THE ETHICAL VOICE

- Rabia Siddique: How do we live an ethical life?
- Avoiding the ethical perils and pitfalls of big data
- The climate for whistleblowing
Trusted by major businesses in complex commercial transactions & disputes.

www.jws.com.au
Features

8  How Do We Live an Ethical Life in the Face of Global Upheaval?
10  A Case Study: Earthcoreco and Bleuline
14  Avoiding the Ethical Perils and Pitfalls of Big Data
17  The Rise of the Product Team: What Can Lawyers Learn From the Digital Economy?
18  Corporate Social Responsibility – Why and How Can In-House Lawyers Play a Role?
20  Beyond Compliance
22  The ACC Australia In-House Lawyer Awards
24  Ethical Decisions in Business
26  Social Media Ethics
28  Facilitation Payments: Are Your Organisation’s Policies Aligned with International Expectations?
32  Walking the Tightrope – Managing Conflicts of Interest Internally
34  The Climate for Whistleblowing: Climate Deterioration Will Challenge the Courage of Corporate Lawyers
39  10 Fundamentals of a Best Practice In-House Legal Team

Regulars

4  President’s Report
5  The Ethical Voice Perspectives – Jonathan Fenwick
6  The Ethical Voice Perspectives – Brian Salter
7  A Day in the Life – Justin Coss
39  ACC Global Update
41  Member Organisation Changes
42  ACC Australia New Members
PRESIDENT’S REPORT

Gillian Wong
National President

I’m delighted to introduce the theme of the Ethical Voice for this issue of Australian Corporate Lawyer magazine. This theme explores a range of ethical issues surrounding the in-house profession including whistleblower protection, the ethics of social media, ethics and climate change and corporate social responsibility.

I’m pleased to announce that the 2017 ACC Australia Mentoring Program will be the biggest yet. I’m personally proud of this fantastic program and I really believe it is a leader in our industry. I’m also proud of how the program demonstrates our members’ commitment to ‘give back’ and serve our sector to help others grow and develop their in-house careers.

Through this program we look forward to not only facilitating the preparation of another generation of in-house leaders, but also providing their more experienced peers with the opportunity to learn through their mentees. The official launch of our 2017 Mentoring Program will take place for participants on Friday June 30, 2017.

In what is a particularly busy time of the year, I’m pleased to announce that the call for nominations to the 2017 ACC Australia In-House Lawyer Awards will open Monday July 03, 2017. These annual awards are the only awards program dedicated solely to the in-house profession and the only awards judged solely by in-house professionals. I encourage you to read the feature in this issue highlighting some of our past award winners and I strongly encourage you to consider nominating yourself, a colleague or your team for these prestigious awards. The 2017 ACC Australia In-House Lawyer Awards will be presented to individuals who have achieved extraordinary success from innovative and effective practices and added significant value to their respective organisations. Applications will remain open until Friday August 18, 2017.

Speaking of the awards program, we’re also turning our attention to the most important event in the corporate counsel calendar, the 2017 ACC Australia National Conference & In-house Lawyer Awards. To be held from November 15 – 17 this year in the red centre, Alice Springs, the Alice Springs Convention Centre, with its spectacular views of the MacDonnell Ranges, the venue will be transformed into a dedicated hub for in-house counsel to learn and network. This annual event offers two and a half days of programming including concurrent streams tailored for in-house counsel at different stages in their careers. Attendees will have the chance to meet and mingle with their peers, browse the trade show and attend the celebratory dinner for the formal announcement of the 2017 ACC Australia In-house Lawyer Awards.

Events are a central component of ACC Australia’s member services. Recent events focused on a range of topics from Uberisation – what does the modern workplace look like? to Managing disputes in Asia. At these events, attendees were provided with a unique opportunity to hear advice on the topics from overseas experts including Sarah Grimmer, Secretary-General of the Hong Kong International Arbitration Centre, and Abhinav Bhushan, Director South East Asia, International Chamber of Commerce.

In an effort to further support the in-house legal sector, last month we teamed up with the University of Technology Sydney (UTS) Faculty of Law, to launch ‘the Corporate Counsel Challenge’ – an exciting new initiative which provides teams of UTS law students with real-world experience and the chance to earn an internship with an ACC Australia member. We had ACC Australia member, Group General Counsel at Coca-Cola Amatil, and UTS alumnus Betty Ivanoff join the panel to discuss in-house career pathways. Judging from the level of questions and discussion, it was a particularly informative session for upcoming graduates.

I am also very excited to announce the launch of the biennial ACC Australia 2017 Benchmarks and Leading Practices Report. This is a major piece of work for our sector and provides a range of indispensable market intelligence for in-house legal teams and service providers.

I encourage ACC Australia members to explore the many offerings that ACC Australia provides in-house counsel to support them in their journey. I hope you enjoy this issue of the Australia Corporate Lawyer and take the opportunity to reflect on the values and ethics of your in-house role.
Some common themes. Namely that we can model the ethical values we expect of others, that achieving an ethical outcome can be challenging and require significant courage, and that (wherever possible) one should avoid facing any ethical dilemma alone.

In-house lawyers strive to be seen as contributing to the development and achievement of corporate strategy and objectives – to be “adding value.” On the other hand, a fundamental aspect of any lawyer’s role is providing independent advice. From time to time, this may involve expressing views, or exploring or elevating issues which a co-worker – who may be an important stakeholder in the organisation – regards as inconvenient or in conflict with his or her view of business strategy.

Hopefully, such situations arise only rarely; but for many or most of us these kind of situations are unavoidable in the long run. My personal examples seem petty in comparison to the challenge confronted by Simon Illingworth, and no doubt by some ACC Australia members from time to time.

However, the likelihood that many of us, if not most, will confront a situation in our professional lives that requires some kind of ethical choice to be made underlines the value of that “ethics point” being built around personal stories. They enable us to ask ourselves “how would I respond?” More broadly, they give us an opportunity to reflect as individuals on how we can contribute to organisational cultures that encourage and value open and effective communication, and build the relationship capital and personal and professional networks that will carry us through that awkward or difficult ethical conversation we may one day need to have.

Over time, in-house lawyers tend to become connoisseurs of a good ethics seminar. I admit to scrambling around in the dying days of the CPD calendar year in years gone by to secure that “ethics point,” only to find myself hearing about the necessity to avoid conflicts of interest in client selection and how a dual in-house lawyer/company secretary needs to have two separate email signatures.

At the last two Victorian Corporate Counsel Days, we’ve had two very different speakers who have discussed ethical challenges from very different and personal perspectives. While not detracting from the importance of gaining a sound understanding of the technical aspects of ethics compliance for in-house lawyers, we’ve made a conscious effort to differentiate the ACC Australia offering from the drier, more conventional content offered by many law firms.

Simon Illingworth spoke at this year’s Victorian Corporate Counsel Day and shared his harrowing experience of how he, while working as a detective in the Victorian Police Force, blew the whistle on corrupt colleagues. He spoke about the ethical toughness required to survive this experience, which came at a significant personal cost. Last year, Gillian Triggs, President of the Australian Human Rights Commission discussed the role that in-house lawyers can play as the “conscience” of our corporate clients. For example, in-house lawyers can bring their influence to bear in support of positive strategies that align with basic ethical values and avoid poor decisions that can result in significant reputational damage.

In many ways both speakers could not have been more different, yet each highlighted some common themes. Namely that we can model the ethical values we expect of others, that achieving an ethical outcome can be challenging and require significant courage, and that (wherever possible) one should avoid facing any ethical dilemma alone.

In-house lawyers strive to be seen as contributing to the development and achievement of corporate strategy and objectives – to be “adding value.” On the other hand, a fundamental aspect of any lawyer’s role is providing independent advice. From time to time, this may involve expressing views, or exploring or elevating issues which a co-worker – who may be an important stakeholder in the organisation – regards as inconvenient or in conflict with his or her view of business strategy.

Hopefully, such situations arise only rarely; but for many or most of us these kind of situations are unavoidable in the long run. My personal examples seem petty in comparison to the challenge confronted by Simon Illingworth, and no doubt by some ACC Australia members from time to time.

However, the likelihood that many of us, if not most, will confront a situation in our professional lives that requires some kind of ethical choice to be made underlines the value of that “ethics point” being built around personal stories. They enable us to ask ourselves “how would I respond?” More broadly, they give us an opportunity to reflect as individuals on how we can contribute to organisational cultures that encourage and value open and effective communication, and build the relationship capital and personal and professional networks that will carry us through that awkward or difficult ethical conversation we may one day need to have.

Each month ACC Australia invites our in-house industry leaders to share their experiences and perspectives on the theme of the current issue of the Australian Corporate Lawyer.
When United Airlines sought to remove a passenger from a flight in April they were simply following procedure. Undoubtedly, they were not expecting the ensuing violence or that a video of the injured passenger would dominate social media and mainstream news channels over several days and prompt justifiable outrage among the public.

Poor conduct like this can seriously damage the trust and confidence of the community, eroding a company’s social licence – whether or not the conduct was strictly lawful.

In Australia, poor conduct by businesses is also attracting attention including that of governments and regulators. Following a number of parliamentary inquiries, for example, there’s been increasing focus on the culture of Australia’s leading banks.

At a recent address to the GC100, ASIC Deputy Chairman Peter Kell said the best response was from business leaders actively striving for a culture of ‘doing the right thing’ – and not just at an individual level. He added that those businesses were also much more likely to consider the long term interests of customers.

This view of corporate responsibility expands the application of ethics beyond the behaviour of individuals to include greater emphasis on culture. And increasingly the need for a corporation to act ethically is finding its way into the law. For example, under section 912A (1) (a) of the Corporations Act, a financial services licensee must do all things necessary to ensure that the services covered by their licence are provided, among other things, ‘honestly and fairly’. There are also a number of prohibitions on ‘unconscionable conduct’, such as in section 991A (1) of the Corporations Act, sections 12CA (1) and CB (1) of the ASIC Act and sections 20–22 of the Australian Consumer Law.

What then is the in-house legal team’s role in corporate ethics and responsibility?

Clearly our primary duty is to ensure a strong legal foundation – by establishing governance, policy and compliance frameworks, clear accountabilities and good practice. One example might be the implementation of a robust and supportive whistleblower regime.

The challenge for legal counsel is to look to the bigger picture of culture.

Many companies profess to putting their customers first – like United Airlines. This may or may not hold true. If a company is honestly putting customers first, it creates a cultural context that makes it difficult to act without regard for people. Mistakes may be made but they won’t be made in bad faith.

If a company’s conduct is in bad faith, the public will make a judgement and the consequences may be felt by organisations very rapidly. It’s this effect that ASIC Chairman Greg Medcraft calls ‘customer regulation’.

On the other hand, if a company responds positively to changing consumer demands and listens carefully to what matters most to customers – for example, by using a customer listening program like the Net Promoter System – then the organisation’s ‘mindset’ will weigh toward meeting community expectations and ‘doing right’.

Values-based cultures aren’t simply a by-product of compliant practices. The most ethical organisations are those whose leaders recognise that culture must respond to change and are proactive in building culture that’s ‘fit for purpose’ – that is, appropriately inventive, efficient, trustworthy and so on.

The larger responsibility for in-house legal counsel, therefore, is in supporting this ongoing challenge to build culture that will help ensure conduct that is in the best interests of the community.
A DAY IN THE LIFE – JUSTIN COSS
Group Legal Counsel & Company Secretary, AUB Group Limited

6:00 am My Labrador wakes me by licking my ear. She is like an alarm clock and knows its breakfast time. Turn on the coffee machine and start the “waking process” of our three daughters – none of whom are morning people.

6:30 am My Labrador wakes me by licking my ear. She is like an alarm clock and knows its breakfast time. Turn on the coffee machine and start the “waking process” of our three daughters – none of whom are morning people.

6:45 am Check to see if any urgent emails came in overnight and review the day’s diary to understand where I need to be. I am not big on breakfast, but coffee is mandatory. The house descends into mayhem as our family of five gets ready. This usually involves a mixture of complaints from the children followed by urgent appeals from the parents to hurry.

7:45 am Drive the kids to school and do some diary planning with my wife, who is a private practice lawyer. To fend off chaos, our lives have to be coordinated with military precision – our mantra being: “If it’s not in Outlook, it’s not happening.” After the kids exit the car, we spend a peaceful 10 minutes of catch-up time until we arrive at the car park and the day commences in earnest.

8:00 am Arrive at the office and grab a coffee with the M&A manager with whom I work closely. AUB is effectively an asset manager and we acquire and divest businesses on a regular basis. There is always M&A activity happening, which keeps the adrenaline going.

8:15 am Before the market opens, I release an announcement on the ASX platform relating to an update to our Board Charter approved at the most recent Board meeting. The ASX listing rules require us to notify the market within very short timeframes on any material developments, such as with respect to the changes in the company’s governance structure, so this sort of task usually gets priority at the start of the day.

9:00 am Review due diligence information on a potential target we are looking to acquire and identify areas of potential concern for further investigation.

10:00 am Meet with the group chairman as part of a regular governance catch up to discuss updating our policies on insider trading and conflicts of interest.

11:00 am Review, amend, and send out a new consultancy contract for a contractor the company is proposing to engage to provide consulting services.

11:30 am Review a lease for new office space for one of the group entities and send comments back to our external leasing lawyers.

12:00 pm Meet a former GC for lunch who has recently had some time off between jobs and is looking to get back into the work force. The value of networking can’t be overstated in this respect as many good in-house roles are never advertised and are often filled by either word of mouth, contact with peers through industry associations such as ACC Australia or specialist recruiters who already know the good candidates who may be looking for a new role.

1:00 pm Back to the office to go through “business as usual” emails. AUB Group has over 75 businesses across 310 locations in Australia, New Zealand, and the United Kingdom. The flow of emails is relentless and requires constant attention.

2:00 pm Self-seclusion time to read documents. Like most offices these days, everyone sits in open plan so I find it useful to “self-seclude,” which is really a euphemism for “hide” in a meeting room to read and think without the constant ping of emails, the buzz of phones, and the distraction of colleagues.

3:00 pm Attend a board meeting of one of our subsidiaries.

4:00 pm The CEO, CFO, and I attend an impromptu meeting of the Management Continuous Disclosure Committee to discuss whether a potential acquisition might be material if it proceeds and therefore becomes disclosable to the market.

5:00 pm ACC NSW Executive Committee Meeting. This is a monthly meeting attended by twenty senior in-house lawyers elected to the committee for two year terms from across a variety of industries. The meetings are held in an informal atmosphere with the venue rotating between law firms and members’ offices. Topics discussed are wide ranging including the promotion of diversity within the profession, agreeing on suitable content for CPD’s, arranging networking events for members, reviewing advocacy initiatives underway and discussion of new potential members’ benefits to name a few.

6:00 pm It’s an unusually ACC intensive day as I head to the annual ACC Australia NSW Trivia Night. Now in its 6th year, the trivia night is a bit of a highlight on the in-house lawyers’ social calendar with teams from across the profession pitting their wits against each other to compete for the ACC Australia NSW Trivia Trophy. After volunteering to MC the inaugural event, I haven’t been able to pass on the baton. As I do every year I promise myself that this will be the last one! It’s an excellent evening with additional points awarded for impromptu singing and dancing performances and hot competition to avoid the dreaded and stupendously oversized wooden spoon.

9:00 pm Make my way home and after a quick snack from the fridge, I review emails and start thinking about the day ahead tomorrow.

10:00 pm Catch an episode of Walking Dead by way of pure escapism and head to bed.
HOW DO WE LIVE AN ETHICAL LIFE IN THE FACE OF GLOBAL UPHEAVAL?

Like many people I have a story. My story starts as a young bi-racial migrant girl, whose early days in this promised land were blighted with experiences of prejudice, abuse and ignorance. The sense of powerlessness and voicelessness that ensued threatened to consume me; but for the wonderful gift of an education I eventually received, which became my saviour.

Having finally found myself in an environment that celebrated my uniqueness rather than defined me by my differences, I decided to commit my life to helping others access justice and finding their voice in a way I wasn’t able to as a child.

That decision resulted in a 20 year career as a legal practitioner. First a criminal defence lawyer and federal prosecutor, then an international humanitarian lawyer, terrorism and war crimes prosecutor and then in-house counsel for government security, anti-corruption and law enforcement agencies.

