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THE ROLE OF LAWYERS IN THE FACE OF INCREASINGLY CAPABLE TECHNOLOGY

WHY LEGAL AUTOMATION DOESN'T NECESSARILY REQUIRE PURCHASING NEW SOFTWARE

EMPATHY AND COMPASSION: HOW LEADERS CAN GET IT RIGHT

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FEATURES

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ACC Association of Corporate Counsel AUSTRALIA

PRESIDENT'S REPORT

Justin Coss
National President

This edition of the Australian Corporate Lawyer contains, as ever, a wonderful array of material that all of us, as in-house lawyers, can apply in our day-to-day work.

It has also given me pause for thought to share some observations on one of the topics covered in this issue — sympathy and empathy among leaders — as I pass the six-month threshold of my new role as Group General Counsel & Company Secretary at Freedom Foods Group Limited.

As many of you may know from picking up a copy of the AFR or other newspapers, Freedom Foods Group has been undergoing a difficult period in its recent history, and the legal function has been front and centre in dealing with the company's challenges. For example, since I started in the role in November 2020, we have been contending with an ongoing ASIC investigation, two class actions, three sets of proceedings both in Australia and in the United States with one of our suppliers, a divestment of one of our operating divisions and a recapitalisation plan that by the time this article goes to print we are confident will have been completed. In addition to this work, there has been the ever-present business-as-usual workload associated with a large-scale FMCG business, undertaken by an entirely new management team unaccustomed to working together and a largely reconstituted Board of Directors determined to execute a turnaround plan to bring the business back to sustainable profitability. Like many of our members, this work has been undertaken by a small legal team of two lawyers (soon to be three) with assistance from external firms.

To say that it has been the most challenging six months of my career is an understatement, but, perhaps paradoxically, it has also been the most rewarding. Despite the long hours and constant stress, the empathy and support demonstrated by the Board, my peers and the other members of the management team have been extraordinary.

Some concrete examples of this empathy and support include an occasional unexpected phone call from Board members posing the simple but powerful question of "How are you?" or the waiver of a deadline in place of recrimination, and a genuine thank you for a job well done. Also, when extra help was called for, resources and budget were allocated (hence the team's imminent expansion to three lawyers). When leaders in a business take time to do these things, it has meaning beyond salaries paid or a bonus earned.

All of these so-called little things have helped to create an environment where people like me and others in the business can thrive. In my role as a leader in the organisation, I have endeavoured to emulate this example and I have seen my junior staff prosper and grow both personally and professionally.

My message, I suppose, is that a business comprises many people — lawyers, accountants, sales and marketing people, directors, managers and so on — but at the end of the day, they are all people. I believe that with a positive culture demonstrated and lived by its leadership, people will succeed. When that happens, all stakeholders, including shareholders, customers and suppliers, stand to win.

It may be axiomatic to suggest that a positively engaged workforce will deliver its best, but so many businesses still approach this subject with some cynicism. It is hard to believe that companies still turn a blind eye to important topics like workforce engagement, gender bias, sexual harassment and employee mental health, but there are glaring examples in the press on an almost daily basis that show us that this is still the case.

There is no doubt that even enlightened businesses have some improvements to make, but my experience indicates that businesses that are truly motivated to improve, rather than just paying lip service to doing so, will make an enormous difference to individuals and that this will affect all aspects of a business, including, of course, the bottom line.

As in-house lawyers, we have a critical role to play in creating and maintaining a positive culture, whether it be in drafting a code of ethics policy, conducting litigation on behalf of the company or just demonstrating the values that we should all aspire to. At the same time, we can be the beneficiaries of that culture.

I have recently been encouraged to re-read a favourite boyhood novel, *Robinson Crusoe*, and it has reinforced in me the adage that no one is an island. So on that note, I encourage you all to show empathy and sympathy to your colleagues, especially when things are tough, because it matters.

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PERSPECTIVES

KATE SHERBURN

In recent years, there has been a lot of talk about company culture and the values that different companies have. While "culture" has become a bit of a buzzword, the values that a company has can really affect the experience of the people who work there. If you have found a company that aligns with your values, that's a big win. If you haven't found that company (yet), there's lots that you can do in your current role.

Like many people, I got into the law wanting to help and make a difference, and most of my career has involved helping people in some way, shape or form. This hasn't always been a conscious decision, but it's something that I have gravitated towards. Working to my values is something that is important to me, even though it has manifested in different ways.

I'm now lucky to work at a company that does share my values, but not everyone has that opportunity. At times, there may be a conflict between your personal values and the values of your employer. You might not be particularly passionate about your role or the organisation where you work. What do you do then?

What are your values?

The first step is to work out *what* your values are. This might sound a bit obvious, and you're probably thinking that of course you know what your values are, but in truth it's not something that most of us give much thought to. You could probably rattle off a few things, but are they really what is important to you? Over a week or so, think deeply about these questions — What do I care about? What am I passionate about? What makes me happy? What gives me purpose? There are a few resources available online to help guide this thinking, but once you've gone through this exercise, reflect on what themes start to show up. They might be what you expected, but they might also surprise you.

What are the company's values?

Once you're working inside an organisation, you get to see what the real company culture is like and what its true values are. This isn't always possible looking from the outside in. Once you've identified what the company really cares about, work out where there is alignment between your values and the company's values. For example, the industry that you work in might not align with all your values, but the company's view on certain issues — like diversity, equity and inclusion — might align. If this is the case, focus on that aspect of the company. Can you gain enough purpose from the areas that do align?

How can you incorporate your values into your role?

Even if the overarching company values don't align with your values, can you implement something at team level? For example, if you want to give back to the community, can you organise a fundraiser within your team? If you're really passionate about mental health awareness, can you introduce a conversation around RUOK Day?

Are there people in your organisation that have similar values to you? If there are, you can work with them and do something you're passionate about. This might not have anything to do with your actual role, but it starts to bring your values into your workplace. If you're interested in environmental impacts, for example, you and some co-workers might start a minimal waste group. Can you reduce the number of printouts or make it a competition to see who uses their reusable coffee cups the most in a month? In this way, you will see the impact that small changes within your workplace can make.

Don't compromise your own values

Sometimes, we can't change our workplace, but that doesn't mean we have to compromise our values. If you can't bring something into your workplace, can you get involved in something outside of your workplace that can add purpose? This could be volunteering or joining an ACC committee that is working towards something you're passionate about.

This can be a tricky one to navigate at times, but ultimately you have to stay true to who you are and try to work that into your day-to-day life as much as you can. It can be difficult when your company doesn't reflect who you are or what you believe. But to stay motivated you can incorporate your interests and the things you value — to the extent possible — into your company, your workplace or your role. Even small things can add up, and a tiny bit of action is a lot better than a whole lot of inaction.

Kate Sherburn

As the sole Legal Beagle (aka in-house counsel) at Who Gives A Crap, Kate works in a role that she loves and for a company she is passionate about. Who Gives A Crap is a social enterprise that donates 50% of its profits to help build toilets for those in need, working towards the goal of ensuring everyone on earth has access to a toilet.

Kate Sherburn was featured in Series 1 of In-house Insiders. ACC's podcast series that's by in-house for in-house.
Listen for free now: acc.com/insiders.

A DAY IN THE LIFE
PETER KOUTSOUKOS

Group Legal Counsel/Company Secretary (Australia & New Zealand) at Bridgestone Australia Ltd.

Peter Koutsoukos

As Group Legal Counsel & Company Secretary, Peter is responsible for all Legal and Compliance matters within Bridgestone Australia and New Zealand. He reports directly to the General Counsel, Bridgestone Asia Pacific Pte Ltd, Singapore (Regional Head Office) and liaises directly to the Bridgestone Australia & New Zealand Managing Director.

6.00 am **Woken up by alarm after very deep sleep.**

6.20 am **Footy training at the local football ground with about 15 blokes around my age – once a week.** We carry out training drills every Friday morning all year round – rain, hail or shine. We don't play – just train. Proud to say we are undefeated for about 8 years.

7.20 am **Back home and rushing to get ready to get out of the house and take kids to school.**

8.00 am **Leave home and drop daughter off at her school and then son off at his school.** Both schools are on the way to work. Our Bridgestone Head Office is on the fringe of the CBD overlooking the Adelaide parklands.

8.20 am **Arrive at work.** Have a brief discussion with my legal team. Check overnight emails and respond to any urgent matters. I also check news headlines. I keep a to-do list and prioritise matters based on whether they are business-critical, risk management or regulatory compliance with a deadline.

9.30 am **Get a double shot coffee from our amazing new machine en-route to this morning's Executive Meeting.** At the meeting, every department head updates the Executive Team regarding any new developments and issues that affect the business.

10.30 am **Back at my office desk.** I check emails, approve resolution requests, sign contracts (DocuSign & hard copy) and return phone calls.

11.30 am **Meeting with the Digital Marketing Team to discuss our eCommerce platform including optics around competition laws, treatment of GST and consumer laws.** As Australia's most trusted tyre brand, it's something we take seriously to maintain the trust of our customers!

12.30 pm **Lunch time hits and I realise that I haven't had anything for breakfast.** Oops! Hunger pains are kicking in so I walk to a nearby café for a sandwich. I never bring lunch to work. I always get out of the building at lunchtime to clear my head.

1.15 pm **Back at my desk checking emails and dealing with any urgent matters.** More approvals, signoffs and returning of phone calls. Attend to matters on my to-do list whenever possible.

2.00 pm **Video conference with the Auditor in the Regional Head Office in Singapore.** Today we're discussing J-SOX compliance: a requirement for our business due to the legal structure of Bridgestone Corporation and its listing on the Japanese Stock Exchange.

2.30 pm **It's time for another coffee (a double shot again) ahead of yet another video conference with Singapore.** I spend a lot of time on them now – I miss going to Singapore for the face-to-face conferences.

3.00 pm **Weekly catch-up video conference with the Acting General Counsel in Singapore Regional Head Office.** We discuss any important legal matters my team are working on, and I update him on the status of our compliance programs being rolled out in Australia and New Zealand. He also offers assistance where possible.

4.00 pm **The Director of Sales calls a meeting to brief me on new Bridgestone Select stores in our network, and the franchise license agreements that need preparing.** I have a great team at Bridgestone and they will prioritise this for a quick turnaround.

4.30 pm **On return to my desk the Marketing Manager follows me up on terms and conditions for a promotion.** I have the sudden realisation that my plan of getting out of the office on time isn't going to be a reality today.

5.00 pm **Meeting with Technical Manager to discuss the results of product testing and to verify the facts and figures in the launch collateral.** Thanks to the great collaboration between our team, the communications team and learning and development, everyone in our business has a good understanding of the need for compliance.

5.30 pm **After saying goodnight to a few fellow employees in my area, I attend to some of my to-do list items.**

6.00 pm **Review the website terms and conditions for the marketing team.** No wonder they were chasing me, it slipped down my priority list.

7.00 pm **Go to the printer and print off documents that I have been working on throughout the day.** Switch off my laptop and take it home with me.

7.15 pm **Arrive home.** Our pet dog (a Moodle) is the only one that is super excited to see me. He follows me everywhere. I have a chat with my wife about our day and our 3 kids. I cut the Wi-Fi and my 3 children appear out of nowhere (son 15 & two daughters 11 & 18).

7.45 pm **Get out of my suit.** Eat dinner (by myself). Then chill out in front of the TV and watch mind-numbing shows. During commercials, I get the 2 youngest children to bed over the next 2 hours.

10.00 pm **With youngest children in bed and wife getting ready for bed – I take dog for a walk up the street – with glass of wine in hand.** Sometimes I walk the dog along a main road and get a few stares.

11.00 pm **While watching more mindless TV I fire up the laptop, surf the internet and reply to emails that have come in from Singapore since leaving the office.** It's a constant battle to keep the inbox empty.

12.00 am **Finally get to bed.** I fall asleep within 2 minutes of my head hitting the pillow. I have deep, deep sleeps. I can never remember what I dream about.

7.00 am **Wake up, and it starts all over again.** Groundhog Day.

THE ROLE OF LAWYERS IN THE FACE OF INCREASINGLY CAPABLE TECHNOLOGY

It is something of a tired cliché these days to talk of the threat of artificial intelligence replacing lawyers. There are already substantial places where increasingly intelligent technology is performing tasks that lawyers used to perform, and we should expect technology to make increasingly aggressive inroads into the practice of law over coming decades. No sensible lawyer should be resisting this trend, and in fact the true challenge for lawyers lies in achieving a type of collaboration with technology.

Lawyers need to use technology to rapidly and efficiently solve high-volume or routine issues, freeing themselves to apply their uniquely human skills to deliver more value for clients and the community. So, what are these uniquely human skills, and how should we be looking to deliver more value with them? I'm being told I need to collaborate – what's my contribution to the collaboration?

In this discussion I have been somewhat undisciplined in relation to how I use terms like "artificial intelligence". A common definition of "artificial intelligence" relates to the use of technological systems to perform tasks normally associated with human intelligence. The definition is fuzzy and slightly circular, but the linkage back to "normally associated with humans" is very well suited to the present discussion. We're talking about technology that does things we (or people like us) used to do.

The impact of technology on the practice of law could be described as disruptive. Many established businesses seem to fear disruption and treat it as something to be avoided, as though disruption were something random and calamitous, like an asteroid collision striking the earth. But the reality is that, at its heart, if your business is disrupted it means that someone else has found a better or cheaper way to add more value to your customers. If you want to avoid being disrupted, either as a business or in your professional career, you should be focused on delivering as much value as possible and should keenly embrace any tool or technology that allows you to achieve this.

Much of the traditional role of lawyers has been intermediating complex information and processes for clients. The average layperson lacks the time and training to research the law themselves or execute complex processes such as a sale of business. Lawyers are trained where to look for the law and how to understand it when they find it; and have training and experience in navigating complex legal processes. Without wanting to be disrespectful, much of the routine practice of law for the *average* consumer of legal services can boil down to the skilful, organised and efficient execution of administrative processes. When seen in this way, technology can democratise access to law. Legal knowledge, processes and logic-flows can be captured in technological systems that guide laypeople through the options available to them and the key decisions they need to make, making legal advice accessible without the need for an expensive professional human to dedicate their time. From a public policy perspective, and provided quality control concerns can be met, more people having greater access to the law at lower cost must be a good thing, and lawyers should be embracing it.

A perpetual dilemma for industries and enterprises faced with threatened disruption is the need to cannibalise legacy revenues. Many would be familiar with the story that Kodak invented the digital camera in the 1970s but didn't invest in further developing it because it was incompatible with their lucrative film businesses. The rest is history, to the point where a "Kodak moment" has become synonymous with an incumbent missing the opportunity to pivot into a new opportunity, therefore dooming themselves to irrelevance. Any lawyer who resists opportunities to use technology to deliver more value to clients is courting their own "Kodak moment".

