

THE EVOLVING ROLE AND FUTURE OF IN-HOUSE LAWYERS



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Emma is currently on maternity leave from her role as Communications and Member Services Director at ACC Australia. She has a wealth of experience across corporate communications; encompassing media relations; marketing strategies; stakeholder management; web and print content development; event and project management; brand strategy and sponsorship. Emma is also a Civil Marriage Celebrant who performs wedding ceremonies and commitment ceremonies across Victoria.

While there are some that may argue that the essence of being a lawyer has changed little over the past century, there is no doubt that the traditional system and way of delivering legal services is being challenged. Corporate business processes have evolved and technology has created an environment where people are connected 24/7 and business is being readily conducted across borders. The in-house legal profession is not immune from these changes and, in some cases, is becoming a champion for change.

Evolving role of in-house counsel

The role of in-house counsel is changing and evolving. There are an estimated 14,000 in-house lawyers currently in Australia, representing 30% of the legal profession.¹ According to figures released by the Association of Corporate Counsel (ACC) Australia, 90% of organisations have at least one general counsel or equivalent. In fact, 91% of privately owned organisations, and 99% of publicly listed companies have at least one general counsel or equivalent.²

While much focus is placed on the large legal teams in major organisations in industries such as the banking and finance sector, the reality is that organisations with large sized teams are in the minority. Only 4% of organisations in Australia have more than 25 staff in their legal department, with 68% of legal departments consisting of 2-10 people.³ Over the past 10 years, there has been a significant increase in in-house lawyers in Australia, which is reflected in the 3% average annual growth in membership of ACC Australia.

At a global level, a recent survey showed that 14% of chief legal officers (CLOs) had significantly increased the amount of lawyers within their team during the past 12 months (a significant increase is marked as 10% or more).⁴ This trend is being mirrored in Australia and New Zealand, where almost 40% of in-house legal teams surveyed anticipated an increase in head count over the next two years.⁵ It is also expected there will be growth in "green-field roles" for in-house counsel.⁶

Given the increasing size of legal teams, 77% of legal functions in Australia and New Zealand expect workflow will increase over the next two years.⁷ This does not mean the increase in work will necessarily be outsourced to law firms. In fact, 61% of global CLOs

predicted that outsourced workloads will remain constant in the coming 12 months. High risk areas such as complex litigation is the most common type of work to be outsourced while contract management is more commonly insourced.⁸

As in-house legal teams continue to grow, it is envisaged that in-house lawyers will start to perform more high value legal work, aided by developments in technology. This is supported by the observation that even in traditional "high value/high risk" areas such as litigation, regulatory and mergers and acquisition, there are some in-house teams who do not outsource work in these areas at all. Notably, 37% of in-house legal teams who do mergers and acquisitions and 17% of in-house legal teams who do regulatory work do not outsource this work.⁹

Another area of continuing change for the in-house legal profession is a focus on the development of non-legal skills. In his article "Today's In-house Counsel: Evolving Roles as Business Enablers",¹⁰ Harish Suryavanshi explains that in-house counsel are seen as enablers of business outcomes, working with senior management and business unit leadership to use legal talents to contribute to the bottom line. It is due to this unique perspective a lawyer can bring to an organisation, that the role of general counsel has risen in stature and it is common for the head of legal to be a part of the C-suite. In fact, 65% of general counsel in Australia are part of the group executive and 54% are represented at board level.¹¹

This trend has led to an increased focus on the skills required by general counsel. In 2013 the ACC and Center for the Study of the Legal Profession at Georgetown University Law published a report which identified general counsel as adding value in three areas; as leader of the legal department; counsellor in chief; and as a strategist.¹²

The report surveyed and interviewed general counsel and company directors in the United States and provided some interesting insights into the way each group viewed the value of general counsel. Both groups consider managing the legal needs of the company to be one of the top three ways general counsel add value. However, both expected this function would be important, but of less significance over the next 5-10 years. Conversely, both groups expected the contribution general counsel provide in

strategic business decisions to grow over the next 5-10 years.¹³ The head of legal functions are also being tasked with the responsibility of managing non-legal areas. In 2015, 89% of general counsel in Australia and New Zealand stated they had additional formal non-legal responsibilities. The most common additional responsibilities were; governance, compliance, company secretary, privacy officer, risk and insurance.¹⁴

This trend highlights the value that organisations are placing in the head of the legal function, and the opportunities for advancement being presented to in-house counsel. Where traditionally general counsel focused on primarily practising law within a corporate environment, today a general counsel must offer much more than sound legal advice.