Life then took an unexpected turn. After becoming a hostage survivor in Iraq and then a victim of a grave personal injustice at the hands of the British military and UK Government, I found myself for the first time on the other side of the court room. That experience lead me to a decision to share my story more publicly, using my story as a vehicle to shine a light on issues relating to the need for us to return to values based leadership, to living a life in harmony with our essence, to building personal resilience and to committing to embracing diversity in all its forms.

Now my work – my calling – is no longer solely focussed on fighting injustices and defending the rule of law, but also on inspiring and empowering people from all walks of life to live a life beyond themselves, and to leading with ethics, values and vision.

Becoming the best kind of leader isn’t about emulating a role model or a historic figure. Rather, your leadership must be rooted in who you are and what matters most to you. When you truly know yourself and what you stand for, it is much easier to know what to do in any situation. It always comes down to doing the right thing and doing the best you can.

That may sound simple, but it’s hardly simplistic. Doing the right thing is a lifelong challenge for all of us, but something that is expected from those of us whose role it is to uphold the rule of law and the rights we hold dear.

Stan Grant, the wonderful Indigenous Australian author, broadcaster and commentator, delivered the Colin Simpson Memorial Lecture last year, and the subject of his speech was ‘How do we live an ethical life in the face of cultural devastation?’

Grant’s address focused on the atrocities and murders committed in the 1820’s battle between his Wiradjuri people and the new settlers. That battle led to the devastation of his people, half of whom were wiped out.

In his address he talked about the greatness of leadership shown by Windradyne, his people’s leader at that time. Windradyne fought for years for his people, defied the settlers and in the end, with his people devastated, his land taken, his culture facing destruction, he made a courageous choice. Grant described Windradyne’s true courage, which was knowing when to face up to a new reality and protect and defend what his people had left.

Grant and all indigenous people still experience ongoing conflict, cultural devastation and challenges in Australia today, as they try to reconcile the loss of one tradition and the inevitable acceptance of another.

Given back in May last year, Grant’s address now appears prophetic. I wonder whether he had even contemplated the global challenges and upheaval that we would all bear witness to a few short months later.

Like many people I have been contemplating, reflecting and trying to reconcile the shocks witnessed throughout the world. As hate crimes, extremism and the displacement of people tragically continues in parts of the ‘Eastern’ world, volatility is rising in the ‘West’.

With decisions like Brexit, the United States election results and the rise of populist parties like One Nation in Australia, the politics of fear and division, and the sinister forces of ignorance and arrogance have gained momentum to engage the increasingly disenchanted yet influential sections of our communities.

While so many parts of the world and it’s peoples are suffering, dying and losing their homes, land, culture and sense of belonging, many of our leaders have responded with proposals to build ‘walls’, to shut ‘the others’ out. These leaders espouse that the secret to making their nations ‘great again’ lies in looking after number one.

Rabia Siddique
A finalist in the 2016 Australian of the Year Awards, Rabia is a retired British Army Officer and former terrorism and war crimes prosecutor. Since 2011, she has held the roles of Legal Counsel to the WA Commissioner of Police and the Corruption and Crime Commission WA. Now a highlight sought after speaker, Rabia is also the best-selling author of “Equal Justice.”

Rabia recently spoke at the NSW and WA ACC Australia Corporate Counsel Day events where she shared her unique story of courage and strength to highlight the importance of ethical leadership, equality and diversity.
I grieve for the apparent loss of ethics and values that I had hoped united humanity. But, like Grant, I find myself asking the same question – how do we continue to live an ethical life in the face of global upheaval? As Grant so rightly points out, these are critical times that we are living in and we need to ask ourselves some fundamental questions. The one positive I take from recent world events is that we no longer need to waste time speculating about whether there are dark forces at play around us. Recent events in countries like the United Kingdom, the US and Australia (with impending elections across Europe also threatening the rise of populist, far right parties) have brought the darkness into the light. We can now see clearly what we are dealing with. The challenge for us now, is how do we respond?

Are we ready, willing and prepared to take up a place at the centre of our respective nation’s social, political and economic life? Not as acquiescent assimilationists, but as agents of change determined to engage and lead from a position of strength and strong values?

Facing up to ethical challenges amidst global upheaval will require courage. More than ever, as legal practitioners – professionals that have the privilege and responsibility of advising, advocating for and protecting peoples’ businesses, homes and rights, human beings that are entrusted by other human beings for safeguarding their lives and liberty, we need to re-engage with those that have felt unheard and unrepresented. We need to protect the vulnerable and marginalised and to hold up those that have committed to lead this work.

As part of a group of people within our society that are expected to set the tone and instill a sense of order and decency (a rarely used word these days), we need to redefine leadership and take on more of these roles ourselves, for the sake of our families, community and country.

At this time, when we reflect on the last twelve months, with all its turbulence, triumphs and traumas, I hope we can re-affirm and commit to embracing our power to create ripples of change – in our own lives, our organisations and in our communities. The challenge for us all, is to see today and tomorrow as a time filled with opportunities to inform, educate and unite our communities. We need to reach out to everyone, especially the disenfranchised.

This can only be done if we are prepared to live a life bigger and beyond ourselves. Let’s reach out without judgement and continue to live lives in harmony with values – our humanitarian essence. This should be our new global movement and something we have the capacity and attributes to work towards.

Like Windradyne, let us have the courage to face up to our new reality, to uphold humanitarian values and protect and defend those who need our help more than ever. If not now, then when? If not us, then who?

With the LLM (Applied Law)

Master Your Practice

The coursework has been absolutely relevant to my daily practice. The material that was provided to us throughout the course is constantly being used throughout my practice.

- Adeline Schiralli, Associate, Willis & Bowring and Student, The College of Law LLM (Applied Law)

Contact us: 1300 506 402 or alp@collaw.edu.au
ACC Australia recently presented a potential ethical scenario to three ACC Australia members and asked them to independently analyse and develop a response to the issues outlined. All names, characters and incidents portrayed in the following case study are entirely fictitious.

A CASE STUDY: EARTHCORECO AND BLEULINE

You are an in-house lawyer at EarthCoreCo, a building and construction company with nationwide operations. Alice, a senior manager in the residential business, has worked closely with you before on some OHS and compliance matters, and on the recent review of the OHS risk management plan. You’ve known Alice since university days. You went to her wedding some years ago, and she has sponsored your charity fun runs in past years. You both enjoy a good glass of red. Alice has sought advice from you before on all sorts of EarthCoreCo matters, including navigating the political landscape, as well as various commercial matters in her business unit.

You are vaguely aware that Alice is a part owner in an equipment hire company (BleuLine), which you believe is a small shareholding in a family business. She mentioned it once some years ago but you are unaware of the details.

One Friday night, you and Alice have been out at a wine bar for a while. Alice asked if you could do her a favour and look over a contract that her family business is considering. She explains that the commercial lawyer who usually gives BleuLine advice is overseas for two months, and Alice is just looking for a ‘back of the envelope’ review, so they are aware of any red flags in the commercial negotiation. She says it would really help out her and the family.

Some of the drafting looks familiar when you review the contract the next day. You suspect Alice may have borrowed the wording from some of EarthCoreCo’s contracts, but decide to overlook it. In the copy Alice had given you, the contract parties and dollar figures in the contract are blank, but you don’t want to invest too much time in it as you’re very busy. You give Alice a call back and verbally give your preliminary comments on the contract: it doesn’t appear to you that there is anything unusual. Alice says she is very grateful for your advice and asks you to send the comments in an email, which you do, from your EarthCoreCo email address.

A few weeks later, the same contract comes back to you for review – but this time, from

Bernard Lankes
With 17 years of international legal experience, including 14 years as an in-house lawyer within Australia, Australia, Germany, New Zealand, South Africa, and Switzerland and now with the IBM Corporation Bernard is a trusted legal advisor to the organisation. Bernard is a regular speaker on IT contract related issues and maintains a keen interest in both legal and business ethics both internationally and within Australia. Bernard is a member of the ACC Australia, New South Wales Division Committee.

Kevin Kim
As an in-house counsel with IBM Australia and New Zealand, Kevin is a trusted legal advisor to a business that is at the forefront of global technological innovation and digital disruption. His work covers a range of areas, from complex IT transactions to commercial disputes and advisory work around regulatory changes including anti-money laundering and the Foreign Corrupt Practices act. Kevin has recently returned from an overseas assignment to Mexico City where he participated in a pro-bono consulting project with the Carlos Slim Foundation.

Emily Jordan-Baird
As Corporate Counsel to Transdev Australasia, Emily provides legal advice across a range of areas to Transdev and its operating subsidiaries, with a focus on drafting and reviewing contracts, corporate governance and privacy law. She is currently completing an LLM at Monash University.
Vivek, a senior manager in a different division of EarthCoreCo. You realise that the other party to the contract with BleuLine was in fact your employer.

You call Alice and ask her about it. “Yes of course, didn’t I mention that at drinks? I guess we had had a few,” she replies dismissively. You go back to Vivek and let him know that you have seen this contract before because Alice asked you to advise on it. Vivek is irritated to learn that Alice is involved in BleuLine, and it’s clear she hadn’t mentioned that to him. He then says, “Look, we just need this equipment in ASAP. I don’t want to hold up the project and I can’t justify getting external legal advice. Both companies want this deal done – you’re already familiar with the contract. Can’t you just look at it?”

Six months later, the deal goes sour. EarthCoreCo managers believe BleuLine has failed in various respects to deliver on its obligations under the contract. Alice comes to you angry, saying that she now understands that the penalties for delay in the contract are “harsh” and her family is being “punished” by EarthCoreCo. Alice says “I asked you for legal advice on this contract – why didn’t you point this out to me? I told you we were relying on you”.

You ask Alice whether she has declared her interest in BleuLine, and she says “Why is that relevant now? You didn’t tell me I needed to do that when we discussed it over drinks. You can’t tell EarthCoreCo now that you advised me – isn’t that covered by privilege?”.

The next morning, Vivek calls you and says that EarthCoreCo has decided to end its relationship with BleuLine. He says he needs you to commence formalising the dispute by writing a formal letter to BleuLine, activating the disputes clause and accusing them of breach of contract. Vivek explains that while they don’t really think that EarthCoreCo has grounds to sue, they want to ‘scare them’ so your letter should be as legally aggressive as possible.

What do you do now?

ACC Australia thanks Rose Bryant Smith, Founding Owner at Worklogic, for her assistance in developing this case study.

EARTHCORECO AND BLEULINE RESPONSE 1 – MEAT IN THE SANDWICH?

Bernard Lankes and Kevin Kim

Do you feel from time to time like the meat in the sandwich when it comes to ethical challenges? Or in other words should you bother about ethical principles at all? In a nutshell, the answer is yes. The reason being that both your client’s reputation and your own are at risk and must be protected.

Before we advise on the scenario in some detail let’s review the role of an in-house counsel. First and foremost, most of us are commercial legal advisors, or partners to the business. This is a significant differentiator from private practice and creates challenges for some colleagues swapping from private practice to in-house. One critical aspect is that we all acknowledge that “no” is not the answer and that we have to propose a feasible alternative instead. Our legal advice has to practically balance the risk. Similarly we have to be pro-active and anticipate certain challenges. That is unless we wish to find ourselves buried under an avalanche of requests for legal assistance.

As in-house counsel, to whom do we owe a duty? You can probably think of at least seven stakeholders, such as the Court, your employer, shareholders, the board, management, employees, customers and potentially even the public. For the purpose of this review we would like to focus on the first two, the Court and your employer.
As a lawyer, it’s not at all unusual to be asked for legal advice by friends and family. Often you’re viewed as the expert on all things legal regardless of your experience and specialty. Industries can be small and there is often a chance you know the other side either on a personal or professional level. On these facts, a sticky situation has arisen – as legal counsel of EarthCoreCo, my duty to my client has been compromised by the advice provided to my friend Alice and I now find myself on both sides of a potentially adversarial situation. But where did I go wrong?

When, after a couple of wines, Alice asked me to review the contract for her family business I agreed without knowing the full particulars, the parties to the deal or even a full understanding of Alice’s relationship to BleuLine. Despite no formal contract, my agreement to provide advice means there is now a solicitor-client relationship between myself and BleuLine with all the associated ethical obligations. The situation is made significantly more complicated on the realisation that my employer, EarthCoreCo is the counterparty to the Agreement and there are additional considerations that arise as a result.

While refusing entirely to provide advice to Alice would have avoided this situation, there are a number of steps I should have taken to address the various ethical issues along the way:

(i) Clarify the client and the scope: When accepting instructions, it is key to ensure you confirm (preferably in writing) who you are acting for and the scope of the advice sought. It may appear we have these facts – Alice


The Australian Solicitors’ Conduct Rules (ASCR) assist us to navigate our way through the everyday legal jungle. All States and Territories have one version or another of the ASCR in place. The most recent version, ASCR 2015, is in place in New South Wales and Victoria and released by the Law Council of Australia. In accordance with ASCR r3 as an in-house counsel, we have a paramount duty to the Court and the administration of justice. Your duty as a lawyer always trumps your duties as an employee.

Now, let’s revisit the scenario.

Friendships aside, business is business. If you heeded the personal favour requested by Alice, you’re immediately placed into an ethically awkward position for a number of reasons. Firstly, Alice is neither your client nor employer in the context of your relationship to date. As such, any review or advice you provide to Alice cannot be construed as complying with your ethical duty to act in the best interests of your client and employer EarthCoreCo (ASCR r4.1.1). Secondly, this may potentially compromise your professional independence as an in-house counsel to EarthCoreCo (ASCR r4.1.4). Perhaps at this stage, you should consider kindly declining Alice’s request and ethically speaking, continue enjoying your evening stress-free.

However, you’ve decided to help Alice out, meaning that Alice does, albeit unintentionally, become a client under the glossary definition of ‘client’ in the ASCR, who has engaged you to provide legal services. You’re then held to a duty to provide your review to Alice with a standard of competence, diligence and reasonable promptness (ASCR r4.1.3). By overlooking issues like the uncanny similarity of Alice’s contract with the EarthCoreCo standard and not further exploring the contract parties and dollar figures, it would be difficult to demonstrate that your ethical duty under ASCR r4.1.3 has been exhausted.

You realise that your employer is the ‘other party’ to that contract you’ve reviewed for Alice. It’s obvious that you’ve found yourself in a conflict of duties – on one hand between your duties to your employer, and on the other hand, to Alice. There is a positive duty on you to avoid such conflict under ASCR 11.1. This would be a good point in time to honestly disclose to each of your clients and cease advising. That is unless they each provide informed consent for you to continue (ASCR r4.1.2, 11.2 & 11.3).

There is internal pressure from Vivek to get the contract reviewed ASAP. While you have a duty to follow your client’s instructions, note that this duty applies only to instructions which are lawful, proper and competent (ASCR r8.1). Vivek is focused on getting the ‘deal done’ as opposed to working with you to find a lawful and proper solution to the conflict situation you have disclosed. In such a situation, you may decline Vivek’s instruction relying on ASCR r8.1 and the fact that it will prevent you from acting in the best interests of your employer (ASCR r4.1.1). At this point it appears necessary to direct Vivek to obtain external legal advice.

Alice complains to you about the quality of the review you initially provided. As we’ve highlighted, given Alice is your client, you are subject to the duties to act in her best interests and to provide competent, diligent and reasonably prompt advice (ASCR r4.1.1 & 4.1.3). This would be your final opportunity to disclose your conflict situation to Alice and seek to discontinue advising Alice on this matter going forward (ASCR r11.1 & 11.2). While Alice is evidently incensed by the situation, remember that your duties to follow client instructions only apply to the extent that those instructions comply with ASCR r8.1. It would have been proper for Alice to have disclosed to EarthCoreCo her shareholding interest in BleuLine under their relevant conduct guidelines. At the very least, she should have made that disclosure when she first engaged you to provide advice at the wine bar and in subsequent communications.

Alice has also indicated a breach of ‘privilege’. Given that Alice is your client, she is correct in indicating that you have a duty to not disclose confidential information (ASCR r9.1). However, in the circumstances, the information you’ve likely disclosed to Vivek will fall under the exception to this general rule given that the disclosure would have been made for the sole purpose of discussing your ethical obligations (ASCR r9.2.3). You are now officially in a ‘meat in the sandwich’ and receive instructions from Vivek to commence formal dispute proceedings under the contract. If you have reason to believe that there is no cause to sue, you have not received lawful instructions (ASCR r8.1). As such, you may decline the request and explore other commercial resolutions with Vivek.