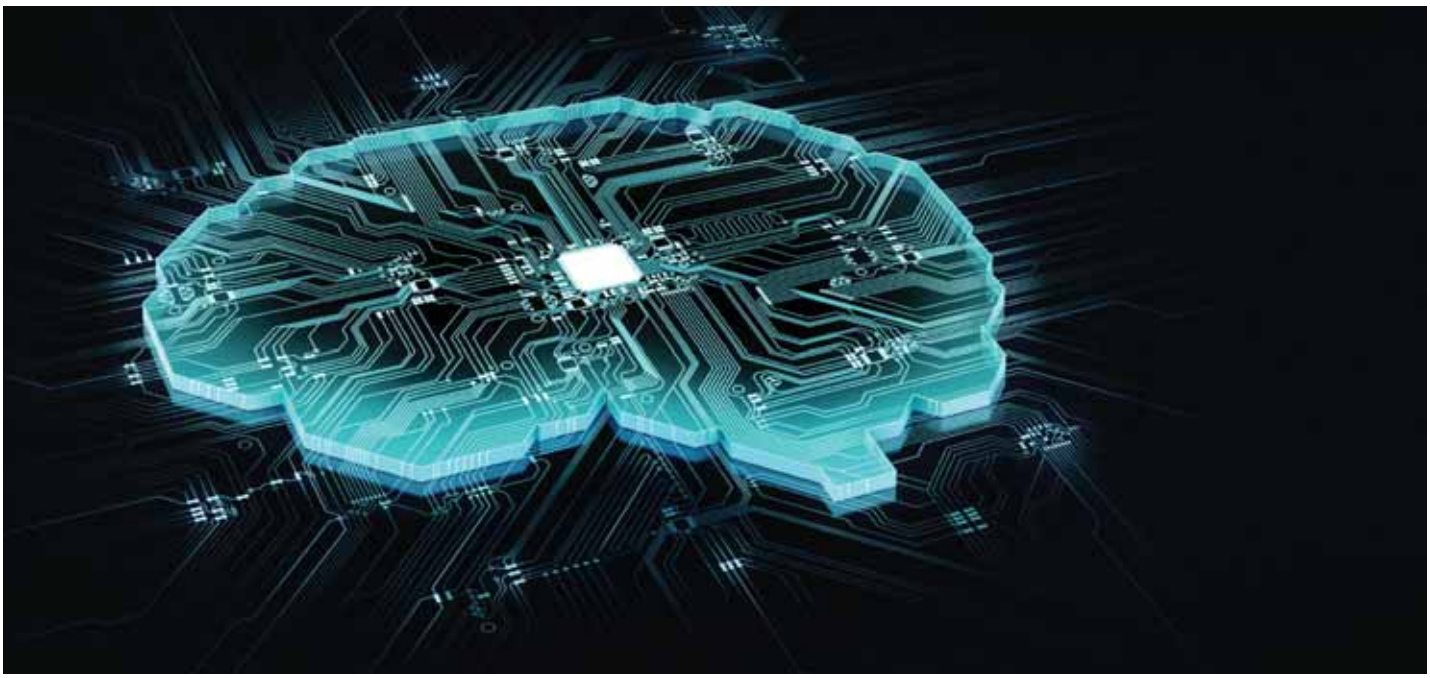
So, if lawyers increasingly delegate lower-order tasks to technology in order to deliver better value for their clients, where should they be looking to offer unique human value-add? I propose the following (non-exhaustive) starting list of higher-order skills that lawyers should be looking to deploy for clients:

- Insights and Opportunities
- Judgment /wisdom
- Values
- Empathy

Turning to each of these in turn:

Insights and opportunities:

If you asked clients to describe what they expect from their lawyers, I doubt many would offer the words "insight" and "opportunity". However, it is one of the easiest ways to add profound value to a client and establish yourself as a trusted adviser. In the process of performing more traditional legal functions, lawyers often have an opportunity to see the client's business or affairs from a perspective that the client themselves rarely sees. Where the lawyer is working on disputes, they will be able to see repeat issues or root-causes of problems that are causing unwanted expense, distraction and customer dissatisfaction. Where the lawyer is working on customer contracts, they will be able to see repeat issues that are triggering customer objections, slowing sales, or causing



mismanaged customer expectations. A good human lawyer is on the look-out for these sorts of insights to help their client improve. Similarly, through being a repeat-player on some of the most challenging parts of clients' lives, lawyers are often in the box-seat to identify opportunities to generate value for clients. A key example that comes to mind is the role that the Disney legal team played in recent decades in their IP protection strategy. Disney is faced with the progressive expiry of copyright in large swathes of its catalogue, starting with the iconic *Steamboat Willie* which brought Mickey Mouse to the world, and becomes public domain from 2024. The Disney legal team has been able to pivot the focus of IP protection from copyright into trademarks, extending the useful life of the catalogue.

Judgment / wisdom:

Perhaps not surprisingly for a higher-order human skill, I struggle to precisely define judgment and wisdom. I think the relevant sense in which I am using it here is the ability to go beyond data to synthesise complex environmental factors that shape or constrain the courses of action that are genuinely available. By way of example, in a large organisation dealing with consumers, it is essential that any proposed course of action is judged against the "back page of the Fin Review" test. The organisation's contractual rights may be perfectly clear, but if enforcement of those rights would be judged harshly by the community when reported on the "back page of the Fin Review", then any quality legal advice on the subject should reflect this.

Values:

In a similar vein, recent regulatory developments such as the Hayne Royal Commission and the Bergin Inquiry into Crown Casinos have highlighted that anyone responsible for brand, reputation and risk in an organisation should be keenly interested in the organisation's values, and the mechanisms for ensuring actions are aligned with those values. Among many other excellent reasons for having strong values, alignment between an organisation's actions and its stated values will be a critical factor in determining the degree of trust placed in the organisation by customers, partners, regulators and the broader community. As with the "back page of the Fin Review" test, there will be courses of action that are legally available that simply do not align with the organisation's values. Legal advice that does not flag important values issues is inadequate legal advice.

Empathy:

Intertwined with the last two skills is empathy – the ability to understand the thoughts and feelings of another human. I am aware of research on areas such as robotic interpretation of body language, and that humans are often nowhere near as good at reading another human's emotions as they would like to think. However, I would assert that it's impossible to provide quality legal advice in complex situations without empathy. Ideally, to provide quality legal advice in complex situations you need to be able to understand as much as you can of the circumstances, aspirations, values, risk appetite and concerns of your client in order to provide the legal advice that they need. Obviously not all issues justify that – the answer to some simple questions may be black and white, and some problems simply don't justify the additional legal effort. But in complex situations involving competing considerations and a degree of risk, the legal solution must be responsive to the needs of the individual client sitting in front of you.

Ultimately, law is a human system. Yes, the practice of law involves data and logic-flows in ways that may not have been apparent to our legal forebears, but ultimately legal systems add the most value when they serve humans. Across the economy there is strong market demand for people with the skills, awareness and passion to make systems work better for humans, and I personally believe the legal profession will not be an exception. I know what I'm going to be trying to contribute to this collaboration.

David Field

Having started his legal career with Mallesons, working in Taiwan, David has since enjoyed a twenty plus year 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.

LOVE THE ONE YOU'RE WITH: WHY LEGAL AUTOMATION DOESN'T NECESSARILY REQUIRE PURCHASING NEW SOFTWARE

The pace of technological advances is truly wondrous to behold … if you're into that kind of thing, at least. Many of us, however, are not into 'that kind of thing' at all. Instead, we hear the incredible functional leaps being trumpeted by legal media and software vendors as a wall of undifferentiated noise that is very hard to pick apart.

So, where to start if you are finding it difficult to pick your way through the Legal Tech universe and find that one product that will solve your problem? One way that seems to have gained popularity in the last year is to consider whether the answer you are looking for *needs* to have the word legal in front of it at all. The reach of digital transformation has landed on many other larger industries' doorsteps in advance of the legal industry, and incredible gains have been made by industry-agnostic global tech vendors like Microsoft, Atlassian and Salesforce.

The focus on internal processes that accompanied our collective overnight implementation of work-from-home protocols[1] and remote collaboration technologies like Zoom and Microsoft Teams (Teams) at the onset of the COVID-19 pandemic seems to have pointed many to this path already.

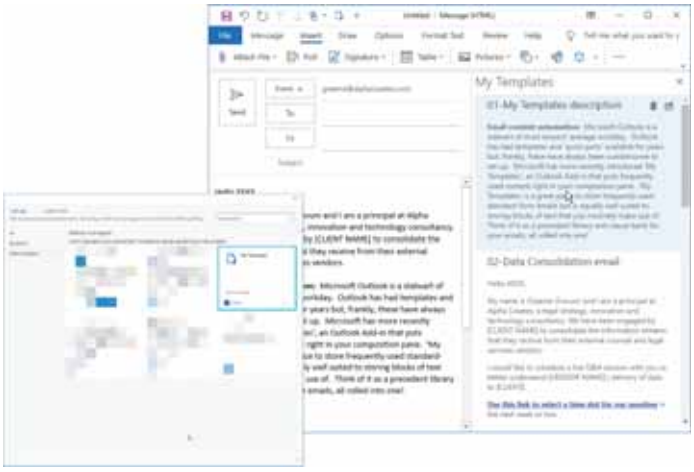
In a lot of cases, the uncertainty of circumstances this time last year precluded the acquisition of additional products, meaning that many of us were going to have to make do with the application suite already in use by our companies, and an obvious place to start was with Microsoft 365 (MS 365).

This aligns with some interesting findings from a couple of 2020 reports that drew on responses from Legal Technology vendors and Legal Technology consumers, respectively. First, the Global Legal Technology Report[2] (GLTR) found that Legal Technology vendors, globally, were feeling the pinch of reduced interest from customers as companies tightened budgets to weather the pandemic. On the consumer side, the ACC's Chief Legal Officers Survey[3] found that the number of legal department respondents not planning to adopt a new legal technology solution in 2021 increased by 10% from the prior year. Legal technology purchasers, it seems, have had to become more focused on the problems they are trying to solve and more judicious in selecting the right solution for a problem, including by addressing workflow issues first and making better use of the technologies they already have.

This accords with our experience at Alpha Creates. In the last year, we have spent a lot of time working with clients in Teams and the broader MS 365 platform to solve workflow pain points using available resources. Here are some solutions we've found to common problems.

Email content automation

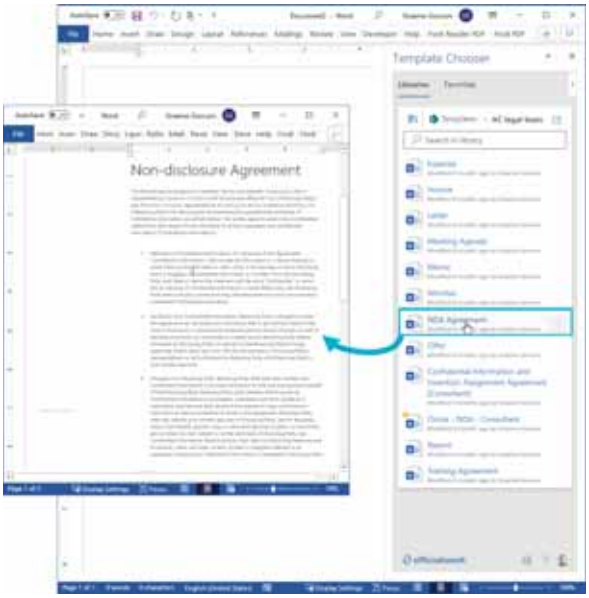
Microsoft Outlook is a stalwart of most lawyers' workday. Outlook has had templates and 'quick parts' available for years; but, frankly, these have always been cumbersome to set up and have not been broadly adopted. Microsoft has more recently introduced 'My Templates', an Outlook Add-in that puts frequently used content right in your email composition pane. 'My Templates' is a great place to store standard-form emails but is equally well suited to storing blocks of text that you routinely use. Think of it as a precedents library and clause bank for your emails, all rolled into one!



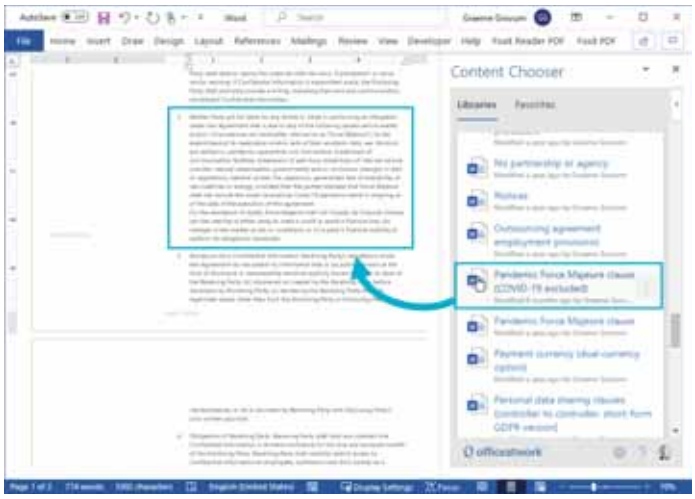
Precedents library and clause-bank automation

Speaking of precedent libraries and clause banks, another Add-in, this time by third-party vendor officeatwork, can quickly set you up to run your own precedents library and clause bank from within MS 365.

The precedent library makes your precedent documents available through a Microsoft Word Add-in. You can browse multiple template libraries to find the right precedent and, when you choose a precedent, a new document based on that precedent is created for you.



The clause bank works in the same way. However, instead of creating a completely new document, the content you choose is inserted into the document that you are drafting:



Both the precedent library and the clause bank above are designed to be shared across an entire team. NB: officeatwork charges a small amount for its Template (precedent) and Contents (clause bank) Add-ins.

MS Teams for matter management?

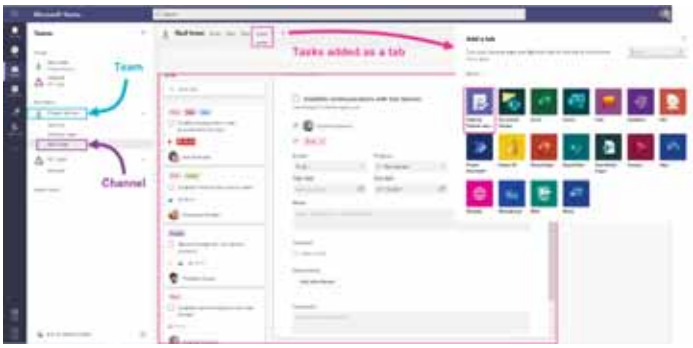
So far, we haven't really scratched the surface of MS 365; while most people use Outlook, Word, PowerPoint, Excel, and, more recently, Teams, they don't really dig into the rest of the subscription. You might be surprised to find that the full MS 365 application suite can play a part across many of your legal team's day-to-day activities. For example, we have mapped MS 365 applications to some typical areas of work:

Intake and triage	Power Virtual Agents, Forms
Matter management	Teams, OneNote, Planner, To Do
Contract management	Power Automate
Workflow management	SharePoint, To Do, Power Automate, Planner
Knowledge management:	Power Virtual Agents, OneNote
Vendor management	SharePoint
Reporting	Power BI, Planner

Let's look at a few examples that pull in more of these applications. First up, Teams is a great place to bring all of your day-to-day work together. Microsoft has been very deliberate in ensuring that, regardless of the systems you use, you will be able to interact with them in Teams.

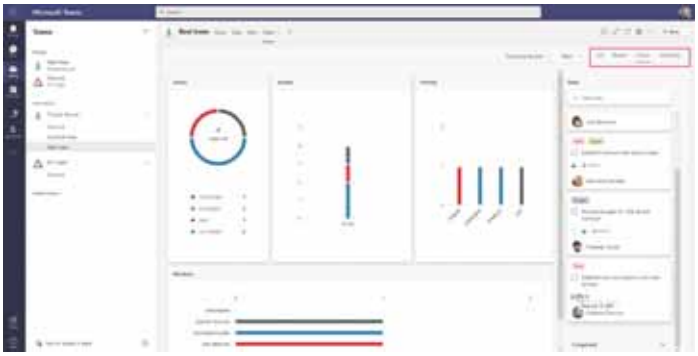
For legal teams, this means that Teams is a great matter-management application. At the matter level, using **Teams** and **Channels** to structure your work will bring order to your group's interactions with each other.

In the example below, a new Team is used for each project. Within each Team, Channels are used to separate individual workstreams that colleagues are working on together for the project.



Because Teams is part of the MS 365 family, all the interoperability that you are familiar with in Outlook, Word, PowerPoint and Excel also exists here; everything just works together! This also extends to other MS 365 applications, all of which can be added right into Teams as well. There are a few ways of achieving this, but, in the example above, we have added a new **MS Tasks** board (a Kanban board that is similar to Trello) to our Channel. The entire MS 365 suite can be added to Teams in this way and, because you can also add websites, any other application your team uses can be added to Teams as well, as long as you can access it through a web browser.

Before we move on, I need to point out one additional aspect of Tasks that really shines: reporting!



Switch your view to 'Charts' within the Tasks tab to see high-level information about how your team is managing from an individual workload perspective, which work is past due, and what volume of your work is urgent through to low importance.

Managing shared work

A real powerhouse in the MS 365 family that most people don't realise they have access to is **Tasks**. (The product is called MS Planner, but within Teams, it is known as Tasks). Tasks is an excellent application for managing tasks that relate to shared work. Within the app you can assign work to yourself and to colleagues (i.e. more than one assignee), add due dates (and be reminded as those dates approach or are missed), attach documents, add checklists within each task and make notes and comments directly within each task. You can also create Kanban board-style buckets to move your tasks through as they work their way through your internal processes. Tasks can be set up to display a cross-board view of all work assigned to you across the Teams and Channels you belong to; a real lifesaver as your use of Tasks increases!

