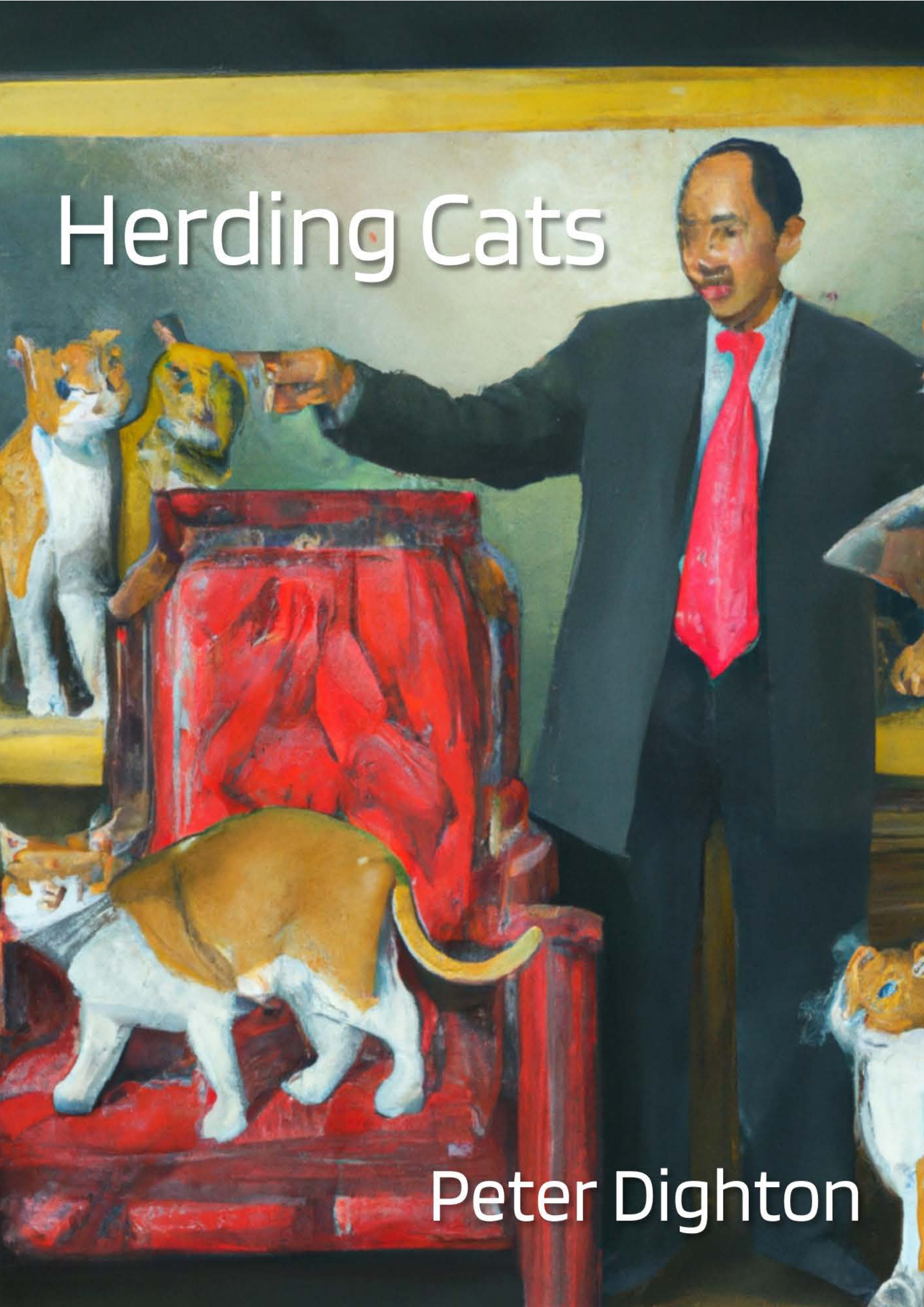
Herding Cats



Peter Dighton

Herding Cats

Bringing discipline and transparency to legal work

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Introduction

This book is aimed primarily at clients who want to have some control over their external legal advisers, (bearing in mind that if an organisation is large enough to have in-house legal staff, then the interface may be lawyer to lawyer). But also it is intended to assist law firms who are struggling to know how to take a pro-active role with clients or who are struggling to react to being placed on a short leash by clients.

Law firms are unusual organisations. Like any business, they rely heavily on relationships, both externally with clients and internally among the fee earners and partners. Yet it would be fair to say these relationships are often strained to breaking point. I have worked in, and with, many law firms and I would not describe them as "happy places".

Not many clients describe their interactions with law firms in glowing terms as positive experiences. Leaving aside the undesirability of having legal issues in the first place, most of the dissatisfaction revolves around fees, and in particular the feeling of helplessness that clients have once the legal juggernaut starts steamrolling. Similarly, young lawyers often put up with exploitation, bullying and even harassment in the hope of ascending to partnership; if successful they are just as likely to be thrust into a selfish environment where partners compete with each other to maximise their own take from the firm. It is very difficult for people working in environments steeped in negativity to live their best lives.

Is it possible for clients to control their lawyers (in most instances read "control fees") without curbing the aggression or diligence or cunning, or whatever attributes attracted them to that legal person or firm in the first place? Is it likely that this process will lead to a change in culture that means law firms may cease exploiting young lawyers?

I firmly believe that implementation of the processes described in this book will result in long-term changes in relationships and culture. For most people, trying to control their lawyers is like herding cats. But one of the certainties of life is change; in my time in the legal game, I have seen some amazing and barely imaginable regulatory and technological changes which have completely changed the way lawyers go about their business.

Yet the underlying tensions, fundamentally arising out of a lack of accountability, remain. This is despite increased transparency, greater competition and some erosion of the "legal mystique" surrounding the profession. Can this situation continue or will there by some form of evolution, or even revolution, in the way lawyers interact with their clients, and each other?

In my opinion it could be both:

- Revolution, instigated by corporate and government clients from the top down (because only the larger sophisticated users of legal services will have the initial bargaining power to be able to impose a different approach), and

- Evolution within the profession, from the bottom up, because smaller professional firms are looking always for a competitive edge to take work away from larger

entrenched firms. It is also possible that professional associations may take on a leadership role which encourages members to give appropriate weight to the process side of their work.

As a result of these pressures, firms which are currently perceived to be the market leaders will face being squeezed from above (by clients) and below (by aspiring competitors) - to preserve market share they will have to refine their work practices and culture. If you ask these firms today, they will say they already have transparent work practices, but in my experience most only pay lip service to accountability. It is redolent of the often-mouthed platitude from law firms that they value work/life balance.

There is no doubt the biggest threat to large firms is complacency. Change is slow, except for technological change necessary to keep up with competitors. As Richard Susskind said, “It is not easy to convince a bunch of millionaires that their business model is wrong!”

I am not an expert in how to change toxic cultures. But I do understand the simple principles of communicating what work will be done, when and by whom; this type of communication benefits both the client and the service provider. A lawyer can achieve a terrific result but may end up having a client with a sour taste in its mouth as a result of an exorbitant invoice, as well as burnt out associates who have achieved the result after working ridiculous hours. Coincidentally, while I was writing this work, we had a major landscaping job done at home. The result looks great, but the original scope was poorly worded and the ensuing arguments about variations took much of the enjoyment out of the process for us.

Economic pressures drive clients to look for cost-cutting opportunities across the board. In their eyes lawyers are just one more business expense, even though this is not how lawyers see themselves. The result is a strong desire to move away from simple time-costing towards more sophisticated billing models, including fixed fees for fixed scopes. Even if a job is time-costed, there will be much greater pressure to work efficiently and avoid waste, or “profligate work habits” to quote the American Bar Association. Whether this constraint is always fair or practical is beside the point - this is the way professionals will be expected to work in the future on transactions and projects.

In the early 1990s the oil industry faced a crisis caused by low oil prices. There was a need to reduce capital and operating costs by around 30% to remain competitive. As part of the drive to reduce costs, the Cost Reduction in the New Era initiative (CRINE) was launched across the industry in the United Kingdom. CRINE largely revolved around simplifying and standardising common forms of agreement, including introducing knock-for-knock provisions in liability clauses[1]. Despite some initial scepticism, this was a very successful initiative which resulted in streamlined tendering procedures, simple plain English standard form contracts, less protracted

[1] Unfortunately a Judge could not believe that knock-for-knock was what the parties really intended and had to find his own interpretation. See *E.E. Caledonia Ltd v Orbit Valve* [1994] 1 W.L.R 1515. Fortunately common sense has prevailed and courts now acknowledge the bargain of the parties should be upheld e.g. *Transocean Drilling UK Limited v Providence Resources plc* [2016] EWCA Civ 372.

negotiations, different types of relationships (in particular clients and contractors joining together to align objectives by sharing costs and benefits) and, finally, as a result of all the foregoing, far less time being spent on claims and contract administration.

To me this is analogous to the way in which the relationship between lawyers and their clients needs to be critically reviewed. Over the last two decades I have achieved a good degree of success in re-engineering the relationship between my clients and their lawyers through the imposition of simple project management principles. Legal Project Management, or LPM, is not a blunt instrument to be used to beat law firms into reducing their fees – in fact sometimes fees may increase if there has been "scope creep" or delays caused by the client. I also believe that often a client will be happy to pay more if it can see that the lawyer is adding value, particularly by appropriately informing the client's internal procedures.

Although reducing fees is important, the overall ambition for clients should be to drill down on exactly what the lawyer will do, when, and what he or she will charge for it, then have a reporting system which enables the client to track progress. This exercise will enable the client to judge whether it is receiving value for money, and to conduct a cost-benefit exercise before proceeding down a path. It also enables in-house counsel to show management that they have control of the situation. Conversely, it allows the law firm to show it is also in control of the situation.

The fundamental aim of LPM is that there will be ***no surprises,*** particularly at invoicing time. When clients consistently receive invoices for more than the amount originally estimated, and staff have to advise management that the budget has been blown, yet again, something has to give. As the prison warder said in *Cool Hand Luke*, "What we have here is a failure to communicate."

Many large corporations have been attracted to the concept of LPM as a way of introducing discipline into the process of delivery of legal services. Initially, the emphasis was on financial data, but it is also now about broader efficiency, including agreed work plans and appropriate resourcing. Clients are becoming more demanding; they expect their professional service providers to be transparent and accountable.

The new paradigm will be that clients will expect professional service providers to demonstrate mastery of fundamental project management skills. Over time the gravitation of work towards those firms who organise their work methodically should create its own momentum which will eventually force other firms to follow suit

It is incredibly reassuring for clients to see that someone has a situation firmly under control; the best way for a professional to be able to demonstrate this is to be able to report to the client against a fit-for-purpose project plan. Of course, there will be extreme occasions, for instance if a regulator is on your doorstep with a search warrant, when costs are the last thing on your mind, but even then a client wants to know that the service provider has a clearly articulated plan.

It would be easy to take the view that law firms have done very well out of time costing over the last thirty years and therefore change is due. This is overly simplistic; clients need to understand that if the leash is too short, the process and the result may be inimical to what the client wants to achieve.

I am not trying to bag lawyers in this book. After all they are a soft target and that would be easy (my father-in-law used to joke that if you have a lawyer buried up to his neck in sand, then you don't have enough sand!). Even Shakespeare said, "First thing we do, let's kill all the lawyers."

Despite such negative sentiments, lawyers proliferate in western society and are among our highest earners. Yet, apart from the odd beaming criminal who has escaped with an acquittal thanks to his "mustard brief", it is extremely rare to hear anyone say what great value for money they got from their lawyer.

In the 1970s Mark H. McCormack wrote a book titled "*What they didn't teach me at Yale Law School – the terrible truth about lawyers*". McCormack was a successful businessman who came out of the legal world, and therefore had some terrific insights into how lawyers work. Despite changes in technology, the fundamental issues plaguing the lawyer-client relationship that he identified 35 years ago are still pretty much the same.

One point McCormack makes is that a law firm is essentially a shop or retail operation that relies heavily on customers coming through the door. When I go to a restaurant I rarely complain unless the meal or service is egregiously bad, but if things are just so-so, I will not complain but will choose not to eat there again. One bad night for a good restaurant can mean a loss of those customers forever. Peter Drucker said, "The purpose of a business is to create and keep a customer." So why wouldn't law firms work much harder to "super-please" clients, to use a David Maister term[2]. Maister makes the point that it actually takes far more time and effort to attract new clients than to invest extra time in those you have already landed. A satisfied client will not only give you repeat business, but will also hopefully tell others about you.

Moving from the external dynamic to internal relationships, a lot of my friends have sons and daughters who work in large law firms and who have been exploited shockingly. Even though the old articles of clerkship are gone, meaning now young graduates receive a decent wage, in return they are expected to work until late in the night and on weekends under great stress, with the dangling carrot of a potential partnership at some unspecified time in the future holding them in this situation.

I have heard many tales of partners sending angry emails (often in all capital letters) to their underlings in the middle of the night demanding immediate responses. I for one do not want a bleary-eyed, sleep-deprived lawyer sitting at the table at a critical time. I was watching a UK legal drama recently where the senior lawyer rang a junior at home and said, "Make sure you go to bed early because you have court tomorrow." This is so far removed from what I have witnessed that I nearly fell off the chair laughing. Yet law firms are the first to preach in mailouts to their clients how important a work/life balance is. When I see someone on their phone and checking emails at functions it is often a lawyer because they are convinced they are the busiest people on the planet. I guess they also want to project that image.

If the work is that urgent, get more staff on to it! Or if there is a team working on it, do they have clearly identified tasks under a plan which enables each person to

[2] "Managing the Professional Service Firm"1997 Simon and Schuster Ltd.

discharge their work efficiently as part of a cohesive whole? When crises arise on a regular basis, it smacks of poor planning and management.

Is this way of working sustainable? You would think not, but then it is not easy to see what the drivers of change will be. Young graduates have all heard these stories, yet most covet a position in a large firm. Partners in large firms are not going to have Damascene conversions where they suddenly decide to treat clients and employees fairly and accept lower remuneration as part of the package.

I have worked in three large law firms and there is no doubt it is a dog-eat-dog environment. While partners have a legal obligation to be just and true to each other, the reality is that they will do anything to get a slightly larger portion of pie when profits are divided. Similarly young lawyers are in a precarious position where they always have newcomers snapping at their heels ready to take their place. There are some serious cultural issues here.

When and how will lawyers be dragged into the 21st century? We have seen really dramatic changes in the way law the business of law is conducted over the last 30 years, but are clients really any better off? Class actions and “no win, no fee” arrangements allow people who would never be able to sustain a case against large corporations to seek justice, but a common refrain is that the lawyers benefit more from these arrangements than anyone else. We have seen the rise of litigation funders, but much of their business arises in funding infrastructure and energy sector disputes for clients who could easily afford to fund the case.

A constant theme throughout this book is that there is a vast gulf between how the public perceive that lawyers execute their work, and how they actually work. This gulf is unlikely to be bridged so long as lawyers are so out of step with the real world. Some of the most uncommercial lawyers I have ever met are convinced they are great at thinking commercially and “adding value”. The concluding chapter of McCormack’s book has the wonderful title “How to think like a lawyer (and not hate yourself in the morning).”

In my forty plus years working as a lawyer and Legal Project Manager, I have often thought about what skills I was not taught at law school and had to acquire via the school of hard knocks. In my case this probably included negotiation, project management and plain English drafting skills.

I was lucky enough in my career to be able to work for, and with, lawyers from local suburbs and towns through to top international firms in London, New York and exotic locations in Africa, the Asia-Pacific region and South America. The funny thing is that while the premises and accents differed markedly, the underlying behaviours of the lawyers did not. By far the biggest challenge I had, and continue to have, when outsourcing legal work is to create a disciplined framework within which the lawyers will operate. It is very hard to stop large firms immediately bringing in a team of people charging around the clock before a proper execution plan has been formulated.

For a client, controlling lawyers requires clear boundaries, constant vigilance and great self-discipline. It is akin to having to deal with a wilful child and is equally exhausting. But lawyers are also a necessity; in western societies we have vast armies of highly paid lawyers because clients drive the demand. Non-lawyers are

quick to complain about them and to tell lawyer jokes, but as the saying goes “Can’t live with them, can’t live without them!”

Our modern society is very much concerned with the elimination of waste. Recycling is high on the agenda, and young people are somewhat embarrassed at some of the post-war materialistic excesses. Companies and Governments are pursuing “zero waste” initiatives in an attempt to introduce economic and environmental efficiencies.

Consistent with all this, one would expect to see an overwhelming trend for the introduction of discipline and efficiency into the work of lawyers. A specific way in which this can be achieved is through the application of project management principles. Firms have largely managed, so far, to resist the pressure to structure their work to meet to the commercial requirements of the market. At the same time they have made a lot of money via time costing. If they can continue to work in this way then they are indeed fortunate, but sub-optimal work practices will not continue forever.

This book analyses the underlying issues and describes a process to make what is going to be a painful progression slightly less painful for all involved.

Part I – The Practice of Law

1. The evolution from generalists to specialists (and back again)

A little over 100 years ago the US branch of Shell wrote to the General Manager in Europe, Sir Henri Deterding, requesting permission to enter into a retainer arrangement with a legal firm. Deterding was shocked and his response was:

"You gave me rather a start with your letter, because I gather from it that you employ solicitors much oftener than we would ever dream of doing. Although we have an enormous business here, we very rarely consult lawyers. We only do so when there is really a legal difference or legal difficulty, whilst it seems to me that you employ them practically in every instance.

Lawyers are not business people, however large a lawyer's experience may be, in the conduct of business he is absolutely useless. A lawyer placed at the head of a concern would soon bring the business to rack and ruin. He is not a creative genius, he is able to give his opinion, if a case is laid before him, but to ask a lawyer to draw up a contract for you is a most foolish thing to do, as this is bound to lead to trouble. Our custom here is to draw up a contract before having seen the lawyer and then to ask him to put it in a more legal shape. Such a contract is more likely to embody the spirit of what has been agreed upon than one drawn up by the lawyer; to ask his opinion as to what you should do or not do is the worst possible way of conducting business which should be kept as far as possible from the lawyers.

It seems to me from your letter as if the lawyers are a kind of department to your business. Their idea that we should be inclined to give them a fixed fee is absurd, but what astonishes me most is their proposal that you should make an arrangement by which one member of their firm should give practically his entire time to the conduct of our affairs. We would never think of such an arrangement. We do not wish a lawyer to give his entire time to our business. We have not got daily disputes, neither do we want to create them. … Messrs. Rice & Lyons' statement that at the present time the daily routine business of our Company consumes the time and efforts of one member of their firm, is a revelation to me. How can you conduct business in such a way! I hate to see a lawyer in our office, if I want him I go to his office and limit the conversation to the shortest possible period. Allowing a lawyer to be practically in daily touch with me would certainly take 90% of my time which ought to be devoted to money making and not to discussing legal squabbles or legal phraseologies."

Things have changed a lot in 100 years. Today large companies have substantial legal departments, and it is not uncommon for people with law degrees to head corporations. In countries like Australia government is dominated by lawyers. But at the same time many clients still complain that lawyers often give uncommercial advice and that they do not seem to have awareness of the way in which the business world operates.

As an aside, Sir Henri did make the very practical suggestion that the client should travel to the lawyer's office to avoid paying exorbitant rates for travel time. One of my clients would also insist on "stand-up meetings" so the legal team did not spend time taking off their coats, spreading their papers out, ordering coffees etc.

Returning to the central thesis, how can it be that the practice of law has changed so much, yet lawyers still struggle to meet the commercial requirements of the market?

Is it because the practice of law is so fragmented now that it is almost impossible for an external adviser to handle all the legal issues arising in a client's life or business?

It is incontrovertible that statutes have become far more numerous and complex, partly due to the more intrusive role of big government, but largely because as our societal mores and technology have changed dramatically, the law has been dragged along in the wake. If we go back over 2,000 years it was possible for a character like Aristotle to write on fields as diverse as physics, biology, politics, ethics and the arts. A major reason for this was that the body of knowledge in diverse fields was limited and therefore "knowable". While we certainly have modern polymaths, I suggest it is no longer possible for such a person to delve deeply into a multitude of diverse areas.

This also applies to the law. Throughout history there have certainly been specialists in certain areas such as advocacy (barristers), but generally a solicitor was considered something of a general practitioner who would handle whatever crossed his (because it usually was a him) desk. Indeed, the aristocracy, who pre-legal aid were probably the only people who could afford solicitors, would rely upon the family solicitor to handle all of their business affairs including testamentary arrangements.

Today it is impossible for any one person to know the law. It is even impossible, or inadvisable, to try to be an expert in every aspect of a specialisation. For example, if you speak to a tax lawyer in a large legal or accounting firm, often he or she will bring in someone else if you start asking questions about stamp duty or customs duties or goods and services taxes. In the field of Energy Law practitioners tend to specialise in electricity or coal or petroleum or nuclear or renewables; even though many of the underlying contractual structures are similar, there are very complex regulatory regimes in each area.

Even in my own area, oil and gas law, the two substances are frequently found together, but the underlying commercial principles applying to oil, which is a freely-traded commodity, are very different to natural gas, which is not a commodity and requires complicated long-term off-take and financing arrangements for a project to proceed. Some petroleum practitioners in developed countries even specialise further in upstream (field development), downstream (pipelines or shipping) or downstream (retail delivery and sales). So even though I have worked on upstream petroleum projects around the world for over 30 years, I know next to nothing about oil trading or the regulations which affect retail service stations.

Similarly you would think of "shipping" as a niche area, but practitioners in that area specialise exclusively in wet (shipping), dry (cargo), insurance or Law of the Sea.

My legal career started in the early days of the move towards narrower specialisation. In 1979, fresh out of school, I started work at a law firm with four partners in a country town. The firm handled everything, secure in the knowledge that if we got too much out of our depth, we could send off a brief to counsel (a barrister). This had the great advantage that once we sent off a brief we could forget about the matter until we heard back from counsel.

I was an articled clerk, which meant that I was indentured for five years working full-time while I studied for a law degree (six years) at night. This type of apprenticeship does not exist anymore, which is perhaps unfortunate as the practical legal training was invaluable. In the first couple of years I was an underpaid general dog's body whose duties included photocopying, shredding confidential documents (hopefully after they became redundant), trotting up to the local court to file documents or

appear on a consent order, cleaning pigeon excrement out of the atrium and replacing broken toilet seats. There were plenty of comedians around, and on our first day in the office as callow youths we would get sent up to the courthouse to ask for some “verbal contract forms”.

After a couple of years, the next young clerk joined fresh from school, and I handed these quotidian chores over to him and started to get my own clients. In practice, the articled clerks only got to see ratbags and lunatics that the partners wanted to avoid. We did not report to the partners on any of our files and only interrupted their busy day if we had a question. Hence much of the practical training came from other articled clerks; we formed a sub-brotherhood whose shared victimhood was assuaged by alcohol.

The free hand given to us was quite dangerous because we had little supervision. I dread to think what mistakes we inflicted on the lower sections of society. Most of our clients were legal aided and I guess the half-baked advice we gave them was better than nothing. We had no structured mentoring or training programs such as organisations have today; instead we were expected to learn on the job and become proficient through some form of osmosis. There is a Persian saying “He who knows not, and knows that he knows not, is a child, teach him”. This never happened.

Strangely enough the system worked. Those who were fortunate enough to be able to attend university for four years came out with a Bachelor of Laws degree and no idea on practical issues such as what forms to fill in or what filing fees were payable. We would roll our eyes when these graduates would be asking us the most basic questions even though we still had a long way to go to complete our degrees. The graduates were like learner drivers who had studied the theory of driving but had never been behind the wheel of a car.

Articled clerks were as poor as church mice. On the rare occasions when I suggested to my bosses (I assigned my articles half-way through) that I was underpaid they would look blankly at me. I was receiving the Law Society scale pay which was a pittance, barely above unemployment benefits; there was certainly no suggestion of paying above scale or giving out bonuses, even when a partner went on leave for a few weeks and I sat in his chair running his files to avoid the firm having to pay a locum.

When I started law it was very much a profession, not a business. Of course the owners of a firm kept an eye on profits, but there were certainly points of courtesy to be observed – no-one engaged in any serious marketing and other practitioners were treated as colleagues. Files ended up very fat because often when a letter was received from another firm, a one-line reply would be sent acknowledging receipt and saying the solicitor would seek instructions and respond. The fatness of the file was very relevant because there was no time costing and little periodic billing of files, so at the end of the matter the practitioner would weigh up the file, reflect on the result and issue an invoice.