From all of the above, you can see the importance of knowing the ASCR and leveraging it to determine what you should and should not do. Even if you find yourself in a ‘meat in the sandwich’ situation, knowing the ASCR will help you navigate your relationship with your client(s) and provide grounded reasons for saying ‘No’ to your client(s) at the right moments.

EARTHCORECO AND BLEULINE RESPONSE 2

Emily Jordan-Baird
needs a ‘back of the envelope review’ for BleuLine – but further information should be obtained about Alice’s position in the company to confirm she is authorised to instruct. I should also note any limitations to the advice as well as areas requiring further review.

(ii) Seek comprehensive instructions: With only a limited knowledge of BleuLine, it is difficult to give good advice on what is contractually acceptable. For example, while a 60 day payment term may be insignificant to a large company; to a small company it may cause significant cash flow issues and affect ability to trade. Similarly contractual insurance requirements may affect the contract price if they are inconsistent with the business’ existing policies. A summary review does not negate the need for proper diligence. Furthermore, by asking questions initially, I could have discovered much earlier that the counterparty was EarthCoreCo, allowing me to address the conflict upfront.

(iii) Check for employment contract restrictions: Before providing the advice, I should check that my employment contract does not prohibit me from providing advice to anyone but EarthCoreCo or whether any conditions apply.

(iv) Obtain informed consent from both parties: While it is best practice not to act for two parties to an agreement, in reality this is permitted in certain circumstances provided Conduct Rule 11.4 is satisfied. As soon as practicable, I need to ensure the situation is fully understood by both parties and confirm they are both comfortable for me to continue acting (preferably in writing so the date of this consent is clear). If possible, another internal lawyer should represent EarthCoreCo and information barriers should be established to prevent any sharing of advice.

(v) Separate from work: As the advice to BleuLine is outside of the scope of my employment, it should be conducted after hours and from my personal email. Emails sent from a work email typically belong to that company, potentially waiving privilege claims.

(vi) Protect confidential information: My position as EarthCoreCo counsel means that I am in possession of confidential information which may influence my advice to BleuLine and compromise my obligations to EarthCoreCo. Along with informed consent from both parties (see above) caution is required when proceeding to ensure no information is leaked. Information barriers should be established where possible.

(vii) Be aware of liability to BleuLine: By providing legal advice to BleuLine I have opened myself to liability for professional negligence claims – the review is outside the scope of my employment and unlikely to be covered by any insurance policies held by EarthCoreCo. Unfortunately, friendship is not a legitimate defence for negligence and I therefore should ensure additional protection is in place upfront. As an ACC Australia member, I have access to a professional indemnity policy which covers informal discussions in social settings which are subsequently relied on as legal advice.

(viii) Investigate the use of EarthCoreCo intellectual property by BleuLine: While I noticed the similarity in some clauses, I let this slide instead of probing further. Seeking further information on this would have revealed EarthCoreCo as the counterparty earlier, as well as identifying the misuse of any EarthCoreCo intellectual property by BleuLine.

(ix) Identify Alice’s conflict: I am not the only person in this scenario with a conflict – Alice is clearly conflicted too as she is both an employee of EarthCoreCo and a shareholder of BleuLine. EarthCoreCo internal policies likely require the disclosure of this conflict and in both a legal and personal capacity, it is prudent for me to inform Alice of this.

(x) Be prepared: While both parties may be comfortable with the situation as it stands, the conflict still exists and therefore the possibility of further issues remains. I should take steps early to be prepared if the conflict becomes unmanageable and ensure all parties understand the process that will follow. Assessment of conflicts is not a static test and needs to continuously be front-of-mind and managed appropriately as circumstances develop or change.

(xi) When in doubt, seek advice: In addition, at any point I can seek specific ethical advice on my situation. ACC Australia has relevant resources and the LIV has a helpline to provide direct advice on the appropriate way to handle similar scenarios. Advice could also be sought from legal colleagues or my direct supervisor, provided this does not affect any information barriers in place. In addition, EarthCoreCo may have a resource similar to the Transdev’s internal ethics committee, who can be contacted for advice about dealing with conflicts.

What do I do now?

While hindsight is great, my sticky situation remains. There are issues with BleuLine’s performance and the conflict has become unmanageable. Given my position as EarthCoreCo counsel, it is not possible to give impartial legal advice to either BleuLine or EarthCoreCo. I must therefore stop acting for both parties in accordance with Conduct Rule 11.2 (with reasonable notice) and provide some suggestions for alternate counsel, which for EarthCoreCo could include other internal lawyers. At the time of advising my intention to cease acting, I should discuss with Vivek the appropriateness of the formal letter requested. It is unethical for a solicitor to send a letter of demand alleging a non-existent claim or threatening action that the party has no intention of taking. Under Conduct Rule 7.2, there is also a responsibility to advise Vivek of available alternatives to fully contested adjudication.

Finally, it is worthwhile having a chat with Alice to request that future requests are formalised and I’m not put in this situation again – I’ve learnt my lesson about legal advice and bars!

N.B. the scenario has been assessed in reference to the Legal Profession Uniform Law (Victoria) (“Conduct Rules”) and may differ in relation to other jurisdictions – the applicable legislation should be checked. ☑

ACC Australia provides an ethics peer referral program. This service is available only to members in Australia and offers a confidential referral with a senior in-house counsel in a non-aligned sector to talk through the issue. It’s a sounding board with someone who understands the complexity of in-house matters. For more information visit the ethics page on the ACC Australia website.
AVOIDING THE ETHICAL PERILS AND PITFALLS OF BIG DATA

Carlos Perez

Offering broad experience in information technology and telecommunications law, Carlos is a Partner and Head of Information Technology and Compliance at ECIJA, a Spanish law firm specialising in technology, media and telecommunications law. Carlos has advised leading Spanish and international companies on data protection, intellectual property, telecommunications, IT outsourcing, internet, social networks, e-commerce, and online marketing issues.

The increased connectivity of people and things is creating previously unimaginable amounts of data. This volume, coupled with the rapid pace of data generation, provides unprecedented real-time insights into the habits, statistics, and patterns of people and processes. The ability to leverage data into actionable intelligence is now critical when making strategic business decisions. Through the use of data analytics, businesses can understand consumer behaviour to refine marketing efforts and predict future personnel behaviour, as well as profile individuals to forecast their behaviour and drive decisions based on data provided voluntarily or gleaned from behaviour.

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

This article examines various stages of the data analytics process, where the decisions to move forward or exercise restraint are key factors in the ethical equation. Before you can take action on data, you need to collect data. This is the first stage where opportunities for ethical and legal missteps arise. Particularly in terms of data veracity and maintenance.

In the United States, there is no comprehensive federal law that regulates privacy, but instead privacy is generally governed by state and by industry sector. For example, and related to the issue of data information collection, both the Fair Credit Reporting Act (FCRA) and the Health Insurance Portability and Accountability Act (HIPAA) contain mechanisms for individuals to access their personal information and rectify inaccuracies. Recently, the collection and use of inaccurate personal information under the FCRA came under scrutiny by both a class action lawsuit and a regulatory investigation. To ensure compliance with the order, Spokeo is obligated to submit compliance notices for twenty years with the FTC and is subject to other recordkeeping and monitoring requirements.

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

In Europe, data privacy is a fundamental right and the European legislative framework includes a variety of obligations for businesses and organisations to ensure data accuracy and safeguarding of individuals’ rights. These measures include embedding privacy obligations within the design of business procedures (known as “privacy by design”), the need to respond in due course to any petition.
from any individual to correct wrong data or to erase data, and the obligation to stop using personal data when not required for business or organisational purposes. Lack of compliance with such legal obligations may be subject to heavy fines – up to twenty million euros or four percent of annual revenue.

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

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

1. How often is data verified? (to the extent possible)
2. How “fresh” is the data, and what parameters reinforce this?
3. What steps are taken to vet mined and third party data?

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

The next stage in this process is the analysis and use of data. It presents ethical challenges ranging from the development of the algorithm or query and implementation of automated analysis processes to the interpretation and use of the results. Precautions should be taken when developing search queries. Avoid queries where the responses, despite the anonymisation, will lead to the exclusion of certain races or classes. Remember, if it is illegal to do in person, it is illegal to do electronically.

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

The pitfall of using such an algorithm to influence sentencing determinations is that the individual will be lost in group characteristics. Eric L. Loomis appealed his sentence when he was subject to a higher prison term due to the COMPAS score indicating he was at “high risk” of committing another crime. Loomis argued that his due process rights were violated because the company that makes the test does not reveal how COMPAS weighs data to arrive at the risk score. He also argued that the evaluation treats men as higher risk than women.

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

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

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

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

From a European perspective, legislation specifically prohibits this type of analysis as well as the use of “automated individual decision making, including profiling.” Data controllers are forced to introduce suitable measures to safeguard data subjects’ rights and freedoms, including the right to obtain human intervention on the part of the organisation that has implemented such automated procedures – allowing individuals to express his or her point of view and to contest the decision.
Safeguards also include applying restrictions to automated decision-making processes based on sensitive information, such as health and ethnicity. In addition to the above described right of not being subjected to “automated decision making,” the legislative framework provides additional safeguards to individuals submitted to big data procedures: If any data controller wishes to use an individual’s data for purposes differing from those for which consent was provided, the data controller must consider several factors to ascertain whether the new purpose is compatible with the initial purpose.17 If this “test of compatibility” confirms the new purposes are incompatible with the ones consented to by the concerned individual, the organisation is forced to choose between two options:

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

This requirement is prompting many European organisations to refocus their procedures related to personal data processing by obtaining blanket consent for targeting, profiling, improving the experience of clients, risk assessment and other data analysis measures. Lack of compliance with such obligations may lead not only to the aforementioned heavy fines, but also to the obligation to identify the concerned individuals for any damages caused. As counsel, you will need to be prepared to offer legal guidance when developing questions in addition to guidance on the evaluation and use of results.

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

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

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

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

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

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

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

To mitigate ethical risks, here are some final recommendations:

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

Footnotes

17 According to Article 6.4 of the REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), such factors are:
(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;
(d) the possible consequences of the intended further processing for data subjects;
(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

THE RISE OF THE PRODUCT TEAM: WHAT CAN LAWYERS LEARN FROM THE DIGITAL ECONOMY?

This article is about the radical change over the last decade or so in how businesses create new products and services and what we all might be able to learn from that as lawyers.

The time when new offerings to our clients (whether internal or external) were carefully created over many years and then rolled-out and sold are over. Instead, the era of “try it, learn and try again” is here. Two high profile examples of this approach are Instagram, which began as a location-sharing service and Twitter, originally an internal communications tool. Neither started as they now are. All of them iterated radically as they went along – built something, tested it with their customers and then changed and changed again.

Unfortunately, this approach conflicts with our natural inclinations as lawyers. We generally like to know the route from A to Z and then build to get there. Step by careful step, not putting a foot wrong. However at the speed of the twenty-first century market, if we adopt the traditional approach we will discover that Z is no longer the aiming point before we’re even half way there.

This is where we can learn from the approach of digital product teams, where businesses don’t build to a distant end goal but start with the minimum of what’s needed and then learn. The methodologies sitting behind this can sometimes be shrouded in what might appear to be tech terminology – try “the agile manifesto” or “the lean startup”, for example. However (and the digital purists should look away at this stage) for application to the world of legal services they can really be boiled down to the following basic principles:

- Create a minimum viable product or service to give to your client and begin the process of learning as quickly as possible.
- In an uncertain market, plans need to adapt incrementally, day by day. So, build, measure and learn. What will your clients actually adopt and value?
- Put people ahead of process. That means collaboration more than contract negotiation. It puts satisfying the individual client as the number one priority.

In other words, the internet has not just changed the channels of distribution for what we all do, but also the way that we create the products and services that we offer. Being agile means creating and changing our services to react to what the client wants and needs.

At Lawyers On Demand we’ve spent recent months building our own digital platform, Spoke, to allow our clients to get individual legal jobs done without all the law firm infrastructure. To do this we assembled a new product team embracing the methods above. Here’s three elements of working differently that we found most useful in creating a new team and service:

1. Cross functional teams: This is about having a group of people with very different skills (who would usually be in different departments) coming together to achieve a common goal. Without clear rules, this could be overly idealistic.
2. Daily stand-ups: Communication is crucial to agile working – everyone must know what’s going on. Stand-up meetings make this happen quickly in ten minutes. It’s about each team member identifying what’s going and for identifying any obstacles.
3. Retrospectives: Weekly or after a milestone, the team holds a meeting to reflect on what worked well, what didn’t and where things can be made better. This is intended to ensure that the project team is always improving the way it works. It also provides a non-hierarchical sense of ownership and self-management.

True to our own methodology, we had our share of failure as well as success in the process of building new client services. So why am I pushing the approach here? It’s because we found this way of working – and its challenges – to be hugely stimulating and effective at getting stuff done. Plus for many of the millennial generation outside of the legal profession it’s now the way they work naturally and best – and is not something we can ignore. Even for more experienced lawyers, being part of a cross-functional team is an experience that sets them apart.

Ten years ago, the idea of lawyers as ‘product developers’ for our clients would have been close to incomprehensible. In the future it’s likely to be unavoidable.

Simon Harper
As co-founder of Lawyers On Demand, Simon was named ‘Legal Innovator of the Year’ at the 2015 FT Legal Innovative Lawyers Awards for a decade of “sending shockwaves through the legal industry”. American Lawyer Magazine named Simon a top 50 innovator of the last 50 years – one of only three UK lawyers to be recognised as such.
CORPORATE SOCIAL RESPONSIBILITY – WHY AND HOW CAN IN-HOUSE LAWYERS PLAY A ROLE?

Although widely acknowledged as important, corporate social responsibility or “CSR” remains an evolving concept with no universally accepted definition. Some of the reasons for this lack of clarity include differences in national and cultural approaches to business, variations in motivations for CSR and the diversity of disciplinary backgrounds and perspectives of scholars writing about CSR.

One commonly cited working definition of CSR adopted by the ISO 26000 Working Group on Social Responsibility, Sydney February 2007 is as follows:

“Social responsibility (is the) responsibility of an organisation for the impacts of its decisions and activities on society and the environment through transparent and ethical behaviour that is consistent with sustainable development and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organisation.”

The business case for CSR and the nature of CSR involvement will differ from one organisation to another depending on factors including the organisation’s business strategy, stakeholders, location, suppliers, size, products, activity and leadership. Importantly however a range of benefits, both strategic and commercial, have been attributable to organisations implementing CSR strategies. These include:

- more effective management of governance, legal, social, environmental, economic and other risks;
- enhanced reputation management;
- improved ability to recruit, develop and retain staff through human resources benefits which include improved staff morale, teamwork, development of leadership and project management skills;
- greater innovation, competitiveness and market positioning;
- improved cost savings and operational efficiencies; and
- improved relations with regulators.

The Sydney office of Mizuho Bank Ltd, a part of the Mizuho Financial Group, successfully implemented a corporate social responsibility strategy, providing an example of how legal and compliance staff are ideally placed to take leadership roles in promoting CSR within their organisation.

With approximately 150 staff, the Mizuho Bank, Sydney office’s CSR Charter outlines the following objectives:

- promote project investment in accordance with the Equator Principles;
- promote and support good social causes;
- promote the financial education of Australian children and teenagers; and
- promote environmentally-sound practices.

Katrina Morgan, an in-house lawyer at Mizuho Bank, Sydney offices, served as a member of the Sydney CSR Committee since May 2014 and chaired the committee from May 2015 to May 2016.
organisations on a number of CSR-related projects at both the global and local levels. On the global level, Mizuho employees worldwide regularly volunteer in their local communities. One of the highlights of the year is the ‘Mizuho Volunteer Day,’ Mizuho Group’s annual global day of community service. Launched in the USA in 2006 to foster feelings of unity and societal contribution across Mizuho offices, Mizuho Volunteer Day has grown rapidly and in 2016 engaged almost 10,000 Mizuho volunteers across 23 different countries.