The power of automation

The level of interoperability within Teams and between the various MS 365 applications makes work continuity much easier to maintain. Every company, however, has workflows that are unique, meaning that there may not be an off-the-shelf solution ready to go. In these cases, MS 365's Power Automate provides the tools to design your own workflows incorporating any of the suite's applications, as well as other Microsoft technologies and a host of third-party applications.

For example, let's say that we want to create a client-facing complaints triage workflow with the following requirements:

- a self-serve complaints submission process
- submissions added to a complaints database for compliance purposes
- complaints allocated as new tasks to staff
- a precedent populated using provided data to create a draft letter of referral
- the draft letter of referral emailed to the client for preliminary review.

We can do each of the above using stand-alone applications (MS Forms, MS Lists, MS Tasks, MS Word, MS Outlook), but how do we string them all together in one automated process?

This is where **Microsoft's Power Automate** comes in. Using Power Automate we can create one or more flows that achieve each of the outcomes above and do so in a connected and automated process.

In the image below:

1. A form captures data from a client.
2. The form data is collected by Power Automate.
3. Power Automate uses the data to create an automated email to the client.
4. Power Automate uses a precedent to create a personalised, automated letter of referral and attaches that letter to the client email.
5. Power Automate sends the same data to different MS 365 applications that are displayed in Teams.
6. Power Automate adds the form-submission data to a Microsoft List (the complaint register).
7. Power Automate adds the complaint itself to Tasks as a new task that is ready for allocation (allocation can be automated as well).

The example above may not line up directly with your requirements. That's okay! It is meant to illustrate that you can model and automate almost any manual process in *your* day-to-day workflow using Power Automate plus the tools that you already rely on to complete your work.

A generic workflow that can be modelled to numerous different legal department processes looks like this:

Start with a trigger like a form submission or a received email. Next, create a flow in Power Automate that uses the information you've received to connect the steps of your process in Teams. Finally, report on the progress of both your work in progress and the improved efficiency of your team in completing that work.

Start small. Start now.

MS 365 delivers much more than most of us are aware of in terms of functionality. Using Teams and Tasks to organise your legal department's interactions with your customers can bring order to an otherwise reactive relationship. If you are ready to dig a bit further into process automation, Power Automate's low-code/no-code platform will help you connect and automate the components of BAU (business as usual) workflows that you already rely on.

Footnotes

1. Dazychain. 2020. What's Next? The impact of COVID-19 on Australian corporate legal departments. [ONLINE] Available at: https://www.dazychain.com/whats-next-the-impact-of-covid19-on-australian-corporate-legal-departments [Accessed 10 May 2021].
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3. Association of Corporate Counsel. 2021. Association of Corporate Counsel's Chief Legal Officers 2021 Survey. [ONLINE] Available at: https://www.acc.com/sites/default/files/2021-01/ACC_CLOreport21_FINAL.pdf [Accessed 10 May 2021].

Graeme Grovum

With an extensive background in delivering legal innovation, Graeme is now a principal at Alpha Creates, a strategy, innovation and technology consultancy for the legal industry. Alpha Creates' services include MS Teams training and MS 365-based process optimisation and automation consulting for legal teams. Graeme is also co-founder of Sydney Legal Hackers.

CASE STUDY: AUTOMATING HIGH-VOLUME PROCEDURES WITH MICROSOFT 365

Many entities, including Australian universities, must comply with the *Business Names Registration Act 2011* (Cwlth) administered by ASIC (Australian Securities and Investments Commission). The penalties for failing to register business names can exceed $6,000.

However, in-house departments are typically stretched for time and resources and may not have adequate procedures to complete this largely administrative task, leaving their organisation exposed to the risk of non-compliance. In this short case study, we outline how we used existing Microsoft 365 tools to streamline compliance with the Business Names Registration Act for a leading Australian university.

Brief

- ☑ **Simplify – Reduce the time and complexity of the process.**
- ☑ **Use existing tech – No new technology to be purchased.**
- ☑ **Enhance compliance – Build in consistency and transparency.**

Opportunity for automation

Our client has multiple controlled entities and over 100 Centres and Institutes. Here is a brief description of the process before introducing automation.

Requests for legal advice would be received by any member of the legal team and by any means, but typically email or phone call, with critical information often missing from the request, resulting in protracted email exchanges. There was no central management or tracking of related correspondence and authorisations, which made generating reports on the progress of any particular name request time-consuming.

A Microsoft 365 solution

Why did we choose Microsoft 365 to build the solution? With a no-spend brief, we opted to use the university's existing Microsoft 365 licence. It was also the best option when it came to maintenance and support.

New streamlined process

The solution integrates several Microsoft products. Here is a summary of each step in the revised process and the Microsoft 365 product used:

Step 1: Microsoft Forms

Applicants are directed to fill in a Business Name request form. Conditional logic is used to ask questions relevant to each applicant and obtain information relevant to their request. For example, if the applicant has indicated they have already started operating under a certain name, the form will ask them for the date they started doing so.

Step 2: Power Automate

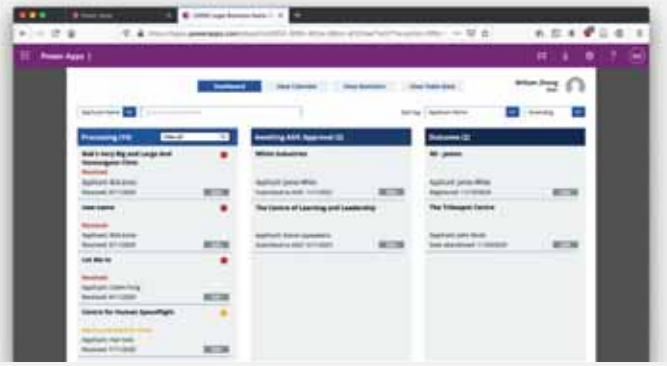
A Power Automate action triggers once the form is submitted — that action writes the information from the submitted form into a SharePoint List.

Step 3: SharePoint List

The SharePoint List stores all the relevant information in one place. The list provides similar functionality as an always-on, shared database without the costly burden of dedicated database administration.

Step 4: Microsoft PowerApps

PowerApps is a platform that allows enterprises to build low-code applications. Built atop the data in the SharePoint List, our application provided our client with a single pane to track and action name-registration requests. The Power App also generated a series of automatic emails, including (1) a response to applicants confirming instructions and next steps and (2) emails updated as the name-registration request proceeded.



Custom application built into Microsoft PowerApps

Step 5: Power Bi

Power Bi pulls data from the SharePoint List, providing our client with real-time reporting data on name-registration statistics.

Impact of the solution

The impact of this solution is a measurable reduction in the time taken to process name-registration requests — from weeks to minutes.

- ☑ **Zero spend.**
- ☑ **Improved compliance, transparency and standardisation.**
- ☑ **Real-time reporting on key metrics.**

Authors

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EMPATHY AND COMPASSION: HOW LEADERS CAN GET IT RIGHT

We've all heard the saying "put yourself in their shoes" — this is empathy. Empathy is the ability to understand someone else's thoughts and feelings, anticipate what they might be thinking or feeling about a situation, and make sensible decisions.

Empathy is one of the most valuable skills you can possess as a leader. Practising empathy can help you better relate to others, communicate better, build valuable relationships with employees and clients, boost morale, breed connection and teamwork, and ultimately support a productive and high-performance workplace culture.

More than just a nice-to-have, empathy provides meaningful, concrete returns. In fact, the 2020 State of Workplace Empathy Report found that 77% of workers would be willing to work more hours for a more empathetic workplace; meanwhile, 60% would accept a lower salary for the same. Empathy is a valuable skill both ways, with staff that demonstrate high levels of empathy more likely to be recognised as high performers by leadership.

Despite 82% of CEOs agreeing that an empathetic workplace has a positive impact on business performance, motivating workers, and increasing productivity, less than half of employees rate their workplace as empathetic.

What's the disconnect?

When it comes to practising empathy, most people mean well but unfortunately get it really wrong. Often this is because they confuse empathy with sympathy — two words that are commonly used interchangeably, albeit incorrectly.

While both words circle the relationship a person has to the feelings and experiences of another person, sympathy is used to convey commiseration, pity, or feelings of sorrow for someone experiencing misfortune, and doesn't empower action. Empathy is a much broader understanding of how people are feeling, providing a greater perspective of the experiences of others and spearheading appropriate action.

If a leader can demonstrate sincere empathy towards individual team members, it goes a long way to helping them feel heard and understood, encouraging them to feel safe at work and perform at their best. Demonstrating sympathy, on the other hand, can often be mistaken for condescension — which can lead to a fear-based work culture.

What does empathy look like?

There are three distinct types of empathy: cognitive, emotional and compassionate.

Cognitive Empathy

This is more about logic than it is about emotion. It means understanding and appreciating someone else's perspective without experiencing the same intensity of feelings. Sometimes this type of empathy is better known as perspective-taking. It's a useful skill for leaders when it comes to negotiations and change management; however, it can be disconnected from the emotions of others, and people who exhibit this type of empathy can often be viewed as cold or uncaring.

Emotional Empathy

This is when a person is able to fully take on the emotional and mental state of another. This response is often seen in caring professions like health, education or welfare. As a leader, it's helpful because it allows you to respond to others appropriately; however, these feelings of intensity can lead to empathy overload — where you start to become overwhelmed by the feelings of others and compromise your own well-being in the process. It's unsustainable.

Compassionate Empathy

This means feeling concerned for someone with an additional move to action. Ultimately, this is the sweet spot between logic and emotion and where all leaders should aim to live. It allows you to feel and understand another person's pain and apply reason to a situation while at the same time remaining in control of your emotions. This means you can make better decisions and provide appropriate support.

Compassionate empathy: the road to compassionate leadership

Empathy is ultimately a precursor to compassionate leadership. At its core, compassionate leadership creates a calm culture, one that does not breed fear amongst employees. Compassionate leaders are mindful and manage their moods, are connective and receptive, take affirming action, show sincerity and consideration, and put people before procedures.

This goes a long way towards building a high-trust culture where staff are engaged and aligned with organisational goals and values. Importantly, staff feel safe to speak their mind, exercise creativity and take calculated risks without fear of punishment or judgement. Staff that may be suffering from well-being decline or struggling with their workload feel safe to put their hand up for help without fear of jeopardising their position.

How do I enable compassionate leadership?

Start with empathy.

Ultimately, you cannot have compassion if you don't first have empathy.

Therefore, you'll be glad to learn that empathy is not an inherent trait; it is, in fact, a learned skill that can be purposefully built and practised intentionally. Listen attentively to others when they're speaking. Be interested in the emotions and perspectives of others. Watch your body language. And be careful that you're not trying to solve someone else's problems. Too many leaders are simply waiting for their super-hero moment when all a person wants is to be heard and understood.

Look within.

Emotional self-awareness and intelligence are crucial to enabling compassionate leadership. Start by doing a self-assessment to see exactly where you are. How do you cope with and react to stressful situations? Do you admit your own mistakes and practise humility? Beyond this, it's important to take steps to self-regulate your emotions.

Focus on personal resilience.

Resilience is key to negating the effects of empathy overload, a state in which we have the potential to compromise our own well-being while over-caring for others. Leaders with a high level of resilience can practise compassionate empathy because they are less affected personally by the emotions of others. The best way to build resilience is through positive lifestyle practices, including self-care, work–life balance, and channelling negative stress into positive action.

Build positive relationships.

Leaders bring many things to the table — including experience, intelligence and direction — but they ultimately need people to bring these things to life. Empathy and positive relationships go hand in hand, so leaders would do well to spend time cultivating positive relationships with their team. This doesn't have to be intense; it can simply be asking your team how their weekend was or showing genuine interest in exciting personal milestones. Putting in the work to build relationships with your team paves the way for openness and transparency.

> ***"Compassion elicits respect and effort from individuals, and these, in turn, create a high-performance culture and drive business success."***

With so many variables in the modern workplace, leaders need to be able to interact with all different types of people, in different locations, with varying levels of personal issues. Therefore, the most effective leaders are those who have a high level of empathy that enables them to lead with compassion. Compassion elicits respect and effort from individuals, and these, in turn, create a high-performance culture and drive business success.[a]

Peta Sigley

Co-founder and Chief Knowledge Officer of Springfox. Peta has a background in psychology and education, and an extensive grounding in HR-focussed business management. At Springfox, Australia's leading provider of evidence-based resilience programs for individuals and organisations, Peta draws on her first-hand understanding of the pressures commonly faced by individuals and organisations in different industries to help her clients achieve positive growth and high performance.

I WANT IT ALL … AND SO DOES MY HUSBAND

I want a fulfilling career. I want to be a leader. I want to influence the legal community and lead cultural change to enable both men and women to work flexibly and be fulfilled at home and at work. I want to rise through the ranks to Senior Management, to Executive level, to be on a Board. My husband wants these things for me too. He also wants the equivalent in his line of work.

We are both working parents. I want to be a wonderful mum and my husband wants to be an impactful dad. We want to raise healthy, happy, independent children who know their worth and are provided the opportunity to fulfill their potential. We want our children to grow up in a household that models balance and equity. So, we tackle each week by attempting to share the load. Guess what? My husband cooks, cleans (occasionally) and loves to do school pickups. I know, it's outrageous. I am one lucky girl. We know lots of men love doing these things. So why aren't there more men at the gate when school pickup rolls around, or volunteering to help in the classroom for reading group? This strikes me as odd.

Did you know . . .

"57 percent of executive women say they take more responsibility than their partner does in making child care arrangements compared with only 1 percent of the men" [1]?

Surely every parent should have the same opportunity to participate in the lives of their kids while continuing to pursue their career? Surely it is every parent's right to indulge in the sometimes-mundane trips to the park, the tedious birthday parties, or the over-excitement of an under-six soccer game? Does wanting to be there for your kids automatically mean you're less serious about your job? Absolutely not. So why haven't we made more progress?

Did you know . . .

"Executives who put the same priority on work and their personal/family life, feel the most successful at work" [2]?

My husband and I have tried for seven years to strike that perfect balance. Occasionally, we think we are nailing it. Most other times we are mired in feelings of guilt and inadequacy. Even this evening, as I was constructing a last-minute email before leaving work, I was aware of a gnawing guilt in the pit of my stomach, reminding me that the sacrosanct tradition of Taco Tuesday was awaiting my presence. So, the endless cycle of feeling like you are neither killing it on the work front nor succeeding at home base continues. Perhaps overhearing comments from well-meaning parents contributes to these feelings.

"Gee, that book week costume leaves a bit to be desired."

"He's always leaving work early. I guess he prioritises family."

I should let you know I am fully cognisant of the incredibly privileged situation I find myself in. I have choice. I have delightful, healthy children. I have a partner, a flexible workplace and a supportive boss. I am grateful for all these things. But (there is always a but, right?) I don't think that absolves me from the responsibility of trying to change a system that perpetuates the myth my generation has been sold.

The Myth: YOU CAN HAVE IT ALL

Somewhere along the line we missed the fine print. The fine print details the hurdles and pitfalls. As a lawyer, I should have been a little wise to the darn fine print!

Yes, sure we can have it all— but only if we change cultural norms, break stereotypes, embed different social structures and get the buy in of our employer and our partner's employer, as well as block out the self-talk that perpetuates guilt and inadequacy.

She hears, *"Oh, you have to work on Friday?"*

He's told, *"It seems your wife is ambitious, but you should know you are required to work from the office every day. If your kids are sick you will just have to figure it out."*

Yes, a boss of my husband's past explained that if his wife wanted a career, perhaps he should consider stepping down from a leadership role to enable that. Cue disgust and anger! This attitude blew my husband away. For me, it garnered no more than an eye-roll. Even though my husband and I had considered ourselves the bastion of modern family life, we had never really got into the nitty gritty of how our worldview correlated with the rest of the world. His boss's comment precipitated an honest conversation we hadn't previously had. It was telling. My husband was appalled by the comment whereas I felt unsurprised. We discussed how the guilt and judgement I felt when he attended a school function while I worked, was the opposite for him. He felt guilt and judgement when leaving work to attend the school function.

Did you know . . .

"Men with employed spouses are more likely than men with at-home spouses to have reduced their aspirations (36% versus 19%)"[3]?

The Wrong Conversation:

As it turned out, the comment sparked a lightbulb moment for us. We were able to articulate a disparity we'd both felt before but never been able to articulate. We were each affected by the invisible force of guilt, innate in those social norms. And this was a perfect example of the kind of comment that kept us locked into feeling diminished as parents, diminished professionally.

