to 2080.’<sup>5</sup>

Research indicates UK standards are similarly using historical climate data, leading to inaccurate estimates of building energy requirements and possibly resulting in buildings not being suitable for the next millennium.<sup>6</sup>

Standards intentionally take account of risk; however, the baseline for assessing that risk is developed from historical experience. Standards have never had to deal with the prospect of a rapidly changing and increasingly unpredictable external environment.

To take a specific example, the COAG Energy Council Major Projects Implementation Team recently assessed standards for the thermal requirements of building materials and sizing and specification of heating, ventilation, and air conditioning (HVAC) systems for buildings currently being designed for Australian cities.

The conclusion was that the standards take no proper account of the likely increase in thermal load due to increased temperatures, humidity, wind speeds and urban heat island effects.<sup>7</sup> The result is a material underestimation of air conditioning and overestimation of heating requirements.<sup>8</sup>

While HVAC is just one example, across the multitude of design issues in a major infrastructure project, it is reasonable to assume that historically based and static standards will increasingly become divorced from the lived experience of how infrastructure must respond.

If the principle in *Højgaard* is applied, it will not be a defence for the contractor to claim they designed to standards if the infrastructure does not otherwise prove suitable for use as the environment changes.

## Knowledge at the time the work is performed

If standards are not a good guide, what about the principle that the content of the fitness for purpose warranty should be determined based on the knowledge of the parties at the time of contract or when the work is performed?

This approach is supported by the Victorian Supreme Court decision of *Barton v Stiff*<sup>9</sup> which suggests that the purpose will be influenced by the

knowledge of the parties when the work is performed. However, in the case of other environmental issues where it may be considered common sense, the builder would be responsible for addressing the issue.

The difficult question then becomes what climate-related changes a builder today should be required to consider.

The task is to apply the 'state of the art' when completing the design of the works. 'State of the art' refers to the art and science that would be applied by competent and experienced practitioners involved in the practice of engineering.

Although it will evolve over time, 'state of the art' is not necessarily the science or engineering known to academics researching at the cutting edge of known technology. Notwithstanding available computing facilities and artificial intelligence, at least for now, it continues to require the input judgement of trained, skilled, experienced and up to date practitioners.<sup>10</sup>

For major infrastructure, the contractors and the engineers and designers who work on them, are highly sophisticated and considered to be at the top of their professions. In considering what the current 'state of the art' is, it is suggested that no reasonable business person today could take the view that significant impacts of climate change are reflected in historical data.<sup>11</sup> Those changes are expected to have exponential impacts. Therefore, it will be difficult to look to historical norms as a baseline or argue that only gradual departures from those historical norms could reasonably be expected.

### Effective or illusory risk transfer?

Major infrastructure contracts always grapple with an uncertain future and allocate risks between parties.

Contractors need strategies to manage and mitigate risk if they are expected to effectively bear that risk. In the case of fitness for purpose, engineering and design professionals are alive to the issue and are increasingly unwilling to accept the contractor's fit for purpose warranty on a pass down basis. They increasingly insist that their duty only extends to professional due care and skill — that is, a promise not to be negligent.

The market for professional indemnity insurance is also tightening, limiting insurance as an option to lay off the contractor's risk. Certain risks are sufficiently costly that if they were to occur, they could materially financially damage a contractor, end careers, and potentially lead to insolvency and cessation of business.

For principals, they should take little comfort in this risk allocation even if the terms of their contracts are clear. If the occurrence of risk leads to, or threatens, insolvency or simply material financial damage short of insolvency, there will inevitably be significant dispute, transaction costs, and delay and uncertainty in enforcing a claim. In the case of insolvency, the unrecovered cost of the claim reverts to the principal.

### Roll up into reporting

It is now reasonably well understood that boards must consider the risks of climate change when preparing financial statements and their annual reports.

If climate change involves a material, difficult to predict, systemic and exponentially increasing disconnect between the purpose of infrastructure understood historically, and what that purpose is in a changing future, then such reporting will also need to grapple with the potential liabilities that the contractors may face across their contract portfolios.<sup>12</sup>

### What are the options?

While this is a challenging problem, steps can be taken to work through it. First, the risk should be recognised and considered deliberately (although that may be easier said than done).

The great benefit that the standards have had in the past is that the complex modelling used to support a standard was inherent in the standard. If that modelling is no longer sufficient because it does not account for a changing external environment over the term of the project, then there is a need for

new and appropriate modelling or other risk assessment to be undertaken.