Mizuho’s Sydney offices was one of the first global offices to join the initiative in 2008. Staff in Australia and around the globe undertake a wide range of community-based projects, reflecting the importance the organisation places on community involvement and corporate social responsibility.

At the local level, Mizuho Banks’ Sydney office has also been involved in the following CSR-inspired projects:

- Assisting Lifeline with packing books for its Book Fairs (Lifeline is a national charity providing all Australians experiencing a personal crisis with access to 24 hour crisis support and suicide prevention services);
- Supporting the Ted Noffs Foundation charity shop with merchandising, sorting and pricing of goods (Ted Noffs Foundation runs drug and alcohol rehabilitation residential facilities for disadvantaged adolescents);
- Fundraisers at pool competition nights for Humpty Dumpty Foundation and Beyond Blue (Humpty Dumpty Foundation is a charity which purchases essential and life-saving medical equipment for Foundation. Beyond Blue is dedicated to improving the lives of individuals, families and communities affected by depression, anxiety and suicide); and
- A battery drive, for a recycling/green initiative.

The Mizuho Bank, Sydney office also recently hosted a group of secondary students from a local school to visit the offices for a day to learn about careers in banking using Japanese language skills.

As a relatively small branch of a much larger organisation, Mizuho’s Sydney office has demonstrated that, regardless of size of the organisation, individuals can make a difference for their community. Whilst it is difficult to measure the success of Mizuho’s initiatives, the output and impact has been able to be quantified in some modest ways. These include the numbers of hours contributed by staff, the NGO labour costs saved, of beneficiaries aided, the number of items collected and donated, etc. This data helps Mizuho to evaluate its volunteer programs over time, enabling it to monitor trends in participation and other measurement metrics.

Anecdotally, Mizuho’s efforts have been acknowledged with a Certificate of Appreciation from Lifeline for its contributions, and the personal thanks from a group of elderly Lifeline volunteers who would have struggled to move boxes of books without the extra assistance. Another example is the continued willingness of the Ted Noffs Foundation to continue the collaboration. Importantly Mizuho shares both quantitative and qualitative outcomes with management and staff to reinforce the value of our community engagement activities.

Some direct benefits for Mizuho Bank, Sydney arising from the initiatives have included an increased sense of collaboration and teamwork amongst employees. The Sydney office consists of different teams, some reporting directly to Head Office and boasts a wide range of employee backgrounds, including expatriate Japanese staff. The CSR projects align with management’s “OneSydney” strategy to engage staff in collaborating across different teams. Working on community projects allows staff to contribute to their community side by side in a forum in which title and tenure are irrelevant. Involvement in Mizuho Volunteer Day brings a sense of belonging to a wider organisation and an opportunity to build bridges across it.

For lawyers looking to make a start in terms of developing a CSR committee or culture, the International Institute for Sustainable Development’s publication “Corporate Social Responsibility, an Implementation Guide for Business” is a useful starting point and resource. The publication contains an Implementation framework, setting out the following steps:

1. Conduct a CSR Assessment;
2. Develop a CSR strategy;
3. Develop CSR commitments;
4. Implement CSR commitments;
5. Assure and report on progress; and
6. Evaluate and improve. 4

To highlight the value of CSR for in-house teams, Katrina offers this final word, “I would encourage in-house lawyers in other organisations to get involved in CSR initiatives – it is a rewarding and fulfilling experience which brings a range of benefits, both to the individual and the company.”

Footnotes

BEYOND COMPLIANCE

Australia’s approach to whistleblower protection has recently come under increasing scrutiny, following suggestions Australia lags behind other G20 countries on whistleblower protection laws. In April 2015, the OECD Working Group on Bribery in International Business Transactions released a report on Australia’s compliance with international bribery conventions. While the report acknowledged that the 2013 introduction of public interest disclosure legislation improved Commonwealth public sector whistleblower protections, it recommended that Australia implement additional measures to safeguard private sector employees who report suspected foreign bribery to authorities.

The business case for a robust whistleblowing protection framework

Instilling a corporate culture where each individual feels comfortable raising integrity concerns is crucial to the early identification of misconduct or other inappropriate behaviour. In most organisations, employees are instructed, in the first instance, to report integrity suspicions to line management or to an appropriately senior person within the organisation designated to receive such information. In many cases, staff will not feel comfortable reporting directly to management especially where management are perceived to be involved in the alleged wrong-doing, or where a previous report has not been investigated or appropriately resolved. In these situations, the whistleblower may only consider raising the matter if they have the option to report anonymously or report to an independent third party.

Some Australian organisations implement whistleblower protection frameworks to comply with applicable legislation or better practice guidance. Organisations adopting such an approach are missing out on the upside from a whistleblower protection program. A robust and effective whistleblowing protection framework can bring many added benefits to an organisation including reducing losses and investigation costs, minimising regulatory and media scrutiny and limiting consequential reputational damage. The earlier an issue is detected, the sooner an investigation can be undertaken to quantify the loss and identify the root cause and other contributing factors. Early detection reduces the associated investigation costs and the diversion of management time and other resources that usually accompany lengthy, complex regulatory investigations. If management becomes aware of the issue before external parties do, unwanted regulatory attention, damaging attacks on social media and negative media coverage can be significantly reduced or avoided. Where a matter has been detected internally, the organisation can direct the investigation and manage the release of information to the media and other external parties, if necessary.

A whistleblower who feels that they will be supported and protected is more likely to come forward and provide the organisation with valuable inside information that may never be uncovered otherwise.

What are the key shortcomings of Australia’s current whistleblowing approach?

Recent reviews of Australia’s whistleblowing laws have determined that the existing whistleblowing framework, particularly as it applies to the private sector, needs to be enhanced. For example, no single whistleblower law or framework that exists in Australia. Discrete whistleblower regimes apply to specific sectors, industries or groups. The key legislation is contained within the Corporations Act 2001 (Cth) covering corporate whistleblowers and the Public Interest Disclosure Act 2013 (Cth) which applies to former and current public officials. In addition, each state has its own whistleblower protection legislation covering the public sector. The current multi-faceted approach creates confusion about what, how and where to report, as well as creating uncertainty about whether the individual will be protected.
In April 2016, the Senate Economics References Committee published an Issues Paper entitled Corporate whistleblowing in Australia: ending corporate Australia’s cultures of silence. This paper aims to encourage further public debate about how Australia’s corporate whistleblower framework might be improved. The Committee concluded that Australia’s corporate whistleblowing framework does little to help or encourage whistleblowers to come forward, nor does it provide them with meaningful protections from victimisation when they do decide to ‘blow the whistle’.

The paper outlines a number of observations in relation to Australia’s current whistleblower framework:

- For a whistleblower to receive protection under the Corporations Act, the person disclosing the misconduct about the company must be a current employee or officer, or a contractor who has an existing agreement to supply goods and services to the company.
- The existing whistleblower protections in the Corporations Act do not currently cover anonymous disclosures and only apply:
  - To disclosures made to a member of the company’s audit team, a director, secretary or senior manager of the company, a person authorised by the company to receive whistleblower disclosures, or ASIC;
  - When the disclosure relates to an alleged breach of reporting breaches of the Corporations Act and the ASIC Act, or any regulations made thereunder; and
  - To disclosures made in good faith, and based on reasonable grounds of suspicion.
- There is currently no requirement for companies to establish internal processes to facilitate internal disclosure.
- The protections in the Corporations Act are rarely used (there are only four published cases referring to the whistleblowing provisions of the Corporations Act).
- The Corporations Act provides little or no guidance in terms of keeping a whistleblower informed of actions taken in relation to the information they provide. This may discourage whistleblowers from making disclosures.
- There have been no prosecutions under the existing whistleblowing legislation for retaliation against whistleblowers.
- Concerns have been raised about the adequacy of provisions in the Corporations Act for the compensation for whistleblowers who have been victimised.
- The current legislative framework does not provide for an advocate for whistleblowers.

Changes are on the way

To date, proposed changes to whistleblower protection in Australia have focussed on specific industries rather than applying to the private sector as a whole. Australia’s whistleblowing regime now is well and truly in the spotlight and a comprehensive review applicable to the whole private sector is underway.

The Fair Work (Registered Organisations) Amendment Bill 2014 was passed on 22 November 2016. The Bill (which was one of the Coalition’s double dissolution trigger bills) enhances protections for whistleblowers within trade unions and employer associations. At the time the legislation was enacted, the Government made a commitment to strengthen whistleblower protections in both the public and private sectors in this country.

On 30 November 2016, the Senate referred an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors to the Joint Parliamentary Committee on Corporations and Financial Services for report by mid-2017.

It is likely that any amendments to the existing regime will reflect the items for discussion that were set out in the April 2016 Issues Paper and mirror the reforms outlined in the Fair Work Amendment Bill 2014. The following topics were outlined in the Issues Paper:

- Preventing and punishing the victimisation of whistleblowers and including compensation for victimisation;
- Requiring organisations to implement internal reporting mechanisms;
- Introducing financial incentives for whistleblowers;
- Implementing an advocate for whistleblowers;
- Broadening the existing whistleblower definition to include former staff and contractors and expanding the scope of information protected by whistleblower protections;
- Protecting anonymous whistleblowers;
- Replacing the ‘good faith’ requirement with a requirement that a disclosure is based on an honest belief; and
- Requiring organisations to keep whistleblowers informed of the progress of an investigation.

How should organisations respond?

Now more than ever, organisations must focus their efforts on ensuring that they have a comprehensive whistleblower protection program with appropriate internal reporting channels, suitable for the size and the nature of their business. More importantly, organisations must establish and foster a culture of corporate integrity, where employees are encouraged to raise concerns and feel comfortable and supported if they do so. It is not just a matter of compliance – there is a strong business case for doing so.

At a minimum, organisations should:

- Develop and regularly communicate a whistleblower policy that is approved and endorsed by the board and senior management. The policy should set out the benefits of the program and the organisational commitment to investigating reported concerns. The policy should also allow disclosures from a range of individuals, not just from employees, and a broad range of issues should be able to be reported and investigated.
- Assign responsibility for overseeing the program to an appropriately senior and suitably qualified resource.
- Establish a Whistleblowing Steering Committee which convenes when potentially serious or sensitive matters are reported. Such a Committee could include senior executives from Legal, Human Resources and the business unit where the matter originated.
- Implement a variety of internal and external independent communication channels and a variety of mechanisms (e.g. phone, website or email) to report concerns. The program should also provide for anonymous disclosures.
- Provide mandatory training to all employees and specific training to senior management and staff responsible for key elements of the program such as those involved in receiving, assessing and investigating disclosures.
- Provide acknowledgment and a unique reference number to whistleblowers when a disclosure is made to facilitate the provision of additional information and feedback. Where appropriate, keep the whistleblower updated during the investigation process and advise of the final outcome.
- Introduce effective measures to protect whistleblowers from reprisal.
- Clearly articulate processes for assessment, investigation and escalation of disclosures as well as processes for the reporting, investigation and monitoring of retaliation towards the whistleblower.
- Provide whistleblowers with a contact within the organisation to access confidential advice and support.
- Develop periodic reporting to board and audit committees.
- Monitor and assess the effectiveness of the program on a regular basis.
Will Irving,
Group Executive, Telstra Wholesale
– 2006 Corporate Lawyer of the Year

On a crowded awards shelf in his office, sits Will Irving’s trophy signalling his recognition as the 2006 Corporate Lawyer of the Year. The award represents a significant evolution in both his in-house legal career, and his career with Telstra. Recalling his acceptance of the award, Will was quick to recall a momentous time in his career. In 2006, as Group General Counsel, he oversaw the final privatisation of 51% of Telstra, which involved a multi-billion dollar transformation of the organisation, a number of key acquisitions abroad and significant litigation battles back in Australia. In the years following the award, Will remained an in-house lawyer. Then in 2011 following the $11 billion deal with the federal government and NBNCo, he accepted an opportunity to move into a commercial role heading Telstra’s Small/Medium Business Division. Another opportunity presented itself in 2016 when he moved into his current role as the Head of Telstra Wholesale. Still in that role he holds responsibility for a division of Telstra with annual revenues of $2.5 billion.

In recalling the impact of winning the award, Will is quick to point to the increased credibility it afforded him with the Telstra board and the relatively new CEO and senior leadership group. He also highlights the significance of the award as a value-add towards his later commercial shift within the company. “Ultimately, the move to a significant commercial role was given added weight by the peer-recognition of excellence that the award signifies.”

Though enjoying his continuing commercial role, Will remains a keen observer of the in-house profession and highlights the shift of importance of the in-house legal team as a significant change to the profession over the past decade. “We’re seeing a continuing shift of high value, high strategic work to in-house teams. This is distinct from the past when boards felt they had to have a big external firm leading major legal projects.”

As the in-house lawyer of the year in 2006, Will offers considered advice to potential nominees in 2017, encouraging those in the profession to firstly take the time to think seriously about what differentiates you from your peers. Secondly he suggests enlisting clients, peers and suppliers for feedback and support. Given Will’s extraordinary career path both in and outside an in-house role, it’s advice well worth considering.

Janean Richards,
Chief Legal Counsel and Group Manager, Corporate Services Group, Department of Social Services – 2014 Government Lawyer of the Year

The Department of Social Services (DSS) is the Australian Government’s lead agency in the development and delivery of social policy and is working to improve the lifetime wellbeing of people and families in Australia. Given its size and diversity, the legal function manages one of the largest legislation programs in the Australian Government, requiring a broad range of commercial and advisory services across its policy and programs.

In 2014, Janean Richards was the Chief Legal Counsel and Group Manager of legal services within the DSS. She joined the DSS in 2013 after a legal career that included a decade in private practice, then in-house government roles including General Counsel at Comcare, General Counsel at the Australian Customs and Border Protection Services and a legal policy role with the Office of Legal Services Coordination in the federal Attorney General’s Department.

She recalls the apprehension of the move away from private practice. “I did a lot of due diligence before making the move in-house, though it still felt like a huge leap into the unknown. I knew I would either love in-house practice or forever regret walking away from my partnership.”

Fortunately the move paid off and Janean quickly noticed both the diversity of the work and the quality of the opportunities offered by government. “The opportunities and variety of work available as an in-house lawyer within government are unrivalled in private practice.”

“It was an honour to be awarded the 2014 government lawyer of the year,” she recalls. Of course her recollections also include her...
appreciation and recognition of her legal team, stating that it simply wouldn’t have been possible without them. “Receiving the award was an enormous compliment that gave me confidence that our work was highly regarded.”

A strong focus on building great teams and of constantly improving the ‘way we do things’ remains a hallmark of Janean’s approach to work. “I enjoy building great teams and getting feedback through client and staff surveys which confirm that: our clients are happy; our services are well regarded and in demand; our people are highly engaged in their roles and proud of the contribution they make to the organisation and that they enjoy their work.”

Following her acceptance of the award she commissioned an external review of the DSS legal function. The resulting report confirmed that the quality of the services provided by the team were held in high regard by the department, a finding that in hindsight further validated her award and the work of her team. The review also led to the implementation of a number of recommendations to improve matter and knowledge management, to ensure the legal team’s resources are effectively being applied to the key organisational priorities and support quality, consistent and efficient legal service delivery.

In mid-2016, Janean accepted an expanded role as the Group Manager of Corporate Services within the DSS. The expanded role sees her overseeing much of the corporate services provided within the department including HR, communications, project management, parliamentary, FOI, audit and fraud, in addition to her legal role.

Lauren Miller,
General Counsel, Carnival Australia and Winner – 2015 Young Lawyer of the Year

A continuing 11 year career at Carnival Australia seemed an unlikely outcome for Lauren Miller when, while yet to complete her law degree, she began a six week contract there as a paralegal in 2006. It was certainly a natural fit. An avid traveller, Lauren’s role at Carnival sees her representing seven different brands under the banner of the global cruising giant.

Now over a decade later, Lauren’s career at Carnival has featured a number of highlights, one of which is represented by a trophy taking pride of place on what she admits is a very messy desk. Her nomination for the 2015 Young Lawyer of the Year award came as a complete surprise. As the-then Assistant General Counsel at Carnival, her nomination owed to the work of her team and was completed without her knowledge. “The fact that they had invested the time and energy in preparing the nomination meant I felt like I had already won, irrespective of the outcome. The award for me was really a reflection of the incredible collective achievements of my team and of all of the nominees.” In an industry that is unmistakably collegial, Lauren fondly recalls the kindness and warmth of her peers in the days that followed her acceptance of the award.