"Oh dear, that child always has tuckshop!"

"Is he out of work at the moment? I've seen him around the school at pickup every day this week!"

So, what's the answer? Well, maybe it's in those conversations we've been having. Perhaps all this time, as a society, we have been having the wrong conversations, or at least, only half of the right ones. Yes, we need to enable women to transition into the workforce after having children, but we also need to encourage and enable men to step out of the workplace and through the school gate.

There is an alternative to keeping us in an endless cycle of stress, feeling the pressure at work, at home, in our marriages. It is outrageous to accept that most women at school pickup love that routine to the exclusion of career fulfilment, or that men are not driven by the same instinct to be part of their children's lives, while also craving respect and responsibility at work.

The Best of Both Worlds

To have it all, we need support within the familial, social, economic and employment structures in which we exist. Without this, we will surely fail in our quest for the perfect balance. We will have to choose which one of us can pursue the lofty heights of leadership, management and career fulfillment, while the other becomes the part-time or full-time carer and domestic manager — ergo, neither of us has it all.

The Buck Stops Here

The in-house legal team I am privileged to work in is committed to gender equity in all its forms. We are empowered by our organisation and enabled by our General Counsel to promote work– life balance and respect boundaries — our own boundaries and those of others. We have decided if our industry is to change, the buck stops with each of us. One of our goals as an in-house legal team is to understand the priorities of our business partners, our colleagues and our external providers so we can play our part in ensuring everyone has an opportunity to live fully outside of work while reaching their potential in employment — to help everyone to indeed **have it all**.

So, double down, people! Live your values unrelentingly. #Choosetochallenge the gender stereotypes that are rooted in last century. If you are a dad, proclaim with pride that you are taking time out to attend a reading group in your child's Prep class or leaving early to meet your child at the school gate. If you are a mum, shed the guilt of missing some of those events to take the time to attend an industry event or deliver a presentation. As an in-house legal community, we can start to normalise this type of behaviour and one by one build a new normal! There is power in simply living our values, even in the face of criticism or cynicism. As in-house lawyers we have the power to make change in our teams and organisations as well as foster and encourage it in the wider legal community.

So, the next time a boss or a colleague leans over and chides your wife for her ambition or questions your commitment to the company because you're ducking out to watch someone receive an award on assembly — Speak Up!

Footnotes

1. Galinsky, Salmond, Bond; Kropf, Moore; Harrington 'Leaders in a Global Economy A Study of Executive Women and Men', Families and Work Institute; Catalyst; The Centre for Work and Family Boston College, 2003.
2. Ibid.
3. Ibid.

Greer McGowan

A proud member of the in-house legal team at Queensland Rail, Greer is passionate about finding ways to ensure everyone in the workplace can live fully, both at home and in realising their career aspirations.

PRIVACY: MAKING IT PERSONAL IS GOOD FOR BUSINESS!

STOP! Don't turn the page without reading this — you'll regret it! Privacy is integral to doing business and to our lives as individuals. Doing it wrong can destroy companies, lives, trust and jobs … so bear with me, I only need a few minutes of your time.

One of the best things you can do for your organisation, your clients (whether private or public sector) and yourself is to understand privacy and good information-handling practices. Understanding why there are rules about how business and government or organisations[1] collect, handle, share and store information affects all of us regardless of our capacity to interact with them. The rules are there to protect our personal information and set guardrails for organisations, but each of us also has a significant role to play in relation to our own information, particularly what we do with it and how we share it.

In my experience, the key to successful privacy and information-handling practices within any organisation is making it personal — making it relatable. When you focus on your own information and get others to do the same, it has far more meaning than standard privacy compliance training. I believe that taking a personal approach to privacy means that your organisation and the people who handle information will be more likely to do so with the care and respect it deserves and think about the consequences of not doing so. How information is handled impacts us in our lives every day — at work, at home, socially and professionally, online and in person. That message will translate into good privacy practices.

So, what is personal Information[2]?

It's information about people — you, the people you work with, serve, help, care for or communicate with. Think about it this way: your personal information can tell others about you, who you are, what your likes and dislikes are, what you think and feel, how to contact or find you, and how you spend your time and money. It can keep track of your daily movements, regular routines like that 8 am coffee or the 6 pm dog walk, depending on who holds the information. And, for most individuals, it can do a lot of these things without them even realising it's happening — particularly in our increasingly digital world. Privacy in this context is information privacy, and it is regulated by the *Privacy Act 1988* (Cwlth).

For people handling information in your organisation, privacy compliance is helped by understanding that what is considered to be personal information is all about context. It's not just what information your organisation has access to, but what it intends to do with it and what consequences that activity might have for the individuals whose information is involved. The contextual nature of personal information is important because it helps you understand how risky your organisation's information-handling practices are or can be.

Here is an example. Think about an activity your organisation is looking to do. What information is needed? Who is the person the activity is intended to benefit (customer group, employee group etc.)? Then think about someone in your own life, a loved one, who would otherwise fit into that category and run the scenario through. Think about your loved one, their life in context, what vulnerabilities they might have, what consequences might result for them, whether there is any likelihood of harm resulting from the activity because of their personal circumstances.

Consider the consequences for vulnerable individual groups of your organisation's information-handling practices before you proceed with an activity using personal information. This is called taking a risk-based approach.

Teach the personal

The risk-based approach that I've described above benefits from the people in your organisation thinking about why privacy matters to them and using their personal context (or that of a loved one) to understand the potential consequences of activities using information.

By personalising the privacy message, making it relatable and using examples, you empower your product people, HR teams, IT people and others to work collectively. In this way, products and services are designed, developed and implemented after considering what information is required to create and, in turn, provide the benefit while minimising harmful consequences. Live the mantra: the less information handled for an activity, the lower the risk of something causing harm.

In my experience, most organisations are doing the right thing in terms of handling personal information or at least trying to with the best of intentions. They've got legal, risk and data people dedicated to ensuring that information is handled appropriately. Teaching the personal means that these roles are supported by those individuals developing products and services with privacy in mind.

Focussing on teaching the personal allows all of an organisation's people to consider the context, benefits and consequences of an activity. This will result in concepts of privacy being built into the products and services authentically. This is what is meant by the term "Privacy by Design". It intends to ensure that privacy compliance is part of doing business, regulator expectations are met, and building a trusted relationship with the organisation's customers is seamless.

Surveys say …

Survey after survey show us that consumers value trust and transparency, and they don't read privacy policies! So, how do we solve that conundrum?

We are all familiar with privacy policies. They can be overly legalistic and voluminous. I acknowledge that to meet an organisation's obligations under the Privacy Act, a lot of information needs to be included in a privacy policy. And understandably, the more information the organisation collects, handles, shares and stores, the more detailed the privacy policy needs to be.

The Privacy Commissioner[4] says that organisations should use different ways to tell their consumers about how they will handle personal information.

In addition to the information to be included in an organisation's privacy policy, the Privacy Act also requires organisations to be transparent about their information-handling practices. You can do this by using different methods to make the content of privacy notices digestible and easily understood, keeping in mind your organisation's target audience for such notices. That means:

- using layered notices to enable consumers to decide what parts of the notice are relevant to them
- using plain English, readable to an appropriate level
- using headings and subheadings so that relevant information can be easily located
- break up lists of uses, or collections of information, so that they are easier to understand
- use examples to explain what you mean
- supplement your notices with a video or other media describing the specifics of a particular product or service, or
- use a point-in-time notification that lets your consumers know when you're going to be doing something with their information.

The flexibility and possibilities in communicating your information-handling practices are endless. You can be as creative and expressive as suits your organisation's approach to messaging, tailoring language to your customer base. Using such approaches to communicate is key to building a trusted relationship.

Personal responsibility

So far, we've covered what we as advisers can do to raise awareness about privacy by teaching the personal, using context, understanding what consumers think and how organisations can effectively and transparently communicate.

The other part of my message is, of course, individuals stepping up and being engaged with organisations and their personal information. There must be a level of personal responsibility to everything in life; privacy of information is no different.

The more we all understand privacy, just as we can make sure our organisation has good information-handling practices, we individually can take steps to ensure that we are protecting our own information too.

Teach your parents, your kids (or perhaps in reality get them to show you how to access the settings on your phone), your friends and colleagues. Review how information that can identify you (or can be used to identify you) is being handled. Check that you're not giving all of the apps on your phone access to your camera, microphone, location and other information on your device.

Nobody wants to live in a society where we are constantly surveilled, monitored and marketed to. We need to understand the value of our information and the amazing things that can be done with information to benefit us, our community and our economy. This means playing our role as individuals, protecting our own information. The more familiar we become with information-handling practices, the more our community will expect from the organisations we deal with, and (I'm hopeful) our legislators will ensure that the protections in our Privacy Act meet those expectations.

The internet is full of stories about the consequences of poor information-handling practices by different organisations, in different industries, different countries and with different impacts. There are endless stories about data breaches (seriously, do a web search for data breaches for any given year, or month — you'll be astonished how many there are that you may not have even heard of). Stories about the information-handling practices of organisations that sit outside of consumer expectations are on the rise (think "creepy" uses of information) and then there are the things that we do ourselves every day. We all know an online over-sharer, a friend, acquaintance or even family member who checks you in whenever you go out anywhere, that posts a photo every day about their life. What about someone who uses the same password for everything, or even saves their PIN in their phone under the contact Mr [insert bank name here].

Simple acts like checking your settings so that you know what you are sharing can make a difference. *It's about knowledge and engagement with your information.*

Use different passwords and PINs and do not share them. Think of them like the keys to your house or your car — they grant access to your information, your money and your life.

Lastly, get involved!

The Australian Privacy Act is under review[5]. The Attorney General's office is pulling together a discussion paper to be released shortly for consultation on changes to the way organisations and the government handle people's information. This is the culmination of years of debate, inquiries and consultation across the Australian economy considering our increasingly digital way of life.

Get involved in the consultation process so that our privacy regime develops in a way that reflects our community values and expectations.

Footnotes

1. I'm going to use organisation throughout this article for ease of reference, but I'm referring to the organisation you work for, the organisations you deal with day-to-day, the government, your clients etc.
2. Defined in section 6 of the *Privacy Act 1988* as *"information or an opinion about an identified individual, or an individual who is reasonably identifiable; whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not".*
3. Only 20% of consumers read privacy policies and are confident that they understand them – Australian Community Attitudes to Privacy Survey 2020, OAIC – https://www.oaic.gov.au/engage-with-us/research/australian-community-attitudes-to-privacy-survey-2020-landing-page/2020-australian-community-attitudes-to-privacy-survey/ accessed 6 May 2020. 94% of consumers reported not reading all of the privacy policies and terms & conditions that apply to them – CRPC 2020 Data and Technology and Consumer Survey, 7 December 2020, Consumer Policy Research Centre https://cprc.org.au/publications/cprc-2020-data-and-technology-consumer-survey/ accessed 6 May 2020.
4. See the OAIC's Guide to Developing an APP Privacy Policy – https://www.oaic.gov.au/privacy/guidance-and-advice/guide-to-developing-an-app-privacy-policy/ accessed 7 May 2020.
5. https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988

Karen Guerinoni

Better known as Kaz in the privacy world, Karen is a recovering lawyer who has worked in all things privacy since 2009. After dispute resolution, FMCG (including loyalty programs), Banking, Energy and even a stint as a privacy regulator, Kaz has recently joined Ashurst Consulting's Risk Advisory Team to establish a privacy risk practice to solve privacy and data protection issues in a practical and commercial way.

SO, YOU SAID YES TO YOUR FIRST IN-HOUSE ROLE: WHERE TO BEGIN?

While it can be tempting to try to jump straight into the 'doing' work and fix everything on day one, this will probably only lead to disappointment in yourself. Building a legal function takes preparation and planning before you can turn your mind to implementing processes and improvements. You will probably be walking into many pre-existing exposures and risks on day one, but it is important to remember the risks were there before you arrived, and it's unrealistic to think you can fix them instantly. Kate Sherburn, Legal Beagle at Who Gives a Crap and Krystal Kovac, Head of Legal & Compliance at Oncore share their insights.

Day 1

Meet your stakeholders and listen

Making the most of your first (few) days

So how do you make the most of your first day? Kate and Krystal both suggest spending the day listening to your stakeholders. Start by mapping out:

- Who are your key stakeholders, and what are their pain points?
- What are the expectations of the legal function? (Each stakeholder will probably have different expectations or needs.) Clarify how far your remit goes in terms of compliance, governance, and risk.
- What is the company's risk appetite?
- What is the culture of the company in terms of how people work together?
- How do the different levels of the organisation want you to communicate with them?
- Has the company previously engaged external partners (maybe a consulting lawyer)? If yes, schedule a conversation with them. It is likely they will have valuable insight into how the company runs and why work has been approached in a certain manner.
- Is there any work that you are taking over immediately? If so, what are the deadlines?

Unless you are taking over a time-sensitive operational process from day one, it can be beneficial to use those first few days to assess where the company is at and make a mental note about potential priority items to add to your timeline for major projects. Your major projects timeline is a high-level plan of projects and improvements you want to roll out over the financial year. This won't come together on day one, but it is a good idea to start jotting down any thoughts.

Practical insight

Krystal says she made the mistake of jumping in too quickly on day one and feeling overwhelmed by everything she wanted to improve. By day three, she had restructured an urgent client MSA because she felt the pressure to have everything instantly available. It took some time for her to understand that her stakeholders didn't grasp how long a particular activity would take and that it was her role to educate them on the timeframes she would need. If you are taking over a time-sensitive operational process (especially when it contributes directly to revenue), such as client contracts, prioritise keeping that process running smoothly. Once you have that under control, then you can begin your planning.

30 Days

Planning & Build Relationships

Over the next 30 days engage in as many conversations as possible with various business units for the purpose of promoting the legal function, learning about the company, and gathering your intel. When speaking with different business units, talk not only to the leaders/managers but also the operational staff. This is for two reasons; 1) the operational staff will give you insights into the practicalities (and potential risks/exposures) of their role and 2) shaping the legal function as an approachable team is paramount in ensuring that issues and risks are raised immediately.

Throughout these conversations, it is also important to identify what information or documentation is already in place and where it is stored. From there, begin pinpointing the gaps; the gaps will help you shape the timeline for your major projects.

Practical insight

Kate suggests introducing legal as a function to the broader business. She has achieved this through creating "Legal 101". As the first in-house lawyer, most people hadn't worked with a legal function before, and those that had, hadn't always had a good experience. This 'Legal 101' session explains how legal can help the business achieve its goals and when to best loop legal in. It also puts a human face to a function that can have a bit of a reputation. To be the most effective partner to the business, legal needs to be approachable, and the business won't come to you unless they know and trust you.

Legal advice

Practical advice in a form that is relevant will immediately show the benefits of hiring legal counsel. What this looks like will vary based on the stakeholders' needs. If you have a busy CEO who likes direct, to the point communication, a 15-page memo is probably the

wrong choice. However, if they love detail, a thorough memo may be perfect. The easiest way to know is to ask, but if it is not clear, provide a concise answer first and add the detail as an attachment.

It is important to keep in mind that giving legal advice is only half the job; you have also been hired to run a function. This means your advice needs to be on point, but as a leader you also need to be improving processes, contributing to strategic planning, understanding the business so that you can offer practical solutions to your advice, and planning workloads and future resource needs.

Technology

To avoid your inbox becoming unbearable, consider putting in place a way to request legal work as soon as possible. If your company operates on Slack, it could be as simple as creating a legal request bot. You could also link your bot to a platform, such as Monday.com, so that your tasks are all in one place and the broader team can find updates without contacting you. There are many ways to do this —start by looking at what systems the company has in place already. In the beginning, it doesn't need to be perfect. The aim is to declutter your inbox and provide updates to the stakeholders without needing to provide a response.

60 Days

Assess

You have spent your first month trying to meet everyone, to understand and sift through pre-existing processes and documents, and to become accustomed to the company's specific services or products. While the first month probably flew by, it is important to try to reflect on what is and isn't working. The best way to do that is to get feedback directly from the people you work with.

Over the next weeks, keep track of the pain points the business has shared and start to tackle the low hanging fruit. The quicker you can automate standard processes and implement self-service, the quicker you can turn your mind to the more difficult tasks (automating and improving will be an ongoing process). Automation and self-service will also win you some ticks of approval with your stakeholders.