The efficient approach would be to have this work done centrally and standards upgraded, which may require the government to co-ordinate and fund this option to make it available for projects currently in planning.

Second, this issue is based on the typical fit for purpose warranty drafting currently and historically used. However, as with most contractual matters, the risk allocation can be amended by express language.


Last, there are limits on liability that can be agreed in terms of monetary amount and time. Major infrastructure contracts often have relatively high liability caps.

Fit for purpose claims are most likely to manifest post-completion. There is scope to negotiate sub-caps for fitness for purpose liability due to climate change impacts, which allow contractors to better manage their exposures to this systemic risk across their contract portfolios yet keep sufficient skin in the game to assure principals that contractors and their design teams will be properly motivated to take account of the more foreseeable of climate change impacts.

Contractors can also place time limits on their exposure to fitness for purpose risks, which only manifest many years after completion.

### Looking ahead

Climate change requires a careful reconsideration of the assumptions and practices underlying core terms in major infrastructure contracts. Current projects will have lifetimes that cover decades when climate change impacts are anticipated to apply.

Thinking through the risk allocation inherent in a typical 'fit for purpose' warranty highlights the need to reconsider old approaches based on historical data and practice. It will be difficult to defend a backward-looking approach as 'state of the art' when the future is expected to be very different.<sup>13</sup> 

### Footnotes

1. In the absence of an express warranty and contrary indication, a fitness for purpose warranty will be readily implied into a design and construction contract: *Barton v Stiff* [2006] VSC 307, para 31.
2. See, eg, clause 5.5(a) of the Victorian Standard Form Linear Infrastructure Project Agreement.
3. [2017] UKSC 59.
4. Højgaard, para 27.
5. DeltaQ, 'Climate Change – Impact on Building Design and Energy – Final Report' prepared for the COAG Energy Council Major Projects Implementation Team, 3 July 2020, 62.
6. Pretlove and Oreszczyn, 'The Impact of Climate Change on the Environmental Design of Buildings' 19, *Building Services Engineering Research & Technology* 55.
7. DeltaQ (n 5) 15, 20.
8. *Ibid* 41, 61.
9. [2006] VSC 307.
10. Charrett, Donald, 'Design Life or Service Life: What is the Difference?' (2017) *International Construction Law Review* 16, 17.
11. See Hutley, SC and Sebastian Hartford Davis, 'Climate Change and Directors Duties - Supplementary Memorandum of Option' 26 March 2019 regarding the state of common knowledge of climate change for reasonable business people in the context of directors' duties.
12. KPMG, *How do I account for climate impact?* (2020).
13. A more detailed discussion of these matters is available at <https://corrs.com.au/insights/climate-change-are-major-infrastructure-contracts-fit-for-purpose>

### David Warren



*As a projects partner at Corrs Chambers Westgarth, David has over 25 years' of experience advising governments, investors, contractors and financiers throughout Australia on major infrastructure projects. He advises both on tendering and contract formation as well as the range of issues that arise during project delivery. David has broad experience across all sectors including rail, road, health and education.*

# .au DOMAIN NAME HOLDERS NEED TO TAKE NOTE – NEW RULES COULD COST TRADERS .au DOMAIN NAMES

With new .au domain name entitlement rules launching, .au domain name holders should review the domain name entitlement rules to ensure they don't lose their .au domain name.

The ability of a trader to reserve a .au domain name is protected by the .au Domain Authority (auDA). auDA gained authority to govern .au domains from the Internet Corporation for Assigned Names and Numbers, which has overarching responsibility for IP address space allocation and the global Domain Name System.

auDA's main role is to protect .au domains so they are available for Australians or traders with an Australian presence. It achieves that role by setting down and enforcing policies governing the .au domain space, including eligibility rules as to who is entitled to register a .au domain name and, to a limited extent, how that domain name can be used.

.au domain names are not purchased; they are licensed from auDA under a revocable licence. That licence can be revoked or suspended for various reasons, including if the domain holder (the **registrant**) loses its eligibility or entitlement to the domain name or uses it contrary to the policies set down by auDA.

Where a domain name is revoked due to a breach of an auDA policy, the registrant is given only 30 days' notice to rectify the breach, if that is possible, before the licence to the domain name is terminated.