Of course in the weeks and months following the award, Lauren was afforded the opportunity to speak at a range of industry events. “I did not quite conquer my fear of public speaking but what I’ve learned is it’s far more powerful to be real and vulnerable than it is to be perfect. If anything, I want people to know that their potential is unlimited. If I am given any opportunity to remind them of that, it’s worth taking.”

The year following the award, Lauren accepted the position of General Counsel at Carnival Australia, signalling a further step away from that initial paralegal position at the same company ten years earlier. According to Lauren, “I was incredibly honoured that the business entrusted me with such a significant responsibility. In many ways, my role at Carnival has taught me the power of possibility and the importance of vision and courage. I think the business really embodied all of those values in offering me this opportunity. I’ve had the privilege of walking in the footsteps of some inspirational leaders at Carnival who have encouraged and supported me throughout my career.”

In reflecting on her personal growth since accepting the award, Lauren brings an interesting sense of perspective to the role. “I’ve developed more confidence in my belief that bringing a sense of self to your role is not only important, it’s the only way to achieve great things. I think there can be a lot of pressure to live up to certain preconceptions of what a lawyer should be but it’s up to each of us to challenge and redefine those boundaries. We each have something unique to contribute.

For those considering nominating for the 2017 In-House Lawyer Awards, Lauren is quick to encourage her in-house peers to nominate, to see the awards process as an opportunity to create opportunities to grow and learn. “Recognition is a wonderful thing but most importantly, know that it is the decisions we make when nobody is watching, the deeds that may go unnoticed, which can be the most definitive of our careers. Measure yourself by what you give and the opportunities you create for those around you.”

NEW RESOURCE for ACC Australia Members

Model Controls for outside counsel possessing your company’s confidential information

Go to acla.acc.com to access
ETHICAL DECISIONS IN BUSINESS

It is usually assumed that corporate scandals are the result of deceitful, greedy people inclined to do “bad” things. Whilst part of the problem is that some leaders are unethical and direct the malfeasance from the top, ethical failures are oftentimes company-wide from the beginning. They typically start with otherwise good leaders being confronted in an untenable position whereby the company is pursuing conflicting goals and asks their leaders to lead with the contradictions those conflicts create. The authors of a Harvard Business Review paper, titled “Goals Gone Wild: The Systematic Side Effects of Over-Prescribing Goal Setting”, contends that leaders who narrowly focus on goal setting do not recognise the consequences of their decisions. This leads to employees becoming less likely to identify ethical decisions. Goals, according to the paper, can also induce employees to rationalise their unethical behaviour and can corrupt organisational cultures.

Laws and regulations have the benefit of putting the force of the law behind ethical requirements and therefore make it less likely for companies to gain an advantage by being unethical. As such “One might suppose that where law is largely absent, behaviour is pretty bad. Yet it turns out to be nearly the other way around. The two areas where law is arguably the largest presence in ordinary life – driving cars and paying taxes – are probably the two areas where there is the largest amount of self-conscious cheating.”

A 2016 survey (from 13 countries – Australia was not included in this survey) by the Ethics and Compliance Initiative found that the extent that employees feel pressure to compromise organisational standards is a key indicator for a larger potential threat to integrity. Nearly 75 percent of all survey respondents who felt this pressure also observed misconduct where they worked. By comparison, when this pressure was absent, just 17 percent said they witnessed misconduct in their workplace.

Ethical failure is not cheap. In 2010, the Association of Certified Fraud Examiners estimated that businesses globally suffer annual losses of US$2.9 trillion as a result of fraudulent activity. This clearly shows the extent of unethical behaviour. In its 2016 report (Report to the Nations on Occupational Fraud and Abuse) the association’s survey estimated that the typical organisation loses five percent of revenues in a given year as a result of fraud. The media loss for all cases in their study was US$150,000, with 23.2 percent of cases causing losses of US$1 million or more. The survey also found that 69 percent of fraud perpetrators were male and 31 percent were female which the report says reflects the labour force itself.

The slippery slope

A 2014 study, The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions, (which at the time was billed – by its authors – as the first empirical study on how unethical decisions compound over time) argued that committing small indiscretions over time gradually leads people to commit larger unethical acts that they otherwise would have judged to be impermissible. The authors referred to this phenomenon as the “slippery slope of unethical behaviour.”

Bernie Madoff (who orchestrated the largest Ponzi scheme in history) reportedly commented that “what happens is, it starts out with you taking a little bit, maybe a few hundred, a few thousand. You get comfortable with that, and before you know it, it snowballs into something big.” Madoff’s comments were reportedly made to his long-time secretary when a former client’s secretary was arrested for embezzlement years before his own crimes were uncovered.

A study, published in The Dishonesty of Honest People: A Theory of Self-Concept Maintenance (Mazar, Amir, & Ariely, 2008), found that participants in an experiment paid to solve math problems within a time limit often exaggerated their performance when they were compensated US$10.10 or US$50 for each problem solved, while participants paid US$1.25 or US$5 per problem solved. The authors concluded that only an extra ten cents might have appeared inconsequential, however the severity of taking an undeserved US$5 bill might have compelled participants to recognise that taking an underserved money is a form of stealing.

Blind Spots

In the book titled Blind Spots: Why We Fail To Do What’s Right and What to Do About It (Princeton University Press) Max E. Bazerman and Ann E. Tenbrunsel cite studies that show that when responsibility is shifted from one party to another, people tend to view the first party as less culpable. One experiment devised by the authors shows how such indirectness colours our perception of unethical behaviour. In version A of the experiment, a group of participants are asked whether it’s ethical for
a major pharmaceutical company to triple the price of a cancer drug. People generally say no. In version B, a subgroup is asked to assess the ethicality of the major pharmaceutical company X selling the rights to a smaller pharmaceutical company Y and in order to recoup costs, company Y increased the price of the drug. Participants who read version A, in which pharmaceutical company itself raised the price, judged the company more harshly than did those who read version B. The experiment (and others cited in the book) suggest that people are intuitively more tolerant in their judgment of a person or an organisation when an unethical action has been delegated to a third party. This is especially true when in the absence of complete information about the effects of the outsourcing.

**Ethical decision making**

Ethical decisions are those that are legal and morally accepted by the broader community. Ethical decision making, like most decisions, begins with a problem and a moral component. Recognising the moral or ethical issue is important and is not concerned with whether there is a rule or not. A rule may require an action (or a lack of it) to be unethical. It must also be accepted (by the person confounded by an ethical decision) that firstly a decision must be made and secondly the decision will (in most cases) affect someone or others. James Rest (1998) proposed the four-component model (which can be generalised for organisational settings and which has been adapted slightly in this article). The model outlines processes that individuals use in ethical decision making. It represents how an individual first identifies an ethical dilemma through to intention and finally deciding to behave ethically. The four stages in the model are: (a) recognising the ethical issue; (b) making an ethical judgement; (c) resolving to make ethical concerns ahead of others; and lastly (d) acting on the ethical concerns.

Organisations that have ethical codes do not seem to have reduced unethical behaviour. This could be due to lack of effective ethics management, such as the embeddedness of ethical codes. In fact, the presence of a code of ethics can even be harmful if it raises employees’ awareness but does not give them the tools to effectively deal with ethical dilemmas.

**Suggestions to safeguard against unethical decision making**

The Economist Intelligence Unit, commissioned by Kroll, surveyed senior executives from around the world operating in a wide variety of sectors and functions in order to assess the current fraud environment. The survey found that the top key drivers of increased fraud exposure were high staff turnover (33 percent), increased outsourcing (16 percent), and entry into new riskier markets (13 percent). The top three methods of exposing fraud were whistleblowing (41 percent), external audit (31 percent), and internal audit (21 percent).

Organisations must implement procedures that can help identify, mitigate and manage unethical behaviour. There is no absolute or perfect solution. Certain safeguards may be necessary to promote ethical behaviour without detracting from an organisation’s goals. These safeguards could include: making the cost or consequences of unethical behaviour far greater than the benefit; ensuring that the organisation’s goals are all encompassing (and not too narrow), thereby capturing the critical components of the organisation’s success; providing for training and development; and clearly articulating the organisation’s level of risk appetite. Other measures such as condemning even small ethical lapses before they compound are useful in dealing with the slippery slope issue discussed earlier.

Large organisations with multiple locations can benefit greatly from having ethical ambassadors. An ethical ambassador is an employee who assists the senior management in promoting an ethical culture based on shared values within the organisation. The Institute of Business Ethics in the United Kingdom conducted a study of large companies with a significant presence in Europe, and found that 96 percent of companies that have an ethical ambassador network employ more than 10,000 employees. Ethical ambassadors can play a role in adapting the way ethical issues are adapted to a local context.

Footnotes

SOCIAL MEDIA ETHICS

Background
As a preliminary point, it is important to understand and recognise that applying ethics (including professional ethics) is much more difficult in practice than in theory. For that reason, it is often very difficult for lawyers to recognise ethical issues as they unfold. This can be particularly challenging in an online context, where ethical lines are blurred and trolls mischaracterise their intent.

What do we mean by ethics?
Obviously, ethics is a very broad topic. Legal ethics refers to the professional conduct rules of each jurisdiction and expectations of adherence to an unwritten code of conduct to which the court holds solicitors. Professional ethics is different from normal ethical considerations that govern the “should I?” versus “could I?” moments that occur from time to time. Law, at the other end of the spectrum, is entirely binary. Either something is lawful or it is not lawful. However, it is sometimes difficult to differentiate between the two, which is why lawyers have an important role in society.

Put another way, the law dictates whether I “should” professional ethics is a hybrid of rules that cannot be breached without a sanction and a code of conduct that assists decision-making.

Social media issues
Life is now online and many communications occur through Facebook, LinkedIn, Twitter, Instagram and Snapchat. The latter form of communication, which is sent through photographs that carry a limited lifespan before being automatically deleted, would not necessarily stand out as a means of communication to which ethical and other obligations apply, but it can be.

Duties to use social media and online tools
Social media is a source of information. Information is used by lawyers in a range of contexts, from the negotiation process to obtaining a forensic advantage in a hearing. Lawyers are obliged to seek and obtain information, which may involve the use of social media and online tools. For example, it would be negligent for a lawyer to undertake a cross examination of a witness without having “Googled” them, as doing so would potentially result in overlooking publicly available information. Likewise, it is now routine to Google potential employees (and for a person to research potential employers, including individuals within organisations). One can also find out a lot of useful information about a counterparty’s negotiating team. Similarly, one could find out much about business development targets through the use of social media and the internet.

So, in what circumstances do ethical issues arise during the use of social media and other online tools?

Limitations
Generally speaking, public information is readily available and there is no limitation on using it. For those of us old enough to remember, reviewing old newspapers on microfiche was often viewed as a chore for junior lawyers to complete ahead of an impending court case. Obviously, there are laws regarding the collection of and access to certain types of information. That does not reflect an ethical issue, but rather a legal issue. That is, “hacking” is illegal. Ethics pertains to the use of legally accessible information.

That said, there are modes of communication that now have various levels of public availability. This changes the analysis from whether it is lawful to whether it is ethical. For example, what one can find about me on Facebook is dictated not only by my privacy settings, but also by the privacy settings of people with whom I communicate. That is, I can restrict who looks at my profile, but I cannot restrict access to a comment that I put on somebody else’s profile; access to such a post is determined by their privacy settings. Additionally, privacy settings are practically bypassed by making friend requests and having those requests accepted. Accordingly, there may be ethical issues in relation to whether one ought to issue a friend request to different categories of persons, such as existing clients, potential clients, actual or potential counterparties, witnesses, and experts. In particular, there are specific ethical restrictions for communications with witnesses and with persons who are represented by other lawyers. One would not necessarily need to issue a friend request through a party’s lawyers, however some discretion may be required. For example, it would probably be inappropriate to issue a friend request to a counterparty in person during the course of negotiations. It would
certainly be inappropriate to invite a witness to be a friend on social media during cross-examination. Additionally, there is an ethical obligation to be frank – so making a friend request solely in order to extract information would likely be a breach of that ethical obligation. As the intention behind a request would be inherently difficult to detect, this is primarily a matter of self-regulation. But assuming you are already a social media friend with a person, and have become so for reasons other than for data mining purposes, is there an ethical issue in using information that one obtains through that relationship? If one's circle of friends is small, there might be a common law inference that the information is confidential. If one's pool of friends is in the order of hundreds, it is unlikely that any post could be considered private. There is clearly a grey area between these two extremes and even assuming that there is no obligation of confidence, is there an entitlement (or even an obligation) to use that information?

As noted above, I consider it unethical to pose as a friend in order to obtain access to information. But once friendship is established, is it unethical to use it? If the information is confidential, and there is an obligation to use it, one has a conflict. If it is not confidential, then there is no ethical issue. However, there is an inherent conflict in being in a relationship in which one has to determine whether information obtained in the course of that relationship is confidential. In circumstances where there is any question, the prudent (albeit socially awkward) course would be to (at least temporarily) “un-friend” the subject and step back from the conflict.

There is also a question of whether there are different considerations depending on the social media app. That is, are the rules different for Facebook as opposed to LinkedIn, on the basis that Facebook is more social and LinkedIn is more professional? As a colleague of mine pointed out, Facebook is considerably more commercial than LinkedIn due to its use of pages, reviews and advertisements from businesses. That said, I suggest that there is a level of distinction, as many people who participate in social media through Facebook are doing so for social purposes rather than for the business. Those who use LinkedIn, however, are doing so for business purposes. It is also worth remembering that messaging functions in any social media platform should be used as if they were a normal means of communication. It is as inappropriate to be direct messaging a witness during cross-examination as it would be to meet them for coffee.

“Liking” – An ethical issue

Anecdotally, one is faced with a range of myths about LinkedIn, including that one should never accept a connection from a lawyer from a competing law firm or company because doing so gives that person access to your network. In that context, deciding to seek a “link” in order to expand one’s network or declining to accept a link to deny access to one’s own network may raise matters of mixed business judgment and ethical responsibility. Additionally, there are some aspects of posts and the way one might react to them, which give rise to potential ethical issues. As with Facebook, my view is that one should be frank in one’s aims. Seeking a link has different implications than making a friend request. That said, seeking a link for an ulterior motive (such as “information mining” ahead of a negotiation or cross-examination) has ethical ramifications.

A real question is whether one ought to like an article written by a competitor (because to do so would promote that competitor’s article through your network). There is, in my view, an ethical issue in considering an article to be “like-worthy” and failing to tick the “like” box to not promote a competitor. It is not, however, an issue from a professional ethics point of view – there is no positive obligation to take action to endorse an article.

However, there is a potential professional ethical issue in relation to the question of peer pressure and the need to like articles by a colleague where one does not in fact like the article (i.e., if you think it is a poorly written, legally wrong, or a dangerous waste of time (in an extreme example)). To the extent that liking represents that you consider that it is “like-worthy,” there is a representation being made that is not a true representation of your views. That is, liking something that you do not really like is a misrepresentation. While the prospect of detection or sanction is unlikely, the action might have some practical ramifications.

Social vs. Professional responsibility

In addition, one may encounter difficulties obtaining information through social media that is adverse to an existing client (or, for in-house counsel, which is adverse to your organisation). For example, one of your Facebook friends may post information relevant to a commercial negotiation or litigation that you are handling in-house. As an external lawyer, and depending on your relationship with the client (including internal clients) and your retainer, this may actually be a matter that requires you to report to the client. For in-house counsel, the issue may be more complex because there are duties as an employee that may overlay one’s duties as a lawyer. Sometimes, there may be tension between them.1

Pictures and confidentiality

While not strictly an ethical issue, there is potential interaction between confidentiality, commercial sensitivity and the posting of photographs.

In observing the social media pages of others, I often see photographs. The truism is that a picture can paint a thousand words and one must be mindful of what they are conveying professionally. A social snap on the weekend conveys a healthy work-life balance. Posting a picture of a client’s premises might disclose aspects of confidential processes. A photograph of a dinner with the general counsel and a restructuring specialist might convey a different message than a photograph of a director and an investment banker onsite. And each message might allow an inference of a forthcoming disclosure.