Key tips to automation and self-service

- **Assess the software already available in the business.** While it may not be perfect, it's a short-term fix until you have the budget to get the built-for-purpose legal-matter-management program you dream about.
- **Accept that it won't be perfect at first.** If you can automate one step, that will go a long way towards establishing a business case for a more expensive platform. (There are many not so pretty ways to hack contract automation — as an example, if you're on G-Suite you could set up a G-Sheet to show the status of particular work items, allowing your stakeholders to check the status without needing to call or email.)
- **Map out the process to identify exactly what you need.** Once you begin the process of procuring a platform, it will become apparent how many features are available. Knowing exactly what you need (and what the broader business needs) makes this task much easier.
- **Create a knowledge base as you go.** Each time you get asked a question, note it down along with the answer. This will slowly build a self-service knowledge base for those standard/frequently asked questions. This will also make training a resource easier when the time comes. If you are running on Slack, you can even build out a bot that will answer the question for you, based on the knowledge base you have compiled.

90 days and beyond

Improve

If there's only one of you (most likely if you're the first in-house counsel), optimising your time and focusing on the outcomes that will give the business maximum value is a must. After two months in the business, you should have a good understanding of what the business needs and wants. Finding the time now to review your precedent templates and create new ones for recurring tasks can assist in optimising your efficiency. Try to make notes when you create a recurring task, as this can form the basis of a how-to manual when the time comes to hire a resource.

Strategic direction

Pause for a moment to think about the strategic direction you want to take the legal team in. Reflect on the points you began to map out from day one. Use those points as a basis to discuss with your CEO/reporting line the full remit of your function. Your goal should be to dedicate most of your time to strategic work and automate, self-serve or resource the business-as-usual tasks where possible.

Roadmaps

It can be helpful to create a roadmap of the legal function, which can encompass:

- **Present state (what the function currently does)**
- **Future state (expanding the remit of the function)** — maybe the focus at the beginning was client contracts; however, legislative reviews, employee training, company secretariat, compliance/governance etc. may need to be included in your workload)
- **Timeline for major projects** — include your major projects plan across the financial year and consider expanding it to include future state tasks with a rough timeline
- **What resources are needed to go from the present state to a future state** — consider both headcount and software
- **Include your stats** — take the time to collect how long a task takes to complete and the impact it has on the broader business. As an example, when building a business case for a contract-management system you should look at the time it takes to generate a contract. Maybe with the CMS, that contract becomes a self-service template where the client now completes 90% of the work, reducing your task to 10% as now you only need to review the final document. If the system integrates (removing the need for the operational team to input the data), measure the cross-functional saving too. Finally, don't forget to measure the decrease of risk exposure — i.e. if you didn't previously have visibility of all contractual clauses in report format, you should include that metric too.

Final thoughts

Building a perfect legal function certainly doesn't happen in 90 days and the steps outlined above are tasks that will be revisited and reviewed throughout the lifetime of the function.

- Prioritising improvement of the company's pain points (for all of your stakeholders) is the starting point to creating trust and establishing your value.
- Accepting that the processes won't be perfect and putting in interim solutions is key to continual improvement of the function.
- Understanding the business, the risk appetite, and the industry is paramount to ensuring your time is spent on the right issues, rather than the technical legal problems that may have a negligible impact in reality.
- Connect with other sole or small legal counsel teams. There is a wealth of support in this space and having a group of colleagues who understand the practicalities of running a legal function alone or with limited resources is key to success (and sanity). The Association of Corporate Counsel has a dedicated special interest group for sole legal counsel that we would highly recommend you connect with.

Kate Sherburn

As the sole Legal Beagle (aka in-house counsel) at Who Gives A Crap, Kate works in a role that she loves and for a company she is passionate about. Who Gives A Crap is a social enterprise that donates 50% of its profits to help build toilets for those in need, working towards the goal of ensuring everyone on earth has access to a toilet.

Kate Sherburn was featured in Series 1 of In-house Insiders. ACC's podcast series that's by in-house for in-house. Listen for free now: acc.com/insiders.

Krystal Kovac

Over the past two and half years, as the Head of Legal & Compliance at Oncore, Krystal has been building the legal and compliance function to assist Oncore's strategic growth plan. Legal process improvement is one of her passions, and she enjoys seeing how those improvements can assist not only the legal team but the broader business.

NO BUDGET FOR LEGAL INNOVATION? HERE ARE 10 HELPFUL TIPS

ACC Australia members identified cost and budget constraints as the key barrier to in-house innovation and deployment of legal technology. Yet, often the budget for innovation and technology falls way down the list of priorities, so where to from there?

In-house legal practice is changing. Fast. The more-for-less challenge is becoming increasingly intense. In-house clients expect easy, fast access to legal support and a pleasing user experience. Organisations expect their in-house counsel to implement proactive strategies to avoid, mitigate and manage legal risks through governance, controls and training. In response, zeitgeist savvy in-house counsel are creating and implementing new and clever ways to deliver legal services. These exciting in-house innovations not only address current in-house challenges but also help future-proof the career trajectories of their creators.

But sometimes, there is no budget for innovation and technology. What then?

1. Innovation is about people, not technology.

The most amazing and cutting-edge technology delivers zero benefit unless people use it in the real world. Entrepreneurial in-house counsel are delivering real and measurable value to their organisations using no new technology whatsoever and by repurposing the technology that is already available within their organisations. They are successful because they bring a mindset of continual growth and improvement to their in-house roles; they partner with IT, and they align and inspire their colleagues and in-house clients to support and embrace innovation.

TOP TIP:
Join the vibrant virtual community of ACC Australia's newly formed Legal Innovation and Technology special interest group at Legal Technology and Innovation | Association of Corporate Counsel (ACC) and be part of the LinkedIn conversation on how to align and inspire people on the innovation journey.

2. Innovation starts with a pain point, frustration or opportunity.

In-house counsel are brilliant at solving problems and capturing opportunities. Practical, doable solutions that support business objectives and enhance business reputation are the in-house counsel's strong suit. It is the same for innovation. Starting with the problem or opportunity enables laser-sharp focus on the options, learning and resources to deliver a solution. A fertile ground for innovation is one that has repetitive, high-volume, low-complexity legal work; this provides opportunities for the business to self-serve and improve the user experience.

*"In the wake of COVID 19, our legal team became inundated with queries regarding who in the business could sign their documents and whether our business could accept electronic signatures for different types of documents given the new and changing laws. Using Excel, I created an app called, "**Digi-Sign**", to answer these queries from across the business."*
Aussie Lawyer, International Company

"My in-house role included compliance training, usually a total snooze for the participants. I created a whole role-play experience based on the TV show 'The Office'. My clients loved it! They still talk about the fun they had and what they learned."
Aficionado of *The Office*, Sole in-house Counsel, International Company

TOP TIP:
Start with the problem or opportunity, then find the innovation/ tech to solve it.

3. Use the technology already available in your organisation.

Innovating with the technology already in your organisation is a fantastic way to start. This technology is funded, deployed and working within your organisation — three significant hurdles already cleared! Also, you already know how to use many of them — for example, Word, Outlook, PowerPoint and Excel can all be used in new ways for legal innovation.

"I use PowerPoint to create interactive documents that feel like you're using a website. Here's a 3-minute video: How to create interactive PowerPoint presentation tutorial - YouTube. My clients click to explore, which lets you store a lot of information in one place without overloading the client with information they don't need."
Corporate Counsel, Large Legal Team

"I needed to track the status and assigned actions for my procurement contracts portfolio. One of my IT colleagues helped me get started by repurposing their IT software development management technology as a contract matter management tool."
Erstwhile TechnoPhobe in-house lawyer

"We needed to implement an electronic document signature solution that would be cost-effective, intuitive, and work within our existing processes. After evaluating several popular but relatively expensive off-the-shelf systems, we realised that our existing document management software included an electronic signature module at a minimal additional cost. Implementation was simple, and change management was made easier as users already had experience."
Cheapskate In-house Lawyer, Mining Company Compliance Team

In-house counsel who have access to the Microsoft Office 365 platform within their organisations are using it to build their own legal innovations, including automation (see article on page 10), data visualisation and matter management.

TOP TIP:
Find out what technologies are already available in your organisation and investigate their functionality.
You might be surprised!

4. Innovation self-education has never been so freely available … and overwhelming.

Webinars, podcasts, publications, presentations, ACC CPD eligible events and on-demand webinars - so much is available at no cost to you or your organisation. There is no single best way to start or even a preferred route. The most important thing is to get started — and whether you realise it or not, you already have.

"I found a 1-minute YouTube video that showed how to use Microsoft Word Developer to create template documents with drop-down lists. I watched the YouTube video on one screen and followed the instructions to create my template on the other screen. The improved templates were a huge success with my clients as they could now self-serve, and I freed up one hour per day filling in contract details!"
YouTube Savvy Sole Lawyer

TOP TIP:
If you're looking for some quick wins, check out this selection of self-education opportunities selected especially for time-challenged in-house counsel Legal Technology and Innovation | Association of Corporate Counsel (ACC).

5. Innovation requires an investment of time.

Finding time to innovate and use technology is arguably the biggest hurdle for busy in-house counsel. CPD requirements provide in-house counsel with ring-fenced time to learn the theory of legal innovation, but innovation and technology skills are best acquired by doing — interacting hands-on with technology — and that takes time.

"I spoke with my direct manager and asked for her support to allow me to develop my innovation idea. It meant that BAU (business as usual) legal work might be a little slower than usual, but I pitched it as the opportunity to invest some time to free up a whole lot more time for our legal team"
Automation Advocate in-house lawyer

"In my experience, dedicating a day a week to innovate paid off in about 3 weeks when we launched a few small initiatives. In those weeks where I couldn't afford to take a whole day out of BAU work, I scheduled tech time as my 'frog of the day' at 7 am."
YouTube Savvy Sole Lawyer

Team-building days, scheduling innovation project time (hack the Google 20% Project), leveraging legal training and development, and other creative mechanisms to dedicate time for innovation are all necessary for legal innovation to flourish.

TOP TIP:
Use your persuasive skills to secure the support of your manager to invest time to innovate.

6. Innovation is not a spectator sport.

Things are changing and developing rapidly in legal innovation and technology. If you delay innovating until you're an expert, you'll never start. The best way to build capability is to select a practical project to work on — something small and achievable. Base your learning on the project, so it is focused, grounded and practical.

"COVID was a great opportunity to acquire a new skill. I decided to try learning Microsoft Forms so I could use it to get information and feedback from my team about the various locations where their documents were stored to help migrate to a new document management system. No one taught me how to use Forms. I didn't even watch any training videos. I just kept clicking around and experimenting to find out how things worked. I'm using it all the time now! Here's a 1-minute YouTube video: Create a form in Microsoft Forms - YouTube"
Erstwhile TechnoPhobe in-house lawyer

TOP TIP:
Start innovating now! The most powerful learnings come from jumping in the deep end.

7. Innovation is a team sport.

The most successful innovations are those designed with the user front and centre — human-centred design. Legal innovation is no different. Consult and involve the stakeholders and users in all stages of innovation — ideation, designing, developing, testing, deploying and modifying.

"We had everyone around the table to map all steps of our contracting process — not just the steps involving legal. Not only did we discover a variety of views about what the process actually was, we eliminated multiple touchpoints and steps that added no value; we also identified steps that could be fun in parallel to speed up the process. Because everyone was involved in the streamlining, they understood the new process, and they were excited to put it into action."
Whiteboard Wizard in-house lawyer

TOP TIP:
Involve all your stakeholders at all stages of the innovation process. Better still, inspire them to join you on the innovation journey!

8. Innovation develops new *superpowers* for lawyers.

In-house counsel, even those who feel "tech-challenged", are eminently capable of mastering tech skills. Don't be trapped into the belief that you don't have the technical capability or expertise to use technology or deploy automation. Lawyers are smart and capable of drawing on the superpowers of patience, resilience and experimentation. They also can accept an innovation that is good but not perfect. The innovation journey will involve times when lawyers may feel lost, frustrated and unable to figure out what's doing on — *why isn't this tech working?* or *what are these (IT) people talking about?* It's OK. Stay calm and carry on. The rewards are worth it …

> *"I spent the whole day trying to build my contract automation app. It still wasn't working. I kept saving new versions and trying different things. The versions were called Last Hope, Desperate Last Hope, Very Last Hope. It was almost 10 pm when finally I figured it out and the app worked. I was ecstatic!"*
> Erstwhile TechnoPhobe in-house lawyer

TOP TIP:
Patience, resilience … and turn your computer off and on again.

9. Innovation Technology can be accessed through law firms and alternative legal service providers.

Tech-savvy in-house counsel can access the benefits of legal technologies through their external lawyers or alternative legal service providers. The key is to identify when there is a value proposition to leverage tech through external service providers. And let's be honest, the plethora of available legal technology is overwhelming.

> *"I needed to place insurance to cover the risks my organisation had accepted in many hundreds of existing contracts. I was aware of a contract analysis tool that could identify and extract risk provisions from contracts and automatically put them in a table for further review. Bringing this contract analysis tool technology in-house was not an option; however, I accessed the outputs of the tool by engaging a law firm to use the technology. This enabled me to focus my time on reviewing and analysing the risk provisions that were automatically extracted by the technology."*
> General Counsel, Healthcare Sector

A general understanding of existing legal technology enables in-house counsel to identify opportunities to access tech capabilities from their external lawyers, where there is no budget for legal technology or where a special-use case exists but is insufficient to justify deployment in-house. Understanding the ecosystem of legal technology is also an investment in the future. If your organisation is not yet ready or able to invest in legal technology, that is likely to change as the business case becomes more compelling.

TOP TIP:
Have a general awareness of the capabilities of existing legal technologies — you might not need them today, but in the future…

10. Find your Innovation Community.

The best insights and ideas about in-house innovation and technology come from in-house counsel who've done it!

TOP TIP:
Join the ACC Australia Legal Technology and Innovation community, check out the resources at Legal Technology and Innovation | Association of Corporate Counsel (ACC), be part of the conversation and connect with other innovation-minded corporate counsel and share your thoughts and comments by emailing programdevelopment@accglobal.com

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Schellie-Jayne Price

As Senior in-house Counsel at Chevron Australia, Schellie-Jayne (SJ) also chairs the Legal Technology and Innovation Committee (LTIC) for ACC Australia and Senior In-house Counsel at Chevron Australia. SJ also leads TIGLS, the Legal Technology Interest Group within the Chevron worldwide organisation. Chevron was recently shortlisted for the Financial Times Innovative Lawyers Award 2021 – Asia Pacific.

LEGAL PROFESSIONAL PRIVILEGE: CHALLENGES FOR IN-HOUSE COUNSEL

It is well established that legal professional privilege applies to in-house counsel in the same way as external lawyers. That said, all in-house counsel face a range of challenges in generating and maintaining privilege — challenges that do not confront external lawyers. This article revisits the basics of legal professional privilege before analysing those challenges and considering the steps that can be taken to address them.

Legal professional privilege protects the disclosure of confidential communications made for the dominant purpose of:

- a client obtaining legal advice; or
- use in existing or anticipated legal proceedings.

The privilege is recognised both under the common law and in the uniform Evidence Acts in force across various Australian jurisdictions (including the Commonwealth). The legislation refers to it as "client legal privilege".

The privilege is a rule of substantive law and not just a rule of evidence — see *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, per Deane J.

Where it exists, the privilege belongs to the client and not the lawyer.

The rationale for the privilege was to enhance the administration of justice and the proper conduct of litigation by promoting free disclosure between clients and lawyers, to enable lawyers to give proper advice and representation to their clients: *Baker v Campbell* (1983) 153 CLR 52.

In *Baker v Campbell*, Wilson J said:

> *"… the adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and … [the] privilege … is an important element in that protection."*

The two types of legal professional privilege

Consistently with the position referred to above, the two types of legal professional privilege are commonly known as "legal advice privilege" (referred to in section 118 of the Evidence Acts) and "litigation privilege" (referred to in section 119 of the Evidence Acts).

Legal advice privilege applies to confidential communications passing between a client and a lawyer (or in some circumstances, between the client or lawyer and a third party) made for the dominant purpose of enabling the client to obtain legal advice.

Litigation privilege applies to confidential communications passing between a client and a lawyer (or in some circumstances, between the client or lawyer and a third party) made for the dominant purpose of use in, or in relation to, litigation that is either on foot or anticipated.