Part of the image that had to be conveyed was that an old firm was sober and reliable, like a country vicar. This included having reassuring office fittings that projected the right image of affluence, tradition and professionalism. Firms were not allowed to incorporate to limit their legal liability. No male practitioner would ever be seen walking down the street without a coat and tie, and the few female lawyers would never wear pantsuits. I still remember the shock when one practitioner turned

up to the local Magistrates Court in a safari suit. I also remember the tongues wagging about a Brisbane firm that had funky décor, pop music playing and receptionists in miniskirts.

Most practitioners were hesitant to sue for unpaid fees, and barristers were prohibited from doing so. It was possible for Solicitors to ask for money up front, but normally the amount requested was only to cover outlays, such as stamp duty or barrister's fees. It would have been ungentlemanly to display a lack of trust by asking for more.

The last subject a law student would study was Ethics, which reflected the very strict rules that were applied to the practice of law, even though some might be regarded today as unethical. For example, the brotherhood of solicitors had the anti-competitive approach that all conveyancing had to be charged for at the Law Society scale. A conveyancing client could ring every firm in town for a quote and would receive the same price from every firm. There were horrified whispers that some young people hanging out their shingle were prepared to commit the heinous crime of undercutting scale. Solicitors maintained very cosy relationships with real estate agents so that contracts would be funnelled their way. It was permissible to send out Christmas gifts to agents, but if you rewarded an agent with a specific thankyou gift, such as a bottle of wine or whiskey for a contract referral, that would be a disciplinary matter that could lead to sanctions from the Law Society.

There was also a very strict ethical rule that lawyers should not have a financial interest in litigation so that he or she could provide the best independent advice. The historical torts of champerty and maintenance prevented a lawyer from having a vested interest in an outcome, and a lawyer risked being struck off if they engaged in this type of behaviour. The USA had contingency fee arrangements (which McCormack describes as "one of the things that is disastrously, catastrophically wrong with the American legal system)."

In the 1980's I remember seeing American television advertisements for law firms featuring bulldogs and special deals; one had a birthday cake with a background voice saying "It's our birthday, but you will be getting the gifts!" My colleagues and I lampooned these American advertisements and could not imagine that such brazen marketing or contingency fee arrangements would ever be acceptable in Australia.

New Zealand went off on a different tangent, introducing no-fault liability to minimise the percentage of compensation payments diverted to lawyers. At the time my friends and I regarded this as some sort of communist plot, but now I have a lot of respect for the scheme because affluent western societies should not abandon badly injured people. The principle that severe injuries can be viewed as a societal issue makes a lot of sense.

The cosy world I have depicted received a massive shake-up in the deregulated 1980's, much to the horror of older practitioners. Apart from the regulatory changes, the other big change was the introduction of time costing, which was probably driven in part by the introduction of information technology. In theory, time costing was a sensible initiative. For the lawyers, it enabled them to:

- Eliminate the real risk of undercharging when a matter went for many months or even years, and the practitioner forgot just how much time and effort went into it
- Greatly improve cashflow by facilitating more frequent billing
- Allow firms to assess the efficiency of staff.

For the clients, time costing was supposed to herald an era of transparency and accountability. What we realise now of course is that hourly rates are no guarantee that a lawyer is working efficiently or providing value for money; in fact the system rewards slow workers. One of my criticisms of the legal profession is that it always trumpets how technological advances will assist clients, when nearly always the result of the initiative is that the lawyers make more money and clients have the same complaints about lack of transparency and inefficiency.

There is no doubt though that law firms were partly dragged into a modern world where they had to market and compete for work. Prior to this point lawyers had not sullied their hands with the business practices applicable to the rest of society. This attitude that law was not a business passed from generation to generation, perpetuated by the custom of bringing young lawyers with minimal business skills into the partnership. Gradually they would acquire basic business skills until they finally stepped up to a senior role within the partnership. And in the meantime, they would advise their clients on how they should run their businesses!

Enter the Entrepreneurs

Let us pause here for a moment. What is a business person? When you look at any organisation there are always people with specific technical skills who are critical to the organisation. This is even more true of a professional services organisation; obviously you cannot have a law firm without lawyers.

A business person is much more than a person applying technical skills, as Sir Henri pointed out. Often business people will have technical skills, but they must have the ability to produce, market and sell a product or service to turn a profit and put in place all the infrastructure, people and procedures necessary to support that aim. It is not easy to teach those skills, and so they must be innate or learned on the job over a long period. Conversely though, beware the technocrat who is promoted to a management position and keeps dropping back into their comfort zone by focusing on technical issues instead of sitting above them.

In "*The E-myth*" the author examined why such a high percentage of new businesses fail in the first two years, and reached the conclusion that in many instances people were technically good at what they did, but knew little about financing, marketing, management and operations. In other words, pure technical skills alone are not sufficient to create a successful business.

Many people who "hang out their shingle" are competent technicians who are good at what they do, but go to work every day expecting to attend to that work without having to apply themselves to the issues of the business i.e. they are working <u>in</u> the business, not <u>on</u> the business. The central thesis of *The E-myth* can be extended further – lawyers tend to only concentrate on the substantive aspects of their work without giving proper regard to some critical processes, specifically project management and client contract administration.

I was a director of an engineering company and the board recognised that only a small number of the professional employees, maybe < 5%, had any "commercial DNA." The rest were happy to design stuff all day and not be bothered with issues, such as financial feasibility or cashflow, that were outside the scope of what they had studied at university.

Historically the legal profession has been mainly populated by people with legal skills, but little else. Those who had business nous tended to create a profitable legal business, then use their spare cash to invest in real estate and other opportunities in the local area. They usually ended up being rich and influential members of their community. The remainder of practitioners either hung on the coattails of those with nous or survived despite themselves because the average client made the huge assumption that the lawyer was a man of the world who had special insights into the workings of society.

If you think I am portraying the old-fashioned law firms as elitists who were out of touch with society, then maybe I am. But the legal profession, or at least the solicitors' arm, did represent an enormous piece of fruit that was ripe for the plucking. Barristers are still very much stuck in a time warp.

Some significant changes came about as a result of the entry of vast numbers of female practitioners, many of whom are now partners in firms or barristers. For the first time in its history the High Court of Australia has a majority of female judges. Female lawyers have brought with them new attitudes, new ways of thinking and, often, new ways of working to accommodate other demands on their lives.

In the 1990's some legal entrepreneurs, who we would today refer to as disruptors, decided to change their business model. This was largely facilitated by advances in information technology. Looking back now it just seemed like good sense, but at the time the changes were so radical and audacious that older practitioners completely lost their bearings.

I know two lawyers who had each built up successful firms over a number of years, then hired management consultants to identify the most profitable area of their practices. In both cases the answer was personal injury cases. The firms then decided to specialise solely in that area and wrote to all their other existing clients to say they could not act for them any longer. This was an incredibly brave thing to do, but both firms have now gone from small suburban outfits to household names across Australia. This all happened in parallel to changes in rules which permitted new ways of charging, particularly "No win, no fee" arrangements, and mass media advertising.

The final point I will make is that over the last forty years law firms have gone from cutting the salami horizontally (firms of different sizes all handling everything) to vertically (firms specialising in designated areas, apart from the largest all-service firms). This fragmentation has resulted in many practitioners only seeing a small part of the chess board when providing advice to clients on complex situations.

In medicine there is often a debate whether you are better off to see an expert who is the best at addressing your specific issue, or whether should see someone who will give a more holistic opinion, taking into account your other physical and mental factors. The answer is that in an ideal world we would have both, which is probably why we still have GPs and specialists.

Similarly in law, a valuable role has emerged for in-house lawyers and legal managers who are able to take an overview utilising the input of specialists. McCormack said "The value of expert opinion – legal or otherwise – lies not in following it blindly or absolutely, but simply in having it available as data. In that form it can be factored in with other data, including one's intuition and experience." I would go even further and say that legal managers not only are able to filter the data for the

benefit of their own executive management, but are also able to ask targeted questions in the first place, thus reducing fees.

Since moving on from the practice of law, I have run my own business for over 20 years as a commercial adviser on petroleum projects and transactions, and as a Legal Project Manager. I provide front-end advice on the structuring and negotiation of the deal, and the final sign-off will be provided by a large law firm. I do not for a moment think that I am an oracle whose advice must be followed unquestioningly; my advice is just data that will be fed to the project or transaction team who will crunch it along with all the other data.

An analogy is that many lawyers are scared to be a company director of listed companies. A director is not legally liable for making a decision which later proved to be flawed if the director considered all the relevant issues, obtained the necessary advice and weighed up the relevant considerations in good faith. Again, it is all about having the right processes, and lawyers tend to spend far more time on nice points of law, to the neglect of points of process.

Of course it can work the other way where there is an obsessive focus on process to the point that the person cannot see the woods for the trees. One of the criticisms of project management is that if perspective is lost, the focus on plans, budgets, schedules, progress charts and reports can swamp the actual project. I saw this on a job I did in Canberra with a law firm that specialised in government work. They had a particular internal issue in their firm to address so were very pleased with the schedule they drew up for weekly discussion meetings over two months, including who would attend and who would prepare notes. But there was no emphasis at all on deliverables or outcomes.

Many professional firms now outsource tasks to developing countries such as India and the Philippines in an effort to reduce costs. This augurs badly for the next generation of local professionals who may receive a paucity of practical training. If handled well it could result in local professionals being managers instead of pure technicians. The management of professional firms will need to teach graduates who are losing their traditional workloads to upskill in such a way that they are able to add value at a higher level.

Outsourcing can create issues when work is delegated to people who have no context within which to work. Clients want more than a technician; they want someone who will pick up the cudgel on their behalf in a constructive way. It might be argued that only compliance work can be outsourced to developing countries and therefore the real value-adding remains at the home office. Even so, third country out-sourcing can be sub-optimal for the client, and may be not appropriate where critical analysis, lateral thinking or innovation are called for.

I have similar views on the use of artificial intelligence (AI). I can understand how it is of terrific use in searching vast numbers of documents by pinpointing key words. I can also understand how it might be used to predict outcomes in formulaic situations such as criminal sentencing or family property disputes or personal injury cases. But I think the role of the traditional lawyer is safe in the medium term.

As Richard Susskind has predicted, in many cases lawyers will specialise in new roles which did not exist in the past. Thus I have worked for some years as a Legal

Project Manager, even though I had never even heard that expression until I had been in the legal game for more than 25 years.

The commonality I have identified is that any supervisor in a law firm or other legal team must act as a business manager who will ensure work is executed both efficiently and profitably. He or she must:

- identify all of the tasks that need to be undertaken
- identify those to be delegated or outsourced, while ensuring the right people are doing the right jobs and that they have capacity to deliver
- Ensure that the out-sourced deliverable facilitates any further analysis which is required
- Track progress on tasks
- Institute remedial action if required
- Co-ordinate all tasks so that a cohesive end product will be provided to the client.

None of the above is a surprise to anyone who has project management training or skills, which unfortunately lawyers rarely have. Successful firms know how to do this stuff, but because it is not always in an efficient way, they fall back on the safety net of time costing.

2. So you want to be a lawyer – theory v. practice

It is probably fair to say that when people embark on a legal career they aspire to "make a difference," either to the lives of individuals or to society as a whole. They probably only have a nebulous idea how they will actually do that, and a lot will depend on future luck, such as what job they manage to snaffle and what clients turn up in the reception area.

The proudest day of any young lawyer's life is when they get admitted to practise, usually in a court room presided over by sombre ermine-robed judges, with the graduate's family sitting up in the bleachers watching on. At that point all the long nights of study seem worthwhile, and a glittering career awaits.

I am not going to say it is all downhill from there because many people have rewarding careers, and not only in a financial sense. But there is no doubt that reality bites when you have to enter the real world which is full of human beings, both work colleagues and clients, with all their flaws and peccadilloes.

Some young lawyers donate their time to working at community legal centres and good on them for trying to live the ideal of using the law to achieve some justice and make society fairer. In respect of the majority who are not quite so altruistic, if a young graduate gets a job at a large law firm it is extremely thrilling and promises a future of high-powered work with commensurate remuneration. Unfortunately, you will have to suck up a lot of rubbish along the way. Probably you are mentally prepared for long hours, but what you may not be ready for is that the people you work for have little interest in you as a human being – what you aspire to or what you believe in. They are probably only interested in how many billable hours you can record and invoice. If you fear burnout and happen to mention "mental health issues"

there will be a judgment that you are not up to it – if you cannot stand the heat, get out of the kitchen. These types of comments are made in the knowledge that if you leave, you will be replaced quickly by another young aspirant.

When young lawyers are fed into this sort of mill, is it any wonder so many bent and broken people inhabit law firms?

One of my colleagues left a firm I was working at to live and work in New York as a litigator. A year later he came back on a holiday to give a lunchtime talk to us on his experiences. For starters, he and his wife outlaid a large sum to secure a lease on a tiny apartment in Manhattan that had a foldout bed and a galley kitchen. In his year in New York he had not seen the inside of a courtroom; instead he spent every day sitting in a warehouse working on discovery of documents relevant to court proceedings about medical patents. He had people coming round periodically to give him food and drink and neck massages; the only time he left his seat was to go to the toilet. He told us if he recorded more than 100 hours of chargeable time in any week (think about that – 14 hours a day, 7 days a week excluding commute time is 98 hours), he got paid a bonus.

The listeners were agog. Someone asked if he worked 7 days a week. His reply was that he only had to work 6 ½ days a week and got Sunday mornings off to do his shopping and visit the sights of New York. His final comment was “New York is terrific. Except for time and space, we have everything we could ever want!” As a postscript, I guess some of that discovery work might now be performed using Artificial Intelligence.

When I joined a large firm I was asked what my interests were, and I started to detail the sports I played and was about to add in reading. The senior partner stopped me mid-sentence and told me I would only have time for one pastime, and I had to choose which one would constitute my leisure activity. The same firm told a friend of mine that he would have to kiss his wife and children and tell them he would not see them for two years while he built up his own practice. That is what he did.

At the other end of the scale, dealing with the dregs of society who regard crime as a sport, then chasing them for payment, is dispiriting. There is not a lot of law involved. And often when you get a client with a case worth fighting, they cannot risk losing their house to pay the fees. You can understand how practitioners in small firms often become cynical and battle-weary.

I am not saying that some exposure to the wild side of life is necessarily bad legal experience. When you are young and enthusiastic there is nothing wrong with sucking it up for a limited time to get established. I dragged my own family off to a dangerous situation in Papua New Guinea and that created a platform for my future career. What I am saying is that often situations are unsustainable, and you have to make hard decisions about the type of person you want to be, and whether the path you are on will nurture that development. As Ash Barty says, you must maintain a distinction between the person you are and what you do.

I know plenty of young lawyers who have been bullied (I was) and even harassed. A young lawyer also often comes under pressure to compromise their principles. I can remember a real estate agent promising to send me contracts if I turned a blind eye to some of the dodgy stuff he was doing. I can also remember some of my first cases

where senior partners from opposing firms rang me to say that they would magnanimously give me some advice as a new practitioner; the advice would be along the lines that my client had no hope and the best advice I could give to my client would be to withdraw its claim. This was totally unethical; luckily I had just enough nous to trust my own instincts.

When I studied law, we had to pass about 20 subjects over 6 years. Most of these related to specific fields of law such as contract, tort, land law, equity etc. A couple were a bit more practical such as trust accounts and ethics, but even these concentrated on how to comply with regulatory requirements. The only subject that had a practical bent was Conveyancing and Drafting, in which we learned the basics of drafting documents. Although the array of subjects offered has broadened, there is no doubt the chief aim of a legal degree is a solid technical grounding.

All of the subjects I studied were lawyer-centric. We never considered clients or the questions which are germane to the practice of law. Who are your clients likely to be? How do you interview these people? When do you listen and when do you speak? Do you support their position 100% or do you inject a dose of reality? Are your clients going to be suburban people for whom you will do a one-off transaction, such as a house purchase, and then not see again for twenty years, if ever? Will they be small businesses looking for help to survive? Or large corporations who require extremely specialised advice in certain areas? What skills do these clients require from you? How do you understand their dreams and aspirations, and respond, or even help drive the thinking? Should you be empathetic or objective? What does “success” look like for them? Will the resolution of an issue have impacts in other areas of the business or the way the business is run in the future? How do you deal with Government clients who are totally risk-averse or who are more interested in the PR spin on what you are doing? How do you understand corporate or government hierarchies to see who are the real decision-makers? On a dispute, when do you go “nuclear” and when do you extend the olive branch?

At law school we parsed cases from the point of view of the fine points of law involved. I remember thinking when reading old cases, “Who were these people? How did they afford to go to court in the first place? Would they lose everything and be bankrupted if they lost the case?” One of the most famous cases in the Common Law canon is *Donoghue v Stevenson*, the basis of our modern law of negligence, where the unfortunate plaintiff suffered gastroenteritis and shock from drinking a bottle of ginger beer which contained a decomposed snail. The back story though is that Mrs Donoghue was described in her action as a “pauper”. This meant that she could not pay any costs awarded to Stevenson and therefore was not required to provide security for costs. Does it also mean that her solicitor agreed to take the action on a no win, no fee basis?

The practice of law is largely about people, or the human factor. Henry Ford complained that every time he wanted a pair of hands he ended up with a human being as well. So it is with clients, who bring with them all their unreasonableness and prejudices.

The issue of having to deal with human beings is often a problem for brilliant people. For instance, if you get top grades at school everyone says you must study medicine, because that is the hardest course to get into, but the reality is many clever people

have little empathy and dreadful people skills. Add this to the out-sized ego most lawyers have, and one can understand how the legal profession features some highly dysfunctional people.

Alas, although I believe my cohort received a good grounding in fundamental legal principles, we received no training in lateral thinking or negotiating or project management. To be fair to law schools, this was probably not part of their remit as they were there to impart knowledge in pure law, not to teach skills which would be best learned on the job. In this area probably not much has changed, (although in the UK and New Zealand there is a push for practitioners to learn some project management skills). At many universities the only practical training still appears to be mock trials or moots. In lieu of articles of clerkship there is now a requirement for graduates to undertake a legal practice management course which simulates real life experience.

There are certain attendant skills that are needed for a practitioner to properly exercise their technical skills, such as the abilities to listen, analyse, assemble facts and thoughts into a logical order, and communicate clearly and concisely. One of the skills which could be really important for young lawyers is active listening, that is, giving the speaker your full attention and taking on board both verbal and non-verbal messages. Unfortunately, these types of soft skills are not valued. As a result, lawyers continue thinking about what they want to say and not hearing the client's story fully. And often this only grows worse over time as experienced lawyers become more convinced that anything they say is far more important than what any client says. As the Desiderata poem says, "Listen to others, even the dull and the ignorant, for they too have their story."

Over a long period in practice, certain other "sixth sense" skills will develop, such as the ability to intuit how a negotiation is going, or whether lies are being told, or whether a case is likely to be a winner, or which issues really matter and which don't. Another associated skill is lateral thinking, or the ability to come up with creative solutions to resolve issues. I read a story about Edward De Bono, who coined the phrase "lateral thinking", attending a conference of regulators in the USA where they were debating water quality in rivers and how to make factories improve the quality of their water discharges. Naturally the regulators were thinking in terms of punitive laws and heavy fines. De Bono's solution was to mandate that the water intake for factories had to be downstream of the waste outlet. This would ensure factories became self-regulating because they would not want to be introducing polluted water into their plant.

I call these types of intuitive skills, "meta" skills, in the sense that you taking a helicopter view on an overall situation to get the full picture and understand how all the jigsaw pieces fit together. Not all important meta skills are acquired by everyone over time. I have met barristers who struggle to pick a winner with cases. Many lawyers are very linear in their thinking and do not ever learn to think laterally. In particular it is very difficult for a highly specialised practitioner who provides advice in a narrow area to ever take a helicopter view. We need these specialists, but it is important to use them as a tool in the tool belt. Someone, somewhere, must have an overview of the situation. Clients assume the lawyers will be in control, but because lawyers are not trained in project management and because it is in their interests to

maximise time recorded, the word “control” means very different things to the lawyer and the client. To change this situation, either lawyers have to change their thinking or clients (including in-house counsel and project managers on large projects) have to impose their will.

McCormick starts his book with “Part I – the war between Lawyers and Clients”, which is probably something of an overstatement. I have pointed out some shortcomings of lawyers and the fact that clients are often very dissatisfied, but generally lawyers are there to help, so the situation falls a long way short of a “war’. Part of the problem is that lawyers are very good at some things and not at others.

3. What lawyers are not good at

At the risk of sounding overly critical, may I hasten to say that there are many things lawyers tend to be good at, for example, advocacy, analysing complex situations, and thinking quickly and logically. That is why we brief them.

But often there are traits they do not possess, in particular the ability or desire to work to, and report against, an agreed plan. Therefore clients often are disappointed that lawyers tend to run their own race, except when they want specific instructions from the client. The central dilemma for clients is finding a way to maximise the positive aspects while minimising the negatives.

Drilling down further, what does the practice of law on a day-to-day basis actually look like? For most practitioners, it involves a hectic day of appointments and reacting to developments on files. There is little time to take a breather. Every lawyer says they have too much work and cannot keep up. There is simple solution – do not take on every job that comes through the door. But often greed and fear of missing out prevents them turning any work away.

This issue of maintaining a measure of control, and being seen to be in control is, in my opinion, extremely important in the practice of law. It also has a major impact on the mental well-being of the lawyer if there is a constant feeling that things are not under control. That is why in Part 2 of this work I outline practical ways of introducing project management principles into legal work. Although an inability to plan work may be the most serious shortcoming of lawyers, it tends to be exacerbated by other shortcomings, many of which are heightened by time costing practices.

Some of the main weaknesses exhibited by lawyers are:

- **Lack of collegiate behaviour**

A significant issue for medium to large professional firms is patchiness of talent i.e. the firm may not be strong across all the disciplines required to execute the job. Or maybe a small firm just does not have enough resources for the job. Where the project is cross-jurisdictional with interstate or international elements, I have frequently found situations where one appoints a reputable firm locally, but it then works in conjunction with one of its small branch offices which does not have the depth and experience to cope adequately. Or often firms brief foreign or interstate law firms because of an established “tie-up”, not because the other firm is a leader in the particular specialisation required.

In contrast, engineers tend to recognise that different firms have different strengths and will often sub-contract to, or form joint ventures or alliances with, competitors to perform work (although sometimes this is done to reduce the number of bidders). Lawyers will brief counsel or sometimes have a freelance consultant on their books, but other than that they will never seek help from a competitor. This is a little surprising given the preoccupation with risk and negligence claims. If queried, the excuses proffered for not working with other firms will probably revolve around the need to preserve client relationships and client confidentiality. These excuses rarely hold water.

Even within firms two of the biggest challenges facing Managing Partners are:

- Discouraging professional staff from hoarding aspects of work when they are not the best person to handle it, and
- breaking down silos to get professional staff to share information.

Working in teams is an alien concept for lawyers, other than a partner supervising those immediately below them. It is difficult to see lawyers moving towards more collaborative and co-operative work practices any time soon. I cannot begin to count the number of times I have seen commercial or property partners continue to run disputes on their files for as long as possible without consulting litigation specialists. When the litigators are finally brought in, they are usually quite angry that they had not been consulted on strategy, and sometimes prejudicial communications have been sent.

It is possible that adopting the types of practices proposed in Part 2 of this book might lead to a more clinical approach towards the execution of work and, in particular, to the allocation of resources. It is more likely to only happen as a result of clients insisting that firms sub-contract particular specialists in a field for certain aspects of a project (a “Nominated Sub-Contractor” in engineer-speak). An alternative might be for the client to excise that scope and brief separate firms to handle different aspects of the job, but this will require sophisticated skills for the client to be able to manage this interface to achieve an optimal outcome.

The alternative contracting model under which different law firms enter into subcontractual or joint venture arrangements is unlikely to happen. Greed is probably the dominant factor which will preclude these behaviours; taking on the risk of being responsible for someone else’s work is unlikely to be attractive to a law firm unless it can make super profits. I worked for a firm where our Hong Kong office was able to charge double the hourly rates of the Australian lawyers. We proposed that HK would outsource some work to Australia and that we would split the uplift. This seemed like a terrific win/win situation, but it never happened because both sides were too greedy.

- **Know it all attitude, coupled with resistance to change**

I have already mentioned that lawyers are not generally particularly good at listening and do not believe the process side of the practice is real legal work. In many of the workshops I have ever conducted with lawyers, the senior people listen for the first ten minutes to get the gist and then walk out or spend the rest of the session doing

emails on their phone. When challenged they will say “I know this”. I liked the retort of one senior partner - “you may know it, but you don’t do it!”

Anyone who manages a law firm is going to have to deal with some outsized egos. It is also a sad fact that the older the practitioner, the more resistant to change they are likely to be, particularly if the change requires a large capital outlay that will be of more benefit to the next generation of partners. At the same time, the pyramid structure of law firms means that the senior partners have the most power. They will protest that they keep up with changes in the law, which of course they should, but that is not what I am talking about. I am talking about the process side of practice and the “best practice” skills which one should adopt to be a rounded practitioner.