Conclusion

For more than 2,000 years, the older generation has criticised their children. In the first century BC, the Roman Advocate Cicero argued that increased violence in society was attributable to the introduction of the public spectacles of gladiators. He also asserted that the younger generation was disrespectful to their elders, lazy, and unlikely to make anything of themselves. I have heard similar observations in recent times in the context of video games, and my mother is regularly disappointed by the attitude of the younger generation. While we think that our lives are faster and more complex than those before us, there are points of continuity. One of those points is human communication – although the modes of communication are changing. The takeaway is that being mindful of the ethical norms when using new modes of communication, such as Facebook, is now just as important as it was when letter writing and oral communication were the norm.

Footnotes

1 It is beyond the scope of this paper to give an overview of where the professional obligations of a lawyer can be in conflict with those of an in-house counsel. It is sufficient here to note that one’s duties to the court may be in tension with one’s duties to one’s employer.
FACILITATION PAYMENTS: ARE YOUR ORGANISATION’S POLICIES ALIGNED WITH INTERNATIONAL EXPECTATIONS?

The incidence of corruption is a significant issue in the conduct of international business – particularly throughout the developing world. Efforts to control and prevent corruption continue through both international law and local legislation, however the approach taken to criminalise certain conduct, and the likely success in doing so, differs across jurisdictions. A striking example of such discrepancies is seen in relation to the bribery of foreign public officials and the permissibility, or otherwise, of facilitation payments (also known as grease or speed payments) – representing a payment made to a foreign public official, usually in cash, to expedite or secure the performance of a routine process. With the Australian Government’s recent decision to continue to legalise facilitation payments, contrary to international benchmarks, in-house counsel for multinational organisations must tread carefully.

The International Approach

United Nations Convention against Corruption (UNCAC)
Addressing corruption in both the public and private sector, the UNCAC represents a significant initiative for the world-wide prevention and combatting of corruption. Adopted by 181 parties, including the United Kingdom (UK), United States (US) and Australia, the UNCAC prohibits the bribery of foreign public officials in the following terms:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business – Article 16(1).

A key distinguishing feature of the UNCAC is that, in addition to prohibiting ‘active bribery’ (being the offence committed by the person giving or promising the bribe), Article 16(2) also encourages State Parties to consider prohibiting ‘passive bribery’ (being the offence committed by the foreign public official or official of a public international organisation soliciting or receiving the bribe). No guidance is provided under the UNCAC regarding the making of facilitation payments – with the consequence that facilitation payments are considered within the scope of an ‘undue advantage’ and any such payment has the potential to amount to bribery.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention)

An initiative of the Organisation for Economic Co-operation and Development (OECD), the OECD Convention is exclusively dedicated to addressing bribery in the conduct of international business. Signatories to the OECD Convention consist of the 35 OECD member countries (including the UK, US and Australia) and six non-member countries. Consistent with the UNCAC, and drafted in similar terms, Article 1.1 of the OECD Convention is focussed on the ‘supply side’ of the corrupt transaction and places an obligation on its State Parties to adopt any measures necessary to establish that it is a criminal offence to bribe a foreign public official. However, in contrast to the UNCAC, the commentaries on the OECD Convention make it clear that small facilitation payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ as required by the OECD Convention, thus the making of small facilitation payments is not an offence.

Cross-Jurisdictional Examination

United Kingdom
The introduction of the UK Bribery Act 2010 set a new benchmark for the prevention of worldwide corruption. Taking authority from its commitments under the UNCAC and the OECD Convention, the Bribery Act makes the bribery of foreign officials an offence in the following terms:

A person who bribes a foreign public official is guilty of an offence if the person’s intention is to influence the foreign public official in [his or her]...
United States
The US Foreign Corrupt Practices Act (FCPA) pre-dates both the UNCAC and OECD Convention in prohibiting 'foreign trade practices'. Consequently, the elements of the offence of bribery of a foreign public official in Section 78dd-1 to 78dd-3 of the FCPA are drafted in language more specific than its UK counterpart and also generally require the offender to 'make use of the mails or any other means or instrumentality of interstate commerce corruptly'. The FCPA allows for a number of affirmative defences relating 'reasonable and bona fide expenditures' directly related to promotion or demonstration of products or services, or the execution or performance of a contract with a foreign government or agency.

Unlike the Bribery Act, the FCPA contains an 'exception for routine governmental action' which makes it clear that the criminalisation of bribery of a public official shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official. The reference to a 'routine governmental action' is clearly defined by the FCPA as an action which is ordinarily and commonly performed by a foreign official in one of a number of specified areas (including the granting of some permits, licenses or other official documents and processing of governmental papers) and does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

Australia
Adopting the measures required by the UNCAC and OECD Convention, Section 70.2 of the Australian Criminal Code Act 1995 (CCA) makes it an offence to bribe a foreign public official. Although different in text, the elements required to prove bribery are aligned with those under the Bribery Act. However, in April 2017, the Government released a consultation paper on combatting bribery of foreign public officials, which recommended that the foreign bribery offence be amended to remove the requirement that the benefit be 'not legitimately due' and replaced with the concept of 'improperly influencing' a foreign public official. A new foreign bribery offence based upon on the fault element of recklessness was also proposed.

Demonstrating that the benefit provided was a facilitation payment is an available defence under Section 70.4 of the CCA to an accusation of bribery – provided that it can be shown that the value of the benefit was of a minor nature and the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor
nature. The scope of ‘routine government action’ is identical to the definition provided by the FCPA. It is also a requirement of the CCA that the person make a record of the conduct (with content that complies with the requirements of the CCA) and retain that record, unless it can be demonstrated that the record was lost or destroyed in circumstances over which the person had no control and could not have been expected to guard against. The Australian Government indicated in the Consultation Paper that it did not intend to alter the facilitation payment defence.

**The Dilemma**

**Overlapping Jurisdictions**

It is clear that there are fundamental differences between the UK, US and Australia as to what constitutes bribery and whether facilitation payments fall within the ambit of prohibited activity. Consistent with the *OECD Convention*, both the US and Australia exempt, or provide a defence for, the making of facilitation payments. Adopting the standard under the UNCAC, the UK legislation does not allow facilitation payments.

The inconsistency in approach towards facilitation payments across jurisdictions gives rise to practical difficulties for individuals and organisations involved in the conduct of international trade. This is particularly the case given that both the UNCAC and *OECD Convention* provide for overlapping jurisdictions by enabling State Parties to establish jurisdiction over offences committed in the territory of that State as well as those committed abroad by nationals or residents of the State, provided, in the case of the UNCAC, that such exercise does not contravene principles of sovereign equality and territorial integrity of other States.

Such concepts of territory contained in the UNCAC and *OECD Convention* have been adopted by the UK, US and Australia. For example, an offence is committed under Section 12 of the *Bribery Act* if any act or omission which forms part of an offence takes place in the UK or, when not occurring within the UK, is committed by a person who has a ‘close connection’ with the UK (including British citizens and nationals, individuals ordinarily resident in the UK and bodies incorporated under the law of any part of the UK). Similar provisions apply under Section 70.5(1) of the CCA and Sections 78dd-2 and 78dd-3 of the FCPA (with extended application to any ‘issuers’ with securities traded on the US exchange or otherwise required to file reports with the US Securities and Exchange Commission, and organisations having their principal place of business in the US).

The consequence of overlapping jurisdictions for the offence of bribery of a foreign public official is that a number of individuals and organisations will fall within the scope of more than one piece of legislation. For example, a dual national of both the UK and Australia, or a UK national resident in Australia, will be subject to both the CCA and the *Bribery Act*. Further, an organisation incorporated in the UK, but having its principal place of business in the US, will be accountable under both the *Bribery Act* and the FCPA. This raises particular difficulties when there is not consistency between the UK, US and Australia in their approach to facilitation payments — permitted activity by an individual or organisation in the US and Australia, will be punishable in the UK. The implications for multinational organisations are significant.

**Implications for the Multinational Organisation**

There is no doubt that an individual or organisation operating in a particular territory must be conscious of, and comply with, the legislation in place within that jurisdiction. However, for the multinational organisation operating across international borders, the line as to applicable jurisdiction is increasing blurred. Noting the inconsistency in the criminalisation of facilitation payments worldwide, a multinational organisation will have little option but to establish a policy threshold that complies with the most onerous jurisdiction impacting on its operations.

Understanding the frustration that may be felt by multinational organisations at having to prohibit a practice that is currently acceptable in many jurisdictions — potentially to its commercial disadvantage, complacency with regard to international bribery is no longer an option. This is particularly the case given that the *Bribery Act*, in addition to making it an offence to bribe a foreign public official (including by way of a facilitation payment), makes it a strict liability offence for a commercial organisation to fail to prevent bribery. In particular, under Section 7, a commercial organisation is guilty of an offence if a person associated with the commercial organisation bribes another person intending to obtain or retain business, or an advantage in the conduct of business, for the commercial organisation.

Adopting a broader territorial scope than the remainder of the *Bribery Act*, a ‘relevant commercial organisation’ includes a body or partnership formed in the UK and any other body corporate or partnership which carries on a business, or part of a business, in any part of the UK. However, the in-house lawyer is given no guidance as to application of such provisions to the operations of its organisation given that the term ‘carries on a business’ is not defined by the *Bribery Act*. Additionally, an ‘associated person’ for whom the commercial organisation is liable is similarly broadly defined under Section 8 of the *Bribery Act* to include any ‘person who performs services for or on behalf of the commercial organisation’ (for example, an employee, agent or subsidiary). Multinational organisations, even with tenuous ties to the UK, should therefore take heed — particularly given that penalties of up to 10 years imprisonment apply and there is no limit on the fine applicable to an organisation convicted of failing to prevent bribery.

It is a full defence to a charge under Section 7 of the *Bribery Act* if an organisation can demonstrate that it has in place ‘adequate procedures’ designed to prevent persons associated with it from undertaking corrupt conduct. While no guidance has been provided by the legislation on what adequate procedures may comprise, the UK Ministry of Justice has published ‘six principles’ that organisations should be guided by in their implementation of bribery prevention procedures: proportionate procedures; top-level commitment; risk assessment; due diligence; communication (including training); and monitoring and review. In a similar approach, the OECD has issued a ‘Good Practice Guidance on internal controls, ethics and compliance’ that emphasises issues to be considered when establishing and monitoring an ethics and compliance program.

It is expected that international consensus will continue to progress towards a no-tolerance approach to all forms of bribery. Given that the Australian Government indicated in its Consultation Paper that it intends to create a new corporate offence for failing to prevent foreign bribery on terms similar to the *Bribery Act*, in-house counsel should lead the way in recommending their organisation implement a progressive bribery prevention program, including expressly prohibiting the practice of facilitation payments. This is particularly the case given that the Sydney Morning Herald recently reported that one-quarter of ASX 100 organisations permitted the practice. Procedures should be supported by good planning to ensure that the potential consequences of failing to make facilitation payments, such as extended delays, can be mitigated. Anything less, particularly for those organisations within the ambit of the *Bribery Act*, risks significant consequences — not just of prosecution and potential penalties, but for the reputational damage and other commercial consequences likely to be suffered.
The latest instalment in this biennial publication features a range of essential data to improve the performance of small and large in-house legal teams.

The report has been compiled following a survey of over 300 General Counsel and Chief Legal Officers and interviews with over 20 General Counsel across Australia and New Zealand.

The 2017 ACC Australia Benchmarks and Leading Practices Report draws on the data from previous reports and highlights a range of trend data that will shape the future of the in-house profession.

Whether you lead an in-house legal team, or service the in-house sector, this report delivers a range of information and will provide a crucial reference point into the future.

The 2017 report includes the following sections:

- The External Environment – the new normal
- The 21st Century General Counsel
- The 21st Century Legal Team
- The 21st Century Legal Function’s Operating Model
- The 21st Century Legal Function’s Sourcing Model
- The Future of in-house.

The 2017 ACC Australia Benchmarks and Leading Practices Report can be purchased via the ACC Australia site: acla.acc.com.
WALKING THE TIGHTROPE – MANAGING CONFLICTS OF INTEREST INTERNALLY

Introduction
A lawyer employed as in-house counsel is subject to the same professional and ethical obligations as any other lawyer. The only difference between lawyers in private practice and in-house lawyers is that the latter have only one client – the organisation by which they are employed.

A highly respected Australian legal academic has written:
“Status as an employed lawyer, whether in private enterprise or in government, in no way diminishes or alters professional responsibility to the client, the court or the public.” (1)

A leading judicial statement on the subject is that of Lord Denning MR:
“They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidence. They and their clients have the same privileges.” (2).

Your paramount duty as a lawyer
All lawyers are officers of the court to which they owe their primary ethical duty:
“A solicitor’s duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.” (3)

A clash of ethical duties between those owed to the client on the one hand and the lawyer’s paramount duties owed to the court and the administration of justice may, in an extreme case, lead to devastating personal consequences for an in-house counsel leading to loss of status, income, and employment. (4) Managing issues such as potential conflicts of interest internally by in-house counsel can often be both an ethical and management challenge.

In a one-hour documentary, LIVing Ethics for In-House Counsel, commissioned by the Law Institute of Victoria in 2016 a retired corporate general counsel, Simon Doyle, gave valuable insights into the processes used by him to achieve satisfactory commercial results for his employer whilst ensuring that its activities remained within the law and upheld high ethical standards. These included having in place formal compliance processes underpinned by education of management, as well as maintaining both formal and informal internal networks to achieve legally and ethically compliant outcomes for the company which supported its corporate financial and business objectives. (5)

Two respected Australian commentators have written:
“Having the ability to provide advice in a commercial way, together with ensuring professional and ethical responsibilities are not compromising, makes the in-house lawyer a business asset. The obligation to be a lawyer first and foremost should never be seen as an impediment to the business.” (6)

In-house counsel must avoid conflicts of interest
Like all lawyers, in-house counsel have a fiduciary duty to their client to avoid conflicts of interest. This is summarised in the Association of Corporate Counsel Australia, Guidance on Ethical Decision Making:
“In-house counsel must avoid conflicts of interests as they compromise the independence of counsel and could impinge on legal professional privilege. When faced with an unavoidable conflict, in-house counsel must be conscious of the conflict throughout their dealings, declare it openly, clarify the capacity in which they are acting and discontinue acting should the conflict become unmanageable.” (7)

Client confidentiality can be the first cousin of conflict
One of the fundamental ethical duties owed by a lawyer to a client is that of confidentiality. Another fundamental ethical duty is to put at the disposal of your client any information in your possession which is relevant to the affairs of the client for whom you are currently acting. When these two ethical duties clash, you have a conflict of interest. The duty of confidentiality will prevail and the only way of resolving the conflict will be for you to cease acting for your current client unless your former client gives you informed consent to reveal the confidential information.

For example, what if you are asked to advise your current corporate employer on a potential investment in a corporation for which you once acted as an external lawyer? If you possessed relevant confidential information from your previous client engagement, you would have to advise your employer that you are conflicted because of a previous solicitor-client relationship and cannot now act.

Michael Dolan
Over a long career in the law and business, Michael has gained extensive experience as a country and city solicitor as well as being in-house counsel for both a major statutory corporation in Victoria and an Australian electricity supply industry association. Now as a senior ethics solicitor at the LIV, Michael provides advice to solicitors on ethics issues and supports the work of the LIV Ethics Committee. He also presents ethics seminars to solicitors.
Who is your client?

More often than not, the first ethical challenge faced by in-house counsel in terms of managing potential conflicts of interest internally lies in the identification of who is their client. It is the very nature of the lawyer-client relationship itself that gives rise to a lawyer’s professional and ethical obligations. Is the in-house lawyer a lawyer first or merely an employee of the organisation carrying out legal tasks for it?

A former regulator of the legal profession in New South Wales has noted: “The duty to the client for the in-house counsel is the duty to the organisation and no-one else. The in-house counsel does not, without other specific agreements, serve as the legal practitioner for any of the organisation’s officers, employees, directors or shareholders.” (8)

The ultimate duty owed by in-house counsel to the corporation is to the Board of Directors. Of course, from a day to day management perspective, in-house counsel may be advising the Chief Executive Officer or other members of the senior executive team. However, in-house counsel must always keep in mind where their ultimate client duty lies.

