

IN-HOUSE COUNSEL AS TRUSTED BUSINESS ADVISOR



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A Partner of McGrathNicol Forensic specialising in dispute advisory and forensic investigations, Janine is also a Chartered Accountant with more than 17 years of dedicated forensic experience. Janine has led and worked on a broad range of dispute advisory engagements and forensic investigations across a number of industries within Australia.

It is inevitable that some, perhaps even a good deal of, an in-house counsel's time can be spent managing disputes. It is a vital role to defend the business against claims from external parties such as suppliers, competitors or customers, or to drive action against others if the business considers itself wronged or suffering a loss.

As forensic accountants, we often interact with in-house counsel in each of these contexts. This may be as an independent expert, engaged within the context of a dispute in which our non-partisan expertise is sought on a particular matter in formal proceedings. Alternatively, it may be as a consulting expert in which we work alongside the business to respond to an issue and help formulate its response.

From our interactions with businesses, we see the function of in-house counsel often extend beyond legal guidance. In the management of disputes, we regularly witness the in-house counsel role act as the voice and representative of the business's interests at a much broader level than in legal considerations alone. In doing so, in-house counsel has assumed the role of trusted advisor for the business as a whole and we see the dispute management process benefit as a result.

How does the dispute process benefit?

Before explaining why and how this is, we should not gloss over in-house counsel's key role – to provide legal insight and direction. The in-house counsel's expertise is law and it is vital that they be able to exercise that expertise unencumbered by the wider demands of the business. In a dispute, it can be costly in terms of fees, time and reputation, to pursue a path that is contrary to legal advice, regardless of the operational or strategic wishes of the business. In-house counsel, often with valuable input from their external legal advisors, should lead the legal direction of a dispute. However, that does not mean that their views should concentrate on legal position alone.

Disputes within the wider business context

Rarely is a dispute simply a legal issue, to be treated in isolation within the business and without appreciation for the wider implications. Increasingly, the in-house counsel we work with understand that a

dispute should also be considered in context of the:

- internal costs, time and effort of pursuing the action;
- financial implications of what has happened;
- reputational impacts with stakeholders – employees, clients, customers or shareholders;
- potential impacts on relationships with suppliers;
- focus and potential reaction of relevant regulators; and
- strategic direction of the business.

Appropriately considering and demonstrating an appreciation of these factors can reduce the friction in the business that results from competing perspectives. Ultimately, a better outcome will be achieved if everyone is on the same page in terms of implications and ramifications.

To accomplish the above, in-house counsel must broaden their skill set, knowledge and understanding beyond their established legal training and expertise. This will greatly support their contribution to the smooth management of the dispute process by understanding the major issues from the perspective of sometimes competing interests of key stakeholders. In our work, we frequently see how the in-house counsel with solid financial and accounting acumen can benefit a dispute management process.

Assessment of a dispute

Every dispute will have a financial impact. Generally, the driving force of each party is to either receive a monetary award or defend against paying one. That may be in the form of damages, compensation or the right to pursue opportunities for revenue generation. And of course, there are the costs of pursuing or defending the dispute itself.

Often fundamental to the assessment of a dispute is an analysis of underlying financial information, or the investigation and interrogation of financial data to establish that a loss has been suffered or to determine the extent of damages claimed. This will frequently require in-house counsel to engage with the business's internal finance personnel and sometimes seek external assistance from forensic accountants.

The ability to determine the financial review required, understand the financial analysis that



is undertaken and critically assess the outcome of that work, is an invaluable part of the process. It goes a long way to enhancing the in-house counsel's contribution to management of the dispute. As forensic accountants, we actively see the benefits of being able to engage with in-house counsel at this level as it makes the review and discussion process more efficient, reducing the time taken to explain findings, methodologies or financial concepts.

Combining financial and legal minds

From a pure cost perspective, the client benefits. Conferences that are more efficient generally mean less time and less fees. However, more often than not, the real benefit arises from their ensuing discussions, not in terms of time taken but in terms of the quality of the debate. Solid financial understanding from in-house counsel can elevate the discussion to a level where the common understanding of financial fundamentals, together with in-house counsel's legal knowledge, combine to generate unique or more technically complex ideas for assessing the dispute and establishing relevant arguments. Financial and legal minds can combine to find the most robust evidence to put forward, which ultimately feeds into the strategic direction of the matter and, more often, a faster and more favourable outcome for the business.

What level of financial acumen is required?

In essence, a good understanding of financial concepts and the language of finance and

accounting is the start. Building a solid financial acumen and the ability to interpret financial data and financial reports at a high level goes a long way. What represents a basic understanding? The ability to read a set of financial statements, understand the language, identify common red flags and recognise the financial drivers of each of your stakeholders.

Furthermore, it is critical to understand and talk the financial terminology of your business and your industry as many sectors and entities have a language unique to them. By understanding the terminology, you will learn what it is that matters most to your business.

Increasing financial acumen

Having identified the need to increase financial acumen, the best methods to achieve this lie internal and external to your business. Internally, engage with the business, review financial reports and understand the metrics that matter to your business. Actively ask questions and seek answers from your colleagues.

Externally, training is readily available and does not have to be an onerous undertaking. Formal financial acumen programs are run by many organisations as a stand-alone subject or as part of wider accreditations. In addition, training courses and workshops on the topic are offered via a number of forums, designed to provide the basics for beginners, or provide a refresher of skills for others. These courses also present great networking opportunities and the chance to find mentors or key

contacts in other disciplines that can really assist in increasing commercial perspective.

Key areas to expand your understanding if dealing with disputes on a regular basis, are the concepts of business valuations and discounted cash flows. Both are fundamental to the underlying methodology of long run economic loss. The language and concepts within each can be daunting, however a high level understanding will facilitate the review and approach to dispute resolution.

It is also worth noting that the information relevant to a dispute and the financial analysis thereof, is often found in a number of places or has its basis in discussions. In a technology reliant world, transactions, conversations, decisions and events leave a digital footprint. It can also greatly aid the dispute management process if in-house counsel understands the business's IT environment, finance systems and what can be obtained in terms of electronic reports and records and what may be relevant to enhance a financial or investigative analysis.

In our experience, an in-house counsel who compliments their legal expertise with financial, commercial and technology knowledge occupies a valuable seat at the table, with the confidence and courage to make difficult calls and offer more informed advice. The business they work within and the disputes they manage can only benefit. ^a