But this resistant culture also presents a great opportunity for those who want to be reactive to what clients want.

- **Lack of commercial judgment**

I have mentioned that McCormack is quite scathing about the business acumen of lawyers. His view is that legal work is mainly an exercise in negativity (i.e. identifying risks and what-if scenarios) so the better approach is for the business people to emphasise the positive, then the negative should be dealt with only after momentum has been established and agreement in principle has been achieved. Although McCormick agrees with Sir Henri Deterding that lawyers are not business people, he makes the point that it is wrong to say that “lawyers *never* come up with helpful and even brilliant suggestions … they do.” I suggest that the likelihood of a lawyer making such suggestions is much higher where the lawyer is tuned in to the aspirations of the client and to the industry in which it operates. So we are probably talking about in-house counsel or a lawyer with a small number of clients, particularly where the lawyer is a good lateral thinker.

Although lawyers generally may not be good at advising others on the ins and outs of their business, a good commercial lawyer can be invaluable and can help “drive the thinking.”

How does one acquire commercial judgment? Some people with legal degrees are astute business people and they carve out very successful careers outside of the law. Working for a law firm all your life can be an insular experience. In sociology a “total institution” is a closed social system rigidly run by an authority, to the point the members can lose touch with the outside world. Law firms and government employers can be like that; practising at the Bar all your life can be an even more insular experience.

For any lawyer, getting industry experience is a terrific way to break out of the total institution mentality. Those who don’t can end up like political apparatchiks who graduate through the party ranks to eventually gain a parliamentary seat, but they bring little real-life experience.

I am not sure commercial judgment is something that can be taught. Over the years we are bound to acquire some level of intuition and rat cunning, but probably still at a level of identifying what can go wrong.

I do believe though that preparing a plan in conjunction with the client helps identify what is important to the client. To give an example, I prepared a legal scope for a client who was proposing to take over a small company that owned petroleum tenements in four different jurisdictions in Africa. The scope included a due diligence program that involved, for each country, perusing the underlying tenements and joint venture arrangements, and obtaining advice from a local lawyer on any unusual features or anomalies we noted. I provided a fixed fee for my portion of the work in each jurisdiction. The client was very happy with the proposal, but thinking about it further, realised that the assets in one country represented < 5% of the value of the transaction and therefore were not material to the decision whether to proceed. Thus that country was deleted from the scope and the client was able to immediately reduce the legal spend by 25% as a direct result of the work program being spelled out in detail.

- **Fear of being sued**

There is a strange dichotomy in the law between those who will advise a client on matters outside their expertise for fear of losing the client, and those who are terrified of doing something they have never done before. The latter type of practitioner may say they have had thirty years' experience, but really they have had one years' experience thirty times!

My managing partner once asked me how I can put together a project plan that applies to work areas or jurisdictions that I know nothing about. I explained that a good lawyer does not know all the answers, but knows what the questions are and from there he or she can identify who can supply answers. He shook his head miserably and said he will only operate in his comfort zone, which meant he never strayed outside of work that he had done before.

This safe approach is laudable in one way, but the legal profession does miss out on a lot of work because it spends a lot of time telling people what it does not do and not what it is capable of doing.

I will give some examples. Every geologist and engineer I know drafts MOUs and Heads of Agreement. I receive them all the time with a request to carry out a "quick" review. The document is usually a mess, because it is based on a previous project with the names and a few details changed, and so I have to work out whether it is easier to try to put lipstick on the pig, or throw it away and start again.

Similarly, on all the major projects I work on, the regulatory approvals path is planned and run by engineers. The perception is that lawyers are too expensive and do not have project management skills, so a client would only bring in a lawyer for an opinion if there is some ambiguity in the legislation. Sad, but a valid assessment.

For the same reason, on major transactions an investment bank will usually act as the project manager. There is a strong perception that lawyers do not have the skills to be able to put their hands up to act as project managers of multi-disciplinary teams.

To me this means lawyers are being marginalised by other professions. Clients probably have no objection because lawyers are expensive, and therefore clients believe it is good to minimise their role.

Here is the nub of the problem – the common perception that lawyers will "make a feast out of what should be a light lunch," to quote a previous client of mine. Where things often go awry with law firms is that a client will ask a law firm to conduct a high-level investigation or due diligence exercise i.e. it will ask it to identify any rocks on the playing field for any proposed project or transaction. Unfortunately most law firms will over-service and will end up identifying pebbles as well as rocks. This arises partly from the fear of being sued for missing something, and partly because of the desire to maximise fees through having junior lawyers research every conceivable issue.

Now, there will be those who will state sniffily that professional standards must be maintained. Of course they must. Equally though perfect is the enemy of good.

Surely it comes down to what an informed client actually wants. The issue can be resolved via agreement of a proper scope which sets out the work required with a high degree of precision, and includes the schedule for completion and who will do that work. But this might require severance of the umbilical call connecting firms to time costing. I will examine the curse of time costing further in chapter six.

4. Types of legal work

As a young articled clerk I did whatever job was thrown at me, including the partners' personal errands. When I became a partner in a large firm, I did not ask anyone to run my errands, but often when I asked a young lawyer to work on something they would decline on the basis that it was not the type of work they wanted to specialise in! I could not believe the narrow-minded attitude. How can one judge what area they want to specialise in before they dabble in everything? I never wanted to be a resources lawyer until I was asked to do some joint venture work on a gold project and really enjoyed it. The other sad thing about planning your career so rigidly is that you may decline to see some down and out person sitting in reception whose case may end up in the High Court and be the most important of your career.

My own career was very strange as I somehow got catapulted from doing wills and conveyancing and defending minor criminals in a country town to working on billion-dollar resources projects around the world. I have been asked how I planned this career path, and the answer is that I didn't. Along the way as I saw opportunities I took them, even if that meant taking risks and dragging my family off to live in dangerous and unknown places. Opportunities arise and you either take them or you don't depending on your appetite for risk. You make your choices in the marketplace of life, and then pay the applicable price for those choices.

For most practitioners, at a very broad level, legal work can be categorised into opinion work, transactions/projects or dispute resolution. My thoughts on these are:

- **Opinion work**

For the reasons I have outlined above, it is very difficult to extract a firm recommendation on a course of action from a law firm. What you will normally receive is an advice setting out options and when you ask which one you should take the answer will be, "Oh no, I could not possibly provide commercial advice." This is like going to the doctor with a serious illness and when the treatment options are

listed, the doctor states it is completely up to you to decide which is the best way forward.

Worse still are lawyers who specialise in telling you what you can't do instead of what you can do; clients are looking for solutions, not lawyers who shut down all courses of action, even if the risk is infinitesimal. If business people only did deals where there is zero risk, then no business would be done at all.

When a lawyer does give an opinion containing a firm recommendation, it is refreshingly welcome. I think this tendency to serve up mumbo jumbo in an attempt to show-off how much law the lawyer knows originally arose because lawyers are scared to commit to a position - scared that they might be sued if the option does not work out well, and scared because they do not have the commercial skills to make a smart recommendation. At the end of the day, it is only a recommendation and it is up to the client, after being fully apprised of risks, to go with it or not.

- **Deals**

For the moment I will lump together transactions relating to existing assets and those that relate to projects to be developed. High-rise buildings in CBDs across the world are full of people talking about money. What exactly is the role of a lawyer in a deal? McCormack takes the view that is not up to lawyers to do the deal, but rather to document it (and I would add structure it). There is a lot of sense in the statement that a lawyer is not the best person to do the business.

I have been to many meetings where highly paid lawyers sit mute until there is discussion of the boilerplate provisions, then they suddenly spring to life arguing about the punctuation and grammar of indemnity clauses, while everyone else's eyes glaze over. These are the same people who feel they are adding value by continuing to amend drafts unnecessarily when the principals are happy with the basics of the deal.

Many drafters are ego driven and therefore it is important for them to "win" the drafting battle. Thus it is common to receive a first draft of a document that contains ridiculously extreme commercial positions, the idea being that the drafter will either get away with it, or as is more likely, the recipient will have to negotiate hard to bring the document back within normal commercial parameters. The fact that many hours of time are wasted in getting back to what should have been the position in the first draft is irrelevant to those who are ego driven.

A responsible law firm should never serve up a first draft containing extreme positions unless it has been specifically instructed by its client to do so. Ultimately it is the clients who pay for the additional unnecessary effort.

I had a ridiculous situation where I was asked to prepare what was probably the first true Public-Private partnering agreement in Australia for delivery of a major piece of infrastructure. I say "true" because there had been many of these contracts where the usual form of construction contract had been used, and behind it there would be a supplemental document saying what behaviours the parties were expected to adopt. In my situation, the client, a government-owned organisation, agreed that if the parties were committing to execute the project together, and were sharing profit

and risk, there could be no liability between the parties and the only option in the case of breach would be termination. As Sir Humphrey would say “Very courageous Minister!” The final agreement was twelve pages long. The in-house counsel of my client, who was a little piqued to not be closely involved in the project, sent the draft to his preferred external lawyers for independent review. They wrote an incensed critique that ran to 20 pages, nearly all of which related to inserting liability and indemnity clauses. A twenty page review of a twelve page contract? The lawyers did not understand what we were trying to achieve. Fortunately, the senior manager of the organisation stuck to his guns and the project went ahead (successfully) using my partnering agreement.

Worse still, if an agreement’s terms are settled ahead of the deadline a lawyer cannot leave it alone and will pick at it like a scab on a sore, trying to add drafting to cover more and more fantastical scenarios.

Many years ago my firm was acting for an airline on the purchase of a new airliner from France. It was a big deal for us and, never having done such a deal before, we enlisted the aid of a partner in a large London firm who lived in Paris and spent his day doing nothing but new aircraft purchases. I phoned him and when he asked how many planes we were buying, I said “Just one.” His response was “Oh, pity.” He agreed to send us the model contract and we fully expected a hundred pages or more to come through. What we got was a 3 page agreement that set out the basics – the purchase price, how it would be paid, where the plane would be delivered, warranties on performance, the remedy if it did not perform as promised, and a list of spares supplied. It was a model of concision.

To me lawyers who over-complicate things are their own worst enemies. Sure, any agreement needs to be tight, but why not apply their excellent analytical skills to help mitigate risks and propose novel structures and solutions to issues? To some extent this might involve putting the “must win” mentality to one side to craft a solution that meets both parties’ requirements.

- **Litigation**

I have handled hundreds of cases on behalf of clients and here is how it normally goes down:

  - A client presents with a grievance and you investigate the facts and present some options in terms of dispute resolution pathways. If the client says it is not about the money, but is a matter of principle, then you make sure you get money up-front to cover your costs. That statement usually means it is about the money.

  - On a complicated case you prepare a brief to counsel including a chronology and witness statements, and seek an opinion on the prospects of success. Usually the advice comes back saying the client has a strong case (maybe 70-80% success case if a probability is given).

- The client, feeling chuffed that justice is on his or her side, gives the green light to go forward.

- Fast forward two years and after spending several hundred thousand dollars on legal fees the client is at the doorstep of the court ready for the big day. The barrister will pull the client aside and say, “You only have a 50/50 chance of winning this case as it is your word versus theirs. I strongly recommend that you settle.” The gobsmacked client will respond that that was not the advice he or she received two years ago, and the response will be, “Yes, but that was before we heard the other side’s case.”

Now one thing to recognise about barristers is that their reputation is only as good as their last case, so winning is very important to them. However, the prospect of settling and getting a handsome fee on brief, without having to argue the case and avoiding the possibility of a loss, is an extremely attractive proposition.

All of this may sound like an incredibly pessimistic assessment, but the reality is that rarely does anyone win in litigation or arbitration. There is lot to be said for swallowing your pride and avoiding the pain, expense and waste of time involved. A friend of mine recently complained to me that his company had a case which absorbed many hundreds of hours of management time (no-one ever factors into the costs the distraction of management from running the business) and cost more than a million dollars in fees to get to court. Once the hearing took place the judge took more than two years to make a decision, and the end result was unsatisfactory. My friend said if he had known all that at the beginning, there is no way he would have gone ahead.

If a dispute is purely about money, I think you are nearly always better off cutting a reasonable deal if possible, learning from the experience and getting on with your life.

Probably a worse situation is family law property disputes. When a marriage breaks up the best case scenario is that each spouse will own about 50% of what they had before. But if they lawyer up and go to court the average middle-class family will end up with a division of a quarter of the assets each to the spouses and a quarter each to each sides’ lawyers. This is just pure maths, so why are intelligent parties always surprised when it happens?

Another way of categorising legal work is according to the degree of complexity involved. David Maister breaks professional service work into three categories:

(a) Procedural work, which is repetitive and tends to be high volume and low margin e.g. conveyancing and low-level litigation

(b) Grey-hair work, where a transaction is reasonably complicated and the client is looking for a “wise owl” who has experience in those types of deals. Grey-hair work might include the purchase or sale of a business, or a proposed takeover or merger, or establishing a long-term joint venture

(c) Brain work, where the client is trying to create something unusual or unique, and one more or less starts with a blank sheet of paper. Brain work might include the establishment of a new type of business or relationship for a company, or the construction of sophisticated and expensive infrastructure.

For procedural work, it is important that firms have their own cast-iron procedures, such as checklists and precedents, which need to be followed slavishly. That necessity arises because the work must be undertaken efficiently in a sausage-machine or cookie-cutter fashion to ensure that the thin margins are maintained and profits are not eroded.

On grey-hair work, precedents are a good starting point, but the transactions are sometimes very complex and there will be an element of adaptation required based on the subtleties of the transaction. Some of the mega-firms try to commoditise this type of work, because they handle thousands of similar transactions and cases, by preparing “Spring-board” maps which set out how the matter should run. This works so long as there is a recognition that a complicated case or transaction is not completely formulaic, which is why one wants to see a few grey hairs on the head of one’s adviser. The danger for the client in this type of work is that often what the professional firm delivers is not what the deal-maker expects; the client may expect to receive valuable commercial input, but instead gets a mini-audit. It would be extremely helpful for clients if the firm provided a Project Execution Plan (PEP) showing the critical path of the transaction and detailing the deliverables.

One assumes that a reputable legal firm will have the gumption to tailor its standard documents to meet any particular considerations unearthed by due diligence investigations. Nevertheless, many lawyers lose sight of what is important in a transaction and get hung up on the stylistic elements of documents or their own ego-driven drafting positions, rather than commercial points which go to the heart of the deal. In any event, it is important that the professional “runs a tight ship” when doing this type of work; proper processes must be in place to ensure nothing is missed.

Brain work requires a bespoke solution because the adviser is confronted with something unique. For example, the client may want to construct an industrial plant that will rely on a new unconventional source of energy because it is cheaper than conventional supplies. However it might be unproven and the provider may be a start-up that is not a credible counterparty (in terms of providing performance guarantees for the life of the project). The adviser needs to start with a blank sheet of paper and ask itself and the client some searching questions e.g.:

- What is the creditworthiness and operating history of the counterparty?
- Are security rights or step-in rights desirable?
- Should there be a baseload contract with a conventional supplier and an incremental contract for the unconventional supply to provide a blend of pricing and risk profiles?
- How would a supply blend affect the economics and how can the two contract volumes be adjusted depending on the success or failure of the unconventional supply?
- How will financiers view these arrangements?
- What government approvals are required?

To help such a project come to fruition, it is absolutely critical that the professional prepares a PEP to properly plan and execute the necessary work; it is not good enough to dust off a few precedents from the last construction project. This type of work is more difficult to plan because much of the front-end work might revolve around research, and preparing papers presenting options to structure the deal, or ways to pursue different work streams (such as planning approvals).

Even though brain work is not as predictable as grey-hair work, it is just as important that the client understands what the deliverables and timing are, and that the professional then reports against the plan. In practice the horizon for any plan is going to be much shorter until the way forward has been decided, so the PEP may only be for a month at a time until certain critical milestones are reached, such as finalising the project structure, or entering into an MOU, or identifying a partner or funding source.

5. Types of lawyers and how to choose one

Usually you only know how good a lawyer is because they have told you how good they are, through radio advertisements or through a pitch you have received. Unfortunately this is the nature of the beast and the profession tends not to attract many shrinking violets.

This is a shame because often the best marketers are not very good lawyers. It is very hard to be good at everything. I worked with one guy who was an audacious marketer and pulled in some impressive clients, but they only ever used him once! In large firms quieter “compliance” lawyers are not highly valued. These people can be a safe pair of hands and that is exactly the sort of person I would want on an exercise like a due diligence. To me, a law firm is like a cricket team which needs a mixture of batters and bowlers and a wicket keeper.

In any event, for a client to gain any measure of control over your lawyer, one has to understand the animal you are dealing with. This involves an understanding of both the individual personality and the area in which the lawyer specialises (or not).

I will make a couple of general observations on these unusual animals to start with. First, a large percentage of people who achieve a law degree never practise law. Law is a great degree to acquire analytical skills and to understand how our society works. I can think of many bankers and politicians who have law degrees.

The second observation, at the risk of repeating myself, is that lawyers tend not to be good listeners, largely because they love the sound of their own voice. Confidence should only come with experience, but often it doesn’t, and some junior lawyers can be very full of themselves. Fake it until you make it!

Similarly, I can think of many older lawyers who are total blowhards. When you meet with them they will give you both barrels without drawing breath. What I realised years ago is that if are on the other side and can hold your fire for twenty minutes or so, your opportunity will come. Before that it is pointless trying to speak because they will just talk over the top of you and not listen to a single word you say. If you have a client present, you will have to tell them in advance what the tactics are so they do not think you have been cowed into submission.

A large part of this particular issue is that it is important to many lawyers to be recognised as the smartest person in the room; once this has been achieved they are often not unduly stressed about where things go after that. Thus, quite a lot can be achieved through the use of flattery, even if it turns your stomach. I recall a deal in the Middle East where we were trying to get a document signed quickly and had to send it to an Arab national oil company, which was the majority owner of our company, for vetting. The lawyer in Head Office (Doctor X) came back with over a thousand (yes a thousand) comments which would take months to resolve. Part of this may have been because my company was British managed, and he was sticking it to the Brits for their superior attitude. My CEO came to me wringing his hands and despairing that we would not be able to sign that day. I organised an immediate meeting with Doctor X and showered him with flattery along the lines of - "I am really sorry to have to trouble a senior and experienced practitioner like you with something as mundane as this." Immediately he was purring like a kitten, and within half an hour had agreed that nearly all of his points were not critical. We signed that afternoon.

Although I have generalised about the attributes of lawyers, all human beings have different personality traits which play to their strengths and interests. In my mind I have a dichotomy between constructive law i.e. looking forwards to see what can be created, and destructive law i.e. looking backwards to see who is to blame in a given situation. I have always been more interested in constructive law and am good at planning and creating "enduring" contracts which require some flexibility, and give and take. I am not attracted to thumping the table in transactions or disputes where the parties want the best short-term outcome and have no ongoing relationship.

Turning to the specific legal roles with which one has to deal, I would classify them as follows:

In-house counsel (including government lawyers)

I have enormous respect for capable in-house counsel. As they are embedded within organisations, they are in an ideal situation to contextualise their advice to help the organisation achieve its objectives, and to weigh up risks better than an external lawyer looking in. The Chairman of the Australian Securities and Investments Commission stated that, "General Counsel should put outcomes for customers and stakeholders at the centre of the way the firm operates, rather than relying solely on a checklist of legal obligations." Of course, that does not mean that General Counsel can be complicit in breaches of the law, as for example allegedly happened in the well-publicised instance of Star Casino.

There is a dual business and compliance role. The Chair of ASIC went on, "A good General Counsel will display judgment and help boards and companies make good decisions about what transactions to enter into, who to do business with, manage reputational risk and, in particular, help companies stay focused on what's in the best interest of the organisation and its customers and shareholders."[3]

[3] *Australian Financial Review* 10 June 2022.

It is possible for General Counsel to have too much of a compliance bent; on transactions, projects and disputes these people tend to act as “traffic cops” who hand work to large firms without taking an active role.

In my earlier years of practice, private practitioners tended to look down their noses at those who had corporate or government jobs, assuming they could not cut it in private practice. This is certainly no longer the case and firms have realised that when their best and brightest take a corporate job they should stay in touch with them as an alumnus in the hope that work may be fed back to the firm in the future.

In-house lawyers who have worked in law firms also can act as poacher turned gamekeeper as they understand how law firms work. Without a doubt the best thing I ever did was take a job in-house with a gas company. Up to that time I had only worked in law firms and resolutely believed that in any situation the lawyers were the smartest people in the room and that they should hold court. Imagine my amazement when I joined the gas company and was surrounded by people who could find hydrocarbons far underground, others who would design equipment to bring it to the surface where it could be treated, and others who arranged shipping and sales to faraway markets. It was a very humbling experience. Moreover, I was not exploited by my employer and was treated fairly and with respect at all times.

This experience of understanding how a business works, in this instance from risking money on exploration through to producing, transporting and selling a product, completely transformed how I practised law. It gave me context for what I was doing, which also meant I acquired commercial judgment, largely because I understood what was important and what was not.

A few years later an Associate I worked with at a law firm sought my advice – he had been offered an interesting job in-house with a petroleum company, but was worried that if he got out of the queue to partnership, he would re-enter at a lower level if he decided to re-join the law firm in a few years. My advice to him was go for it, for the reasons mentioned, but also if he got good experience in the company the law firm would probably later want him back at a reasonably senior level in the hope he could bring the company as a client. He took that advice and has had an interesting and lucrative career in the petroleum sector, both as an employee and a contractor. He will never go back to private practice.

Going in-house was the best thing I ever did. In summary, my advice to any young lawyer is to seek exposure to varied areas before specialising, and to spend some time in a business before committing to a life in a law firm.

Law firms

Life is tough as a sole practitioner trying to cover all bases; the number of negligence claims against sole practitioners reflects this. Some degree of specialisation is highly desirable, so professionals usually form partnerships, which are likely to be incorporated these days, to allow each partner to specialise, to offset some risk (because different areas of practice may be busy at different times) and to share expenses. Note that barristers are not allowed to enter into partnerships, which is good for their independence, but bad from the perspective of being accountable to others.

The former CEO of IBM Lou Gerstner said “An organisation is nothing more than the collective capacity of its people to create value. Culture isn’t just one aspect of the game. It is the game.” I have found that the firms in which I have worked have mainly had a dog-eat-dog culture, or less commonly, an ineffectual culture which does not deliver better results than if the partners were working alone. As a general rule, the larger the firm, the less likely it is that the partners like or respect each other (although I have a friend who was a partner with another guy for 30 years in a two-partner firm and in that time they had never been to each other’s houses!). If partners do not particularly like or respect each other, or perhaps even trust each other, what binds them together? The simple answer is greed. The larger a firm is, the more likely that it will attract lucrative corporate work and the more likely it will have opportunities to gear its resources and maximise profits.

Greed does not seem like a very satisfactory basis for a business relationship, and in my experience it is not. There is very little collegiality in most larger firms. The competition among lone wolf personalities to maximise their share of the profits pie means law firms consist of silos where work is often shared reluctantly. Occasionally I have seen the opposite situation on really large jobs where the partner in charge drags in every person he can think of to rack up fees, but this only applies where the partner gets appropriate financial credit for landing the job.

Does any of this matter to a consumer of legal services? Maybe not. The most important goal for a client is to make sure the person you are dealing with does not stray outside of his or her specialty.

Looking further at the types of law firms, I would sort them as follows:

- **Large firms** – as with many things in life the nature of their relationship with their clients is governed by relative bargaining power. If the client is a large corporate or government client, a law firm will crawl across broken glass to get your work. If the client is a small company, it may be regarded as being disposable and often treated with contempt. One firm I worked for had a Client Rationalisation Adjustment Program (CRAP) where every year we discarded the bottom 20% of our clients, judged solely by fees invoiced.

  In my in-house and LPM roles I have read many pitches from large firms (both legal and accounting). The pitch documents are so much alike that it is risible. They are usually prepared by a marketing department, and consist of many cheesy photos of partners with a description of the wonderful work they have done for other clients. I regard the technical expertise of large firms as a given, so I just skate over all this guff. There will be some grand statements such as “Put simply, we are the best”. Really, according to who? What are the benchmarks? In other words, the pitch is all about the firm, with little thought given to the client and what the client wants to achieve.