Internal requests for legal advice

From my own experience of more than 10 years as an in-house counsel I know that it is not uncommon for managers and employees of the corporation to seek legal advice about their own affairs or about their roles and actions within the corporation.

For example, a senior manager may ask for legal advice on the terms of their employment relationship with the corporation. In responding to any such request, in-house counsel must be scrupulous in making it clear to the employee that any legal advice given by them can only be on behalf of the corporation to seek independent legal advice about their own position or personal affairs.

Also, it should be remembered by in-house counsel that they cannot give legal advice other than to the corporation which employs them unless they hold a full practising certificate issued under the legal regulatory regime in the Australian State or Territory where they practise.

Competing interests within the business

What about when different sections of the organisation with internal competing commercial and compliance interests seek legal advice from in-house counsel?

For example, sales and marketing people might wish to launch a new product to market as quickly as possible to gain increased market share whereas the quality assurance people may wish to conduct further health and safety tests before doing so? Clearly, that situation may require in-house counsel to investigate further and escalate the ultimate decision further up the organisation’s hierarchy.

One Canadian commentator has written: “The identification and management of conflicts of interest is vitally important as the business world becomes increasingly complex. … Navigating through those conflicts is often perplexing, however the basic principles at the departure are simple, one must remember that there is only one client, the corporation, and that counsel must always act in the company’s best interests.” (9)

Be alert to possible external law firm conflict

Before engaging an external law firm to act for your employer in a particular matter, it is prudent to ask the law firm to ensure that it does not have any potential conflict issues of which you are not aware. It is primarily the duty of the law firm to satisfy itself that there will not be any conflicts in acting for your employer in the particular matter, but reinforcement of the need for the law firm to undertake adequate conflict checks is a wise step to take. This is particularly so in the current migratory legal environment in which we live.

A lawyer’s statutory protection regarding ethical responsibility

The Legal Profession Uniform Law, in force in New South Wales and Victoria since 1 July 2015 has created a new offence under the heading of “Undue Influence”:

“A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations. Penalty: 100 penalty units.” (10)

In a recent matter which came to my attention a corporation was pressuring its in-house lawyer to act in a clear conflict of interest situation, but client education on this part of the Uniform Law was instrumental in resolving the situation.

Conclusion

Like all lawyers, in-house counsel have an ethical duty to avoid conflicts of interest. Often this can be a challenge when the lawyer is working inside an organisation. Identifying the lawyer’s client is the first step to managing internal potential conflicts successfully. As in-house counsel, you need to carefully inform yourself, ask questions, and seek internal or external advice from legal colleagues or your professional bodies (so you don’t have to sweat it on your own).

References:

2. Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No. 2) [1972] 2 QB 102 at 129.
5. Simon Doyle, Living Ethics for In-House Counsel 2016/2017, Law Institute of Victoria [Chapter 1].
8. Steve Mark (former NSW Legal Services Commissioner), Walking the Ethical Tightrope:Balancing the Responsibilities of In-house Counsel to Key Stakeholders, Legalwise Seminars Pty Ltd, 12 November 2009.
Global warming, emerging corporate risk and lawyer disclosure

The impacts of climate change are upon us and corporations now face the ramifications. Those with emissions intensive processes have boards, in-house counsel and even external litigators who will increasingly bear reputational responsibilities and legal consequences if they do not prepare.

Is there an emerging duty on lawyers to protect shareholder value by blowing whistles about clients’ climate-destructive activities? I think such a duty is ‘emerging’, for the following reasons:

- First, there will be, in my opinion, an ethical responsibility upon lawyers to disclose clients’ climate-damaging actions, or those that show a lack of climate-mitigation in relation to emissions;
- Second, there exists a permissive exception to client confidentiality in the conduct rules, allowing us report iniquity or wrongdoing; and
- Third, all lawyers have the inherent right and autonomy, not to suffer a decline in their own reputation for honesty and integrity.

So a key legal issue is: to what point in time will future courts and regulators look back and determine that climate risk was reasonably foreseeable by key corporate decision makers, and also say that boards and their legal advisors ought to have known this? Given the quantity and depth of publicly available information about climate-deterioration, it is conceivable that that ‘look-back point’ is, more or less, now.

Consider the current state of play in climate litigation. Presentations to a law and climate change workshop at Melbourne Law School in November 2016 heard that

- although no Australian cases have so far resulted in injunctions or damages against either government or miners in relation to climate damaging activity, the cases that have been heard establish that climate science is acceptable in evidentiary terms, that single projects can contribute to average global warming and that emissions are cumulative;
- government participation in and ratification of international climate mitigation treaties could constitute adequate assumption of a duty of care by such governments; and
- ‘… there is a real prospect of success [in tort] against government in an Australian context,’ for failure to ensure that harm is not inflicted on citizens by the consequences of climate change.¹

While there is obviously an emerging personal risk to directors and a financial risk to corporations with no, or no credible, climate-exposure plans (which can be activated through shareholder class actions),² there is also a longer-term regulatory compliance requirement, likely to be policed by ASIC or APRA, for which the consequences of breach will be quasi-criminal or criminal, in a similar way to that in which, for example, lawyers’ artificial tax schemes are prosecuted today and any money laundering activities will be too.³

The G20 Financial Stability Board

Let’s look at the latter regulatory compliance issue, because that is where the immediate action is, and the story begins with the Financial Stability Board. In the aftermath of the global financial crisis, the G20 set up its Financial Stability Board and, in turn, the Task Force on Climate-related Financial Disclosures (TCFD), chaired by Michael Bloomberg and including representatives of ratings agencies, mega-banks, asset managers, stock exchanges, accountancy firms, insurers/re-insurers, miners and carmakers.⁴

The TCFD has produced a draft framework for corporate disclosure of climate risks, with recommendations that encourage the key financial and industrial sectors to develop and disclose to markets, over a 5 year time frame, progressively deeper and ‘… more complete, consistent and comparable information, for market participants, [with] increased transparency and appropriate pricing of climate-related risks and opportunities.’⁵

Although Australia’s largest fossil fuel industries are well behind the global trend to disclose and manage their exposure to climate change, there is a real prospect of success [in tort] against government in an Australian context,’ for failure to ensure that harm is not inflicted on citizens by the consequences of climate change.
risk in terms of the TCFD draft framework, APRA has very recently decided that the TCFD direction – involving both risk and opportunity – is the right way to go.

**Implications for lawyers’ duties**

So what has this got to do with lawyers, especially those with transactional and litigation practices and connections to major climate-exposed clients? Lawyers inside corporations and external firms acting for them, have rarely been concerned about corporate negligence being imputed to them personally. Even disciplinary action or prosecution by regulators is unusual, unless there is clear evidence, for example, of corruption or tax evasion.

Part of the reason for this protective bubble around us is our traditionally agnostic attitude to our clients’ activities – this is the so-called ‘agency’ rationale for non-engagement of lawyers with the moral issues behind our clients’ behaviour. Where a client decides to try to keep secret or deliberately understate a climate risk – even though they know about the TCFD recommendations – or we become aware that the client is just careless (negligent) as to the real extent of the risk – our natural conditioning is to keep the secret too. But is it professionally necessary to speak out?

I’ll get to this, but there is a preliminary issue here – a lot depends on who the client is. If the client is obviously the corporation (and not the CEO), it may be easier for us to say, ‘Ok, my client is the corporation and its shareholders,’ and therefore their interests are better served by disclosure of that risk to the market or a regulator.

Take this very contemporary local example – the 23 remaining coal-fired electricity generators around Australia: with renewable energy prices falling rapidly and no clean coal technology available, these generators may shortly find themselves saddled with coal mines and turbines that are huge, financially stranded assets.

- Should we, as the in-house lawyers be worried about this personally, if we know the company has ignored the need to model their climate risk under the TCFD guidelines?
- Answer: not if we are clear that our true ‘clients’ are the company’s shareholders and we act accordingly.

As climate risk becomes a more immediate financial risk to corporations, especially for emissions-intensive industries and their many customers, corporation lawyers (internal and external) who succumb to CEO pressure to contain awareness of that risk, are in turn at risk of breaching an emerging duty to disclose to shareholders what is going on.

So, what does legal ethics say to lawyers who may be caught up in this scenario? Many will think they have no option but to stay silent in any event, because of the duty to preserve client confidentiality. But this is not necessarily the case.

**Lawyers’ Ethical Types**

Looking closely at confidentiality first requires a look at what is known in legal ethics as the dominant lawyers’ ethical type. The Adversarial or Zealous Advocate type of lawyer is dominant because most lawyers generally agree with the view that they need to do what their client tells them to do. This sort of lawyer is moderately to highly partisan; ie, they consider they must do everything possible for their client within the law. But adversarial advocacy encourages an unhealthy tacit agreement between client and lawyer – a mutual avoidance of ethical responsibility, particularly for ultimate actions that cause damage to others.

This is a process where some clients (even sophisticated, corporate clients) can become over-reliant on their adversarial advocate lawyer for ‘advice,’ but the lawyer, even though they know this, will be content to stick with the view they typically learned in law school – that their client is ultimately in charge and always makes their own independent decisions. The result is that these clients can effectively, be aided and abetted in ignoring the intention of the law and focus on complying with its letter only.

But for climate-exposed companies with ASX values that are dependent on reputations, complying only with the letter of the law may not be enough for much longer.

Self-aware adversarial advocates may guard against this cozy relationship, but all who practice private law with monthly budgets,
know that it is in their short-term financial interests to go along with such avoidance devices. And because adversarial advocacy dominates most lawyers’ thinking, we almost always say that, as long as what a client wants is ‘legal’, ethics are less important.

Take this example. A client cement producer, who knows that they are breaching environmental emission standards because of their under-maintained and old sintering furnaces, may be content to rely on an EPA inspector’s report that emission levels are being maintained, even though the inspector was rushed and did not have the resources to properly measure the emissions. When the client’s internal risk management report to this effect comes to the attention of in-house counsel, they are able to fall back on the Adversarial Advocate ideal, rationalise their silence, maintain confidentiality and avoid whistleblowing by convincing themselves that the EPA inspector’s report established company compliance. And further up the line, in the office of the CEO or chief risk manager, they are able to say that as the corporate counsel’s office is happy with the situation, they are also.

Lawyers who are stuck inside this framework keep hearing the same script in their heads: adversarial advocates do not talk! And, because there have been notorious examples of this type of lazy-ethics thinking (AWB, the Reserve Bank’s note printing subsidiaries40) the notion of lawyers’ excessive adversarialism or hyper-zeal has emerged. Hyper-zeal is sometimes used to describe an ‘anything goes’ mentality among adversarial advocates, in the interests of meeting a client’s instructions:

• Can you think of a hyper-zealous colleague who can be relied upon to keep silent, no matter what?
• Are you at any risk of trending this way yourself?

This issue of mandatory silence and secrecy has long been a feature of the United States’ legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that legal ethics, but here in Australia the courts are very clear that anything does not go, and that

Lawyers who are stuck inside this framework keep hearing the same script in their heads: adversarial advocates do not talk! And, because there have been notorious examples of this type of lazy-ethics thinking (AWB, the Reserve Bank’s note printing subsidiaries40) the notion of lawyers’ excessive adversarialism or hyper-zeal has emerged. Hyper-zeal is sometimes used to describe an ‘anything goes’ mentality among adversarial advocates, in the interests of meeting a client’s instructions:

• Can you think of a hyper-zealous colleague who can be relied upon to keep silent, no matter what?
• Are you at any risk of trending this way yourself?

This issue of mandatory silence and secrecy has long been a feature of the United States’ legal ethics, but here in Australia the courts are very clear that anything does not go, and that

Lawyers who are stuck inside this framework keep hearing the same script in their heads: adversarial advocates do not talk! And, because there have been notorious examples of this type of lazy-ethics thinking (AWB, the Reserve Bank’s note printing subsidiaries40) the notion of lawyers’ excessive adversarialism or hyper-zeal has emerged. Hyper-zeal is sometimes used to describe an ‘anything goes’ mentality among adversarial advocates, in the interests of meeting a client’s instructions:

• Can you think of a hyper-zealous colleague who can be relied upon to keep silent, no matter what?
• Are you at any risk of trending this way yourself?

This issue of mandatory silence and secrecy has long been a feature of the United States’ legal ethics, but here in Australia the courts are very clear that anything does not go, and that

Lawyers who are stuck inside this framework keep hearing the same script in their heads: adversarial advocates do not talk! And, because there have been notorious examples of this type of lazy-ethics thinking (AWB, the Reserve Bank’s note printing subsidiaries40) the notion of lawyers’ excessive adversarialism or hyper-zeal has emerged. Hyper-zeal is sometimes used to describe an ‘anything goes’ mentality among adversarial advocates, in the interests of meeting a client’s instructions:

• Can you think of a hyper-zealous colleague who can be relied upon to keep silent, no matter what?
• Are you at any risk of trending this way yourself?

This issue of mandatory silence and secrecy has long been a feature of the United States’ legal ethics, but here in Australia the courts are very clear that anything does not go, and that

Lawyers who are stuck inside this framework keep hearing the same script in their heads: adversarial advocates do not talk! And, because there have been notorious examples of this type of lazy-ethics thinking (AWB, the Reserve Bank’s note printing subsidiaries40) the notion of lawyers’ excessive adversarialism or hyper-zeal has emerged. Hyper-zeal is sometimes used to describe an ‘anything goes’ mentality among adversarial advocates, in the interests of meeting a client’s instructions:

• Can you think of a hyper-zealous colleague who can be relied upon to keep silent, no matter what?
• Are you at any risk of trending this way yourself?

This issue of mandatory silence and secrecy has long been a feature of the United States’ legal ethics, but here in Australia the courts are very clear that anything does not go, and that

Lawyers who are stuck inside this framework keep hearing the same script in their heads: adversarial advocates do not talk! And, because there have been notorious examples of this type of lazy-ethics thinking (AWB, the Reserve Bank’s note printing subsidiaries40) the notion of lawyers’ excessive adversarialism or hyper-zeal has emerged. Hyper-zeal is sometimes used to describe an ‘anything goes’ mentality among adversarial advocates, in the interests of meeting a client’s instructions:

• Can you think of a hyper-zealous colleague who can be relied upon to keep silent, no matter what?
• Are you at any risk of trending this way yourself?

This issue of mandatory silence and secrecy has long been a feature of the United States’ legal ethics, but here in Australia the courts are very clear that anything does not go, and that
mentioned previously, the forthcoming TCFD recommendations are likely to be voluntary in the short term, so clients and their lawyers are unlikely to be compelled to disclose their climate risk assessments or preparations. Accordingly, lawyers who do disclose are unlikely to be able to assert that they were compelled to do so under that arm of 9.2.2. But what if the final TCFD recommendations, considered as a whole, make it abundantly clear that global financial stability is profoundly threatened by lack of preparation for and mitigation of climate risk? Will a lawyer inside such a corporation, or inside an advising law firm, be ‘permitted to disclose’ under 9.2.2?

Christine Parker and I address this in Ch. 4 of the forthcoming third edition of Inside Lawyers’ Ethics18. It is clear that the possession of so-called ‘iniquitous information’ about crimes or frauds does not attract confidentiality19, that ‘crimes, frauds and misdeeds’20 may occur in responsible lawyer concerned for their own balance the competing interests to determine whether disclosure is justified22.

There is therefore support for a disclosure iniquity or wrongdoing as understood by ‘permitted by law’ under ASCR 9.2.2 where iniquity or wrongdoing as understood by ‘permitted by law’ under ASCR 9.2.2. ASCR 4.1. ‘A solicitor must … [4.1.2] be honest … in all dealings in the course of legal practice’.

Conclusion

Since the TCFD framework and APRAs adoption of the same are imminent, it is probable that there will be instances where secrecy will constitute an iniquity by defrauding and degrading the market. There is therefore support for a disclosure ‘permitted by law’ under ASCR 9.2.2 where iniquity or wrongdoing as understood by Australian common law is involved, providing competing interests in secrecy or disclosure are actively balanced. This balancing process is essential for any prospective whistleblower23, and no less so for a corporate, responsible lawyer concerned for their own reputation for integrity24, given the likelihood of later publicity.

On behalf of the Australian in-house legal sector, ACC Australia recently provided a submission to the federal parliamentary inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. This submission can be viewed via the ACC Australia website.