## The .au Domain Name System

The .au domain is sub-divided into a number of 2LDs (for example, com.au, edu.au, and id.au) and each 2LD has a purpose. For example, com.au is for commercial entities, gov.au is for government bodies, and org.au is for non-commercial organisations.

The purpose of each 2LD dictates the eligibility and allocation rules applicable to that 2LD.

The 2LDs are again divided into two categories:

- a. 'Open 2LDs' – open to all users, subject to some eligibility criteria. For example, com.au, net.au, and org.au.
- b. 'Closed 2LDs' – have a defined community of interest closed to the general public. For example, edu.au, gov.au, and csiro.au.

Most traders are focused on open 2LDs and com.au domains, which is what we focus on here.

## Current Eligibility and Entitlement Policy Rules – Open 2LDs

The current eligibility and entitlement rules to open .au domain names are set out in the [Domain Name Eligibility and Allocation Policy Rules](#).

Registrants in all open 2LDs must have an Australian presence, as defined under the eligibility and allocation rules for each 2LD. There is also a requirement of a connection between the Registrant and the domain name, which is specific to the particular 2LD.

For example:

1. To be eligible for a domain name in the com.au 2LD, registrants must be (**Australian presence rule**):
  - a. an Australian registered company; or
  - b. trading under a registered business name in any Australian State or Territory; or
  - c. an Australian partnership or sole trader; or
  - d. a foreign company licensed to trade in Australia; or
  - e. an owner of an Australian Registered Trade Mark; or
  - f. an applicant for an Australian Registered Trade Mark; or
  - g. an association incorporated in any Australian State or Territory; or
  - h. an Australian commercial statutory body.
2. Also, domain names in the com.au 2LD must be:
  - a. an exact match, abbreviation or acronym of the Registrant's name or trade mark; or
  - b. otherwise closely and substantially connected to the Registrant (**the close and substantial connection rule**).

A domain name may also be registered in the com.au 2LD for the purpose of domain monetisation.

The close and substantial connection rule allows some flexibility for registrants who do not want to license a domain name directly related to their name (or cannot do so because the domain name has already been licensed by another Registrant). It is a subjective test and can often be fulfilled by a trader merely offering a service or product under that name.

The current com.au rules allow Australian entities and sole traders (with an ABN) to register a domain name. They also allow foreign entities, with no other Australian presence, to register com.au domain names based on an Australian trade mark.

However, there are currently no rules on sub-licensing domain names to others, allowing registrants to licence .au domain names to those who would otherwise have no entitlement to the .au domain name.

Also, where entitlement is based on an 'Australian trade mark' (**trade mark entitlement**), the trade mark does not need to correspond to the domain name. This allows foreign entities to reserve multiple com.au domains because it has a single trade mark regardless of the words of the trade mark. The domain names still need to correspond to the registrant's name or be closely and substantially connected to the registrant.

## New Licensing Policy Rules

auDA wishes to preserve the integrity of the .au domain system. On 12 April 2021, auDA will be enforcing new licensing rules for open .au domains. The new licensing rules are set down on the [auDA website](#).

The new rules only apply on the renewal of a domain name or registration of a domain name after 12 April 2021.

Two major changes are:

1. Introduction of a restraint on sub-licensing domain names.
2. Restriction to the trade mark entitlement rule.

## Sub-licensing

Under the upcoming licensing rules, a registrant will not be able to sub-licence a .au domain name to another entity unless that entity is a related body corporate with an Australian presence (**the third-party rule**).

The third-party rule states: *A Person must not rent, lease, sub-licence or permit the use of the licence by another Person, unless that Person is a related body corporate with an Australian presence.*

This allows Australian subsidiaries of holding entities to use the domain. However, it will restrict the activity of legitimate Australian traders who would, without illegitimate purpose, allow third parties to use domains.

The third-party rule also extends to sub-domains. A sub-domain is a domain that is part of a larger domain. For example, 123.eaglegate.com.au would be a sub-domain of eaglegate.com.au.

Those affected by the third-party rule are expected to be:

1. Franchisors that allow:
  - a. un-related body corporates or individuals to use domains or sub-domains.
  - b. foreign entities with no Australian presence to use domains or sub-domains.
2. Sole trader registrants that have subsequently incorporated and allow the body corporate to use the domain.
3. Body corporates that have restructured or undergone a merger or acquisition and allow un-related body corporates to use the domain.
4. Foreign traders, who themselves have no legitimate entitlement to a domain name but who licence domains from those who have entitlement.
5. Purchasers of domain names who have not updated the ownership of the domain.