It will be clear from the above that, in relation to both types of legal professional privilege, there are three elements required for the privilege to apply:

- first, there must be a communication;
- second, the communication must be confidential; and
- third, the communication must be made for the dominant purpose of the client obtaining legal advice or to be used in existing or anticipated legal proceedings.

The dominant purpose test

The dominant purpose has been described as the ruling, prevailing, paramount or most influential purpose — see *Federal Commission of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416; *Grant v Downs* (1976) 135 CLR 674 at 678.

Importantly, this means that a communication is not privileged if one purpose for its creation is to obtain legal advice, but there are other equally (or more) important purposes.

An example illustrating that position is the case of *Sydney Airports Corporation Limited v Singapore Airlines Ltd* [2005] NSWCA 47. In that case:

- an aerobridge at Sydney airport, operated by Qantas Airways Limited, had malfunctioned, causing a door to be sheared off a Singapore Airlines plane;
- an in-house counsel for Sydney Airports Corporation Limited (SACL) commissioned an expert report into the incident, on behalf of SACL;
- approximately three years after the incident, Singapore Airlines commenced proceedings against SACL and Qantas;
- in the litigation, SACL claimed privilege over the expert report;
- SACL asserted that the report was commissioned for the dominant purpose of litigation, which was anticipated at the time of the commissioning;
- at first instance, McDougall J found that:
  - there were three other purposes for the report that were unrelated to litigation — namely, to enable SACL to understand what had caused the incident, to satisfy the Airline Operations Committee that the aerobridge was safe before it was put back into use, and so that SACL could ensure similar incidents did not occur in the future; and
  - while litigation was a fourth purpose for the report, SACL had not discharged its onus to establish that the report was prepared for the *dominant purpose* of litigation; and
- an appeal against that decision was dismissed, with the Court of Appeal saying (at 55):

> *"The evidence that the report was always to be deployed for non-privileged purposes, which purposes were of significance to the Claimant – particularly to have the aerobridge back in service – was such that although the privileged purpose may have been the most important single factor, it was not shown to be dominant."*

Waiver of legal professional privilege

It should be noted that, where a communication is privileged at the time of being brought into existence, the privilege can be waived.

In short, waiver of legal professional privilege occurs where the party entitled to the privilege (that is, the client) performs an act that is inconsistent with confidentiality, which is one of the three elements of legal professional privilege referred to above.

Under the common law, the leading Australian decision on waiver of legal professional privilege is *Mann v Carnell* (1999) 201 CLR 1. In the uniform Evidence Acts, waiver is dealt with in section 122.

So, what does all this mean for in-house lawyers?

There is no doubt that legal professional privilege applies where legal advice is given by an in-house lawyer in the same way it is given by an external legal adviser.

Under the uniform *Evidence Acts*, that position is confirmed by the definition of "client", which includes:

> *"a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service)"*

However, there are a few key differences between in-house lawyers and external legal advisers that can complicate the position with respect to legal professional privilege.

A close relationship with the client

Those differences between in-house lawyers and external legal advisers include:

- the fact that an in-house lawyer is, by definition, employed by the client;
- the fact that an in-house lawyer has, in substance, only one client (and it is the same client for all matters); and
- the fact that, in many instances, reporting lines are structured in such a way that an in-house lawyer reports to a non-lawyer employed by the same organisation.

In combination, these factors often have the result that in-house lawyers develop close relationships with the executive and management in their organisation. Yet, that situation can be problematic in the context of legal professional privilege.

Why? Because the privilege applies only to communications that are made in the course of a professional relationship between the client and the lawyer. In those circumstances, a critical aspect of legal professional privilege is the *independence* of the lawyer in performing his or her legal function.

In *Waterford v Commonwealth* (1987) 163 CLR 54, Brennan J explained that independence is necessary (at 70):

> *" … in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he [or she] gives or the fairness of his [or her] conduct of litigation on behalf of his [or her] client."*

The importance of independence in this context is shown by the judgement in *Seven Network Ltd v News Ltd* [2005] FCA 142. In that case:

- News Limited claimed privilege over 22 documents.
- Most of those documents were internal communications between company executives and the Chief General Counsel.
- However, the evidence showed that the Chief General Counsel was closely involved in the making of commercial decisions, including that he was:
    - a director or alternate director of six companies in the News Ltd corporate group;
    - a member of the Partnership Executive Committee, and
    - actively involved in commercial negotiations.

- In those circumstances, Seven Network contended that the Chief General Counsel did not have the independence required for legal professional privilege to apply.
- In relation to 17 of the 22 documents in question, the Federal Court agreed.
- It was held that the dominant purpose test was not satisfied because the court was not convinced that the Chief General Counsel was acting in a legal role or that the claims for privilege were based on an independent and impartial legal appraisal.

Legal vs commercial communications

Another factor that can sometimes arise for in-house lawyers but is usually not relevant for external legal advisers is a blurring of the line between legal advice and non-legal (or commercial) advice.

To a large extent, that occurs because in-house lawyers are required to perform both legal and commercial functions, rather than legal functions only. A common example is where the General Counsel of a large corporation is also the Company Secretary or Head of Risk/Compliance.

In the *Sydney Airports* case referred to above, Spigelman CJ had this to say on that issue:

> *"An in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who, in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice. An in-house solicitor may very well have other functions. Accordingly, in determining whether or not a document was brought into existence for a purpose which was both privileged and dominant, the status of the legal practitioner is not irrelevant."*

Practical Tips

Given the above, you may now be asking yourself what an in-house lawyer can do to ensure communications that are genuinely the subject of legal professional privilege can withstand a challenge to the privilege.

Helpfully, there are a few practical measures that can be implemented and that may help maintain a claim for privilege over communications by in-house counsel.

Structuring employment arrangements

Because a contract of employment contains a description of the role and responsibilities of the employee, it can assist in evidencing the fact that communications involving an in-house lawyer are privileged if his or her contract of employment emphasises the legal nature of the role (in particular, with the primary responsibility being to provide legal advice to the organisation).

Further, it is contrary to the notion of independence if an in-house lawyer's key performance indicators or remuneration/reward structure include criteria that are relevant in assessing whether the business has been financially successful (such as profit levels). In other words, if a court sees that an in-house lawyer is incentivised by the business achieving greater financial success, it may be more cautious about accepting a submission that the lawyer's advice is truly independent.

Another factor that may be critical in establishing before a court that certain communications are privileged is whether the relevant in-house lawyer has a current practising certificate. If an in-house lawyer maintains a current practising certificate, this can be of great assistance in showing that he or she is acting in a professional legal capacity.

Independence policies

If there is a policy that states clearly that the function of the in-house lawyer is to provide independent legal advice and that commercial people within the organisation should not in any way seek to undermine that independence, this may also assist in evidencing to a court that communications involving the in-house lawyer are privileged.

Reporting lines

Where an in-house lawyer reports to a non-lawyer, it can be difficult to persuade a court that the advice of the more junior person is independent and satisfies the dominant purpose test.

Therefore, where a party is seeking to establish before a court that communications involving an in-house lawyer are privileged, it is better if the relevant in-house lawyer reports to another in-house lawyer.

Of course, where the in-house lawyer is the most senior lawyer employed by the organisation (for example, the General Counsel), that won't be possible. In those circumstances, the matters referred to above (such as employment arrangements and independence policies) become even more significant.

Identifying the capacity in which any particular communication is made

For each piece of work performed by in-house counsel, it helps if they are very clear in their own mind as to which "hat" they are wearing — i.e. legal or non-legal/commercial.

To the extent that this flows through to other things (such as the job title used in an email sign-off), they should also be very clear to others on the same point.

Applying an appropriate label

Finally, although not determinative in itself, it does no harm to state in a document that its purpose is to provide legal advice (or for use in litigation) and label the document with something like "subject to legal professional privilege", where that is the case.

That said, such a label should not be applied on a "blanket" basis to all communications irrespective of whether they are privileged because, in those circumstances, it becomes meaningless. Worse, genuine claims for the privilege can be undermined by using the label on other, non-privileged communications.

Luke Buchanan

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A PLAYBOOK FOR OVERCOMING COGNITIVE BIAS

Cognitive biases are an inescapable part of being human, and they can negatively affect an in-house counsel's performance during a negotiation. However, taking their effects into account confers great advantages. As advisors to companies, NGOs, governments, and the like, it behoves negotiating lawyers to study the impact of human irrationality in decision-making and spot it when it happens to others. The effects of cognitive bias become more pronounced with higher stakes and longer-term negotiations, as more will hinge on human intuition with every decision. Creating a "negotiation playbook" to address cognitive bias can help in-house lawyers avoid the pitfalls that may otherwise occur.

Large enterprises that value consistency and transparency may wish to automate certain negotiations to minimise the risks of cognitive bias. For organisations that have less contractual risk, or that value speed, integrating an enterprise-wide approach may not be the best approach. Regardless, the ability to recognise cognitive biases is a skill that will help in-house counsel serve their organisation.

Cognitive bias

A cognitive bias is, in essence, a systematic error in thinking arising from mental shortcuts, known as heuristics, that are endemic to most human beings. Situations arise that can exacerbate one's mental shortcuts to the point where they impair one's judgement. The study of these cognitive biases has given rise to a branch of science known as behavioural economics, which studies the economic impacts of human irrationality, be it stemming from psychological, cognitive, emotional, cultural, or social influences.

Sunk cost fallacy

The amount of discretion a lawyer has for executive decision-making during a negotiation often falls to their client. While the idea of having the ability to walk away from a deal sounds inviting, it is rarely the case that one may do so in reality. The deal may simply be too important. For example, a sales team with an axe to grind may be far more powerful in the eyes of executive leadership than a lone lawyer appearing to cry wolf about the future risk of certain contractual terms. Politics and human emotion go hand in glove in frustrating a negotiator's goals.

This issue leads us to the sunk cost fallacy[1], which arises when people believe their existing investments justify further investment and cost. In the case of the negotiating counsel, it is when counsel feels pressure from internal and external forces to continue to agree to terms because "we've come too far and negotiated too long to walk away".

Say a sales team pressures a legal team to cave on a term or condition that gives the lawyer pause. Add in the pressurising factor that this negotiation has been going on for a long time and a large percentage of the sales team's P&L depends on closing this deal. What then? If one can't walk away from the deal, the wisest action is to learn from that scenario (rather than making a futile attempt to prevent it after the fact) and plan for its recurrence. Mitigation may be your most realistic tactic. While you might lose that battle, you don't have to sacrifice your wisdom to the aggression of outside factors.

To address the sunk cost fallacy, a negotiation playbook is needed to outline clear limits and guidelines regarding how much leeway a negotiator has before walking away. Some deals must be stopped to save the company from risks, be they financial, reputational, or even political. Knowing what risks are red flags — and when to pull the ripcord — may save the company great pain and loss in the long run and help decision-making.

Decision fatigue

Another dangerous and common factor is what is known as decision fatigue[2]. In one study[3], Israeli judges were observed throughout a working day to determine the likelihood of them granting paroles. The study found that prisoners seeking parole early in the morning tended to receive parole nearly 70% of the time, while prisoners who appeared much later in the day were paroled less than 10% of the time. This same group of judges was also more likely to grant paroles after a meal.

Decision fatigue leaves one vulnerable to poor decisions and may lead a negotiator to agree to terms they would not have agreed to if less fatigued or irritated. As many negotiators have experienced, a redlined contract offers an endless source of psychological drain. Every time you must decide to say yes to one term and no to another, you're using a finite resource until, as a negotiator, your mental fuel runs out.

A negotiator's patience and mental will have limits. A crafty counterparty may seize on that fatigue to soften up their opponent. The counterparty could table the vital terms and conditions until later in the negotiation. Unless one has a larger team of negotiators to share the burden, the fatigue developed by slogging through nominal terms before getting to the meat of the contract will work against an inexperienced negotiator.

To mitigate decision fatigue in contract negotiation, an effective technique is to spread out the negotiation over several sessions, limiting the time for each debate (for example, no more than three hours per session with frequent breaks for refreshments). If the counterparty works to exacerbate decision fatigue, observe how they are trying to do it: Are they asking to spend long hours negotiating? Are they allowing fewer breaks or imposing

a deadline for the end of negotiations? All these actions are strategies to pressure your side to capitulate on key terms. If this is a complex agreement, prioritise negotiating terms that are most important to you early in the negotiation. Avoid allowing the negotiation to get mired in red herrings or low-priority terms with little legal or business consequence, as these will cause both sides to develop decision fatigue.

Probability blindness

Research[4] shows that humans do not naturally see and understand probability despite the cornucopia of resources available. To see and understand probability requires training and practice. When we were not living together in sophisticated communities, generally accepted theories state that we used heuristics to survive in the wilderness rather than an understanding of mathematical probability. That is, a caveman probably did not sit and calculate the movement of a deer before attacking.

In our current world, this blindness to probability tends to harm us and manifest itself in numerous ways. For example, think of how many people drive like maniacs yet are scared of aeroplane turbulence, even though the former has a far higher probability[5] of fatality than the latter. Three probability-blinding cognitive biases are particularly interesting for contract negotiations: optimism bias[6], subadditivity effect[7], and gambler's fallacy.

Optimism bias

Optimism bias causes us to underestimate gravely the probability of bad outcomes. By allowing a counterparty generous rights to withhold payment, a negotiator for a vendor might be grossly underestimating how badly things could go if the company has to sue the customer.

According to research[8], having an outside view will help overcome the overly optimistic views of a team embedded in the project — because optimism bias will not take hold as strongly for an outside team. The outside team could prepare a checklist and think of a "premortem" — a thought experiment[9] that involves running scenarios in which events transpire poorly.

A key strategy is to adopt a standing or ad hoc human committee approach. Such a committee needs to consist of the right balance of members, however. Too many invested members would result in optimism bias while too many objective members would result in a committee that is aloof to on-the-ground concerns such as time sensitivity and P&L.

Subadditivity effect

The subadditivity effect is the human tendency to judge the probability of the whole as less than the probabilities of the parts. If a negotiator is addicted to executing a higher number of contracts, instead of managing overall risk, the risk for the entire contract portfolio will gradually increase; and the negotiator may not notice.

Gambler's fallacy

Gambler's fallacy is when humans erroneously believe that past events affect future probabilities. For example, flipping a coin and having it land on heads six times in a row does not mean the seventh coin flip will have a higher probability of landing on heads.

By applying these principles to contract negotiations, it's easy to imagine problems compounding. A negotiator will tend to have an optimistic outlook that not a single contract will ever be subject to a civil suit or investigation, even if the negotiated terms were suboptimal. With such an assumption, a negotiator will not see the mounting risks as more and more contracts with more risks are added.

As the negotiator's client company grows more successful, it is likely that the number of contracts in its portfolio increases. As the years go by without any lawsuits filed by the negotiator's client or counterparties, a negotiator will assume all is well and not change their behaviour or style of negotiation. But, quietly and insidiously, the likelihood of risk has increased across the portfolio. Every day that passes with the accumulated risk, the company rolls the dice, like driving long distances without a seatbelt.

Hindsight effect

The hindsight effect is another common cognitive bias, which provides explanations after the fact for why an event was predictable.

Many negotiators think about one single contract at a time. This is because humans generally ignore the ever-increasing chance of a negative legal event if they can't perceive it. If each executed contract independently bore a 1% chance of having a costly legal consequence throughout its term, then having 99 active contracts at a time versus three active contracts massively increases the overall risk borne by the organisation, with the former having a far higher probability of a negative consequence in the near term.