It is no surprise to note that globally, general counsel are seeking to develop non-legal skills within their departments. Areas such as executive presence, project management, communication and business management are highly sought after.¹⁶

Studies have revealed little correlation between a group's collective intelligence and the intelligence of individual members. However if the group is more diverse and includes more women, its collective

intelligence rises. As businesses push for greater diversity in its management ranks, the in-house profession is continuing to push for more diversity within its legal teams, as well as in its briefing practices.

According to a recent report, 42% of organisations have a woman as their most senior legal officer. However, women account for only 33% of heads of a legal function in ASX200 or equivalent organisations.¹⁷ While this compares more favourably than the percentage of female partners in most law firms, there is still a little way to go, given that 57% of ACC Australia members are women.

In the United States and Canada, there have been some significant developments in improving diversity in law firm and barrister briefing practices and ensuring diversity within legal teams which is being driven by the in-house profession.¹⁸ Some Australian general counsel are already promoting diversity in briefing practices and, in line with these overseas trends, it is anticipated that more Australian general counsel will adopt initiatives promoting diversity within the broader legal profession over the coming years.¹⁹

Evolving legal issues affecting in-house legal counsel

The uniqueness of the in-house industry means no two roles are ever the same. Internal

and external forces such as type of industry, organisational structure and geographic footprint of the business means each role can have its own challenges. However, there are some notable trends in legal issues keeping in-house legal counsel awake at night.

In today's global environment, many organisations are operating across international waters and the legal department is responsible for legal services in multiple jurisdictions: 41% of Australian and New Zealand organisations operate in Asia, 30% in Europe and North America, while there is also presence in South America, the Middle East and Africa.²⁰ In fact, over the next four-five years, this trend is set to continue with some Australian in-house counsel reporting that they planned to have legal operations or a legal team in many countries such as Singapore (11%), China (9%) and Hong Kong, India and Malaysia (7% each).²¹

The Australian experience is consistent with a global survey of in-house legal counsel which found that managing foreign entities poses a significant challenge for those in multinational companies. Keeping on top of international regulatory affairs and compliance, as well as setting up offices in new regions and qualifying to do business internationally, were the specific challenges highlighted.²²

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With this growth, more in-house counsel will have to become familiar with foreign legal systems and laws and in particular, how to manage the relationship between Australian and international legal obligations. This area is fraught with complexities such as legal obligations relating to ethical supply chains, corporate disclosure and anti-bribery and anti-corruption, which have the potential to be more onerous in countries such as the United Kingdom and the United States.²³ It also requires in-house counsel to be more aware of international legal issues and how to enforce legal rights using courts in foreign jurisdictions or through international arbitration mechanisms.

Businesses in Australia are increasingly focused on corporate social responsibility and social license to operate. This has, in part, been driven by an increased corporate governance focus on this area such as the need for publicly listed companies to report on material environmental and social sustainability risks on an “if not why not” basis.²⁴ In addition, the Chairman of the Australian Securities and Investments Commission, Greg Medcraft, has suggested there should be law reform in the area of corporate culture to make companies liable for poor corporate culture that results in a breach of law.²⁵

In-house counsel will continue to play a valuable role in advising their businesses on the legal issues relating to these areas. In addition, by being bound by ethical and professional obligations and having a primary duty to the court,²⁶ in-house lawyers play an important role in ensuring business decisions are ethical, as well as providing fearless and frank advice, promoting a culture of openness, and an avenue for other business colleagues to voice their concerns.

In a survey of Australian company directors, 35% had spent over 30 hours a year focusing on their top three regulatory issues alone. The survey also noted that while many directors see this as the new normal, there is a clear frustration and recognition of the increased regulatory burden faced by most companies.²⁷ Unsurprisingly, this has in turn, led to an increased role for in-house counsel in assisting their business keep up to date with new regulations, and ensuring there is compliance with all regulatory requirements.

It is predicted that this focus on regulatory compliance will continue and grow. Given the increased globalisation of business, there will be an increased need for in-house lawyers to manage global compliance needs even if domestic regulation is simplified. In fact, globally, one in five CLOs have created new positions in compliance in 2015 to address this concern.²⁸



In addition, as regulators become more funded and resourced, more internal legal resources will need to be allocated to “reactive” regulatory work. In fact, one in three global CLOs reported their company had been involved in a matter relating to regulatory enforcement or an investigation in respect of any alleged violation in the last two years.²⁹

The increasing dependency on computers, outsourcing of information technology functions and value of data is increasing the vulnerability of business to data breaches and cyber security issues. According to a recent survey, 36% of in-house counsel in Australia have experienced a data breach at their current or former company,³⁰ compared to a global average of 31%.³¹ Among the top concerns regarding a data breach are loss of proprietary information, damage to reputation and brand, business continuity and shareholder activity.³²

Given the Privacy Commissioner’s increased powers to penalise corporates for data breaches involving personal information,³³ more in-house counsel will become involved in proactively managing cyber security issues. A recent global study revealed that 50% of in-house counsel wish to increase their role and responsibility regarding cybersecurity, while 57% expect their legal department’s role in cyber matters will increase in the coming year.³⁴

The skills required to tackle this issue are not always necessarily legal and may require in-house counsel to develop non-legal skills such as project management, communications and stakeholder engagement skills.