## Trade Mark Based Entitlement

The Australian presence rule for com.au and net.au domains is changing to be:

A Person applying for a licence in the com.au and net.au namespaces must be:

1. a commercial entity; and
2. the domain name applied for must be:
  - a. a match of the Person's company, business, statutory or Personal name; or
  - b. an acronym of the Person's company, business, statutory or Personal name; or
  - c. a match of the Person's Australian Trade Mark; or
  - d. a match to or an acronym of a name of a related body corporate or
  - e. a match or an acronym of a name of:
    - i. a partnership of which the Person is a partner;
    - ii. a trust of which the Person is a trustee; or
  - f. a match or synonym of the name of:
    - i. a service that the Person provides;
    - ii. goods that the Person sells (whether retail or wholesale);
    - iii. an event that the Person registers or sponsors;
    - iv. an activity that the Person facilitates, teaches or trains;
    - v. premises which the Person operates and which that Person is providing at the time of the application.

Where a Person has established an Australian presence by relying on an Australian trade mark, the domain name **must be an exact match to the words** that are the subject matter of the Australian trade mark. For example, a trader cannot rely on a trade mark for EAGLEGATE LAWYERS to establish an Australian presence to register EAGLEGATE.com.au.

Those affected by the Australian trade mark rule are expected to be:

1. Foreign traders with no Australian presence apart from an Australian trade mark which does not correspond to the exact domain.
2. Individuals with no ABN who rely on their Australian trade mark to gain entitlement and where the trade mark does not correspond to the exact domain.

3. Traders who rely on an Australian trade mark to establish an Australian presence:
  - a. who could not obtain the domain name corresponding to the words of the trade mark because it was unavailable.
  - b. where the trade mark contains additional words to give it a distinctive component for trade mark registration but where those components are not part of the domain.

It is expected that a significant number of foreign traders will breach the trade mark rule and fresh Australian trade mark filings will be required to perfect entitlement.

## Entitlement Complaints

It is straightforward and cost-free for a person to make a complaint to auDA as to the entitlement of a domain name. auDA and registrars can also independently verify entitlement to domain names.

If an entitlement complaint is made out, the domain name licence with the registrant is terminated under the policies (known as a **Policy delete**). The registrant will be given 30 days' notice of termination of the licence. A Policy delete can be challenged; however, some breaches cannot be rectified.

Once the licence is terminated, the domain name will be put back into the pool of available domain names (referred to as **dropped**) and will be available for other entitled traders to register. The list of dropped domains published by auDA is not confidential. The new registrant will have full use of the domain name, including accessing emails received after it registers the domain.

If the former registrant wishes to re-register the domain, it will be competing with other entitled traders and obtains no preferential treatment.

A complaint regarding entitlement to a domain is entirely different to a complaint under the au Dispute Resolution Policies (auDRP). The auDRP procedure is ideal where the registrant has no legitimate interests in the domain name and the complainant requests the domain name is transferred to itself.

## Recommendations to Preserve Entitlement

**Foreign traders** should audit their domain and trade mark holdings to ensure compliance. New trade mark filings may be preferable to changing domain names.

**Australian traders** should audit use of their domain names to ensure either the licence sits in their name or the entity controlling use of the domain name is a related body corporate and has its own Australian presence.

**All traders** should ensure they comply with the upcoming entitlement and licensing rules and:

1. Gain and maintain an Australian presence such as by filing applications to register Australian trade marks, which correspond exactly to the domain names held.
2. Upon a merger, acquisition or other restructure, transfer the domain names to the controlling entity or ensure it complies with the third-party rule. **a**

### Nicole Murdoch



*As the founding Director of EagleGate Lawyers, Nicole is a registered Australian Trade Marks Attorney. EAGLEGATE is a technology and IP law firm that assists with registration, commercialisation and protection of IP rights. She also volunteers at Arts Law Centre Australia, Australia's independent national legal centre for the arts.*





# ACC GLOBAL UPDATE

## Introducing the 2021 ACC Chief Legal Officers Survey

For more than 20 years, the Association of Corporate Counsel (ACC) has been researching and disseminating crucial, high-quality data on corporate legal department functions and the evolving role of the CLO. The Association of Corporate Counsel's (ACC) 2021 *Chief Legal Officers Survey* expands on that practice by delivering one of the largest and most comprehensive surveys of its kind.