  When I started my consultancy in 2000, the company consisted of my wife and I sitting in the front bedroom of our house in the suburbs. At that time a major government-owned electricity entity wanted to review its panel of corporate strategy advisers and advertised for submissions, which were not to exceed 12

pages. The existing providers were all topflight legal and accounting firms, and I knew we had zero chance of making the panel, but I remarked to my wife that it was a way of airing the name of our new business. In our submission, I spent 11 pages examining the place of the entity in the energy market, where it might aspire to go and how it might get there. The 12th page was about me. A few weeks later the guy handling the tenders rang me to say that we were the only tenderer that spoke at length about their business, so he would be including us on the panel with the big players! We had a long and rewarding relationship with that company.

Back to large firms though. When you brief a large firm you are entering into a Faustian pact. You know that because they are an all-service firm, they can handle anything you throw at them and that they will have teams of people working on your files and will charge you eye-watering amounts of money. If you are a smaller client there is little you can do to control the fees.

Large firms are extremely good at minimising the risks to them. They will push risks as much as possible back on the client or other service providers (in the same way investment bankers do) and will run a mile before offering commercial advice. There is a direct relationship running through the level of fees, arrogance, technical capability and risk-aversity.

Large law firms have also very cunningly instituted a system where their clients pay for the training of young graduates. On any large job a partner will rock up to meetings with at least an associate and a callow youth who does not say anything but takes lots of notes and tries to look intelligent. The firm has brought the young graduate along to get experience and to make notes and do research, but the reality is they add no value while billing at around $200 per hour for their time.

All things considered, it is tempting to say that large firms are ripe for the plucking, but they seem to have weathered all challenges well so far. While they may be as difficult to manoeuvre as a dreadnought, they are similarly unsinkable. But don't forget the dreadnoughts eventually became obsolete.

- Small and medium size firms – selecting a law firm is very much a "horses for courses" exercise. You are unlikely to approach a top city firm to do your suburban house conveyance, but you are equally unlikely to ask your local practitioner at the suburban mall to advise on complex international transactions.

  Small firms are operating very much at the retail end of the market and their role in life is fairly clear. Chiselling out a place in the market is more difficult for medium sized firms, who aspire for the complicated corporate work, but are not an all-service firm and are unlikely to ever attract the largest listed companies.

Government work is even harder to land; no-one ever got sacked for using IBM, so it is hard to convince public servants to take a risk on second-tier firms, no matter how much they like you and how good they think you are.

Sometimes two medium size firms cook up a “midtown merger” in the belief that the top corporates will come to them by virtue of sheer size, but all you normally end up with is a large “B” grade firm.

A different way to cut the salami is to have a niche firm that only operates in one area, but does it extremely well. Many of these firms are very successful and are happy to commoditise their work and charge fixed fees. You would think these firms would be obvious candidates for other firms to sub-contract on large jobs, but lawyers do not think that way.

I believe there is a great opportunity for medium sized firms to encroach on the work of large firms through the use of disciplined project management techniques, and I will examine this further in chapter 7.

Barristers

People who practise at the independent bar (including those who are not partners in a firm in jurisdictions where there is a fused profession) are weird cats. As with most professions there is a bell curve, with the top brilliant Queen’s Counsel at one end and hacks in local courts at the other. What is common to all of them is that the longer they are at the bar, the more removed from reality they become.

I have always been amazed at how leading counsel can get their head around the most complex engineering or medical issues, then when the case is over they forget it all and move on to the next job. During a case they gradually fill the bathtub with facts and technical detail, and then at the end pull the plug out and all that is left is a dirty ring around the tub!

Don’t ask a barrister for commercial advice because they live in a rarified world far removed from the quotidian activities of the rest of us. They cling to antiquated rules that they cannot be sued for their performance in court or that silks must have a junior present. Barristers do not deal directly with the great unwashed so do not market in the way law firms now do; almost all of their briefs come from law firms. While they value the firms who brief them, there are plenty of stories of barristers who double book their time and then pressure clients to settle, or leave a client in the lurch at the last moment. This is not a reflection on all barristers but on the greed of certain individuals, and a system that facilitates this type of behaviour.

One would assume all Queen’s Counsel who are at the peak of their profession are brilliant, but I have met a number who were arrogant idiots. Sometimes just putting in the time will get you there. Equally unfortunately, nearly all judges have risen through these ranks and have difficulty viewing cases through a practical lens. The law is a strange profession where you reach the pinnacle of your profession and have to take a hefty pay cut, then become burdened with administrative tasks which you have never before undertaken.

The bad news for consumers is that I see little hope of any of this changing any time soon. Hence there is little scope for negotiation of fees or imposing meaningful controls on the way barristers work. Occasionally one hears of a barrister who has project management skills, but these people are outliers.

Academics

Those who work in tertiary institutions fulfil a valuable role in training the next generation, examining trends in the law with "cool eyes" and proposing reforms. But there is very little interaction between academics and either the public or practising lawyers. As a young articled clerk, I naively asked a barrister one day why solicitors would not brief academics when the academics probably knew more law in a particular area than barristers who are across many areas. He hissed a response to the effect that in his opinion academics could not find their backsides with both hands because they had no idea how the real world works.

Considering how top barristers breathe rarefied air, this comment shows a total lack of self-awareness. What barristers do have, which academics will never have, is a working knowledge of court procedures and how to run cases. There is a vast difference between being able to write a treatise on the laws of evidence, and being able to make a split-second decision to object to a question during a trial.

In other words, barristers have to walk the talk. In one of the Rumpole books, the eponymous hero had a case in Oxford and was invited to attend a dinner with the law dons. Over port one of them asked him, "What do you think of academic lawyers down at the Old Bailey?" Rumpole answered "Well to tell the truth, we hardly think of them at all."

Twenty years ago I did some consulting work on a commercial job along with an academic who was one of the top Trade Practices lawyers in Australia. The first thing he said to me was that I had to change the name of my company because it would mislead the general public. As a matter of pure detached law he might possibly have had a point, but in the context of my activities it was a ridiculous thing to say.

Having cut and diced the profession and the types of work they do, let's return to the central question of how clients can control their legal service providers. Here is a summary of how I think members of the legal profession are likely to respond to a request from a client to provide a work plan and fee proposition that the client can understand:

- In-house Counsel. Probably used to providing plans for management, but in terms of dealing with outside lawyers, they will be the client.

- Law Firms. The ability to impose discipline depends heavily on the relative bargaining power of the client and the type of work. The greatest leverage probably exists in commercial work being done by mid-tier firms or corporate work being undertaken by large firms for top corporates.

- Barristers. Good luck with trying to impose change! We will probably not see many barristers adopt project management techniques in my lifetime.

- Academics. Not applicable.

Rather than providing a justification for clients to jump all over lawyers, let's turn the telescope around - what if this is an opportunity for those law firms who want to provide an alternative to straight time costing?

6. The curse (or blessing) of time costing

Time costing is only a curse from the viewpoint of clients; for the legal profession it has facilitated years of prosperity with limited accountability. The usual explanation for a queried invoice is "I charge $X per hour and I spent Y hours." So there you go – it is a matter of simple arithmetic, unrelated to what value the practitioner added and how efficient he or she is.

There is nothing wrong with time costing *per se*. In theory clients should pay for the time spent diligently (and recorded honestly) in furthering the interests of the client. This is the rationale behind all user-pay systems.

What makes time costing by lawyers different to other user-pay systems is the element of legal mystique. The term "legal mystique" refers to the shroud of secrecy that surrounds what lawyers actually do. Historically it has been very much in the interests of professions to cultivate an air of secrecy, so that work that is performed retains its arcane and somewhat magical character. Preserving this sacred tradition is why many lawyers do not like initiatives such as Plain English drafting or transparent project execution plans. The secrecy serves to continue monopolies and heighten prestige, but it also precludes any detailed analysis of whether work has been executed efficiently or whether it is good value for money.

As I have mentioned before, up to the 1970's firms proudly declaimed to anyone who would listen, usually other self-congratulatory members of the brotherhood, that they were part of a profession and not a business. By this they meant that they were not going to sully themselves with advertising or marketing or the types of practices in which more common trading entities engaged. "Honourable" firms always charged scale rates for conveyancing and litigation without ever discounting or ever pausing to reflect on the anti-competitive nature of price-rigging.

The truth is that while the legal game was described in that era as a profession, it was probably more of a club. Membership to the club was closely guarded and tended to be restricted mainly, but not exclusively, to white males who had a familial or school connection with the partners of existing firms.

Clients knew that "Solicitors", as they were then called, were expensive, but regarded them as men-of-the-world counsellors dispensing wisdom based on years of experience. But those clients who were business people would have been astonished to know how little time the partners spent on the internal processes and systems of their own legal business. For general work where there was no applicable scale of fees, invoices were not prepared on a scientific basis.

Over time it became apparent that the amount of time actually spent on files was always seriously underestimated. As a result systems for tracking time were

introduced to prevent value leakage. There was a side benefit in that management could track the performance of individuals and the firm as a whole in something approaching “real time”, plus the benefits of billing work in progress benefited cashflows considerably.

At the same time, technology was having a dramatic impact, in particular word processing which made the generation of drafts much easier. To top it off a new generation of law students felt they should be treated as human beings, including being paid a decent wage, and this was another driver for firms to look at ways to maintain profitability.

Time costing was seen as a panacea for all previous woes. The original concept of firms charging clients based on time spent on work for that client was theoretically fair. It seemed reasonable that a difficult and demanding file, or a difficult and demanding client, should be charged more. It was paradoxical that at the same time when legal practitioners became ruthlessly competitive, they were also united behind the banner of time costing – it was a mast to which the profession could cling collectively as storms tossed around the ship on which they sailed.

The last thirty years or so have represented the Golden Age of time costing, where the smug answer to any question on how much something would cost was “I charge $X per hour”. This applies regardless of the result produced and regardless of whether the work was really necessary.

One of the flaws in time costing is that the relentless charging of time is disconnected to the value actually being added. I have been a partner in a firm charging $500 an hour for my time. Sometimes, for example if I am helping a client with a suburban office lease, my time is worth nothing like that; conversely I have helped provide solutions for clients where my time has been worth ten times that. In the latter situation it is very difficult to capture the upside, but the point here is that your time is not always worth $X per hour.

Efficiency is not integral to the concept. I had a situation where a senior partner nursed one of my files for a couple of weeks while I was on leave. He answered a couple of calls and sent a couple of anodyne letters without progressing the matter in any way. When I returned, I billed the file and wrote off his time. He was outraged and yelled at me that his time was worth $400 per hour. I almost got sacked by replying “No, it’s not. It depends on what value you have added and in this instance you have added none, so your time is worth nothing!”

If a law firm is pressed to give a price for a job, it will provide an “estimate”, but almost inevitably the client will receive an invoice for more than the estimate. Although there is an element of the old joke that dogs do certain things because they can, it is not to suggest that lawyers are always being dishonest. Part of the problem is that Law Schools did not teach Project Management skills and therefore the practitioner does not have the skills to prepare an estimate on a scientific basis, in the same way as perhaps an engineer would.

Alas, as any Buddhist knows, all realms constantly change. Over time clients have begun to resent strongly being charged for six-minute increments recorded indifferently on a time sheet. Specifically, clients feel that there is a total disconnect between the charges and the actual value that is added. It is incredibly difficult to see

how a system that rewards slow workers could operate in the best interests of the customer.

On one occasion I worked in a peripheral role on a due diligence with one of the largest law firms in Australia. The supervising partner had a team of young lawyers on the job with no allocation of roles or tasks. The result was that everyone looked at everything and the resultant report must have taken the partner ages to collate. The exercise probably cost the client double or even triple the amount in fees that it should have. I went to see the senior partner of the firm, who I knew, afterwards and, after explaining what had happened, offered to contract to the firm as a Legal Project Manager to ensure future large jobs would be executed efficiently. He was totally nonplussed and asked why the firm would do that when they would earn less money? It was at that point that the penny dropped for me and I appreciated how diametrically opposed time costing can be to the principles of efficiency. It was like approaching Colgate-Palmolive with a proposal that the hole in the tooth paste tube should be smaller so that people use less toothpaste.

Allowing people to work in silos on specific tasks while recording every minute of their time has the effect of diminishing the sense of narrative which a job deserves. In the Middle East the concept that everything is preordained makes it virtually impossible for the locals to plan anything and in fact they do not try. It means they can be wonderfully spontaneous. Culturally though, poems, songs and life generally consist of individual links which are interchangeable but do not necessarily form a chain or a sequence. This is analogous to how junior professionals work on large projects when they have not been privy to a proper planning session.

The high degree of specialisation of modern practitioners means that individuals do not understand the length and breadth of projects; many are often so wrapped up in their own discrete work that they are not particularly interested in what others are doing. While it is great to have a dedicated specialist on the job, one of the pet gripes of clients is that professionals are so specialised that they are unable to take a holistic view.

Large firms are populated by intelligent people who understand the job at hand, but to them calculating the remuneration is merely a matter of totting up at the end of the job using the simple equation –

Fee = time spent x hourly rate,

where the “time spent” factor is determined unilaterally. And to exacerbate the problem, because there has been no reporting against a plan, and because the engagement contract has not been administered in such a way to notify the client the firm is not going to meet any estimate it provided, the client often gets a letter at the end that says, “there has been a time over-run on our estimate but in view of our relationship we will agree to only charge you for half of the additional time.” In other words, we have a problem in that we have incurred a large cost over-run, so we are making it your problem!

According to the American Bar Association *Commission on Billable Hours Report 2001-2*, some of the disadvantages of time costing include:

- Decline in the collegiality of law firm culture

- Discourages taking on pro bono work
- Does not encourage project or case planning
- Provides no predictability of cost for the client
- Penalizes the efficient and productive lawyer
- Fails to promote a risk/benefit analysis
- Puts the firm's interests in conflict with those of the client
- Emphasises quantity over quality

Unfortunately, time costing has operated like cholesterol in the corporate blood stream causing professional firms to suffer from their own form of arthrosclerosis – the complacency which has arisen from the liberal charging of time has led to an inability or unwillingness to give proper emphasis to the process side of professional work. The result is deficient or non-existent planning and poor communication, both between professionals within the firm, and between the firm and clients concerning the specifics of work assignments. This is at the root of client dissatisfaction and ensuing disputes.

Each operative's daily target for time charged has become an end in itself, divorced from the professional work. For most young professionals the timesheet hangs over their head all day like the sword of Damocles - keeping one's chargeable hours up can be more stressful that the actual work itself. Defenders of the system will say that it was about time professional firms began to operate as a business instead of a "Gentlemen's Club". There is some truth in that, but my contention is that time costing has led to a different type of unbusiness-like behaviour; we have gone from one dubious form of charging to another.

In the workplaces of 40 years ago various forms of sexist, racist, or discriminatory attitudes were prevalent. These practices are now frowned upon by our more enlightened society. Yet strangely the march of cultural progress is yet to impact upon the anachronistic practice of untrammelled time costing among lawyers, and the knock-on effect of thrashing young lawyers to record as much time as humanly possible.

How do professionals get away with imposing a system of time costing that seems to be inimical to the ambitions of clients? Dr. Johnson said "patriotism is the last refuge of the scoundrel," but in the case of professionals the last refuge is the process of time costing. Most clients froth at the mouth at the thought that they are being charged for 6 minute increments, particularly since that is the minimum increment, meaning a 2 minute call will still incur a 6 minute charge.

If you ask an engineer how long a piece of string is, they will furrow their brow and ask a series of questions related to the purpose for which the string is to be put. Will it be knotted? Does it need elastic properties? What sort of load will it need to support? Can an off the shelf piece of string be adapted for the intended use? They may even research the latest technology to see if there are stronger fibres available. If multiple pieces are required they might be able to be sourced cheaper overseas. Eventually a good engineer will come back with a specification which will include the cost and timeline for delivery. If the cost and schedule fit with your expectations, then you will engage the engineer to go ahead with the order on your behalf.

There is a great contrast if you ask a legal firm to work on any reasonably complicated engagement. They are experienced professionals who are good at what they do and you know they can deliver. You will receive a high-level narrative of what needs to be done and a description of the team responsible, but you will not receive any specific details of who will do what or when. You will ask for a “quote” and get an “estimate”.

Many will protest that this is not a fair comparison because engineers build tangible structures, whereas lawyers deal with abstract concepts where it is often difficult to define boundaries with precision. Yes it is difficult, but not impossible.

Equally it may be said that because Project Management is “results focused”, it sees everything in a linear fashion, whereas life is not like that and any complicated job will be full of blind alleys and changes of direction. Again this is true, but testing structures, ideas and negotiating positions can be factored in to any exercise by way of identifying intermediate tasks and milestones. For example, the *task* might be to investigate possible project structures, then the *deliverable* might be a paper which makes a recommendation to the client based on tax and other considerations, and finally the *milestone* is when the client makes a decision on the structure. These types of activities reflect proper processes which can be planned and budgeted. On top of that, if a job takes an unexpected turn, the additional work can be treated as a variation.

If a client receives a proposal for work on a time basis, how can it ensure that time will be recorded honestly or that the work will be done efficiently? Time costing has the rather odious effect of rewarding inefficiency, in that a practitioner who takes longer to do work gets paid more! The result is that the security blanket of being able to charge for all time spent means that there is no incentive to plan work properly or execute it efficiently.

It is of course quite feasible to prepare a project plan based on time costing and my technique set out in Part II does this. The next obvious step is that if the plan is detailed, the client may insist the budget becomes a fixed fee for that scope. Thus the professional firm may be hoisted by its own petard. But why should a firm be scared of providing a fixed fee proposal which is subject to an allowance for contingency and to variations if there is scope creep? A particularly frightened ex-partner of mine used to say, “What if we get it wrong?” I would reply, “So what? We will not get it too badly wrong and we will learn from the experience. And undoubtedly there will be times when we get it wrong in our favour.”

The result of a failure to plan is that there is very little transparency for the client. This means it is virtually impossible for the client to understand exactly what work will be done or to monitor progress. This is particularly problematic when trying to integrate different streams of professional work or to co-ordinate legal work with other activities which must happen to make the project a reality.

I have already made the point that when law firms include extreme positions in their standard drafts, it will ultimately be clients who pay for any additional effort required to move the documents back to normal commercial parameters. Obviously, one cannot predict how many drafts of an agreement will be required or how long a transaction will take to finalise. This is not a reason to avoid preparing a proper

schedule of work, albeit one with plenty of assumptions (e.g. the number of drafts of a document that will need to be exchanged before it is agreed). If these assumptions do not hold up, the plan can be revised and the client can be informed of the knock-on effects for both cost and schedule.

I have worked with only a few lawyers who are good at preparing a detailed work schedule; generally they do not handle process issues well. Brief any lawyer on a job and chances are they will not dedicate front-end time to preparing a critical path and communicating it to the client (plans are only to impress the client to get the job; once you have the job why would you bother?). In their own minds they have a very good idea of what has to happen, but the failure to spell it out in any detail for the client will immediately cause the client to be suspicious. The curious thing is that it is reasonable to charge for establishing a plan to execute the work, yet few lawyers do it, opting instead to launch into conflict checks and initial letters to interested parties.

Looking at fees in a different way

There is little doubt that the culture surrounding time-costing is inimical to the ambitions of clients. As a result, clients look often look for innovation in fee structures which might include blended rates, or a mixture of fixed fee and time, or even risk sharing through a reduced fee coupled with a success fee.

Another approach might be a bottom-up price based on a cost-plus calculation, instead of working from an assumption that standard hourly rates are always the starting point. This approach is occasionally used by law firms when they second staff to clients.

Normally when one approaches any contractor to do a job, the contractor will work out how long the job will take, what the cost of equipment will be, the cost of staff including on-costs such as providing equipment, an office, employee benefits, overheads in administering the staff etcetera, and then add on contingency and profit to come up with a price. This is straightforward and is the logical way to cost any job. Then, if the engagement goes over time, as a result of either a change in scope or delay caused by the client, it is not hard to extrapolate what the compensation should be for the extra time.

An issue for lawyers wanting to build in the same sorts of contractual protections to cover a situation where work is delayed is that they do not cost their work in this way. A firm preparing an annual budget will work out its expenses and target profit, calculate how many working days a year there are, set a target per professional of 6-7 hours per day, then work out what the charge out rates need to be per staff member to be able to meet the budget. This all sounds reasonable. Where the line gets crossed from reasonable to unreasonable is the expectation that staff can work up to 24 hours a day and therefore anything over and above the target budget of 6 or 7 hours chargeable a day represents “super profits”.

The culture in large firms is that professional staff are rewarded for maximising the amount that clients pay for work. If the junior employee queries whether the charge is reasonable, they are told it is not their job to query what is reasonable – their role in life is to record as much time as possible and if they successfully do this they might be rewarded with a partnership. A few years ago the media published an email from a partner to everyone in his team complaining that it was 11p.m. and demanding to

know why he was the only person in his section in the office working (at least the firm was honest about what was expected – many large firms try to deny that this is the culture).

This type of approach to work is not sustainable in the long term and, importantly, is not conducive to having balanced functional people succeeding to management positions. A time-costing culture where there is no such thing as a "normal" working day gives rise to a culture of exploitation. The cycle is then perpetuated because there are always willing younger graduates, eager to get a job in a prestigious firm, who are desperate to pick up the weapons of fallen (burnt out) soldiers and continue until they too either burn out or become inured to that culture. There are no strong drivers for this culture to change. Is it any wonder that young professionals who leave to join a smaller firm, or industry or the public sector, all say it is the best thing they ever did?

I worked for a law firm where the US partners used to have competitions for who could record the highest number of hours in a day. The winner recorded 35 hours because he was on an international flight going to a meeting for a client and charging the relevant client for the time spent on the plane. At the same time he was charging a second client for time spent reading documents on the plane, and because the plane was flying westwards he took advantage of a longer day!

Without expressing a view on the underlying morality, the story does evoke the old joke about the lawyer who dropped dead at the age of 47 and on arriving at the pearly gates complained to a puzzled St. Peter who said, "But we added up your time sheets and thought you were 78."

Is this the best way to charge on projects and transactions? Rather than starting at the desired income for the year and working backwards until hourly rates are set, professionals could cost their work in the same way as the rest of society, namely by calculating an hourly or daily rate based on:

Staff costs + Overhead + % Profit = Price

Managing partners reading this will by now be having an apoplectic fit and will argue that this assumes that people will be spending a substantial amount of time on a small number of major projects, which of course does not happen because project work is notoriously lumpy. Well yes and no. If someone is budgeted to work on a project for say, 4 hours a day for two months, then that person is still available to do other work (including super-profit time) for the rest of his or her theoretical working day. In addition, there is an army of capable people who are available to work part-time on project teams – it gets back to my point of selecting the best people to do the job and not the team which is available (treating them as a "sunk cost"), or which delivers the highest profits to the firm.

Microsoft Project is geared to this type of charging arrangement - when entering resource utilisation into that software, there is a need to specify the working day and the percentage utilisation of that person on that job. This makes sense and it is the way tradesmen prepare quotes.

Note though that this is not all one-way traffic. The objective of moving away from time costing is not merely to reduce how much a firm can charge. It is about fairness

and transparency. So there will be situations where the professional may be remunerated in circumstances not covered currently by pure time costing arrangements. For example, if a plan is prepared for a job where the client expects certain people to work to meet the stipulated schedule, it would be reasonable in my view for the professional firm to say in its pitch “Our price is calculated on the basis that team members will spend approximately half their time for X months on this job. If there is a delay caused by the client or a third party before we can proceed with further work we will charge you a weekly stand-by rate of $Z”.

The current system of time costing means that if a firm is delayed in doing work then it will not be recording time on the project i.e. it is not invoicing anything for “stand-by”. This means that, unless there is such a surfeit of work that staff can be reassigned readily to other work, those staff will be more or less twiddling their thumbs until work on the project resumes. In those circumstances, where the firm has assumed a certain level of revenue because it has allocated people to that project, it is fair that a stand-by rate be paid. Similarly if the client drastically reduces the scope of the job it would be fair for the professional to claim some compensation on the same basis i.e. that it has allocated its resources internally on the assumption that they would be working on the project.

Regardless of how firms calculate fees, there is a need for greater transparency and accountability. It is likely that as scopes become far more detailed, both clients and professional firms will be more assiduous about including contractual provisions in the engagement letter which dictate what will happen when there are changes in scope or delays.

In summary, one would expect that with changing circumstances, clients will insist on professional advisers shedding the time costing security blanket. Clients want to understand exactly what “bang” they will get for their buck.

But will this actually happen?

7. Why should anything change?

Although in the last generation there have been some fundamental changes in the practice of law, in one critical respect, namely work planning and transparency, things have not changed much at all.

In the introduction I stated that change will come from pressure from influential clients, or the pressure of smaller firms offering more efficient servicing, or both.

One of the biggest impediments to change that I see is that practitioners are scared. Scared to turn away work, scared to give a fixed fee for a fixed scope because they might get it wrong, and scared to offer anything other than mealy-mouthed advice in case they are sued. It is very easy to tell clients that it is their decision entirely rather than take a position and put forward a recommended course of action. And another very real fear factor is that if work is carried out in a disciplined way the lawyers will earn less.