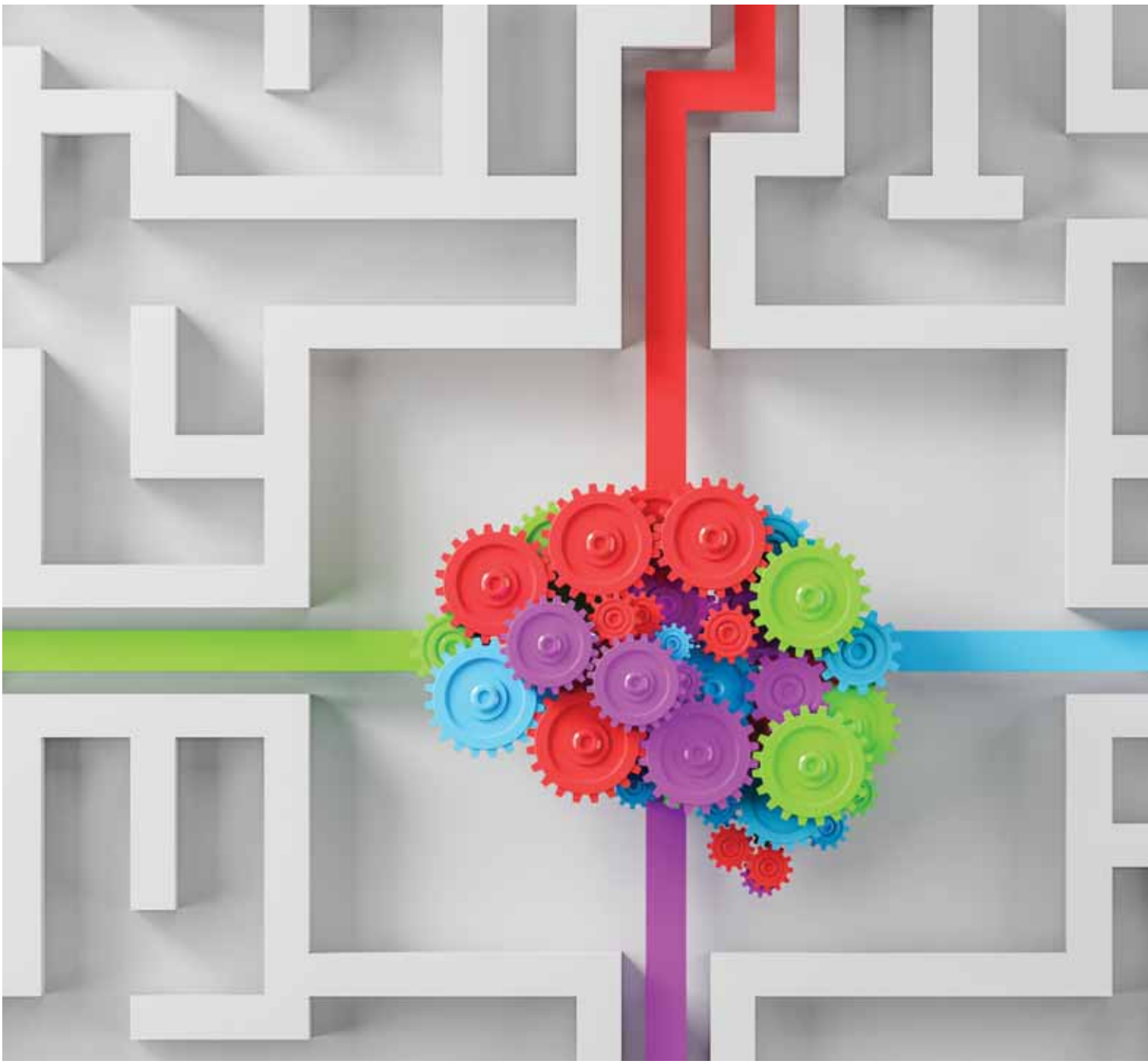
A negotiator will likely not look back at all the contracts they have negotiated over the last three to five years, for example. Nor is there, by default, a watchdog or contract administrator within the company to oversee said risks as they compile over time. Even if there is a watchdog group within the company, what metrics of risk probability is it applying to the portfolio of executed contracts?

Imagine a scenario in which a negotiator consistently allows a counterparty to insert terms that permit the counterparty to sue the negotiator's client many times above the value of the contract itself, and the governing law allows such terms. While not a single contract may ever be litigated, with enough contracts and enough risks present, something is bound to blow up. Under these conditions, there is the spectre of a Black Swan[10] event, in which an outlier event, which carries extreme risk, occurs. This event is justified retroactively by the hindsight effect. Blame is then thrown around without the hurt party understanding why this phenomenon occurred in the first place. This is "risk creep", a situation in which a company's overall contractual risk increases over time but is invisible to all concerned parties. Hindsight, as they say, is 20/20, though not particularly useful if a costly legal catastrophe has already occurred.

Hyperbolic discounting

Another cognitive bias is hyperbolic discounting, which is an ever-present human tendency to take a reward today rather than a much greater reward in the future.

Sales teams and other stakeholders tend to exacerbate hyperbolic discounting[11]. Explaining to a sales team that contract negotiations ground to a halt because the counterparty introduced key risks into the contract is a near-impossible task. Factor in commissions and the fact that a salesperson's job is on the line, and you have a potential recipe for disaster.



Having a whole team with that same mentality multiplies the problem. Sales teams are incentivised to deliver in the short term and count their commissions with quarterly figures. They have neither the luxury nor bandwidth to propose questions of long-term risk. The sales team is rarely penalised directly for accepting risks long term, only for failing to "make their numbers" for a short reporting period.

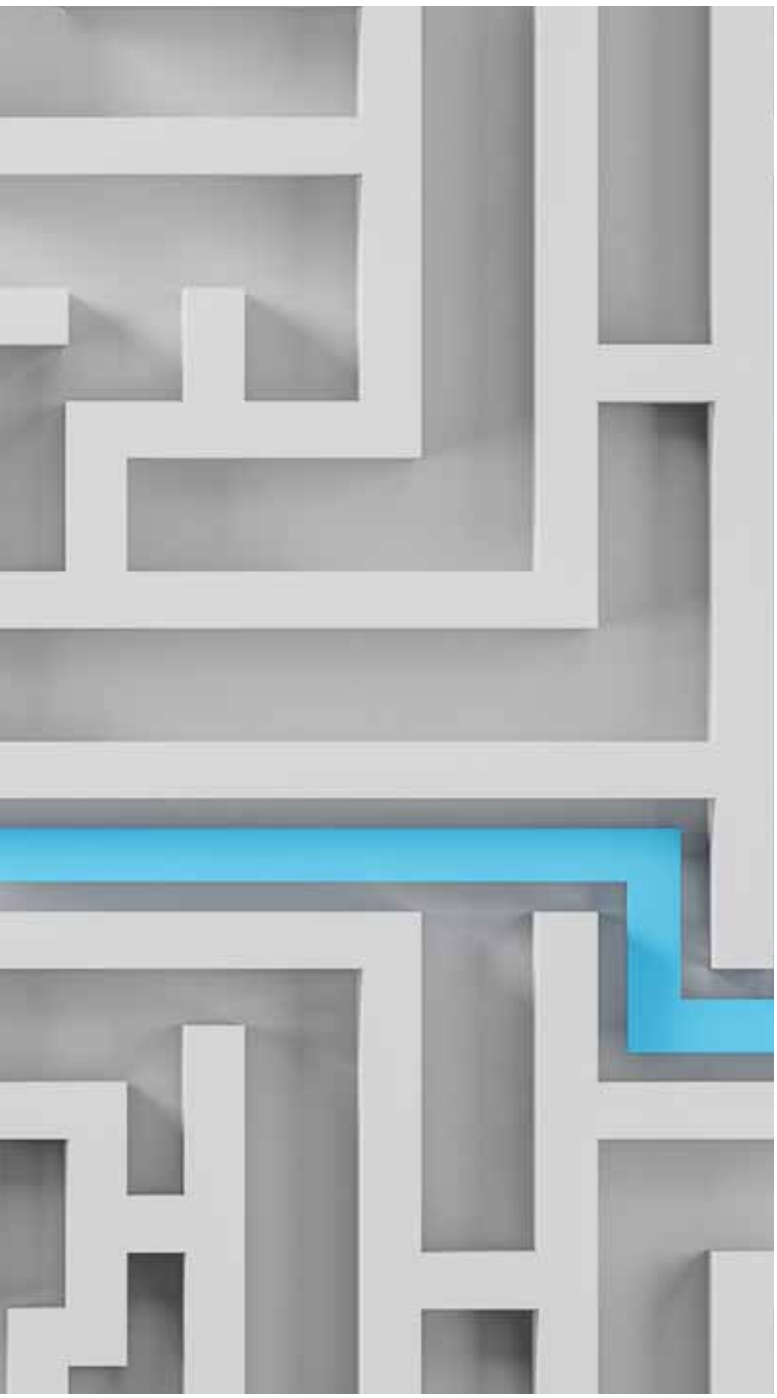
Overcoming cognitive biases in contract negotiation

Moving from being a transactional negotiator concerned with getting one contract to execution to a more systemic negotiator who sees the larger enterprise-wide risks and rewards is the first step to overcoming cognitive biases.

A negotiation playbook can counteract hyperbolic discounting, probability bias, and other cognitive fallacies. By using the playbook's strategies, one implements a "tripwire" to allow long-term logical, algorithmic thinking and planning to overcome "heat of the moment" decision-making. The playbook should include a set of terms that are ideal positions and non-ideal but acceptable compromises.

An overarching contract negotiation playbook can provide anchors and guardrails. A playbook will require approval by one or more executives within the organisation. This jointly created playbook will serve as guidelines for all negotiations of a certain type and has buy-in from the stakeholders, who will be less likely to contradict the strategy they helped create and support.
In such a case, deviations from the playbook would go to predetermined decision-makers within the organisation who have the executive authority and expertise to proceed if the negotiators do not. Human intervention in the application of the playbook should only occur in instances that are unprecedented in the life of the company, as the playbook should be based on the collective knowledge and experience of the company's legal team. The value of a playbook is not only in mitigating the power of cognitive biases and psychological pressures but also in being a risk-mitigation strategy for an entire contract portfolio.

Whether one takes a standing or ad hoc human committee approach, or the more algorithmic and mechanical playbook approach, having a



clear and objective weighted scoring system for a contract's overall risk factor can be a way to further mitigate cognitive biases from creeping into decision-making. By assigning an objective, predetermined risk value to certain changes in contractual terms, a legal team may be able to diagnose the contract's overall risk factor quickly. For example, an unfavourable Limitation of Liability clause would have far more weight for a certain type of contract than changing the governing law between similar jurisdictions.

(EXAMPLE: accepting 10 times the value of the contract = -200 points or -20 points per multiple of the value of the contract)

(EXAMPLE: changing the default State [Virginia] to [Maryland] = -10 points).

More maths means more logic and less emotion. It gives a legal reviewer a chance to step back and look at the whole contract as a snapshot of risk. It may even be possible to build a "contract portfolio risk index" to see if there is a systemic drift towards more risk.

In the end, managing risks while factoring in human cognitive biases is a difficult task and a tough balancing act. Sales and legal teams need to work together to understand the visceral urgencies of the other side and come together to present a united front to the counterparties in every negotiation. Depending on the size and risk appetite of your organisation, automating certain decisions and making systemic strategic calculations can serve the client well and streamline successful negotiations for the long term.

CHEAT SHEET

- **Cognitive bias.** Mental shortcuts can impair the judgement of contract negotiators and put contracts at risk.
- **The long haul.** When contract negotiations take a long time, some lawyers are willing to cut corners and endanger the deal to wrap it up faster.
- **Future.** Over time, considerations of compounded risk and reward must be made to avoid fallacious negotiations.
- **Playbook.** Biases can be avoided by creating a playbook of strategies to protect contracts from unnecessary risk. [a]

Footnotes

1. https://www.sciencedirect.com/science/article/abspii/0749597885900494?via%253Dihub
2. https://www.researchgate.net/profile/Jean-Twenge/publication/237738528_Decision_Fatigue_Exhausts_Self-Regulatory_Resources_-_But_So_Does_Accommodating_to_Unchosen_Alternatives/links/554b9ee40cf21ed21359ccbd/Decision-Fatigue-Exhausts-Self-Regulatory-Resources-But-So-Does-Accommodating-to-Unchosen-Alternatives.pdf
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Dean Dastvar

Now serving as Senior Corproate Counsel at Autodesk, Dean has over 14 years of in-house legal experience across the government and private sectors. With a keen interest in commercial contracting, Dean also serves as Adjunct Professor of Law – Government Contracts at Washington and Lee University.

An original version of this article appeared on www.accdocket.com

UNTOUCHED TERRITORY: BARRIERS FACED BY FOREIGN QUALIFIED LAWYERS IN AUSTRALIA

For an industry that strives to be associated with diversity and inclusion, the challenges commonly faced by Foreign Qualified Lawyers (FQL) when trying to gain a foothold in the Australian legal sector are significant. Overcoming these challenges starts with a conversation involving all sides of the issue.

Early last year, she arrived in Sydney with glittering hope. She was internationally trained in the law, had spent a few years working as a lawyer in her home country, was eager and job-ready. When admitted as a lawyer in the Supreme Court of NSW, she felt a sense of pride. However, she couldn't help feeling inadequate when she witnessed other applicants being 'moved' by a father, mother or another close relative. Although English is not her first language, and she is the first in her family to be a lawyer, this achievement is relatively minor as she joins the sea of overseas migrants who are 'overqualified' and 'unrecognised' by the Australian workforce.

Cold calling and emailing recruiters, she is eager to get into the legal industry but quickly realises how naïve she has been to think that it will be an easy transition. She is not a fresh graduate, yet her accent sticks out as if she were 'fresh off the boat'. Like many other international students and foreign qualified lawyers, her savings quickly dwindle, and she is left with no options but to accept part-time jobs while juggling her studies. Working in a supermarket, she meets many other overseas-educated international students and migrant parents, some highly qualified with double masters, even PhDs. These highly skilled migrants are pushing trolleys to make ends meet, in the hope that 'this' is just a transition phase to 'a better life'.

The story of how highly skilled migrants end up in low-paying work is not new. In 2019, an article published in ABC News[1] covered this issue in relation to doctors and engineers working as taxi drivers. Unfortunately, this is not just the story of a 'girl with glittering hope' but is the story of many skilled migrants in the legal industry and their sheer grit and resilience to build a new life in Australia. It is another sobering story of the barriers and the challenges faced by foreign qualified lawyers who aspire to enter the Australian workplace in their chosen profession.

Foreign Qualified Lawyers or Internationally Trained in Law – what's the deal?

Like many professionals, the path to qualifying as a lawyer is a rigorous one. The basic criteria are: possession of relevant academic qualifications, completion of practical legal training and work experience, and ability to meet the English-proficiency test requirements. However, it is naïve to think that meeting these criteria is all that matters. The legal profession is one of the oldest professions, yet it remains an 'elite' one. One often wonders, is it reserved for certain postcodes, Anglo Saxon names, blood relatives of a referral, or locally qualified lawyers with local experience?

The term 'foreign qualified lawyers' ("FQL") or 'internationally trained in law' ("ITL") is used to collectively address a group of either (1) lawyers qualified in a foreign jurisdiction; or (2) internationally educated law graduates.

Challenges faced by FQL

1. No Australian experience

'How can I get local work experience when no employers are willing to accept me or give me a chance?' The difficulty in securing local work experience is a crippling pain. Unsurprisingly, most employers prefer prior local work experience in Australia and tend to recruit from a pool of local talents.

There are foreign qualified lawyers who have completed their studies and may have worked in the law in another country before immigrating to Australia. Many of these have years of seniority and have built a considerable reputation in their home country in their area of practice. However, their prior experience is often fully discounted — even disregarded. They are either dismissed as 'overqualified' for a legal support role or 'disqualified' because they do not have the relevant post-qualification experience acquired in Australia. Thus, they make a living example of 'the chicken or the egg' problem.

Compare this situation to the Australian law school students, who are much better positioned. Usually, the university placement cells work hard to ensure that their students have secured work placements or legal support roles during their early years of study. Consequently, often these law students end up securing work placements with top-tier employers before they graduate. As for those Australian students who have gone overseas and graduated from a non-Australian university, they may not have the same networking opportunities, but they have either grown up in or understand the Australian culture, making them an easy 'fit' for employers.

2. Visa and other practical issues

Some FQL are restricted to working 40 hours a fortnight (if on a student visa); others are on temporary visas, making them less desirable candidates.

The problem is twofold: lack of permanent residence plus lack of financial means to keep looking for legal roles. Without the opportunity to enter the legal market, many FQL — being the first-generation immigrants or primary caretakers of their families — are forced to take other jobs to support themselves or their families. With the burden of having to make ends meet, many of them see their dreams fade before them.

Another issue is the absolute disregard for the overseas experience, despite the major work experience and transferable skills acquired in their law practice in their home countries.

> Subhashree Sundar says, *"Having acquired a legal education from the UK (Common Law Jurisdiction) and having gained substantial legal work experience in India and Singapore (again Common Law Jurisdictions), we were not regarded as having sufficient transferable skills, which made it difficult to leverage the multicultural and diverse experience and to break through the legal market in Australia."*

In many cases, FQL put themselves in vulnerable positions, subject to unhealthy working conditions — underpaid or unpaid work. This is an unfortunate reality of the competitive legal market in Australia.