This in-depth study builds on responses from 947 CLOs at organisations spanning 21 industries and 44 countries and offers a number of insights into the effect of legal on business. The data gives new perspectives on organisational structure and the responsibilities of the legal department; the depth of the CLO's interactions with, and influence on, business executives and the board of directors; the most pressing business concerns for in-house counsel; and the trends that will affect the profession in the near future, including the impact of the COVID-19 pandemic.

Key highlights from each of the four sections of the report are presented below.

### Section 1: The CLO's Role and Reach

- Nearly four in five CLOs report directly to the CEO: Seventy-eight percent of CLOs report directly to the CEO. The result is consistent with last year's result (80 percent) and within the margin of error, and therefore the overall trend since 2018 is positive.
- Privacy reports to the CLO in nearly half of organisations: Out of a list of 19 corporate functions, privacy ranks as the second most common function that reports up to the CLO (46 percent) after compliance (74 percent).
- Legal Ops roles continue to grow: Sixty one percent of legal departments now employ at least one legal operations professional. This is a 6.7 percentage point increase over last year and 39.4-point increase since 2015.

- One third of legal departments expect to add more lawyers in 2021: Thirty-two percent of legal departments expect to hire more lawyers in 2021, a surprising amount given the COVID-19 pandemic.

### Section 2: The Legal Department's Value to the Business:

- Cybersecurity, compliance and data privacy are the most important issue areas for business: For the third consecutive year, cybersecurity, compliance, and data privacy top the list as the most important issue area for businesses rated by CLOs. However, this year for the first time, cybersecurity has overtaken compliance for the number one spot.
- CLO'S spend more time on business strategy: Although CLOs still spend about one-third of their time providing legal advice, they also spend a significant amount of time on board matters and governance issues, contributing to strategy development, and advising other executives on non-legal issues.
- Six in ten departments have a comprehensive data management strategy: Most departments across all revenue categories have a data management strategy in place to ensure compliance, defensibility, and security.

### Section 3: The political and regulatory landscape:

- Significant organisational changes made due to the COVID-10 pandemic: As a result of the pandemic, 95 percent of CLOs say they made changes to their employee safety policies and 94 percent made changes to their travel policies.
- Companies are pressed by investors on socio-economic issues: Fifteen percent of CLOs say their organisation has been pressured by investors to either take (or refrain from taking) a public stand (or both) on a particular political or cultural issue over the past year.
- Industry-specific regulations expected to pose biggest legal challenges: Sixty-one

percent of CLOs say they expect industry-specific regulations to pose the biggest legal challenges for their organisation followed by data protection privacy rules (53.6 percent).

- Increased attention to ESG issues is impacting corporate strategy: As attention to ESG issues continues to increase among businesses, corporate strategy is being impacted in more than one way.

### Section 4: The outlook for the legal department:

- Contract Management is the top legal tech area in which CLOs plan to invest: Forty-two percent of CLOs say they plan on adopting new legal tech solutions to improve department efficiency over the next year while 10 percent say they have already recently done so.
- Data Privacy concerns expected to accelerate: Ninety percent of CLOs believe data privacy issues will continue to accelerate in the near future followed by a focus on diversity and inclusion (72.7 percent) and ESG issues (65.8 percent).
- Delivering value to customers continues to be a top priority for CLOs: For the second year in a row, when CLOs were asked what their organisation plans to prioritise over the next five years, delivering value to customers topped the list with 51.6 percent ranking it number one, ahead of maximising profits (ranked as the top priority by 30.2 percent of CLOs).

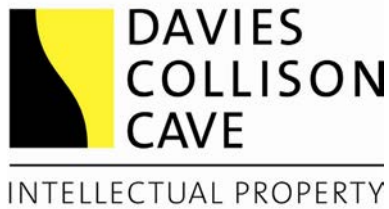
The 2021 ACC Chief Legal Officers Survey was developed in partnership with Exterro, the exclusive ACC Alliance Partner for E-Discovery, Data Privacy and Cybersecurity Compliance.

ACC would like to extend our sincere gratitude to all the CLOs and GC who dedicated their valuable time to participate in this survey.

ACC Australia members can download a full copy of the survey from [acc.com/clo2021](https://acc.com/clo2021).



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