The fear factors I have identified have led to the legal profession being somewhat marginalised in the ways I described in chapter 3. Maybe lawyers are happy to be marginalised in this way. Partners in large firms still have very healthy incomes, so

why should they flirt with areas where they may be stepping outside of a strictly legal role and risk not being covered by insurance?

Fair enough, but the risk is that the role of lawyers will continue to shrink. I personally think that over time large firms will be squeezed and that untrammelled time costing will disappear. In the meantime, there is a great opportunity for niche players to move back into the middle of the fairway when providing legal services.

Moving the fairway

When I started my consultancy business, I did not want to compete with law firms, but rather decided to supplement the services they offered. One of the biggest challenges I had was to say exactly what I do as a niche business. I used to start off by saying my business was not a law firm, but after a while I realised that I was only confusing people by saying what I do not do, instead of what I do. Eventually I settled on the descriptor of “Legal Project Manager”, but then I still had to overcome the perception that clients were paying for two layers of lawyers.

When I was pitching for potential new clients they would often roll their eyes as they thought of another layer of lawyers and asked, “How much is that going to cost us?” To their astonishment I would answer, “Nothing,” and then explain that through careful definition and administration of the scope of the large firms, I would probably save them money.

The service I provide is very different to the law firms. and I work with law firms every day of my life. Essentially I am front-end in that I identify exactly what the client is trying to achieve, then set about planning a way to get there through negotiating with the counterparty and dealing with other stakeholders. During this process I ask very targeted questions of legal and accounting firms from whom specialised advice or investigations are required. Once *consensus ad idem* is reached with the counterparty, usually evidenced by a Terms Sheet or Heads of Agreement, the lawyers (after an appropriate selection process) are instructed to convert that document into the fully blown deal and to take it to completion.

I am not alone in providing services that supplement the traditional offering. I know dozens of ex-lawyers who work as contractors or consultants in a quasi-legal role. This is analogous to the type of opportunity I see for small and niche firms.

The Opportunity for small firms

Instead of competing directly with larger firms, it is possible to instead offer clients the best of both worlds.

The introduction of a small, specialised firm to run a tight, limited scope not only has the potential to save the client money by the elimination of inefficiencies, but also may result in the client getting the type of commercial input that it wrongly assumes it can only get from a big-name firm. A large firm can still play a very valuable role in providing its best specialists to provide answers to specific questions, or to sign-off on the final agreements.

Let us examine what an architect does. If someone is building or renovating an expensive house, or other premises, they will usually engage an architect to prepare

an attractive and functional design which is consistent with the site, and the aspirations and budget of the client. After that the architect may be retained to:

- Prepare specifications for bids from builders
- Help negotiate and award the contract
- Oversee the project to ensure it is running to time and budget, and, in particular, perform a Quality Control role to ensure plans are being followed and standards are being met
- Handle any interface issues with the builder and in particular assist the client to resolve technical issues which arise, as well as deal with variations and claims

On major industrial projects it is common for an "Owner's Engineer" to be appointed to undertake a similar role between the client and the main construction contractor(s). This is usually necessary because the client has neither the manpower nor the expertise within its organisation to supervise the activities of the contractor.

I submit there is a similar role for an "Owner's Lawyer" to work in conjunction with major firms on complicated projects. Often in-house counsel will take on this role and often they do it very well. But this is only possible if:

- The organisation is large enough to have in-house counsel
- The in-house counsel has spare time over and above his or her day-to-day duties to manage a project
- The internal person has project management and contract administration experience

A key objective for any smaller or specialist firm should be to form the type of relationships with clients where it is sympatico with the culture and aspirations. This is not a role large firms are particularly looking for; they are more comfortable in a dispassionate, reactive mode. Therefore, over time the smaller firm may filter the work of the large firms to provide commercial input to the client; if the small firm has known project management skills it may even be appointed as the overall Project Manager or "deal-maker" on a transaction or project.

A word of caution. When a specialist firm carves out a niche on a large project, it needs to be clear that the role is described properly in the project structure and in its scope of work. The danger is that if it only has some sort of nebulous floating role, then it may be considered as the de facto Project Manager even though it is not formally acting in, or remunerated for, that role. In *Deloitte v Unioil*[4] the court had to allocate negligence contributions between an accounting firm and a legal firm arising out of a failure to properly assess the liability of a target company for warranty payments in respect of defective swimming pools. The court took the view that because the accounting firm had a long relationship with the client, it had assumed the de facto role of co-ordinating work and therefore was responsible for any omissions.

That case highlights the dangers inherent in co-ordinating professionals unless the manager obtains a work plan from each and then applies its mind to whether there are any gaps in the work to be performed. Frequently projects feature a

[4] (1997) 17 WAR 98

multidisciplinary team which includes accountants, technical advisers, financial advisers and lawyers. It is absolutely critical that a proper work plan be prepared for each discipline. The overall Project Manager is then able to co-ordinate those plans into a Master Schedule and supervise execution across the team.

A rear-guard action from large firms?

How might large firms react to this type of encroachment by smaller firms? You can pick up any financial newspaper with a legal supplement and often read a quote from a senior partner saying something along the lines of, “we are restructuring our fee arrangements in an innovative way to meet the requirements of clients.” This is code for “clients are screwing us for a discount on our rates.”

Both clients and firms themselves need to be aware that there are some significant cultural elements present in legal firms which must be broken down if project management principles are to be successfully implemented. As is often the way, the process is circular because the implementation of collaborative, transparent and efficient work practices will in itself go a long way towards changing the culture.

The cultural changes required include:

- free flow of information which will break down information silos and facilitate collegiate work practices
- Calculating fees in a different way
- Training in, and implementation of, basic project management principles
- Eliminating wasted effort through gains in efficiency

The leading national and international firms carry enormous cachet in the marketplace, but the danger for those firms is they must avoid sliding into mediocrity as a result of complacency. If large firms do not implement transparent and responsive processes to deliver work, then I believe that sooner or later smaller specialist firms using efficient work practices will make inroads into the work currently undertaken by the top firms.

If lawyers are not perceived to be providing value for money, the danger is that their role will continue to be minimised. For example, while lawyers should be attending important internal meetings to understand the context of issues and create the right chemistry with the client team, the reality is they are not invited unless the client feels their presence is indispensable.

An obvious consequence of moving towards greater transparency is that the scepticism about the value lawyers add will diminish. The riposte from professionals will be that a client might abuse the requirement for meetings if there is no additional cost. Of course, that is a danger, but there must be a middle ground and it is not hard to build assumed numbers of meetings or drafts into a project plan. What is particularly important is that the work be reasonably transparent so the client can have a high degree of confidence that, in theory, it is tailored to the client’s requirements.

It is beyond question that professional firms tend to only concentrate on the substantive aspects of their work without giving proper regard to some critical processes, specifically project management and contract administration. Changing

this focus may be easier said than done. Most professionals do not have the training or skills to prepare a detailed PEP. What happens today is that someone who is technically good and who is earning the firm a lot of money will graduate through the ranks and eventually reach the level of partner. Undoubtedly, he or she will acquire skills along the way in dealing with clients and staff, but rarely do they acquire sophisticated project management or contract administration skills – these partners have not been taught these skills at university and the failure within firms to structure the planning and execution of jobs means that younger practitioners do not acquire the skills by osmosis either. The end result is that partners in firms do not have process skills and therefore are unable to impart them to the next generation, which perpetuates the problem.

Sub-optimal work practices are not sustainable in the long term. When business slows, companies look for "across the board" cost reductions, which means professional fees will be included in the cuts and may be the first to receive the slash of the razor if there is a perception that the fees are not good value for money. Lawyers may be asked to provide a fixed fee for a fixed scope, which will keep them awake at night worrying because they have not been trained in creating critical paths against which they can then confidently provide a fixed price and detailed scope.

How can a lawyer have any confidence that the fixed remuneration the firm will receive will result in the firm making a profit when it is embarking on a journey into the unknown? This thinking often defaults to the negative i.e. the firm feels the only way it can protect itself is to prepare a scope in which it is clear what is not included.

Lawyers should not fear this brave new world. In fact, they should eagerly embrace the opportunity to earn repeat business if projects are executed efficiently and competently in accordance with an agreed plan. Imagine the relief of a client if its lawyer states what it will do, when, how much it will cost, then reports regularly against that plan, and advises the client early if there is a problem, and what the time and cost implications of that problem will be!

The role of a leader is to cultivate a high-performance environment; a manager of a firm knows that, in practical terms, this means maximising profits and minimising risks. One would assume that a high priority for the manager of any firm would be to minimise waste (which manifests through write downs of time) by the use of efficient work practices. And on the positive side, proper planning opens the door for the firm to be able to recover additional fees for work carried out as a result of scope creep – it goes without saying that a by definition there cannot be scope creep if there is no well-defined scope to begin with!

Therefore firm managers should welcome a methodology that achieves those ends, and at the same time leads to junior staff working within a context and therefore being trained well. I can also guarantee that if a firm is pitching for a job there is nothing more impressive than presenting a detailed work plan showing how the work will be executed.

It seems natural that any firm would look to providing training for partners and other supervisory staff who are strong on the substantive side, but weak on the process elements. In practice it may be a big ask to expect seasoned professionals to retool in this way and, if they struggle with it, it is likely to reduce their overall effectiveness.

A better way forward is for the firm to play to its strengths. In other words, the firm would employ people, who may or may not be lawyers, who can take a roving role in overseeing the planning and execution of work (where a fee or complexity level has been triggered), and provide training within the firm on the basic concepts so that the culture is changed gradually over a long period. This is a role which often appeals to young lawyers, who may choose to stay in an LPM space in the longer term.

Interestingly, one of the advantages of using people not directly involved in providing professional services on a job as a project manager is that you are far more likely to get an objective view, and therefore a more honest appraisal of when things look like they are running off the rails. A senior lawyer working on the job who is also tracking progress is more tempted to think, “Well we are behind schedule on a few key tasks, but I know the reason for that and we can recover the situation so no need to do anything about it”. There is an assumption in firms that people are available to work on the job up to twenty-four hours a day. This Pollyanna approach is common, but normally results in disappointment or anger when the client becomes aware of the situation. The client should not be allowed to continue to believe that work is proceeding in a certain way; the correct, and constructive, approach is to advise the client that things have fallen behind and (if applicable) that the firm is taking remedial steps to try to recover the schedule, including introducing further resources.

The move towards disciplined execution of work has been happening at the top end of the legal market in the USA (and to a lesser extent Australia and the UK), where many large firms have adopted LPM as a way to reduce the fees they charge clients, but still maintain profitability. The techniques being used by the US firms are laudable in that they are intended to bring discipline and efficiency into the legal work, but at the same time the emphasis is on commoditisation of complex work (e.g. takeovers and mergers) instead of providing bespoke solutions for clients. To use the nomenclature of David Maister again, firms are trying to turn Grey-hair work and Brain work into Procedural Work that can be done on a cookie-cutter basis. Perhaps, based on the volume of deals they work on, this can be achieved, but I have some doubts. The “top-down” approach used by these firms, albeit supported by data, is still backward looking and based on precedents, instead of being a more scientific “bottom-up” analysis of what the particular job requires.

So, if LPM sounds good in theory, what is happening in practice? I have written extensively and enthusiastically on this topic over the last decade, and believe that change is in the offing. LPM is becoming accepted as a credible path and sophisticated clients and legal entrepreneurs see LPM as an enormous opportunity.

This book is not intended to provide sophisticated project management techniques for professionals who are seasoned project managers. It is targeted to help clients navigate their way through the legal morass, and to assist lawyers to react by performing work more efficiently.

Above all else, project management is a culture which is inextricably bound up with efficient and disciplined work practices. The methodology set out in Part II is really Project Management 101 – it is a way of preparing a work schedule and preparing a budget. At the other end of the spectrum, PMBOK (Project Management Body of Knowledge published by the Project Management Institute) 5th edition has 534 project management definitions. If a professional (or even a non-professional

member of staff) in a large firm wants to become an expert in project management, then over time that person will be able to add a lot of value on projects, even those outside the person's main area of practice. This will almost inevitably result in that person being able to carve out a specialist role within the firm where he or she provides an indispensable in-house service for which clients should be charged accordingly.

This is happening already in some mega law firms where specialist Legal Project Managers are being hired. Their role is not just to provide specialist input on specific projects (where they will help set up the project, manage the scope, track progress and prepare reports) but also to set up project IT infrastructure and help develop improvements to processes, systems and tools, and provide coaching and training.

To capitalise on this, large firms are introducing codes for tasks to identify how long a task takes so that in future they can provide a firm quote to clients and the software will highlight variances if someone is taking longer on the task than they should. While this approach may be important in a very large firm to maintain discipline and profitability in a highly competitive environment, it also reeks of a desire for commoditisation and reflects the backward-looking love of precedents that lawyers have. In my view it fails to recognise the unique aspects of every file which means this highly systemised, data-driven approach is unlikely to be followed by the majority of smaller commercial firms.

The alternative is a "bottom up" technique which can be used by any sized firm to develop a bespoke scope and plan for any legal job of any type or any size. The mechanical steps to implement this technique are discussed in Part II.

Part II – How to Introduce Discipline to Legal Work

1. Basic project management

The three main assets of any professional firm are its external relationships, people and intellectual property. For any law firm aspiring to execute transactions, projects or litigation that involve a degree of complication, I would add another important ingredient to the mix – the ability to plan work and manage its efficient execution. Even when the work is not overly complicated, presenting a basic plan to a client will go a long way towards developing and maintaining a good relationship.

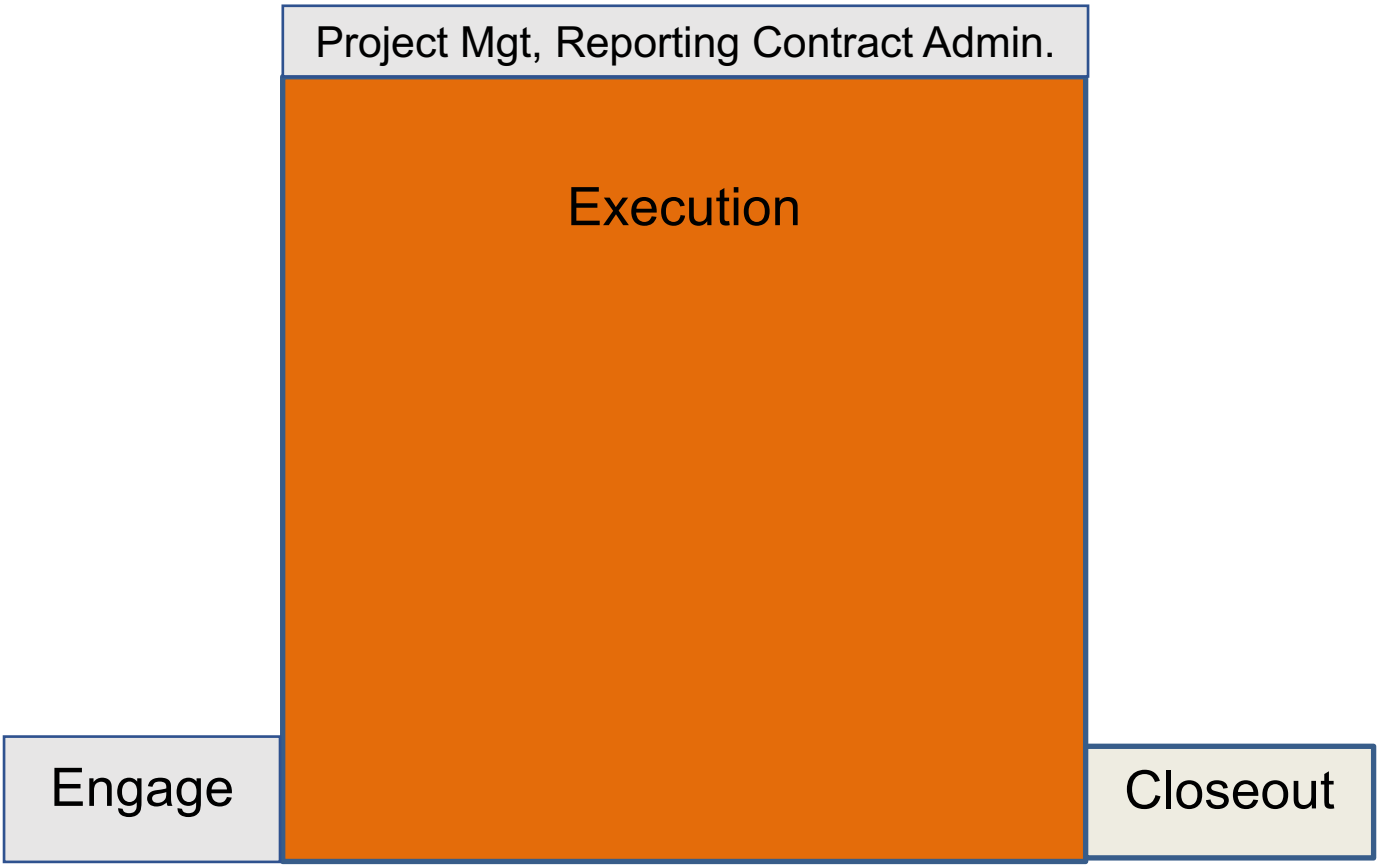
More specifically, adopting a project management approach to work will result in:

- Increased respect both from clients and other consultants, greatly increasing the likelihood of tender wins, referrals and repeat business
- A means of educating young practitioners to understand the totality of an assignment, rather than just focusing on a discrete parcel of work.
- A way of executing work that is disciplined and reduces both waste and risks

To many lawyers, project managing a job merely entails having a cursory kick-off meeting with the team to discuss what has to be done in general terms, then everyone goes away and starts recording time. This is a long way removed from a regimen which analyses the tasks to be undertaken, then examines who will undertake them, how long each will take and how the tasks fit together as a cohesive whole to match what the client needs. A lot of clients would be startled to learn that this type of planning does not happen often – most clients would assume a high level of organisation is part and parcel of professional work. Unfortunately they do not appreciate the extent to which time costing practices cause misalignment.

The following figure 1 depicts how clients think a firm will plan and execute a complicated transaction:

However, the following figure 2 depicts what really happens:



There is clearly a serious disconnect between the way lawyers actually work and the way in which clients assume they perform their work. If a client expects to see a detailed Project Execution Plan (PEP) including a budget, with appropriate reporting of progress against it, then usually the client is going to be sorely disappointed. There is no doubt that clients should pay for valuable time properly spent in the administrative processes associated with legal work, namely, planning the work, reporting progress and closing out the job; clients assume they are already paying for this attendant work. Instead, the reality is that very little time has been spent on the planning and process side. However, the fact that time is not spent on the process side is unlikely to result in a saving for the client because the end price will be inflated through inefficiencies in execution.

The most obvious discrepancies between the two figures above are:

- Planning phase – Figure 2 depicts minimal planning. In other words, the work will be done when it is done, mindful of the overall time limit set by the client. Unfortunately, this often means that busy practitioners attend to tasks on a "just in time" basis, which adds a lot of stress to an already stressful occupation. In addition, firms will simply invoice all time spent, whether the time was productive or not.

- Execution – one would expect the more detailed administration in Figure 1 to involve more time overall, but this is rarely the case. When work is not planned and is pretty much "open-ended", as is the case in Figure 2, it will inevitably fill the vacuum created by that lack of stricture. A professional is always nervous that they might have overlooked something, and while this nervousness will never be eliminated completely, part of it must stem from a feeling that things are not fully under control because work is not proceeding according to a designated plan. In Figure 2 there is little emphasis on reporting or contract administration. For most professionals the engagement letter is placed in the drawer and only pulled out if the client threatens to take action under it. There is a strong perception among professionals that there is no need for contract administration if one is merely charging for time spent, and that the only real contractual haggle will come at the end if the time spent leads to an exorbitant invoice. Despite the lack of emphasis on process in Figure 2, I would still expect the time expended in the second case to be greater than in the first in most instances, as a direct result of inefficiency.

- Closeout - to a lawyer, closeout of a project means that completion has taken place, any necessary notices have been given and a final invoice has been sent to the client. It is unusual to have a "lessons learned" session unless things have gone badly. In my view a short closeout session, even over a few drinks, is desirable in all reasonable-size projects, not just to examine what went wrong but also to emphasise what worked. If things went reasonably well, I would also seriously consider including the client in this session as a constructive exercise in how things can be improved for next time.

An analysis of the plethora of LPM software programs available in the market is beyond the scope of this work. These programs offer monitoring dashboards, toolkits,

centralised documentation for the team to peruse (with chat capability), and the ability to sort documents into discrete parcels to track ongoing instructions (scope), contract management and knowledge management. I am not an expert in LPM software, but I am an expert in planning legal projects and transactions, and I suggest that only proper planning can provide the correct software inputs.

When I was with a particular major legal firm, our Property group was engaged to undertake the purchase of an iconic commercial property. The deal was complicated because the property was mixed use and included retail shops, licensed premises, offices, residential apartments and leisure facilities. The night before settlement of the transaction there was a lot of work still to be done. The situation saw harried partners screaming at staff and young lawyers in tears, with the client realising that the firm was not on top of things and expressing great displeasure. Completion took place but, unsurprisingly, there was no repeat business from that client. In a "lessons learned" discussion featuring all partners, I offered to prepare an *ex post facto* project plan with the team to examine where things went wrong. The head of Property was sceptical and said that because I did not practise in the area, I would be clueless on how to prepare a plan. Nevertheless, we assembled the (rather sheepish) team from the transaction and spent two hours covering a wall with stickers detailing all of the tasks involved in the transaction and who would do them. The conclusion which emerged was that the team could only have completed the job if each person worked 24 hours a day for three weeks (when the timeframe allowed was two weeks). Clearly the lack of planning meant the job had been badly under-resourced. The head of Property said to me, "You never told me you were a property lawyer!" I replied that I was not, and that all I had done was map the process; he and his team had provided all the inputs.

The main takeaway from this story is that project management procedures provide a rational way to dissect and cost work. A suburban builder will work out with some precision what labour and equipment he needs to execute a job before he gives you a price. Astonishingly, a partner in a major legal firm will not – they will just give you a price based on experience, in the smug belief that the clients will probably accept it (because the other large firms will be just as expensive).

A good project manager on a legal job need not be the best and brightest lawyer in the room. Nor need it be the most senior professional on the job - in fact because the firm quite rightly should budget and charge for the procedural oversight time necessary to track and report on progress, it is inappropriate for a client to have to pay top dollar for a senior partner to perform administrative tasks. Many large law firms have legal project managers on staff who are not lawyers. The biggest challenge for those staff is to sell the concept to the professional staff.

Legal Project Management is not a panacea that will fix all issues, but the discipline imposed does have very real benefits in terms of minimising risk. Lawyers are very focused on risk; they are trained to focus on what can go wrong. If this negative focus is taken too far a lawyer can spend his or her professional life telling people what they cannot do, instead of exploring possibilities and proposing go-forward options. I regard advisers who consistently advise clients to do nothing, because there are risks involved, as unintelligent.

One would assume then that lawyers would welcome a methodology which helps minimise risk, including the risk that they will do far more work than they are remunerated for.

Of course there will be professional mistakes and misjudgements; that is life. Sometimes the professional will not be to blame and sometimes it will. As an example of open communication I worked with a Senior Partner of a firm who would ring clients and say, “There has been a cock-up. We will work to fix it and ring you back if we can’t.” The clients loved this because they believed the practitioner was not hiding anything from them.

A further benefit of LPM is that younger staff benefit enormously from working in a collegiate atmosphere where they understand what is happening, rather than being treated like mushrooms who are kept in the dark and having instructions for tasks barked at them. Having the team jointly spend some time preparing PEPs for jobs is probably the single most important step a firm can take in enabling younger staff to inject perspective into their work.

Bottom-up v. Top-down

When costing any significant project there are two approaches, namely top down (look at the cost of a similar job and identify different features) or bottom up (begin with a blank sheet of paper). Because lawyers are obsessed with precedents they tend to gravitate towards the former.

The concept of Legal Project Management kicked off a few decades ago when large American corporations grew tired of legal costs exceeding budget on every job. The discipline of LPM was imposed by large corporations on large law firms (although most firms would say it was their own initiative).

The model adopted by large firms in the USA is very much data driven, and is therefore top-down. By examining data from similar matters they have handled in the past, firms can get a fairly accurate picture of what the costs should be on a job, including how much time each fee-earner of different seniority should be spending on each stage. The supervising partner, or sometimes a non-legal manager, monitors the time recorded, and if there is a major deviation then it means either the operative is inefficient or the client is in some way responsible, which may mean a claim for additional remuneration.