Footnotes

1 Anita Foerster, Han Choudhry and Jacqueline Peel, Shaping the Next Generation of Australian Climate Litigation. Report on a Melbourne Law School Workshop, 17 November 2016 (unpublished).


Recommendations-Report-Overview-Deck-Long-1.23.pdf. This TCFD webinar goes through the recommendations: https://www.fsb-tcfd.org/event/webinar-overview-


5 See n 3.


9 Do you remember this example? the case of AWB, the major wheat exporter which covered up bribes to the former Iraqi regime of Saddam Hussein. Inside AWB, at least one in-house lawyer was in close contact with other AWB executives and knew of their decision to keep quiet about the bribery and did not act. See Christine Parker and Adrian Evans, Inside Lawyers’ Ethics, 2nd ed, Cambridge University Press, Melbourne, 2014, pp 13–16; June Lee, Five Year ban, $50,000 fine for former AWB boss, The Age, 11 April 2017.


11 Parker and Evans, n 7, p 34.

12 Parker and Evans, n 7, p 13.

13 Parker and Evans, n 5, p 322-333.

14 There is insufficient space here to discuss this large issue, but see this site for an overview: https://www.whistleblowing.com.au/learn/whistleblowing/whistleblowing-legislation/

15 (1884) 10 QB 153 (158).

16 Attorney-General (N.T.) v Kearney (1985) 158 CLR 510, 514 (Gibbs CJ); R v Bell; ex parte Lees (1980) 146 CLR 141, 156 (Stephen J).

17 For example, an Australian lawyer who advised company directors to phone their companies to avoid paying properly due debts was disciplined for being ‘involved’ in the contravention. ASIC v Somerville & Ors (2009) NSWSC 934.


19 Gartside v Outram (1857) 1 LJ Ch 113.

20 Initial Services v Ruttenil (1968) 1 QB 396.


22 Koomen, above n 59, 76 (emphasis in original).

23 See Parker and Evans, n 7, Ch 4.

24 The concept of honesty is unsurprisingly, a baseline in the ASCR ASCR 4.1. ‘A solicitor must … [4.1.2] be honest … in all dealings in the course of legal practice’.
9 FUNDAMENTALS OF A BEST PRACTICE IN-HOUSE LEGAL TEAM

Jemima Harris
An experienced senior corporate and commercial lawyer, and Managing Counsel at Lexvoco, Jemima works with Lexvoco clients advising on a broad range of corporate and commercial legal issues including construction, competition, IP, property, corporate governance, infrastructure, projects and disputes. She also plays a key role in delivering consulting projects to clients in certain industries.

Customers want three essentials from suppliers. They want a solution that’s fit for purpose; and they want that solution as quickly and cost effectively as possible. Clients of legal services are no different. The tricky part is balancing all three without unknowingly sacrificing one aspect. Here are 10 tips for becoming an efficient, cost effective and self-sufficient. Develop guidelines for communication with the internal client regarding expectations, deadlines and status updates. Poor client satisfaction normally comes from poor communication about time expectations.

3. Appoint a gatekeeper
Unless it’s a one-person legal team, there should be one person responsible for collecting, distributing and coordinating workflow. In larger teams this could be a full-time role, and in smaller teams one person could spend as much time as needed on ‘operations’ within their usual role. This person can ‘triage’ legal requests, ensure complete instructions are received and then allocate the work to be done. They may even assist with paralegal duties. Some advanced teams have this in a system and the gatekeeper manages the system.

4. Get data and record what you do
Record what legal does, for whom, why and how much (both in $ and time). This data, captured by an app or by team members, assists your team to plan and justify resourcing, and helps to identify opportunities for continuous improvement and benchmarking, eg are you spending too much time on low value, low risk work which could be eliminated by introducing self-help tools such as automated contracts.

5. Reduce total legal spend
All in-house lawyers should be trying to reduce total legal spend. You can do this by doing more work in-house, and using continuous improvement measures to drive efficiencies to provide capacity to do so. A good benchmark to aim for is a 2:1 ratio for in-house vs external legal spend. Where additional resources are needed, consider using flexible in-house resourcing to fill skill or capacity gaps.

6. Be accountable
Your internal clients should understand the cost (and value!) associated with your services in order to make sound business decisions. Each regular user of legal should have a budget for legal costs. Assign a notional value (normally around $200/hr) to the work performed by your team. This encourages internal clients to use the in-house resource and motivates the team to continuously improve to remain the supplier of choice, not just because they are cheaper. For the same reason, don’t be shy about communicating legal’s successes.

7. Develop practice guides (and link them to the workflows)
Use these for common work types to record how the work should be done most efficiently, and include hyperlinks to previous advices and templates to share knowledge internally and avoid buying or doing things more than once.

8. Seek assistance from non-legal colleagues
Get out into the business and develop relationships with your colleagues in other parts of the organisation. Apart from the obvious advantages that flow from a deeper understanding of the business, it will create opportunities for collaboration with other business units. Talk to your colleagues in finance and IT to leverage their specialist skills. Visiting other teams or sites within the business can help the team identify opportunities for legal to improve its processes to better support its internal clients.

9. Automate
Once your processes, templates, guidelines, rules and people are working well, you can then remarkably improve the speed, consistency and cost of your more common legal tasks by automating them. This can be done by building them into an application that takes your inputs (eg deal terms) and produces the contract, sign-off form and all relevant communications about the deal. Anything from simple employment on-boarding processes to NDAs, sale and purchase contracts and compliance checklists. But... don’t try to automate a process that’s not slick and routinely followed. Such a system will only magnify problems. Fix the process and documents first.
THE CHALLENGES TO IN-HOUSE COUNSEL ARE CONSTANT

Seeking solutions to stay on top of your ever-evolving responsibilities? ACC has you covered with best-in-class education on the most pressing issues and trends facing in-house counsel.

The most in-demand sessions include...

• Business Education for In-house Counsel
• Preventing Litigation Through Contract Drafting
• Contracts: Handling Large Volumes in Small Departments
• Regulator Session: Corporate Compliance and Enforcement
• Employment Law Update
• Regulator Session: International Data Privacy
• Cultivating Your Network to Support a Career Transition: Search Strategies for In-house Counsel

Use the meeting program guide in this issue of the ACC Docket to customize your Annual Meeting agenda!

Register today at www.acc.com/am2017

“"This is the best CLE I attend. I operate under a very tight budget, and even if I couldn’t convince [my boss] to have the company cover it, I’d pay for it out of my pocket. There simply are no other offerings out there with as much relevant, recent information for in-house counsel.”

EMILY CHASE
General Counsel, CPM Holdings, Inc.
ACC Issues Guidelines for Law Firm Cybersecurity Measures

ACC recently announced the release of safety guidelines for outside counsel who have access to sensitive company data as part of their engagements with corporate law departments. The guidelines, “Model Information Protection and Security Controls for Outside Counsel Possessing Company Confidential Information,” will serve as a benchmark for law firm cybersecurity practices. Encompassing information retention/return/destruction, data handling and encryption, data breach reporting, physical security, employee background screening, and cyber liability insurance, the model requirements are based on ACC members’ experience, past data security audits, and learned best practices in ensuring that sensitive client data remains confidential.

“We are increasingly hearing from ACC members, at companies of all sizes, that cybersecurity is one of their chief concerns, and there is heightened risk involved when sharing sensitive data with your outside counsel,” said Amar D. Sarwal, ACC vice president and chief legal strategist. “With these Model Information Protection and Security Controls, the in-house bar, with the help of outside counsel, are taking the lead on sharing established best practices to promote data security.”

A number of ACC members worked together to draft the guidelines, receiving input from several law firms on the standards. The guidelines are being issued on the heels of the ACC Chief Legal Officers (CLO) 2017 Survey finding, that information privacy and data breaches/ protection of corporate data were ranked as “very” or “extremely” important by two-thirds of CLOs and general counsel (GCs). Since 2014, the percentage of GCs and CLOs expressing data breaches as “extremely” important rose from 19 percent to 26 percent this year.

Corporate Lawyers Spotlighted for Leadership Contributions in Advocacy at ACC Mid-Year Meeting

ACC is pleased to recognise the following winners of the second annual ACC Advocacy Award:

- **Dawn Haghighi**, general counsel of PCV Murcor Real Estate Services, Hightide Settlement Services and Vendor Resource Mortgage Services, and **Laura Dorman**, managing director and associate general counsel at Berkeley Research Group, LLC, creators of the ACC Regulatory Working Group
- **Paul Lanois**, senior legal counsel at Credit Suisse

Building upon members’ strong interest in developing relationships with regulators, Haghighi and Dorman created the ACC Regulatory Working Group, which provides regulators and public officials with an opportunity to update in-house counsel on various regulatory developments in real-time throughout the year. Haghighi and Dorman’s efforts have maximised corporate counsel's ability to understand and adjust to new regulations, as well as to educate policymakers about the impact of these roles on their businesses.

Paul Lanois’ influence is deeply ingrained in educational efforts related to the practice of in-house law throughout Europe. Lanois published a book, titled “L’effet extraterritorial de la loi Sarbanes-Oxley,” which is listed among the authorised books used by candidates for the French aggregation examination for professorship positions -- the most prestigious civil service competitive examination for the public education system. Lanois also spoke before the French Parliament on transparency in the governance of large companies.

ACC Legal Operations Names Inaugural Chair

VP, Head of Legal Operations at Campbell Soup Company to Lead Association of Corporate Counsel Membership Section for Law Department Management Professionals

Reese Arrowsmith, VP, head of legal operations, Campbell Soup Company is the first-ever chair of ACC Legal Operations. ACC Legal Operations, the membership section created by the association in March 2015 to support the burgeoning position of legal operations executive, has grown by 40 percent since its kick-off conference. The membership section includes nine interest/industry groups and seven regional groups, including in Europe, the first group outside of the United States.

As chair, Arrowsmith’s priorities are to develop a foundational tool kit for the legal operations function and to ensure that ACC Legal Operations continues to provide strong ongoing education, including the annual ACC Legal Operations Conference. The work extends to educating general counsel about best practices in establishing the legal operations function and providing law department management resources.
The following ACC Australia members changed organisations between February 2017 and April 2017. ACC Australia encourages all members to notify us of a change of workplace to ensure we have your current contact details.

<table>
<thead>
<tr>
<th>Name</th>
<th>Past Organisation</th>
<th>New Organisation</th>
<th>New Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brendan Tynan-Davey</td>
<td>CBRE Pty Ltd</td>
<td>United Resource Management</td>
<td>Legal Counsel</td>
</tr>
<tr>
<td>Tien Tifa</td>
<td>Woolworths</td>
<td>Toyota Motor Corporation Australia</td>
<td>Senior Corporate Counsel</td>
</tr>
<tr>
<td>Kirsty Harvison</td>
<td>Melbourne Market Authority</td>
<td>Quest Apartment Hotels</td>
<td>General Counsel</td>
</tr>
<tr>
<td>Kristian Imbesi</td>
<td>Australia Post</td>
<td>Australia Post</td>
<td>Head of Board &amp; Shareholder Liaison</td>
</tr>
<tr>
<td>Astrid Heward</td>
<td>The Movember Foundation</td>
<td>Travelport Locomote</td>
<td>General Counsel</td>
</tr>
<tr>
<td>Dion Gooderham</td>
<td>IAG</td>
<td>Uniting Church in Australia</td>
<td>Director of Legal Services</td>
</tr>
<tr>
<td>Nick Willetts</td>
<td>Landis + Gyr</td>
<td>Suncorp Bank</td>
<td>Commercial Lawyer</td>
</tr>
<tr>
<td>Ben Cameron</td>
<td>Wilmar Sugar Australia</td>
<td>Thiess</td>
<td>Senior Legal Counsel</td>
</tr>
<tr>
<td>Gina Georgiou</td>
<td>Australian Hearing</td>
<td>Macquarie University</td>
<td>University Solicitor</td>
</tr>
</tbody>
</table>
YOUR NEW ACC AUSTRALIA COLLEAGUES

We welcome the following members who joined ACC Australia in the three months to 1 May 2017

AUSTRALIAN CAPITAL TERRITORY

Anna Fredericks Department of Human Services
Emma Morrison Department of the Prime Minister and Cabinet
Anne Lea Fujitsu Australia Limited
Andrew Ford National Disability Insurance Agency

NEW SOUTH WALES

Tom Nguyen 3M Australia Pty Ltd
Lisa-Anne Carey Abacus Property Group
Penny Dixon Baiafa
Luke Ayres Brookfield Global Integrated Solutions
Helen Telfer CBRE
Kate Dixon Chartered Accountants Australia and New Zealand
John Bourne Coca-Cola South Pacific Pty Limited
Naem Hashemi Coffey International
Rae Terry DuluxGroup Limited
Karen Reid Energy & Resources Lawyers Pty Ltd
Joseph Haddad Envest Pty Ltd
Dawnie Lam Ernst & Young
Emily Moore Fujitsu Australia Limited
Scott Mortimer Fujitsu Australia Limited
Robert Picone Fujitsu Australia Limited
Henry Sun Fujitsu Australia Limited
Amanda Luhrmann Graincorp Limited
Anthony (Tony) Marshall HealthCare Australia Pty Ltd
Andrew Handelsmann IAG
Kym Koffel IBM Australia
Vera Lee IBM Australia Limited
Jonathan Nguyen IBM Australia Limited
Stanley Yu IBM Australia Limited
Chris Kearney InterRISK Australia Pty Ltd
Rebecca Michelides Jurlique International
Spogemay Mangal LexisNexis
Janna Vynokur LOD - Lawyers On Demand
Richard Anderson LOD - Lawyers On Demand
Rebekah Edwards LOD - Lawyers On Demand
John Grimes LOD - Lawyers On Demand
Lisa Grindlay LOD - Lawyers On Demand
Jenny Hwang LOD - Lawyers On Demand
Michelle Milligan LOD - Lawyers On Demand
Anthony Poole LOD - Lawyers On Demand
Luke Rollason LOD - Lawyers On Demand
Philippa Tate-Gilder LOD - Lawyers On Demand
Catherine Herlihy Manpower Group
Alina Angheluta Medtronic Australasia Pty Ltd
Jennifer Mew-Sum Medtronic Australasia Pty Ltd
Viola Yousef Melbourne IT
Grant Jones MLC Limited
Kim Alexander National Australia Bank Limited
Jasmine Burns Pernod Ricard Winemakers Pty Ltd
Maysem Elmaet QBE Asia Pacific
Priscilla Umaria Ratch-Australia Corporation Limited
Adam Papadakis ResMed Ltd
Simon McCarrn Simon McCarrn
Heather Rooney Staples Australia Pty Limited
Cecilia Wang Staples Australia Pty Limited
Natalie Cromb Suez Recycling & Recovery Australia & New Zealand
James Couche Thales Australia
Evonne Cheung The George Institute for Global Health
Monique Hennessy The Invisible Exercise
Dominic Carey The Law Society of New South Wales
Timothy Perry Thomson Reuters
Julianne Stringer TJ Clan Pty Ltd
Marcela Kamada TransGrid
Amanda McFadzean Weir Minerals
Raksha Pathak Westcon Group
Peter Bockos Westpac
Michael Hogan Womrald Australia Pty Limited

NORTHERN TERRITORY

Thomas McGree Power and Water Corporation

QUEENSLAND

Rifa Shamma ASIC
Nicola Molloy Aurizon Holdings Limited
Catherine Abercrombie Brisbane Catholic Education
Fran Finucan Collins Foods Limited
Matthew Stewart Cromwell Property Group
Simon Wood Fujitsu Australia Limited
Kate Hynes Halfbrick Studios Pty Ltd
Phillip Hourigan Ironside Risk Partners
Emily Dux Olam Australia
Yi Zhao QIC
Aidan Lavin Queensland Treasury
Kylie Prideaux Queensland Urban Utilities
Julian Walsh University of Queensland
Malcolm Carroll Woolworths Limited
David Pitt Woolworths Limited

SOUTH AUSTRALIA

Mun Lai Bridgestone Australia
Sam Dighton ElectraNet Pty Ltd
Melissa Davies Lucas Total Contract Solutions
Michael Pritchard Raytheon Australia
Jason Roberts Return To Work
ACC Australia National Conference 2017

15 to 17 November 2017

Alice Springs Convention Centre, NT

Register now at acla.acc.com