Impact of Innovation and Disruption on the in-house legal profession

Technology is beginning to disrupt many professional services industries. Just as the Industrial Revolution, where machine automation changed labour intensive industries, artificial intelligence and computers are beginning to change the delivery of professional services, including legal services.³⁵

Technological disruption is not the only force for change within the in-house legal profession. With more in-house lawyers required to increase efficiencies and do more with less, legal teams are under pressure to look at new ways to increase productivity and maximise efficiency and value. Although there is still hesitation in the market, research shows in-house counsel are embracing innovation and seeking alternative ways of delivering legal services.³⁶

As in-house legal teams increase in size, many are beginning to invest in software systems aimed at streamlining common tasks, demonstrating value or managing legal risks. Such tools include contract management systems, data search, online document storage, automatic document assembly and document sharing as well as legal project management and matter management software. In a recent survey of over 200 United States-based lawyers, 78% of respondents felt technology had made their work easier. However, some respondents felt new technologies meant they were “always connected” which was at times both a benefit and a burden. This trend is just the beginning. Advances in artificial intelligence, and in particular, predictive coding will transform many of the repetitive tasks currently performed by paralegals and junior lawyers. The use of predictive coding in discovery matters is already being used in United States and United Kingdom courts with Australian judges beginning to consider the benefits. At least one major United Kingdom bank has sourced use of predictive coding technology for early case assessments with significant cost savings. While Australian lawyers are yet to fully embrace this trend, at least anecdotally the profession is beginning to use this technology in arbitrations, regulatory and internal investigations. Given the significant cost savings of using this type of technology, not to mention increased accuracy and ability to manage big data, it is expected that Australian in-house counsel will start to invest in predictive coding over the next five to 10

years, especially those with high exposure to investigations and litigation.

Although still a relatively new concept in the Australian market, the number of in-house functions with legal operations staff has dramatically risen in the past 12 months. Legal operations staff are part of the legal team with a role solely dedicated to the operations of the legal function, taking on the responsibility for areas such as finance, outside counsel management, human resources and workflow solutions. With general counsel increasing their formal non-legal responsibilities, legal operations staff can focus on the department operating in the most effective way to add maximum value to an organisation allowing general counsel to focus on business strategy. This is reflected in the fact that in 2016, 48% of CLOs globally reported having legal operations staff, double the result from the previous 12-month period.

Conclusion

Over the last 30-40 years, the corporate world has embraced in-house lawyers as valued business partners and trusted advisors. Over the next 10 years the in-house profession will continue to evolve and grow, taking advantage of technology and changes to better advise their business clients in an increasingly global and complex world .

Footnotes

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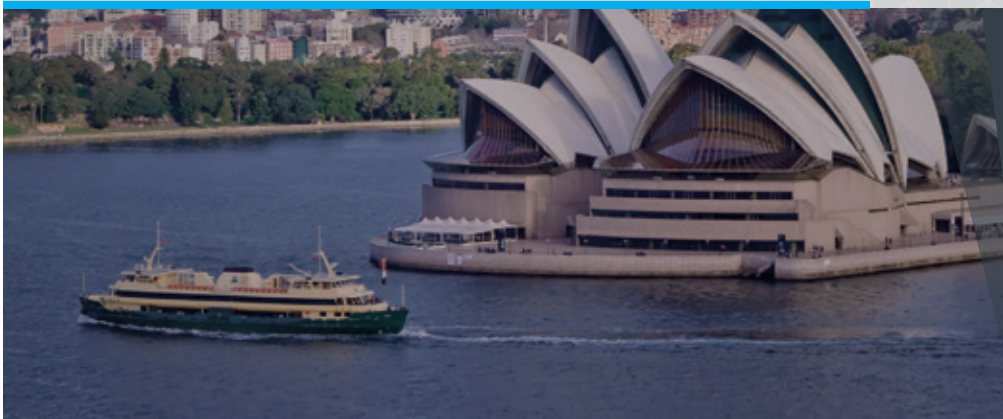
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