The top-down model can be used in situations where a firm has a high volume of similar deals, but in my opinion does not deliver the outcomes that a bespoke or bottom-up approach can deliver. Therefore that is the approach which I use and I have conducted workshops for a number of law firms on how to plan and implement work on this basis. My approach relies on hourly rates to add each brick to the wall, but there are other costing approaches which might be used, including fixed price, once the work has been scoped properly.

I conducted one workshop for a major firm and at the end a litigation partner said sniffily, “That is very interesting, but of course it does not apply to litigation”. In my opinion that statement is not correct, and I said so. While it is not easy to apply LPM principles to litigation, it is not impossible. The argument is that there is little control over where and how far the litigation may run, but that may also be said of

complicated transactions where it is not known how many drafts are required or how long it will take to achieve agreement or to obtain regulatory approvals.

The American Bar Association introduced a Uniform Task-based Management System and, interestingly, the first major area it addressed was litigation. It broke down the litigation process (and I believe the principles would apply equally to arbitration) into five areas:

- Case assessment, development and administration
- Pre-trial pleadings and motions
- Discovery
- Trial preparations and trial
- Appeal

These five areas were then broken down into further subsets to detail the work to be done under each head, mirroring the type of bottom-up approach I am advocating. Interestingly under “case assessment, development and administration,” the comment is made that this is where the lawyer should focus on the forest and not the trees i.e. adopt the type of helicopter view which is so essential to proper planning. Included in this charging area is the preparation of budgets – I agree wholeheartedly that the client should pay for proper administration of the processes which are integral to the case.

Of course, a litigator may still hide behind this process to utilise open-ended time costing by providing “estimates” for each stage instead of fixed fees or “not to exceed” estimates. When I am working on a complicated transaction, I often give the client a price based on an assumption that there will be a specific number of iterations of documentation; if the number is exceeded someone is being unreasonable or something has gone wrong. A “not to exceed” quote means that if the time pushes up against the ceiling, the onus is on the lawyer to approach the client and demonstrate why it is necessary to lift the ceiling.

Returning to litigation, I have heard of American firms providing a price to proceed to hearing and including an assumption that there will be a certain number of witnesses deposed. In other words, if a greater number is needed then that is a variation. This is interesting because I am used to barristers in Australia and the UK wanting to call as many witnesses as possible who might shore up their case, without regard to cost; this can become an exercise in diminishing returns. The US approach enables a sophisticated client to perform a cost/benefit analysis of whether further witnesses are worth the investment.

I treat all jobs as a “project” which simply means a deliverable is involved. Of course in legal work there always is a deliverable. The deliverable might be an opinion, or conclusion of a transaction or project or dispute or criminal prosecution, or the finalisation of a deceased estate. It goes without saying that an experienced lawyer understands in each situation what the deliverable is and what is required in general terms to get there. But the failure to apply the most basic project management principles will mean work is not discharged efficiently and communications with the client will be sub-optimal.

Asking the right questions

Project Management is neither a science nor a black art; it is largely common sense and logic. Legal Project Management is just a fancy way of saying how basic project management techniques are applied to legal work.

Legal issues can be highly complex, which is why clients need lawyers to provide detailed opinions. Nevertheless, I am also a big believer in examining first principles which, even if they do not point to a solution, will help to frame the question. The hardest part of practising law, I think, is asking the right questions. There is an old saying that a good lawyer doesn't necessarily know the law but knows where to find it – in my view you will not know where to start looking if you do not identify the issues correctly.

I rely heavily on the words of Rudyard Kipling:

"I keep six honest serving-men
(They taught me all I knew);
Their names are What and Why and When
And How and Where and Who.
I send them over land and sea,
I send them east and west;
But after they have worked for me,
I give them all a rest."[5]

Prince2[6] puts it another way, that is, at the start of any project we must ask:

- What are we trying to do?
- When will we start?
- What do we need?
- Can we do it alone, or do we need help? (Note this is not a question lawyers often ask!)
- How long will it take?
- How much will it cost?

This then means that every project should have:

1. **An organised and controlled start**

   The need to do this is reflected in my premise that, rather than diving into performing substantive work on a project in an enthusiastic but undisciplined way, there is a need for professionals to spend an appropriate amount of time preparing an execution plan before work commences.

[5] "Six Honest Serving Men"
[6] www.Prince2.com

When you brief a professional the first thing they will do usually is pick up a dictaphone and start giving instructions for a new file, a conflicts search and a preliminary email/letter to the client saying how pleased they are to be working on this "exciting project". The missive to the client may contain a broad outline of the work to be done in a standard form engagement letter and an "estimate" of fees (if the client has asked for that), but the primary concern is to send out the standard engagement letter with a payment clause and a limitation of liability clause. Rarely is time is spent working out a critical path and the precise deliverables (again unless the client has specifically asked for it). The reason for this is that most professionals just want to dive into the detail and practise law, not get bogged down in administrative or process work that might lift the skirts to show what they actually do.

2. **An organised and controlled middle**

   To achieve this, the individual or team must continue to execute work in a disciplined way. In particular, this means that a free flow of communication must be maintained, firstly, among team members to be able to track progress against the plan and, secondly, with the client to report progress and to understand if events are likely to force the revision of the schedule and budget, so all parties can understand what the contractual ramifications of any changes might be.

3. **An organised and controlled end**

   This does not mean sending an invoice and moving on to the next job. At the back end all loose ends must be tied off, not only from a substantive point of view but also from a procedural perspective e.g. collating final copies of signed documents, closing out the Letter of Engagement and, on larger jobs, conducting a proper closeout or "lessons learned" review.

However you wish to frame it, what we are talking about is the 5P principle – "Poor Planning produces Poor Performance". The message is that while front end planning of a project is essential, it is not sufficient to prepare a plan and then not execute and report in accordance with that project; to operate in a truly professional way, one must maintain the discipline throughout the life cycle of the project, no matter how big or small it is. If Edmund Blackadder was a project manager he would say "We are not at home to Mr. Cock-up."

Formal and informal designation of a project

Drilling down on the concept of what constitutes a project, from a project management perspective a project is any work engagement which involves the service provider furnishing a "deliverable" after the execution of multiple sequential steps, usually involving the co-ordination of work being carried out by different people. The Project Management Institute[7] has defined a project as "a temporary endeavour undertaken to create a unique product, service or result."

[7] www.PMI.org

In the broader corporate world, a project is a variance from day-to-day operations which has a finite time period and leads to a specified outcome. A particular feature to note is that usually a team is assembled to undertake the project, before being disbanded after the job is completed. A very good example of a project is a Hollywood movie where an army of people must be co-ordinated to sign actors and technicians, arrange funding, locations, logistics, costumes, music rights, publicity etc. If a tight rein is not kept on all this the movie goes over budget and is perhaps abandoned altogether[8].

For professionals, a project is probably not a variance from quotidian operations as they probably work on many similar projects as part of their practice. In any event, common sense will dictate when something is a "project". The relevance of the definition is that a credible firm should have its own internal policy concerning when formal project management procedures should be instituted. The firm should establish its own guidelines on when a job should be considered sufficiently complex to trigger the methodology set out here – the methodology may be triggered when the expected fees exceed a certain threshold, or where a minimum number of people is expected to work on the job or where a team is obliged to complete a series of steps within a fixed timeline set by a client or statute or a Court. Note this does not detract from my central thesis that in every situation an appropriate amount of thought should be given to what is required so that a proper scope can be prepared and agreed with the client.

When discussing deliverables, the ultimate objectives of the client may be on the distant horizon, so there may be shorter term deliverables which determine whether the project will proceed at all – these usually revolve around due diligence, feasibility, availability of funding and finding a way of dealing with issues (including structuring and regulatory issues) satisfactorily. Therefore most large projects will normally have intermediate deliverables along the way and these are usually **milestones** on the road towards the ultimate goal.

Some of those milestones will be Go/ No Go decision points. I often prepare scopes to get to a specific milestone, with the intent that if things progress a further scope can be prepared, informed by greater knowledge of the tasks involved in the next stage. A basic rule of thumb is that the longer the timespan of the project and the greater the number of steps involved, the more likely it is that there will be "known unknowns" and even "unknown unknowns" to use the phrases of Donald Rumsfeld. Therefore, mapping out the entire project from start to finish for a long-term engagement is a major exercise which must involve numerous assumptions. Of necessity, a long-term plan needs to be reasonably flexible as delays, obstacles and setbacks will occur. For these reasons, on this type of project the client is likely to consider that it is more appropriate to abandon traditional time costing, but a law firm will fight harder to retain it on the basis that the scope is not clear. The more vague the scope, the better it is for those charging for their time!

[8] See for example "*Lost in La Mancha*" a documentary by Terry Gilliam about the abandonment of his film "*The man who killed Don Quixote*". Orson Welles also had many unfinished movies, one of which was, strangely, "*Don Quixote*".

On a staged project or transaction, an early specific deliverable on an aspect of a project might be an Issues Paper or Discussion Paper, or even a cost/benefit or risk analysis that enables the client and the adviser to meet and debate a way forward. This is particularly the case when looking at the structure of a deal, which might include consideration of issues such as:

- Whether to purchase via assets or shares
- Whether the client should enter into an alliance relationship with a supplier or customer
- funding alternatives
- tax issues such as carried-forward losses, capital gains or stamp duty
- Contracting strategy e.g. a lump sum turn-key construction contract or adopting a different strategy
- weighing up the merits of different candidates for JV/acquisition/merger
- Evaluating pre-emptive rights or “poison pills”
- Reviewing whether risks have been allocated to the respective parties best able to assess and manage those risks
- Regulatory and statutory issues, or government subsidies

To summarise, it is often imperative on a complicated long-term job to break the project into stages. This also applies to litigation where a periodic high-level review is desirable. Things change – for example a test case which a company is determined to pursue to higher courts because of the impact the principle will have on its business, may be down-graded if the business focus changes, or even if the company is taken over.

Although a law firm may be worried that the client will use another service provider for later stages, in practice this is highly unlikely unless the client is deeply dissatisfied. Unless one is trying very hard to dazzle the client, it is usually better to map a front-end sub-project, with the expectation that if this is executed well and the project proceeds, then a service provider with the deep knowledge of the project will probably be engaged for continuing work. At that point it will prepare a further scope and execution plan for the next stage. To quote General George S. Patton – “a good plan violently executed now is better than a perfect plan executed next week.” As I said earlier, perfect is often the enemy of good.

By now the reader should be comprehending how critical a proper scope is.

2. It all begins with the scope!

Years ago we went with friends to visit Knossos and no matter what question we asked the guide, he would answer, “It all begin with the Greek.” This has become a bit of a standard joke in my family.

If we are going to talk about undertaking work in a disciplined, transparent and accountable way, then it all begins with the scope. The scope sets the expectations on both sides for what the lawyer (or any other service provider for that matter) will do, when, and what the client will pay for that work. If there is additional work, then that should be treated as a variation, just the same as if a builder is building a new room at your house and you ask him to install additional fittings. I suggest that the main reason lawyers avoid fixed fees, wherever possible, is that they are scared they

might either get the scope wrong or not administer the contract diligently, resulting in undercharging.

The scope of work is critical. A professional firm can live or die on its ability to prepare proper scopes – if there is no proper scope a firm is going to spend much of its time in damage control and writing off time. I have had discussions with major accounting firms where they have revealed that although their operatives have high nominal charge out rates, their recovery factors are a long way short of 100%. One would expect the firm to want to spend a fair amount of time defining the scope with a high degree of precision, yet strangely this rarely happens.

For clients, the primary focus is on what has to be done, when, how much will it cost and when the firm is to be paid. However, show any lawyer a contract (particularly one to which their firm is a party!) and their eye will immediately be drawn to the liability/indemnity/insurance provisions; lawyers are trained to look for who will be responsible when problems arise (to be fair that is why many people go to lawyers in the first place).

I am not sure how many different ways I can say this, but the scope of work is central to the contractual arrangement between the lawyer and the client. It deserves to be spelled out with specificity and to have mechanisms for its evolution during performance. A general scope will only lead to uncertainty about what was intended to be included and this will result in scope creep, meaning either less revenue for the firm, or more revenue at the expense of the relationship with the client. A primary aim of service providers should be to maintain good relationships and win repeat business, so wrangling over fees is not helpful and rarely results in a happy outcome for anyone. In fact, one judge has expressed the view that there is no such thing as a "general retainer."[9]

Further, a scope may well increase or decrease during the course of a job, and the contract should include mechanisms to deal with this, and with delays caused by either party or a third party. For example, part of the scope may be discarded or suspended by the client. In a contract involving equipment it is reasonable for the contractor to receive reasonable compensation for having to stand down that equipment. In respect of human resources, if a person who is either employed specifically for a project or dedicated to a project is no longer required, or if that aspect of the work is suspended, then similar compensatory principles should apply. Unfortunately, the obsession of professionals with time costing means that contracts for professional work do not unfold in this way. The result is that professional firms have to take the scope reduction or suspension "on the chin", unless they explore alternative arrangements such as stand-by rates.

In my experience, lawyers are fairly hopeless at writing a proper scope. Many times I have seen Project Managers on large projects tearing their hair out because they are trying to prepare a master schedule that shows a Work Breakdown Schedule across all disciplines, but the lawyers consistently fail to give them what they want. The mentality is that it is sufficient to provide a vague outline, rather than providing granularity on what the lawyers will actually do.

[9] Oliver J. in Midland Bank case, supra.

A proposal I saw for legal work on a major project (construction of a power station) included the following "tasks" as part of the scope:

"undertaking land tenure audits over the proposed project site and expeditiously obtaining all necessary land tenure over the selected site, including town planning, and the securing of easements or other appropriate access to the project site, and obtaining cultural heritage clearance and resolution of any native title claims."

This tells a client nothing that the client does not already know. This is a general work description which provides no clues as to what specific tasks are involved. What any client wants is a breakdown of exactly what has to be done and who is going to do it. In this particular instance, it may be that the firm was not familiar with the proposed site in which case there could be a Phase 1 scope which might consist of:

- an audit of the tenure, followed by
- preparation of a proper go-forward work programme (i.e. a Phase 2 scope) identifying what tasks need to performed to resolve town planning, utility easement, cultural heritage and native title issues.

To give another example, it is common in complicated corporate transactions, such as an Initial Public Offering or a takeover, to establish a Due Diligence Committee, as a sub-committee of the Board of Directors, to ensure proper investigation and verification takes place. The Committee then makes recommendations to the Board. The processes to be followed by this Committee should be mapped out properly - it is not sufficient for its role to be described generally as "undertaking continuous due diligence" (*GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd*[10]).

The point is that a general scope to execute a complex job is not good enough for either practical or contractual purposes; effort must be made to identify specific tasks and the means and timing for their performance, which then means the cost to the client may be identified with a reasonable level of certainty. These three concepts – scope, time and price – are so inextricably intertwined that they have been referred to as the "triangle of truth"[11].

Not everyone gets to pitch on the construction of a power station. I can imagine time-poor, beleaguered practitioners in small firms in the suburbs or country towns rolling their eyes when reading this – they know their stuff and have been doing it for years. Obviously this example above was included to provide an example of a poor scope, but let me make two points that apply to all practitioners on jobs of any size:

- the failure to make a basic plan and agree the process with the client is likely to lead to conflict later, and
- the time spent preparing a plan is integral to the job, so it can and should be charged.

[10] [1998] FCA 1486

[11] "Project management for Accountants" by E. Kless. Journal of Accountancy April 2010. www.journalofaccountancy.com

The criticality of the scope cannot be underestimated as it is fundamental to every service contract. It is not good enough to provide a client with a good end result if the client is unhappy with the process along the way.

Another critical concept, which with all lawyers will be familiar, is **proportionality**. Any plan must be fit for purpose, but good professional practice demands a degree of proportionality in respect of the amount of time and effort that goes into the planning of any job. There is a world of difference between pitching for a billion-dollar project and attending to a house conveyance which you might have done a thousand times before.

The fact that you have done something many times should make it far easier to detail what specific tasks are included in the quoted price. It may be sufficient on a straightforward assignment to have a proper scope without preparing a detailed Project Execution Plan. For example, a lawyer in a small firm might have 100 or more current files at any time and most of the work requirements will be too straightforward to justify undertaking project management exercises on every single file.

For more complicated work, I think it is a great piece of marketing for a team to spend an hour or two preparing a PEP to impress an existing or potential major client; equally it may be counterproductive and ultimately unprofitable for the team to frequently spend great slabs of time preparing PEPs for pitches unless it has a good win rate. It is also relevant to bear in mind that the more often one prepares PEPs, the better one becomes at it.

When preparing a more complicated PEP it is reasonable to expect the client to also invest in the process. If the client cannot be bothered to give up a few hours of its time to participate in an important planning process, then my guess is that either the client does not have a clear idea of what it wants (which augurs badly for the professional trying to respond) or the client is not seriously considering giving you the work anyway. If a professional organisation is going to work to a plan, then the client must also “own” that plan.

LPM as a Marketing Tool

Spending time planning work for clients should be regarded as an investment in that client. The “Pareto Principle”, commonly called the 80/20 rule, is one of those rough rules of thumb that seems to have universal application e.g. 80% of the wealth is owned by 20% of the people, 20% of roads carry 80% of traffic, 80% of a teacher’s time is taken up by 20% of the students etc. In a professional context, in most medium to large firms it seems 80% of fees are generated by 20% of clients.

Legal firms spend a small fortune on marketing. They will take valued clients to lunches or sporting events, even going as far as arranging for them to be picked up from home in a limousine. Some of these excesses are not only undignified, but do not contribute towards demonstrating the firm is able to provide professional services which are tuned to the requirements of the client. Sitting at the football and having a few beers is fun, but preparing a bespoke solution for a client on a job seems to be a more productive use of time. What better way to invest in the top 20% of clients, or the top 20% of projects by value, than to prepare detailed pitches and work plans?

Let us explore this concept further. If it is a large project (say >$100K in fees) and the firm has project planning competence, why not volunteer to produce a legal project plan for the client before any work starts? Or better still, have a representative of the client sit in on the project planning session to make sure the plan is aligned with the aspirations of the client. The result will be a plan which both parties "own".

To me (as a user of legal services) investing this time in a project to be able to demonstrate a tight, efficient operation which will execute work that the client understands and endorses, is far more impressive than getting taken to the football.

From a marketing perspective, the value of providing a PEP is in creating the perception that you are adding more value than the client is paying for. David Maister has written that professional services require a high level of customisation and therefore most professional services have a strong component of face-to-face interaction with the client. As a consequence, definitions of quality and service take on special meanings and must be managed carefully. I would take this a step further and say that as part of the customisation process, the modern professional firm must be able to demonstrate how it will provide a bespoke solution. It is very difficult for firms to differentiate themselves; currently most try to do this by rolling out hyperbolic CVs and descriptions of previous work in an attempt to impress the client. Also with a heavy emphasis on precedents, input sheets and software, firms forget that these initiatives are intended largely for the benefit of the firm and not the clients.

When I am reviewing pitches from large firms, I take their capability as a given. What I am looking for is a high-level analysis of the issues to be addressed to show the firm is thinking about what must be done. In other words, despite all the commoditisation of work through use of precedents, I look for a firm that will provide a bespoke solution, including describing the process to be followed and identifying how it will work with the client to tailor that process where necessary. The message to the client should be "we will cut the cloth to fit your measurements." This is all part of the concept of "super pleasing", where you go above and beyond to show you are tuned in to the client's business. The best form of marketing is to get more work from your existing clients rather than burning up a lot of time trying to chase new clients; if the existing clients are really happy, they will tell their contacts. Marketing is all about the strawberry jam principle – the further you spread it the thinner it gets.

But how do I prepare a proper scope?

In my home jurisdiction of Queensland, lawyers are required under the Legal Profession Act 2007 to enter into Costs Agreements for work valued over $1500. This is a good start, but it really only stipulates that the lawyer must make the basis on which he or she will charge clear. There is no provision for a detailed scope and of course the law firm will take great care in preparing a template so the terms will favour the law firm with little room for negotiation.

It could be worse though. The Institute of Chartered Accountants for England and Wales (ICAEW), which has almost 200,000 members, a few years back had the

following advice for its members:[12] "Members will wish to prepare engagement letters that clearly set out the services to be provided and any specific tasks to be undertaken by the member. Members may also find it helpful to exclude those tasks which are not to be undertaken where uncertainty might otherwise arise. The level of detail appropriate for each engagement will depend upon the nature of the tasks to be undertaken by the member." So far, so good. However, under the tab "Managing Risks arising during the Engagement" the further following advice was given – "Members may find it helpful to monitor the tasks that they have agreed to undertake during the course of the engagement". Helpful? How can any professional firm justify agreeing to undertake certain tasks in an engagement letter, then not monitor that it is actually performing those tasks? This statement seems to presume that the firm was not reporting to the client on the completion of specific tasks against any schedule, or indeed at all.

Frankly, any professional firm that operates in this way is inviting negligence claims. Perhaps it would be easy to explain the advice above as being understated in a typical English way, but in my view it is symptomatic of some deep-rooted cultural issues, namely:

- Professionals tend to treat an engagement letter as a means of getting work, locking in a payment obligation and minimising liability. The letter is not seen as a dynamic document which continues to govern how work is performed

- Professional bodies representing lawyers and accountants in Western countries tend to be obsessed with how their members can defend themselves against claims and limit liability, with very little attention being paid to how professionals can adopt work practices which will result in satisfied clients and repeat business (and therefore the avoidance of claims). These bodies take the attitude that rather than building a guard rail to prevent accidents on a dangerous stretch of road, the better solution is to have an ambulance on stand-by to get victims to the hospital quickly! Another analogy might be the machines installed in supermarkets and malls to wrap wet umbrellas in plastic. Where the legal profession is focused on how to handle claims made by people who are injured from slipping on wet floors, the smarter approach is to try to prevent claims in the first place. In my view the best service a professional body can offer to its members is training in how to agree a proper scope, how to monitor progress and report to the client, and how to administer a letter of engagement properly.

So far I have only stated what a good scope does not look like. Preparing a useful scope is actually fairly straightforward and begins with describing specific tasks, or actions, that individuals will perform.

According to Lao-tzu "every journey of a thousand miles must begin with a single step". Many projects are incredibly daunting, but as the project is broken down into

[12] www.iacew.com. I do not know if the advice has changed because the relevant section is now only available to members

bite-sized pieces, it becomes more recognisable as something that can be achieved (usually meaning that the initial trepidation starts to convert into enthusiasm!).

Identifying the specific tasks necessary on any project is fundamental to the planning process. There is also usually a logical sequence for many tasks, for example, if one is building a house the walls cannot be erected until the foundations are laid, and the roof cannot be erected until the walls are in place. In a transaction, often due diligence cannot commence (other than searching public registers) until the relevant materials have been provided by the vendor, and these may not be provided until a Confidentiality Agreement has been agreed and signed. Subsequently one might not be able to start work drafting a purchase agreement until the client has considered the advice given and decides whether to proceed with a share sale or asset sale. Obviously in the interests of efficiency as many tasks as possible should be performed in parallel.

A central thesis of this book is that because professionals tend to only describe the critical path in general terms, without taking the time and effort to break the job down into the specific activities, it is almost impossible for those professionals to give an accurate lump sum price or determine precisely what human resources are needed, or to efficiently deal with reporting and changes to the scope.

To give a simple example, when working on a plan a legal professional might take a straightforward activity, such as assisting the client to appoint a stockbroker to handle an IPO, and based on previous experience will allow a certain estimate for fees and maybe a timeframe of a week or two for that appointment to be finalised. But a closer inspection of what is required might result in the following activities being identified:

- If required by the client, reviewing proposals and sitting in on presentations from firms pitching for the work. Note that this is an important clarification – the lawyer might assume it is vital that he or she be involved in this process, but the client may decide it wants to save a couple of thousand dollars by not having the lawyer there
- Reviewing the draft mandate from the successful bidder and assisting the client to negotiate items such as the detailed scope, exclusivity arrangements, commission structure, break fees, termination arrangements on both sides etc.
- Finalising execution of the mandate document

Once a simple sub-deliverable such as this appointment has been broken down into its elements, the lawyers can think about points like:

- Who should do this work – does it need an experienced partner, or maybe a senior associate, or both?
- If the client procrastinates for a couple of weeks on the appointment, how does that affect the Project Schedule and more particularly is there a knock-on effect on the overall schedule for the legal work?