We are job-ready!

To address the employers' concern about whether FQL or ITL is a good 'fit', one must understand the requalification process that FQL are required to complete to practise law in Australia. We need to create more awareness among employers and recruiters so that the requalification process is afforded as much seriousness and dignity as other local qualifications.

Requalification process:

1. 'Localising' the degree with Academic Assessment — FQL must have their qualification assessed by the Legal Profession Admission Board of the relevant State or Territory of Australia. Some undergraduate subjects need to be done to 'localise' the degree before admission. This may take from one to four years. The assessment is made on various factors such as the country where one qualified (commonwealth vs civil law), the credibility of the university where one graduated, the time of graduation, the subjects undertaken, and the grades earned.

2. Completing the Practical Legal Training (PLT).

3. Australian work experience — Despite the prior legal experience outside of Australia, part of the PLT course component requires local Australian experience.

4. English-proficiency requirement — To satisfy the relevant Legal Admission Board of English proficiency, one is required to take the International English Language Testing System ("IELTS") academic test, or another English-language test as required by one's Legal Admission Board.

5. Admission process and obtaining a practising certificate — This process is the same for local applicants seeking to be admitted to practise law.

After completing the lengthy and expensive requalification process, FQL are already localised — that is, updated with local laws, 'job-ready', eager to offer their unique skill set to employers.

> Yama Choezom says, *"I was ready. All I needed was one chance to prove myself and show how willing I was to learn and work hard. I got an opportunity as a paralegal in a law firm, and I proved I could survive even through the pandemic when the law firms were downsizing the headcounts. There is no looking back now. It seems all I needed was ONE CHANCE."*

Why should FQL be considered?

Foreign qualified lawyers are gritty, resilient, and have demonstrated that they are willing to learn. They have moved to a new country, adapted to a new culture and have undergone tedious requalification. They are highly adaptable and flexible. In most cases, these lawyers are multilingual, which is advantageous for employers with a global presence and the need to represent a more diverse group of clients.

With an international background, transferable skills and experience, multilingual capability, willingness to learn and a fresh perspective, isn't this package a good 'fit' for the job?

FQL Initiative — We are here to help!

The FQL Initiative is an initiative of the FQL Subcommittee, currently part of the NSW Committee of the Asian Australian Lawyers Association. It was founded and is chaired by Kripi Bhatt, who herself is an FQL. Having gone through the same struggles and received hundreds of rejections before she entered the legal industry, Kripi resolved that once she reached the other side of the tunnel, she would work towards creating a support network for FQL and raise awareness of this issue. Surprisingly, this issue had never been discussed in Australia at a large forum until she held her first event in 2019, which received overwhelming support.

Kripi founded the FQL Initiative with the support of the NSW Asian Australian Lawyers Association and Gillian Woon, a Senior Associate at Baker McKenzie. The FQL Subcommittee, which currently consists of 15 members, envisions creating a platform for FQL to help them be more job-ready by gaining the skills to integrate into the Australian workplace environment. It also aims to provide a support network for FQL to connect, share resources and seek guidance and mentorship.

The FQL Subcommittee welcomes all interested people to join this cause irrespective of their backgrounds.

Conclusion

Diversity matters in the legal profession, but do employers really embrace it?

Embracing difference should not just be a banner to wave in Corporate Social Responsibility projects; it should have an impact on the bottom line. Through this article, we aim to initiate this unprecedented conversation by deliberating on the extraordinary challenges faced by foreign qualified lawyers.

The responsibility runs both ways. On the one hand, it rests on the FQL to have a growth mindset, project confidence, improve their skill sets, seek mentorships and integrate into society (without masking their differences). On the other hand, it rests on employers to have an open mind and be prepared to give opportunities to FQL, based on their relevant transferable skills. But currently, it seems, FQL are singlehandedly carrying this responsibility.

We, the legal industry as a whole, must pick up our pace and match countries like Canada and the United Kingdom, which are already actively supporting FQL. We should identify more systemic ways employers can make a difference and the programs, policies or position descriptions required for the job environment to be made more inclusive. It should be fundamental to business strategy and become part of every legal business because 'unity is in diversity'.[1]

Footnotes

1. https://www.abc.net.au/news/2019-10-31/migrant-experience-of-work-australia-talks/11600862

Kripi Bhatt

As in-house legal counsel at CPB Contractors, Kripi is particularly passionate about cultural diversity and extending peer support to FQL who are seeking to re-qualify in Australia and in need of professional guidance. Kripi has steered the creation and is the chair of, the FQL Initiative under the NSW Branch of the Asian Australian Lawyers Association.

Kripi Bhatt was featured in Series 1 of In-house Insiders. ACC's podcast series that's by in-house for in-house. Listen for free now: acc.com/insiders.

Aivee Chuan

Having achieved an LLB from the UK and a Certificate of Legal Practice in Malasyai, Aivee is 'koalified' as a lawyer in Australia. She is experienced in reviewing and drafting technology services contracts and is a passionate innovation enthusiast.

MANAGING JUNIORS AND NEW JOINERS IN THE "COVID NORMAL"

Managing junior members and new joiners to your team is a well-known and well-documented business challenge — but doing this in an entirely remote setting is a whole new ballgame. Since March 2020, most companies have had little to no face-to-face meetings, and many employees are yet to even set foot in their office. This presents managers with new challenges and opportunities.

While a large part of Lawyers On Demand's (LOD's) workforce has been remote for over a decade, we've typically found that our more junior lawyers and paralegals have predominantly worked in the office. Now that this isn't possible, we've been doing a lot of thinking about how best to support this group. As a result, we've prepared a guide on best practice for the remote management of juniors and new joiners.

As well as drawing on our expertise, we spoke to leading General Counsel, thought-leaders and paralegals across Europe and the Asia-Pacific. We married their feedback with organisational management thinking from leaders in institutions like Cambridge, MIT and Harvard, distilling their advice into six categories:

1) Think about the width and depth of your communications

We have more communication channels than ever. Just think about the notifications you receive on an hourly basis — texts, emails, phone calls, social networks, and instant messages (like WhatsApp, Slack or Teams). Then add in the burgeoning demands of video conferences across multiple different platforms. Our communication landscape is so fragmented that you can easily get lost in the sea of options.

To combat the communications confusion, you might consider a "comms playbook", sometimes referred to as "rules of engagement". This will provide your new joiners with a clear reference on "when to use what", tailored to your organisation. Email might be for substantial matters or with external parties; Slack might be for communicating with different business functions (like IT or finance); and WhatsApp might be for more casual or social interactions. This will be equally helpful for juniors, who've spent a lot less time working in businesses than the senior members of your team. This may even be their first professional job.

> *"One GC told us that she sets her communication expectations with new joiners straightaway — on a day full of meetings she wouldn't respond to email, but she can respond to more urgent requests over Teams, for example."*

You also need to consider the impact of the richness of communication. A glib assumption that people make is that the more high-fidelity the communication, the better. And in some ways, that's true. Video does enable us to communicate with body language. But this doesn't immediately equate to better. As Assistant Professor Ella Hafermalz said on our LODcast on remote work, sometimes low-fidelity is a better option — it doesn't invade so far into our home lives. There is a balance to be struck here, but don't assume that video calls should be the default medium.

> *"Another GC we spoke with talked about a weekly check-in with his team where everyone was encouraged to dial-in only and go for a walk. It was surprisingly effective in boosting not only morale but also engagement during the meeting itself."*

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2) What structures are you giving them?

This is about providing your juniors and new joiners with clarity about what you want. Particularly early on in a new relationship, the less left to chance or assumption, the better. Tell them how you want it delivered (format), when you want it by (deadline) and the kind of information you expect to receive throughout the task, project or matter (updates). One easy way to ensure you've been understood correctly is to get them to playback the instructions.

Part of providing structure is giving them the flexibility to work in a life-friendly way. Often our minds jump straight to the difficult balancing act many working parents and carers must manage, forgetting that many juniors are in tricky home situations because of COVID. Living in a cramped flat-share means back-to-back video calls can be a real challenge — not just on the communal internet bandwidth but also because of the human fatigue that accompanies long video calls held from inside someone's small bedroom.

> *"One GC introduced 15-minute bi-weekly 'huddles' to quickly align, prioritise, delegate (including upwards delegation) — but also to reduce longer, more draining meetings."*

Early on, it's likely your new joiner or junior will have a lot of questions. There are a couple of strategies here you might want to adopt. If you are managing a team of juniors, you might consider setting up an hour a week as a time you're available for any questions or consultation. Another strategy that you should consider is assigning them a buddy. This should not only allow your new joiner or junior to ask questions more freely but also allow you to focus on other priorities. The buddy system has been established as a key element in successful onboarding and a way to boost productivity.

3) Training & development 2.0

One of the biggest concerns we're hearing from the market surrounds how juniors can grow and develop outside of the office environment. As a profession, the law has been comfortable with how it trains juniors. You bring them into the office and present them with some structured, formal training, but the bulk of the learning is done in situ: sitting with seniors, learning from colleagues and taking part in some client-facing work. The concern here is around the degree to which this is replicable in a virtual environment. But perhaps the problem needs to be reframed — it's not the degree to which you can replicate that experience; it's finding the best way to train juniors in a digital environment. It's the time to reimagine, not re-create.

In some respects, parts of your training program should become easier. Getting your juniors involved in the more strategic discussions is easier than before — for example, they can dial into client calls or senior leadership meetings as silent members with ease.

> *"One Head of Legal found it easier to take trainees and junior lawyers to senior-level meetings because they could join on Zoom with their camera and microphone off — something perhaps a little easier than them sitting in traditional physical meetings. This meant they could attend a wider variety of matters than before."*

Spend time to put pen to paper on your training and development policy. It should be a key part of your formal talent management strategy — something covered in detail in our recent report with Terri Mottershead – *Building the next in-house legal team.*

4) Culture is more than your statements

Culture is not a list of value statements. It is not a ping-pong table or a SodaStream. Put simply, culture is the quality of human experience and connection. Culture lives through people's interactions, so your focus should not be on aspirational declarations but on how your people are interacting with one another. Focus on creating a knowledge-sharing culture — a place where people feel encouraged to ask questions, share insights and collaborate without hesitation. Without the physical proximity of working in an office, this is easier said than done. Leadership here can often be done by role-modelling the virtues you want to see — ask questions, share what you're working on and show them your multidisciplinary workstreams.

Beyond the encouragement of an open, knowledge-sharing culture, think about asking your juniors and new joiners what support they're after. This can help provide grassroots-style self-organisation and greater buy-in from them. It's also one of those things that is so obvious it often gets overlooked. Some of the best ideas can come from juniors and new joiners, who can offer a fresh perspective — so ask them what they think!

At LOD, we have been using a "Random Buddy Generator" for our HQ staff since the start of COVID, and it's been enormously successful and even praised by Professor Heidi Gardner on her guest appearance on our LODcast on remote work. Beyond the onboarding buddy mentioned above, you might think about randomly pairing up your remote workforce with a buddy on a weekly or fortnightly basis. This is even easier now with innovations such as the Icebreaker-Bot for Microsoft Teams, which essentially automates the process of allocating a buddy and setting up a meeting time.

5) A genuine focus on well-being

You need to go beyond platitudes and offering an EAP (employee assistance program) helpline. You need to check in on your juniors and new joiners proactively and regularly. You don't need an academic journal to tell you that if your workers feel ignored, they won't perform their best.

> *"One of the paralegals we spoke to felt ignored during the first few weeks of the lockdown. A lot of her work was cancelled, and she wasn't invited to internal calls and meetings. If she didn't have work to do, no one spoke to her."*

To combat any feelings of abandonment or isolation, we recommend a multi-pronged strategy: weekly check-ins, buddy systems (as mentioned earlier), wider corporate social activities, and ensuring they always have someone to talk to about how they're getting on. Another part of the strategy is to provide your workforce with mental health days and to take the lead in encouraging healthy and sustainable working practices.

"One of the paralegals we spoke to felt ignored during the first few weeks of the lockdown. A lot of her work was cancelled, and she wasn't invited to internal calls and meetings. If she didn't have work to do, no one spoke to her."

6) Opportunities and risks

The COVID crisis, like many crises before it, offers us both challenges and opportunities. It's clear from speaking to the market and reading more widely that the first reaction is to ensure the well-being of your team. One of the biggest risks for your juniors and new joiners is to feel abandoned or isolated — and ultimately disengaged from your team.

It's important to remember the real opportunities that can present themselves. Reverse mentoring has been growing in popularity across the board, and one of the General Counsel we spoke to found it a neat way to 'kill two birds with one stone' — help your juniors network and learn from seniors, while also helping those more-experienced practitioners with their issues, often technology-based.

Conclusion

Out of sight cannot mean out of mind. With your workforce working remotely, it's vital to ensure your newest and most junior team members are properly supported. Hopefully, this has helped provide structure for our thinking and some practical and actionable points.

Paul Cowling

With responsibility for LOD's Australia business, Paul has worked both within and alongside the legal profession throughout his career. Prior to joining LOD, Paul practiced as a commercial disputes lawyer in both London and Hong Kong, managed the legal teams of two global recruitment organisations and headed up an Australian legal project management business.

ACC GLOBAL UPDATE

ACC Supports the Uluru Statement from the Heart

In February, Tanya Khan, ACC Vice-president and Managing Director, APAC, issued an open letter to Prime Minister Morrison supporting the Uluru Statement of the Heart. The statement calls for a 'First Nations Voice' in the Constitution of Australia and a Makarrata Commission to supervise agreement-making and truth-telling between governments at all levels and Aboriginal and Torres Strait Islanders.

"The ACC Australia Board unanimously supports speaking in favour of the Uluru Statement and our ACC global leadership is also overwhelmingly supportive of this action," she said.

"Many of our member organisations are actively seeking ways to support Indigenous and Torres Strait Islander employees, customers and vendors as part of their business-critical sustainability activities and because it is simply the right thing to do. ACC is encouraging all of our members to support a referendum for the adoption of the requests in the Uluru Statement."

Ms Khan's letter is available here.

A podcast that's by in-house for in-house

In-house Insiders is a podcast produced by the Association of Corporate Counsel (ACC), featuring in-depth discussions with some of the most interesting in-house legal professionals in Australia.

Hosted by Mei Ramsay, Group General Counsel at Medibank, each episode introduces a new in-house counsel, as we dive into their stories, hear about the challenges they've overcome and the lessons they've learned that have defined their careers.

In-house insiders is available for free on all major podcasting platforms or visit the website for more information here.

ACC's Data Steward Program

ACC's Data Steward Program (DSP) is the legal industry's first and most comprehensive data security evaluation and accreditation program specifically designed for law firms and their corporate law department clients.

Officially launched at the end of 2020, the program creates a standardised framework for assessing, scoring, benchmarking, validating, and accrediting a law firm's stance towards client data security. The DSP also enables secure and easy sharing of this profile with the firm's current or potential clients.

The program, designed by working groups of law firm and in-house counsel, leverages controls from existing data security frameworks (e.g. NIST), but it customises the control selection, available responses, arrangement, and compliance metrics to meet the specific needs of law firms, delivering both questions and reports in an easy, online platform. A set of charter law firms — ranging from AmLaw 50 to small boutique firms — is already signed up and completing their first Data Steward assessment, some working in partnership with key clients to do so.

There are two evaluation tiers for law firms to choose from within the DSP. Tier 1, the DSP Core Assessment, allows law firms of all sizes to assess their information security capabilities and demonstrate to clients the measures they take to protect confidential data through the online, secure platform. DSP Tier 2 offers confidential, independent validation of the law firm's self-assessment by third-party industry experts, resulting in the award of an "ACC DSP Accreditation" upon meeting threshold requirements.

"Mac Murray & Shuster was the first law firm to participate in the ACC's Data Steward Program," said Michele Shuster, Managing Partner, Mac Murray & Shuster. "The streamlined SaaS interface and industry-standard NIST security controls allow our firm to demonstrate, to current and future clients, the measures we take to protect their confidential data. M&S recognises the competitive advantage this will give our firm: it will level the playing field so our clients will not have to worry about our firm's technological expertise but can focus instead on the calibre of our attorneys."

For additional information and a detailed explanation of the program's processes, please visit the Data Steward Program website here.

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