This simple example is also an example of **dependency**. For example, if holding the kick-off meeting of all advisers with the client is a milestone which must happen by a certain date, with further activities scheduled after that, then clearly if the advisers have not all been appointed yet then the kick-off meeting cannot take place and all

activities will get pushed back. This delay may be irrecoverable, meaning that the target date for the IPO may get pushed back into a sub-optimal period e.g. Christmas holidays. It is then unreasonable for the client to angrily demand that the project team must compress their work programme to still meet the original target. Of course, if a legal firm can accelerate its work, it will, but the point needs to be made that any additional resources applied to the work must be paid for and that the lawyer is not responsible contractually if the schedule cannot be recovered.

A final point is that if one wants to use software such as Microsoft Project to monitor project execution, it is impossible to avoid identifying the tasks which must be performed. Those tasks are the core entries which need to be made. Software is a valuable tool for recording information and being able to report against it and reschedule where necessary. But a project management programme is not an enchanted charm which can magically determine what needs to be done – for that we need proper processes and experience to map out the path and the necessary tasks. So far as computers are concerned, the maxim is “Garbage in, garbage out” – the quality of the output is limited by the quality of the input. It is possible to plan and execute a project well without using software, but conversely it is not possible to plan and execute well relying on software where the inputs are not underpinned by sound processes.

What happens if the scope changes?

Naturally, things often change. Even the most minor construction job at your house can involve unforeseen difficulties or owners changing their minds on certain aspects. Any properly drawn contract will include provisions setting out when variations and claims are payable. Despite this, smart operators will apply a “swings and roundabouts” philosophy to avoid upsetting the client unnecessarily.

The way in which the certainty of the scope changes may be illustrated by considering a major construction project. After the first sod is turned, engineers and contractors are required to comply with, and report against, detailed schedules and budgets. What follows is the potential for penalties to be imposed if they are not adhered to and, conversely, the potential for claims to be made against the owner if it or its other contractors do not fulfil their obligations on time or if the scope of the job is altered. But at the front end, before construction begins, there are many balls in the air with the owner trying to coincide having all essential contracts signed, regulatory approvals obtained and financing in place to be able to proceed with the project. The objective is to have all these elements in place at the earliest possible time, which is called “Financial Close”. At best the client can only nominate a target date and drive the contractor hard to meet it. No-one knows if a key contract, for instance an off-take agreement which underpins the whole project, will take one month or 12 months to negotiate. It may need 10 drafts or 50 drafts. It may never be signed at all. Similarly, the proponent may only be able to estimate the time required for government approvals.

Thus at the front end of major projects, it is difficult to adhere to a plan because there will inevitably be delays, obstacles and setbacks. Therefore the initial plan is more or less a “wish list” which will need to be revised frequently, but what is really important is that the stakeholders maintain open communications, consult on revisions and that

the contractual arrangements with contractors and consultants be robust enough to be able to cope with those delays, obstacles and setbacks.

“Robust” is not a word I would apply to the types of engagement letters that professional firms issue as their standard. These letters are unlikely to contain contractual mechanisms to cope with variations because the foundations needed to underpin those mechanisms, namely a firm scope and detailed execution plan for the professional work, are unlikely to exist. Lawyers usually have no project management training themselves and are therefore extremely reluctant to be corralled into, and have to report against, an explicit project plan. On the contrary, if the professional firm is able to have its team work around the clock on documents while recording long lines on time sheets and charging accordingly, then it will regard the project as manna from heaven. The professionals will of course try to make appropriate noises about the “critical path”, but deep down they believe that the concept of working rigidly to a plan only applies to other disciplines working on the project, not to legal work.

If we compare engagement terms for lawyers to a contract for engagement of an engineering consultant, the most glaring difference is that in the legal scope there is unlikely to be any mechanism dealing with changes to the scope or with claims that the client or a third party have caused delays. The main reason for this is that, ideally, the professional firm will be charging hourly rates so it does not care how big the job becomes (and conversely is powerless to do anything if the agreed scope decreases). If the firm is not tracking progress against the plan in a disciplined way, and reporting to the client accordingly, the firm is not geared up to administer the contract properly and deal with changes as they occur.

An engineer (which is what most project managers are) who is engaging a legal firm to perform work finds all this difficult to understand – instead of achieving a mutual understanding of what is going to happen, the engineer is told the firm will perform an amorphous lump of work and at the end the client will be presented with an invoice which in theory will fit within the estimate. Most likely the invoice will be more than the estimate, mainly because there was little science applied to the provision of the initial estimate, and after all it was only an estimate! This then means that there will have to be an awkward discussion on the amount payable which, again, will not be based on any scientific principles but will come down to a horse trade between the client and the firm.

It is difficult to believe that professionals at the top end of the market, who are in the business of advising other people on how to run their businesses, could be so unprofessional when it comes to procedural matters. What should be happening is that variations and claims should be dealt with properly, in accordance with the contract and as they arise, instead of being allowed to fester.

A variation occurs when the original scope is increased or decreased, or there is otherwise some sort of change, for example (in the case of legal work) to the deal structure or the sequence of work. In construction contracts clients will give themselves the ability to issue “change orders” and it is then up to the contractor to comply with that request and to propose any effects on budget and schedule. The client can then accept the contractor’s proposals, or negotiate them, or refer the issue to dispute resolution.

Variations arise frequently in due diligence exercises where something turns up which leads to another line of enquiry. For example, the lawyer may become aware that a target company has been subject to some claims in respect of an alleged defect in a particular product and may recommend that, as an add-on to the original scope, it undertake an investigation into what has been alleged, the possible number of claims and their potential total quantum, and whether there is insurance cover. If the client agrees, there will be a variation to the engagement in that additional specified tasks will be performed with a new deliverable (a report) and the remuneration will also be increased. Equally though, the client may be very familiar with that industry and may tell the professional it is not concerned by the claims; in that case the professional has done the right thing by alerting the client to the risk, but has not run off and recorded time on the issue without authorisation from the client.

A claim is any demand for payment of money arising out of the contract. As with any legal claim, there are issues of liability and quantum. In a construction environment, a party will lodge a claim, or list of claims, based on some wrongful act or omission, coupled with a calculation of the loss that ensued.

Currently legal firms do not have the correct mind-set to handle variations and claims efficiently because they want to perpetuate the practice of blithely charging fees based on time for everything they do. It does not seem to matter that at the end of the job this almost always results in either a lively discussion with the surprised client, or else the client shrugs its shoulders and pays the bill, but then thinks twice about who it engages for the next project. No matter either that when a fixed price is given this can enable the client to fudge the scope at the edges and get more work for the same price – to a legal firm this is a lesser evil than having to introduce proper contract administration procedures. It is a rather strange that many law firms advise on construction contract clauses every day of the week, in particular the provisions dealing with scope, variations and claims, yet they are unwilling to follow their own advice when preparing letters of engagement.

That is not to say that the disciplined handling of these issues will automatically result in the adoption of ethical practices. There are large construction companies who try to win jobs almost at cost with the assumption that once they are on the site, profits will flow from variations (akin to a car sales outlet making its money out of after-sales service and parts). Conversely, I also know of resource companies who deliberately understate the scope on large projects in the hope that they will get away with not paying for the inevitable scope creeps, either because the contractor is not vigilant in tracking and pursuing the changes, or because the client hopes it will get away with lots of small changes with the contractor not wanting to “rock the boat” with its client.

Like most things in life, if there is to be a happy relationship there must be some give and take. This is to some extent why I would always include a contingency of 10-15% in a fixed price to allow for the inevitable minor hiccups along the way.

I cannot stress enough that most senior lawyers are seasoned professionals who understand what needs to happen on a transaction, project or case. A competent professional will deliver the result if he or she is able, but often at an horrendous and unanticipated cost. The client will be pursuing its dream in a single-minded fashion and may be pleased to see professional staff in the office working at midnight trying

to meet deadlines, but that memory will fade far more quickly than the shock of the massive invoice. Ideally, the client wants to be able to understand what work will be done towards the objective, who will do it and what it will cost. And the client wants to be able to see that someone is firmly in control.

Recently I was involved in a merger transaction that involved numerous statutory steps prior to completion. The completion of the transaction was critically important to one of the parties, which had liquidity issues and needed the deal to happen quickly. Therefore the CEO of the company, who was an engineer, made the lawyers detail the specific steps required to achieve the merger within the required timeframe. He then prepared a work plan and monitored daily that every relevant step had been executed. Two days before a Court hearing at which a detailed affidavit was required setting out that all the statutory steps had been satisfied, the CEO rang the law firm and said, “Who is preparing the affidavit and where is it”? The breezy response was “Oh your in-house counsel can prepare that.” An irate CEO informed the lawyers that the in-house guy was on two weeks holiday and that the law firm had better get onto it! As so often happens in these situations, there was a mad flurry of activity and again, as so often happens, it was all right on the day. But it meant that the barrister did not have the chance to settle the contents of the affidavit and that a reasonably lengthy document was tendered to the Judge to read in court, as opposed to being filed beforehand so he could read it at his leisure. When I see this CEO now, he still always expresses disbelief that lawyers who charged $500 per hour did not properly manage the work that needed to be performed.

This example is more the rule than the exception. To give a simple example, when a large firm promises a piece of work on a certain day, invariably it comes in late in the evening on that day, too late for the client to do anything constructive with it. Law firms seem to operate on a “Just in time” basis.

I have been a consumer of legal services from top-end firms throughout the Western world for over thirty years. I am always astonished at the massive divide between the way clients want professionals to work on projects and the way in which professionals actually do their work. There is no doubt that large firms are professional and help clients achieve their objectives, but for some reason they will not toe the line in terms of the process to be followed. Some might argue that it would only increase the fees if the professional had to spend time sitting down and planning the work in addition to doing it, but I do not believe for a moment that it would. The only explanations are that professionals either will not do it (because they do not want to be held to account) or cannot do it (because they have not been trained in how to prepare a proper execution plan).

Clients do not like surprises, and this is very much a key principle underlying the art or science of Legal Project Management. In simple terms, clients want to know what the service provider is doing to meet their deadline and quality requirements, and what it will cost. The client also wants to be updated if things change (which they often do).

The fact that professionals deal in intangibles is not a sufficient excuse to fail to plan work properly – the old saying goes that if you fail to plan you plan to fail! What we are talking about is a significant cultural issue which is only likely to change as a result of the demands of consumers. Professionals themselves are unlikely to have

the motivation to plan and execute work efficiently so long as the current practices of recording time in an untrammelled fashion, then charging what one can (and taking massive write downs for the balance) are allowed to continue. There is an obvious need to plan work properly to meet the expectations of clients, and this begins with having a proper scope and varying that scope when circumstances require.

In conclusion, for high volume and low margin procedural work, including a proper scope of work in the Letter of Engagement may be the end of the story, unless the scope changes (for example if there is a dispute arises during the course of a conveyance) and the lawyer wishes to claim additional compensation for the variation. For "grey-hair work" and "brain work" a more sophisticated plan is required. Again it gets back to proportionality.

3. Other project management concepts

Moving on from the scope, all practitioners should be acquainted with some other basic project management concepts.

- **Assumptions** – Professional standards require lawyers to be duly diligent when carrying out their work. Obviously there must be rational limits applied to every such exercise; otherwise lawyers could theoretically have to make unlimited enquiries on matters of marginal relevance. The result would be that due diligence would go on forever and costs would be totally disproportionate (which as I have noted earlier is a danger of perfectionist thinking). Further, clients often do not want their advisers to trawl through to see if every "i" is dotted – instead clients are often looking, initially at least, for a "helicopter view", or to put it another way, a "quick and dirty review." Note that scope limits will not necessarily relieve the professional from the obligation to alert the client of matters it becomes aware of which might warrant further investigation.

  PMBOK defines an assumption as "A factor in the planning process that is considered to be true, real, or certain, without proof or demonstration". On any complex due diligence exercise, professionals will include a long list of assumptions - for instance that search results provided by government entitles are correct, or if copies of signed documents are provided then there will often be an assumption that the originals have been duly signed by authorised persons (and duly stamped). An experienced firm will also include practical assumptions, particularly relating to work that it believes clearly falls outside its scope of work.

  Importantly though, there must also be assumptions concerning materiality levels. For example, if you are working on merging BHP with Billiton you are not going to do a stock-take of every piece of office furniture and then carry out searches to see if it is encumbered. On the other hand, it is absolutely necessary to audit physical assets which form a material part of a transaction (*Commonwealth Bank of Australia Ltd v Friedrich*[13]). These are extreme instances – an example which arises more often might be the legal scope including an assumption that the law firm is not responsible

[13] (1991) 9 ACLC 946

for any tax advice (i.e. the assumption is that the accountants will provide this). The client may respond that since the lawyers are studying various contracts, they may be best placed to advise on stamp duty and GST/VAT. At the very least, a detailed scope will allow this to be resolved at the outset. If this issue of who is providing tax advice is not specifically resolved, it is possible a professional may be liable by default for failing to provide advice on the tax aspects (*Hurlingham Estates Ltd v Wilde & Partners*[14])

- **Schedule** – lawyers should establish their own schedule which provides a breakdown of the sequential professional work that they will need to do to meet the time requirements of the client. On a more complex project involving a diverse team of advisers, the overall Project Manager will prepare a Master Schedule which identifies all the tasks that need to be performed, their duration and inter-dependency. It is the master document which shows the tasks to be completed and their sequence, and therefore is the control document for the purpose of monitoring progress. The greater the detail contained in the underlying professional work schedules, the more the Project Manager will understand the work that is to be performed and the impact on the Master Schedule if that work is not completed on time or if additional work becomes necessary. An example is if there has been an assumption that a particular approval is not required, but as a result of circumstances it becomes necessary to institute a process to obtain that approval.

  Within the Master Schedule there will be certain important **milestones** identified and these form the **critical path**. The schedule for the legal work should be cognisant of what deliverables are required from the professional service provider to enable the milestones to be achieved. Often the deliverable from the professional might be a paper with an opinion or recommendation to assist the client to make a decision on an issue. Some examples are :

  - Merger –which entity will be the acquirer and which is the acquiree
  - Acquisition – whether the deal is structured as a sale of assets or as a sale of shares in a parent or subsidiary
  - Construction project – whether the construction strategy is to enter into a lump-sum, turnkey contract (LSTK) or to divide the scope into disparate scopes with an overall manager responsible for integration.

  Most large projects will be divided into different stages, although it would be a mistake to think that stages are always neatly segmented. Often there will be preparatory work to be done in a stage to enable the next stage to be executed according to schedule. For example, on a resource development project an important early milestone might be the award of all purchase orders for “long lead items” and a delay in these might have a significant knock-on effect on completion of the project on time.

  As a matter of necessity, any schedule is not set in stone and may need to be modified if there is acceleration or delays. It would be very unusual for a project to proceed exactly to schedule. However legal claims in respect of delays will be based on the original (or baseline) schedule unless a modified schedule has been agreed.

[14] [1997] 1 Lloyds Rep 525

Hence a legal firm should report progress against the baseline until the schedule is modified and any consequences of that modification must be understood.

Finally, it must be noted that, for a lawyer, an important part of any scheduling exercise is determining whether any part of the scheduled work is contingent upon a third party (either the client or someone else) delivering something at a given time. Some obvious examples are the grant of government approvals or the approval of finance or it may even be an input from another adviser e.g. tax advice. What is important is that;

- the professional firm should not be held to its original Project Execution Plan if there have been delays beyond its control, and
- The client needs to understand the consequence of delay in terms of the overall cost and schedule.

- **Resources** (including Key Personnel) – for legal firms the primary resource utilised is human beings. Clients get particularly annoyed that often the senior partner pitching on behalf of a firm is in effect a "rainmaker" who is never sighted again once the job is won. I personally do not have a problem with that if the senior partner is expensive and out of touch, so long as there is ample opportunity to meet the people who will actually do the work. A detailed PEP would bring more granularity as to who is actually doing the work and the Letter of Engagement may nominate certain individuals as Key Personnel whose role on the job is assured.

  While it is obviously cheaper for junior staff to attend to many tasks, the client still wants to know a grey-haired practitioner has their hand on the tiller. Overall, the client wants to see a balanced team with work allocated at the appropriate level. A client can also draw some comfort from a PEP which recognises and factors in team communication, which is one reason why Project Management should be identified as a separate work stream with appropriate allowance for team meetings – this is discussed further under "Interfaces" below.

- **Interfaces**

  When planning a job some thought must be given to the extent communications, both internal and external, will have an impact on fees:

  - **Internal** – the top lawyers in firms often tend to be driven individuals who throughout their professional career have been very focused on their own work. As they ascend through the firm, they often find it difficult to communicate effectively with a team and become frustrated with underlings who do not somehow divine what the partner wants via Extra Sensory Perception. Communication is key to the success of any team, particularly in terms of providing context to the junior members. Therefore, one would hope that team leaders would be self-aware enough to recognise that they may not be the best person to drive communication within the team. If not, it is incumbent on any Managing Partner wanting to

impose Project Management procedures to recognise who has the right skills to be a team leader, quite apart from any questions of professional competence. Whoever is responsible for information flow must ensure that the channels are open and that the flow of relevant information is not hindered by egos or petty professional jealousies.

In any reasonably complex execution plan I would schedule an initial planning exercise with the team, then a regular team meeting (even if only weekly for say 15 minutes), so that everyone understands where the work is headed and their own role within the team. These days with the use of emails it is also easy to copy everyone with important information (e.g. reports to the client). There is really no excuse for allowing team members to operate in a vacuum.

- **External** – As part of the PEP I would schedule a weekly report to the client and an appropriate number of meetings. If the client is made aware of what is scheduled it will also be aware that if it wants a much higher level of contact then there will probably be cost ramifications. The client can also choose whether it wants regular meetings with all of its advisers together or one-on-one meetings. Even on the most basic project a simple Communications Plan is desirable to show the intended communication routes between the advisers in the team. The Communications Plan can be expanded if there are other critical stakeholders identified e.g. different Government agencies, financiers, trade unions, key shareholders, stock markets or activist groups, and the client wants to keep a tight rein on the channels of communication.

  In considering communications it is possible the CEO of the client may say the project is top secret and must not be discussed with anyone but the CEO; equally the CEO may say that they do not want junior lawyers taking up their time. Another important clarification is whether the consultants have direct contact with each other without the client being present. Many companies do not want consultants happily debating issues with each other at the client's expense. On a fixed price job this should be less of a concern.

- **Gantt Charts** – this is a topic for more sophisticated project managers but is mentioned for the sake of completeness. Gantt charts are bar charts for the planning and monitoring of work. The concept is the basis for the most popular type of presentation format one would see in Project Management software programmes. The format was developed by an engineer, Henry Gantt. These charts were very popular with Stalin when preparing his five-year plans, which perhaps demonstrates that a good plan does not always guarantee a good result. Engineers love Gantt charts – if your client is an engineer, prepare a Gantt chart and they will be either incredibly impressed or will attack your plan because they understand it!

  In projects which involve physical construction, the Project Manager will often prepare a Gantt chart to show the percentages of completion, particularly to identify if

one discipline or area is lagging and when progress payments need to be made to contractors. In practice such a sophisticated reporting regime is probably unnecessary for lawyers, particularly when considering the difficulties in predicting how many iterations of agreements will be required. It should suffice for professionals to report against schedule in written summary reports. When I am running a legal project I normally prepare a short bullet point summary each week on what has happened that week and what work is scheduled for the following week. Also it is very important that an action list be circulated after every meeting.

- **Risk** – this is a big topic that, strictly speaking, is outside the scope of this book. It must be noted though that there is a very close relationship between the concepts of risk and project management. At the beginning of any project risks need to be identified and the steps necessary for handling risk by avoidance, or minimisation, or mitigation, or contractual allocation, built into the schedule. Obviously assumptions need to be made as to how long these measures will take to implement, and inherent in that is a further assumption that the measures will be successful or that there will be some sort of decision process, including possible abandonment of the project, if they are not.

  One Project Manager on a major industrial project told me that every day he goes to work and finds he is confronted by a wall - he then has to make a decision whether to go over it, or under it, or around it, or through it! Another client on a very difficult project told me he saw himself as being trapped in a pit full of snakes but could see a rainbow in the sky above him. What he wanted from his professional advisers were strategies to climb out of the pit and reach for the rainbow.

  Clearly any plan is not going to foresee “unknown unknowns” or “black swan” events. What is particularly important is that if such an event should arise, the communication channels are sound so that key stakeholders become aware of the event at the earliest possible time and can take steps to address the situation. This is one reason why it is so important to encourage open communication with all team members so that they understand the context within which they are working – if a junior person becomes aware of a portent to an adverse event, the junior must be able to have sufficient background knowledge to recognise what might be happening and the cultural encouragement to then raise a flag with the team leader. There is a positive duty on a professional firm to not merely advise within the strict limits of its retainer, but to also call attention to and advise upon risks which become obvious during the course of carrying out the retainer.[15]

  On a major project it is essential to develop a risk matrix at an early stage and to identify how those risks will be managed through practical steps (e.g. hiring someone with particular experience), contractual documentation and insurance. On a regular basis the matrix needs to be reviewed to see if any new risks have arisen and to ensure that risks are being managed properly. Similarly, the team should keep an issues register to record issues as they arise, and to also record the client’s position and how that issue has been dealt with.

[15] Boyce v Rendells [1983] 268 EG 268

- **Project Charter –** where a project is particularly significant, or transformational, for a client, it will often write a foundation document which sets out the historical background to the project, its purpose, how it will be executed and key success indicators. It may charge its internal project team with delivering a specific result, and describe the roles and responsibilities of the team. Sometimes it may go as far as describing what work behaviours are expected from the team members (e.g. transparency, honesty).

  If a professional firm is to be engaged to work on such a project, it would be fair to provide the firm with the Charter to align the service provider with what the client and its team want to achieve. Moreover, if certain behaviours are described as being required from the team, is it reasonable to expect a commitment to the same types of behaviours from the extended team, that is, including external professional service advisers? If so, it will depend on the personality of the professional team leader and the firm culture whether it embraces the same behaviours or merely gives lip service to the Charter. However, I will make the point that if the firm is expected to act in a transparent way, it is unlikely to be able to do so unless it adopts the project management disciplines described in this book.

4. Legal Project Management in Practice

If you, as a client or lawyer, are still asking why it is necessary to have a work plan on a job, the simple answer is that it is impossible to understand what any complicated professional engagement entails, and to allocate resources and prepare a budget for the work, unless the job is broken down into its constituent tasks. PMBOK has a definition for the process, namely, “Create WBS (Work Breakdown Structure)” – The process of subdividing project deliverables and project work into smaller, more manageable components.” A WBS is what I am proposing as a Project Execution Plan.

Preparing a PEP is something which top professionals think they are good at; in truth they are usually good at understanding how to execute a job, based on previous experience, but they either do not have the skills or do not make the effort to take a “meta” view of the process from the client’s perspective. They are well educated people, but unlike chess players, they do not seem to have the capacity to plan numerous moves ahead, for example, by using analytical tools such as decision trees.

Little wonder current work practices are repugnant to clients who are trying to put together a team which can attain an objective in accordance with an overall budget and schedule. One can imagine them leaning out the window like Peter Finch in *Network* and yelling, “I’m mad as hell and I’m not going to take it anymore!”

In this section I will outline the technique I use to prepare a PEP or WBS to break down work on a job in a logical bottom-up, way. It is a simple methodology, but in my view is the optimal approach for firms who want to approach work in a structured way without the need to wheel in experienced Project Managers using sophisticated techniques. My experience with law firms has led me to adopt an Ockham’s Razor

approach – the more complicated the process is, the less likely it is that the firm will embrace and implement the process.

Getting Started

My approach (which I call Cogito – Latin for "I think") is based on a bottom-up tracking of tasks, then applying hourly rates, on the basis that hourly rates seem to be a building block that law firms understand (and note my comments in Part I on alternative forms of charging). So I am not abolishing time costing, but rather am abolishing "untrammelled" time costing by imposing rigour on the process. It is possible a sophisticated client may want to break down the hourly rates further and agree an alternative rate which covers costs and a reasonable profit, but in my experience most clients accept hourly rates at face value and do not want to delve further into the internal affairs of the practice.

The reason I do not like a top-down approach is that I believe it is important for firms to be vigilant to not fall into the trap of just working off the plan from the last job. Lawyers rely very heavily on the use of precedents. When undertaking legal work this can manifest in several ways:

- Corporate precedents prepared in-house are mandated as a bible which must be used by everyone in the firm. While these can be a good starting point in terms of quality control, slavish adherence to the standards can sometimes produce farcical results. For example there is nothing more tragic than seeing a document that has cost someone many thousands of dollars containing a clause heading in the middle of the document - "Not Used"!

- The use of precedents from previous transactions. Again these are valuable as a pointer to what issues needed to be covered, but equally one needs to think about what is not covered in that document because it was not relevant to the transaction or was negotiated out. A significant issue is that lay clients tend to use the end point of the previous transaction as a starting point for an HOA/MOU for the next transaction, forgetting that it was a negotiated document. Therefore they are always starting where they finished in negotiations last time, meaning their commercial position becomes badly eroded over time.

My preference when drafting a complex legal document is to provide a bespoke solution, working up from an agreed terms sheet. Often I prepare the terms sheet as a short-form abstract of the actual agreement (i.e. same format and numbering) so that the full agreement may be prepared quickly and efficiently if and when the parties agree commercial terms. There is nothing worse than agreeing an HOA or MOU, then having to trawl through a law firm standard agreement that bears no resemblance to the interim document.

This bottom-up approach is even more important when preparing a PEP. The most valuable use of previous plans is as aides-memoir to help ensure no key tasks have been overlooked, but someone who has prepared a few plans will already have a clear idea of what is required. Dwight Eisenhower said "Plans are nothing; planning is everything." I think the preparation of the PEP is a critical exercise which should not be undermined by attempts to commoditise the underlying work.

Similarly, one should not start with the same document from last time and then make changes to it. This is a mistake. A previous PEP is helpful to see what practical steps were involved, but it is the wrong focus for a team to ask, “What is different from last time?” The fundamental question is, “What do we need to do to execute this job properly?” In addition, there may be aspects to this transaction that did not exist last time e.g. the vendor last time may have been a sole owner, whereas this time it might be a member of a joint venture which means there is another line of enquiry. Finally, in my opinion it will often take more time to modify a previous plan than it will to do the PEP properly by starting with a clean sheet of paper (or blank wall).

Let us assume a firm has been invited by a client or potential client to pitch for a substantial piece of work on a project. Lawyers tend to refer to these exercises as “beauty parades”, but this pejorative term reflects, that in their minds, most competent firms are capable of doing the work and therefore it is largely going to come down to who has the most dazzling smile and C.V. This is not how the real world works. If the firm is relying on proposing lower hourly rates than its competitors, it should recognise that only a naïve client will make a decision based purely on stated rates when the client is unable to judge how efficient the people sitting in front of it are.

The following methodology will enable the firm to produce a PEP which enables the client to understand, in a scientific way, exactly what the firm will do for it, so it is not forced to rely on cosmetic or intuitive considerations. Not every firm will want to pursue this approach, but I can tell you what I am looking for as a procurer of legal services, and it does not involve dazzling smiles and hyperbole. My view is that it is appropriate for a client, and in particular its in-house counsel, to request a draft work plan as part of any pitch.

Lawyers love words, and therefore in preparing a pitch will operate almost exclusively in Microsoft Word. There is nothing wrong with that, but is very helpful to non-lawyers to include some diagrams showing a possible project structure or lines of communication, or even tables showing some risks and issues with possible solutions. This is a far better way of demonstrating an understanding of the issues than merely describing other jobs the firm has worked on in the same sector. A savvy client will also know that a firm will put a huge infrastructure development on its C.V., even if it was a minor role such as advising a sub-contractor, just as every geologist who does any work on a petroleum well that is successful will claim the discovery.

Preparing a plan does not require a lawyer to be proficient in basic Project Management software, although this of course would help on a major development where the work plan can be folded into the master WBS. For reasonably straight-forward jobs, it is appropriate to use the technique described below and then make a proposal to the client in Word or Excel, if that is what the professional feels is most appropriate. Again it is a question of proportionality. On large jobs I tend to prepare the plan and then leave it for those with better computer skills than me to record the inputs in Microsoft Project.

To commence any project planning exercise the necessary tools are large “Post-it” stickers (at least 12.5cm x 7.5 cm), which may be different colours if you want to colour-code to distinguish deliverables against tasks, and different coloured marker pens. I have prepared PEPs for the provision of professional services on multi-billion-

dollar projects using materials that cost under $10! In addition, I recommend having either a white board or some butcher's paper up on another wall to note any assumptions or other interesting points that come up in discussion.

It is possible that the more technologically savvy may wish to use a laptop or I-pad with virtual sticky notes on screen and the results projected on a wall for the team to see. I think the old-fashioned stickers on the wall with hand-written notes are the easiest visually, particularly in a team environment. Equally, it is possible to enter tasks directly into Microsoft Project and allow it to organise the tasks, but to me the primary objectives of the stickers on the wall are to identify tasks with a high degree of specificity and then to be able to rearrange them in a visually accessible way.

There are 4 stages in the preparation of a detailed Project Plan and attendant budget. The thesis of this book is that professionals, when preparing a bid or estimate or otherwise planning work, tend to carry out the first stage (identifying work streams), skate over the second and the third (identifying tasks and preparing a schedule) on the basis that they will do whatever needs to be done within the allotted time, and if charging for time, do not bother with the fourth (allocating resources and preparing a budget).

Do not be put off if the initial planning meetings do not start off smoothly because the more PEPs you prepare, the better you will get at it. Once a team has done a few of these it should be able to prepare a plan within half an hour on most jobs, and up to say two hours on very complicated projects or transactions – again proportionality is the key. To me such a small amount of time invested up front is sure to reap rewards.

Step 1 – Identifying Work streams

This is straightforward and most seasoned professionals will be proficient at this. Conceptually, any project or transaction might involve:

1. Due diligence/Investigations/structuring
2. Preparation, negotiation and signature of contracts
3. Completion/Execution

Within these broad groupings, we need to establish some work categories, before proceeding to drill down further and identify specific tasks. By way of example, following is a shopping list of some typical categories that might be applicable to a complicated commercial project, (note the important addition of Project Management activities which would not normally be top of mind for professionals but is critical for any work involving more than one person):

- Project Management (includes preparation of plan and budget, and ongoing internal communication and reporting to the client. This is the same as the ABA litigation item - Case assessment, development and administration)
- Title and tenements (which might include environmental, planning and native title or these may be separate work streams if there are major items e.g. if a property has to be acquired or rezoned for a development)
- Joint venture or partnership issues
- Corporate
- Litigation and claims
- Intellectual Property

- Sales/off-take contracts
- Input contracts (for goods and services)
- Plant and Equipment
- Competition
- Employees and Industrial relations
- Taxation
- Financing

This list is, of course, not exhaustive. Litigation might be broken down in accordance with the ABA headings.

Once the team nominates the main headings for the work it will undertake, these are listed in a column of stickers on the left side of the wall as the “Y” axis. I suggest the heading of Project Management should be at the top, and the rest below it. Some items may be of only marginal concern. For example, the team may not think there are any competition law concerns, but nevertheless may include the heading to allow for an expert to spend a few hours writing a paper to confirm that is the case.

Hints:

- Some space should be left at the top of the wall to allow stickers to be added later across the top to show the chronology (because time is the “X” axis”).

- When listing the headings down the left-hand column, allow reasonable spacing between the stickers e.g. 2-3 sticker widths, because in Step 3 the specific task stickers on the horizontal (“X”) axis will be grouped to reflect that many tasks can be performed in parallel.

Step 2 – Identifying Tasks within work streams

Once the work streams have been listed vertically as the “Y” axis, the critical activity is then to identify the specific tasks which must be undertaken to complete each work stream. For now, we should not be worried about dates because the imposition of a timeframe is step 3. Generally though, we will tend to arrange the task stickers in sequential order from left to right, knowing that they can always be re-ordered if we realise the sequence is not right.

It is usually easier to identify milestones and deliverables, and work backwards. A milestone is a specific decision point along the path e.g. a Go/No Go decision, or finance approval, or execution of a contract. A deliverable (e.g. issues paper or report or first draft of agreement) can be marked with an asterisk, or a different coloured sticker, and in each case this is a target we are working towards. There will of course be an ultimate deliverable e.g. completion of a transaction, but there may be many sub-deliverables along the way.

We now have to map all the tasks which must be undertaken to reach each deliverable and each milestone. A fundamental rule is that any sticker with a task on it should begin with a verb, e.g. “review” or “peruse” or “prepare”. There may be also minor tasks which must be carried out as a prelude to other work e.g. “Search Companies Office” or “Obtain Due Diligence Material from Vendor” (which is important because delays in this may delay the whole schedule – equally some time

needs to be allowed for someone to check if anything vital is missing). One would not write “advise client on JV status” as that is really an objective or deliverable, not a task. It may be that the act of writing a paper summarising the JV status is a task which will take up time, but to get to be able to write that paper one might have to undertake a series of tasks such as perusing the JV agreements and perusing minutes of meetings. Equally one would not write “Sign Confidentiality Agreement” to access DD material as a task, unless the form of the CA is already agreed. Someone has to prepare a draft CA, the other side has to review it, and there are usually a couple of iterations – obviously this all takes time and is part of the engagement.

At this stage tasks can be noted randomly in the work streams and will be ordered chronologically in step 3 – this is why we use stickers!

While tasks are, for now, sequentially ordered in a general way horizontally (including in parallel where appropriate) within work streams, there may be some tasks that cannot be performed until a prior task in another work stream is performed, or the client makes a particular decision. An example might be that a lending terms sheet cannot be finalised until it is known which entity will be the borrower; if it is a new special purpose vehicle then someone has to incorporate that vehicle and guarantees might be required. This interdependency can be shown by a two-headed arrow drawn with one end on the prior action (finalise borrowing entity) and the other on the subsequent action (prepare or negotiate terms sheet). Note that this also alerts you that a late decision on one aspect will cause a knock-on delay on the subsequent professional work, (which may not be the fault of the professional firm). The firm should highlight this to the client and mention it in the Letter of Engagement.

Step 3 – Preparing a Schedule

After all tasks have been identified, they should be re-ordered in chronological order from left to right across our wall, bearing in mind they (ideally!) should not extend beyond whatever deadlines the client has set. From there we can group the tasks and various deliverables into time periods.

Across the top of the wall we will place date stickers which properly reflect the time frame for the work, which might be days, or more commonly weeks or months. The task stickers can then be grouped under the relevant timeframe in which that task needs to be completed, (or across boundaries if it spans two frames). Some items, particularly Project Management items such as reporting and team meetings will be recurring – for those items one sticker suffices with a mark on it showing it is a weekly item for instance (e.g. an “R” or a circle to show it is a recurring item).

Projects will usually have a clearly defined start date (e.g. kick-off meeting) and end date (the date by which the client requires the deliverable), so it is a matter of working out how the work needs to be sequenced to fit the time allotted. The caveat here is that the professional firm must have the resources available to execute and this is reviewed in the next stage.

Step 4 – Allocating Resources and preparing a budget

In step 4 once the tasks from the previous steps have been specified and scheduled, those tasks (including project management tasks) may now be allocated to the relevant team members and an estimate made of the time each person will spend on

that task. This is done by noting an initial on the sticker in a different coloured pen and showing the estimated number of hours for that person, or multiple persons on that job. Fractional hours can be shown as a decimal e.g. half an hour is .5; I would not bother trying to become more granular than half an hour. For any items where all team members are involved, such as a team meeting, you can write “all”.

Many might be tempted to not bother with this last step 4, particularly when charging on a time basis with no requirement from the client for a fixed price for a fixed scope. Even if the lawyers have the luxury of just charging for what ends up on the clock, I believe it is important to allocate resources to ensure the work can actually physically be done. For example, if the stickers show that in a particular week a particular individual has to spend 50 hours or more to discharge the work allocated to him or her, then that is only likely to be achieved if the person is not working on anything else and is prepared to put in some overtime. If an associate, say, is working on three projects at a time and realises that under the PEPs they have to dedicate long hours per week on each, then something has to give. In the current environment where PEPs are not prepared, the most the overloaded associate could do is complain to the partner that they have a lot on their plate.

If it becomes obvious that the work cannot be achieved on time using the allocated resources (as it did in the postmortem I conducted on the commercial property deal), then either more resources must be found for the job, or the schedule must be extended.

On the budget, it should be merely a matter of arithmetic (i.e. hours for each person x charge out rate) to work out a price to do the work. If the client merely requires an “estimate” for professional work, then this methodology should still be utilised to reach a properly calculated number.

We can now add up all the time for each person (remembering to extrapolate recurring items over the life of the project). Of course, it is impossible to predict every single item that may arise during the course of the work, and there needs to be some allowance for unreasonable behaviour on the part of a client or counterparty, so a contingency should be added – I would normally round up the calculated number and then add a contingency of 10%.

Step 5 – (Optional) Recording the Plan in Software

We now have a robust Project Execution Plan which has identified the tasks involved in executing a piece of work, the deliverables and their due dates, the work schedule to achieve those dates, and the persons who will do the work and what the likely cost to the client will be. Whether, and how, the firm wants to keep these workings is a matter of judgment in each case. In a straightforward assignment, the leader may be happy to just photograph the stickers on the wall or assign to some unfortunate junior the job of preparing a freehand sketch. The leader may feel that having analysed the job fully, he or she is happy to write to the client in more general terms describing the work, the schedule and the estimated or fixed price.

Where the job is more complicated (particularly where the firm is nervous about the possibilities of delay due to external causes), or where it wishes to impress the client, or the client demands a proper plan, then the information should be recorded in software such as Microsoft Project. All of the inputs necessary will have been

identified on the stickers, so this is actually a fairly easy task. Once the information is recorded it will be saved as the "Baseline" plan and then the firm can, if it or the client wants, record actual progress against the baseline and show deviations.

The final piece of the discipline is reporting. At one end of the spectrum, if the client has been brought in to prepare the PEP, then it would be appropriate to report progress on tasks and time recorded, bringing to the attention of the client any slippages or issues, and adjusting the plan accordingly. For these types of engagements, I would send a short report at the end of every week saying what work was done and outlining the work program for the following week. For smaller jobs where an estimate has been provided, a similar result might be achieved by sending an update against the plan and an invoice fortnightly.

5. Conclusion – Whither goest thou?

In the introduction to this book, I asked two questions –

- Is it possible for clients to control their lawyers (in most instances read "control fees") without curbing the aggression or diligence or cunning, or whatever attributes attracted the client to that legal person or firm in the first place?

- Is it likely that, as part of this process, law firms may cease exploiting young lawyers, or will the situation become worse if the principals believe they will not earn quite as much money?

In respect of both questions the typical law firm culture comes into play. Every organisation, including professional firms, has a culture, whether by design or default. In my view any firm that sets it sights on executing higher-end legal work should be embracing basic LPM principles, but this often requires a significant cultural change and large professional firms tend to have a culture which is resistant to change. As Peter Drucker said "Culture eats strategy for lunch!"

The answer to the first question is a clear yes in my opinion. LPM techniques bring a scientific rigour to the practice of law, and the adoption of these procedures should complement the legal skills and attributes of practitioners.

The issue though is that lawyers are very resistant to change and part of this problem arises from the traditional pyramid structure in law firms. The pyramid structure usually means that the people who are most resistant to change (because of reluctance to retool or commit capital to an LPM program) are the older powerbrokers who control the purse strings. Implementing LPM requires some radical changes to entrenched work practices, particularly among those who have been charging for their time on an hourly basis for many years.

My experience with firms has been that those who are the most enthusiastic about embracing LPM principles are usually under 40 years of age. To be able to embark on an LPM course, the champions will have to convince those at the top of the pyramid that it is a journey worth taking. To expect individuals in the twilight of their careers to agree to retool, acquire new skills (project management), and lose a chunk of their earnings on the cost of training and software which will mainly benefit the next generation, is a very hard sell. An understandable response from the senior partners is that they are happy for the next generation to implement LPM after they

have left the firm. My advice to firms facing this obstacle is to adopt the words of ice hockey star Wayne Gretsky – “Skate to where the puck is going, not where it has been.”

Once the decision has been made to go down this path, it must be recognised that LPM can represent a major change management program, and in fact is a project that must be managed in the same way as any other project. My first question to any firm is “Are you sure you are up for this?” because there is often a fair bit of grief associated with change management, and even more so with independently minded professionals. A few firms have adopted a “crash or crash through” approach, where LPM reforms are mandated firm-wide. This is likely to result in tantrums, tears, and partners leaving, but if a firm has the resolve to make this happen, then good luck to them.

For the majority of firms who do not want a world of grief, it is very much about “baby steps”, or what the Australian Prime Minister Bob Hawke called “the inevitability of gradualness.”

The first decision is whether the programme will be started as a pilot applying to certain people, who must be prepared to champion the cause and drive it from pilot to firm wide adoption, or to specific types of work.

An LPM roll-out, like any major change management program, will be a multi-year exercise that must be planned as a project and therefore have a project manager, a critical path and a budget which must include software changes and training. The goal is to move through the stages of change management:

- Awareness – “This proposes to change the way we manage our business and daily work”
- Understanding – “The new system should allow me to change the way I make decisions”
- Acceptance – “I believe this project is integral to maintaining growth in a competitive environment”
- Commitment – “I know the value the project delivers and it is a critical part of how we do business”.

I should caution clients here that if their legal service provider says that it uses LPM techniques, what does that actually mean for the client? In the last few years I have briefed major firms who have spent a lot of money on establishing project management systems and brag that they are at the leading edge of this revolution (evolution?). Yet those firms are still reluctant to move away from simple time costing unless the client insists and has enough bargaining power to prevail. Apparently their concept of LPM is that they have adopted standard operating procedures, but I suggest these are often inward looking (to protect the firm from claims) and not outward looking, for the benefit of clients.

The second question about the treatment of young lawyers in firms is far more difficult. Before looking at young lawyers specifically, I will mention the mental health benefits of having the work aspect of your life under control. Many lawyers thrive, or pretend to thrive, on the relentless pressure, long hours, sleep deprivation and unhealthy eating and drinking habits. The attitude of these people is that if you can’t stand the heat, get out of the kitchen, and they see weakness in others as an

opportunity for them to work harder and earn more. And, unfortunately, departments in law firms tend to have a groupthink mentality which reflects the behaviour of the supervising partner. Sociopathic partners who bill many millions of dollars can be treated like rock stars whose bad behaviour is indulged.

For those who crave having their life under control, how good would it be that work is being executed according to a plan and not according to the “just in time” approach so often seen. Or that work is properly resourced by the right number of people doing work that is right for them?

There is much more discussion now on mental health and the importance of a balanced life. I believe there are many lawyers who work in large firms and are desperately unhappy with the way they are treated and the ridiculous hours they are expected to work. The only thing that is likely to affect these attitudes towards young lawyers is a change in bargaining power.

In recent years there have been many associates who have decided quality of life beats a big salary, and perhaps the pandemic, during which many worked from home, has contributed to that. Part of the so-called “great resignation” has been caused by people who feel they have no control over intolerable workloads, which can lead to mental health issues. One of the issues for associates is that partners will continually push work towards trusted associates, regardless of how much that associate has on their plate, and possibly in the knowledge that the associate will find a way to oblige, even if that involves working inhuman hours. The other factor, which particularly applies to barristers, is that they are often loath to turn work away for fear that someone else will become the favourite for briefs.

If the competition for associates and young graduates becomes keener, then perhaps they will no longer be regarded as cannon fodder.

LPM techniques can have a major impact on cultural issues. A simple example is that if firms prepare proper resourcing plans and realise that if a job needs someone to work, say, 20 hours a day, then the solution is to have two people working ten hours a day. In addition, the training of junior lawyers is likely to improve immensely if they are able to work to a plan and receive proper instructions and context. To me this type of practical training is far more important than professional seminars.

In summary, the objectives in preparing a PEP, tracking progress against it and then administering the contract properly are to:

- Ensure that the work fits with what the client actually wants (ie make it fit for purpose)

- Minimise the chances of essential tasks being overlooked or being attended to by the wrong person, thus minimising the chances of claims for professional negligence

- Protect the client from having to pay more for inefficiency and at the same time ensure the service provider is properly remunerated if the scope increases

- Introduce a higher level of efficiency into the work, both in terms of internal co-ordination and integration of the work with that of other advisers

- Improve the quality of the work through open communication and enabling team members to conduct their work with a proper sense of context

- Allow firms to resource work in a responsible way, facilitating a reduction in stress levels

- As a result of the abolition of waste and greater transparency, increase the chances that the client will be impressed and give the firm more work in the future, or that pitches will be successful because the firm is able to show a deep understanding of what the client seeks to achieve

- help lawyers and their clients to foresee factors and events that might prevent the project from happening and to take steps at the appropriate time to either avoid those events or to mitigate their effect if they become likely (in effect, risk management)

One would think that proper discipline in the execution of professional work is something that all partners and managers in firms would be keen to implement. The evolution or revolution to achieve these desirable objectives needs to be driven by clients, ambitious firms and professional bodies.

Postscript

We have all heard the cliches such as “if you fail to plan, you plan to fail”. To borrow from a quote by Vaclav Havel, proper planning of projects represents a kind of hope, which “is not the conviction that something will turn out well, but the certainty that something makes sense, regardless of how it turns out”. This is what Project Management techniques will deliver – a form of certainty. Note though that it is certainty of process, not certainty of the result. The proper process will go a long way towards ensuring the outcomes desired, but things can still go awry - to quote John Lennon “Life is what happens while you are making other plans” or as Prime Minister Harold McMillan put it, the thing which might prevent a plan reaching fruition is “events, dear boy, events”. Mike Tyson said everyone has a plan until they get punched in the mouth.

I did some work for a start-up company which wished to explore for minerals in the Falkland Islands and wanted to list on the Alternative Investment Market (AIM) in London to fund the activities. The underlying geological theory was that as the islands had once formed part of the South African land mass, there was the potential for gold, diamonds and uranium, but as the islands were covered by several feet of peat there was no outcropping or obvious signs of minerals.

The company identified that a critical first step to exploration would be to obtain an aerial magnetic survey which would give some clues as to the underlying geology. A service company would have to be contracted in the USA or Europe to undertake this work and it would have to bring in an aeroplane and equipment from elsewhere to the Falklands. This would be an expensive exercise and the client would need to raise funds by listing on the stock exchange to pay for the work. Understandably there was

considerable excitement among the Falkland Islanders, including at Government level, that this work was happening and that something valuable might be found.

Although it was only a small company, the client company was professional and disciplined in its procedures. We prepared a lovely PEP which tracked the listing of the company and the contracting procedure for the work. We had identified the ideal weather window and worked backwards to plot all the steps that needed to take place, and worked forwards from the completion of the survey to track the processing and interpretation work so that we would be able to announce the results and, if positive, raise more money and proceed to drilling.

To minimise performance and counterparty risk, we decided to appoint a highly reputable large international service company to do the work. In its tender this contractor told us that it had a fully fitted aeroplane in Uruguay which was ready to mobilise when we were ready i.e. when we had raised the cash. The downside of negotiating with an international player when you are a small company is that you have little bargaining power, so we had no choice but to sign their standard form of contract which stipulated minimal liability for the contractor. There was no firm mobilisation date because everything was conditional upon the client raising funds.

The client proceeded with its listing and managed to raise the money, although as is always the case with these things, it took several months longer than planned. Throughout the process the company kept in contact with the contractor and was given the impression that the moment the hefty mobilisation fee was paid the plane would be “wheels up” from Uruguay and winging its way to the Falklands.

After the listing the company immediately wired through the mobilisation fee and rang to confirm the plane was about to take off. The contractor thanked the company for the funds and said it would now take two weeks to outfit the plane. This was an irritating thing to hear at that point.

Things gradually deteriorated. Two weeks later, when we expected the plane to mobilise, the contractor rang and rather sheepishly explained that it had now worked out that the small plane did not have the range to fly across the sea from Montevideo, where it was based, to the Falklands and further, because it was prohibited from flying through Argentinean airspace, it would have to “hop” down the western side of South America, to the southernmost tip of Chile. From there it could fly across to the Falklands. This journey would take a week or more.

By now the client was seething because the weather window was closing, but there was nothing it could do. The aeroplane proceeded to hop its way down to Puntas Arenas at the southern tip of Chile. However when the pilot arrived he was told by the local air traffic controller that there was no way the plane could make it to the Falklands from there without crossing a sliver of Argentinean airspace. Moreover, the local added that the Argentinean air traffic controller on the other side of the border was a friend of his, and if the pilot attempted to take off the Chilean air traffic controller would tell his friend and the likelihood was that the plane would be shot down by Argentinean fighter jets.

The pilot was terrified and refused to take off. The contractor declared force majeure and proposed flying the plane back to Montevideo. The client was desperate to find a solution because if the survey was aborted, the reputational damage with investors

would mean it would be unlikely that the company could raise money to have a second attempt.

The plane and pilot sat for about a month in Puntas Arenas while numerous conversations took place. Eventually the British Governor in the Falklands, to his great credit and probably well beyond his authority, assured the pilot that if he flew and there was any trouble then British jets would fly out to protect him. A very nervous pilot made the flight and arrived safely.

The survey finally began but the delay of several months meant it was taking place in sub-optimal weather conditions which affected operations. One day, when the survey was a little over half completed, the plane was returning to the main airfield at Stanley where it crash landed and was destroyed (luckily no-one was hurt). That was the end of the survey.

The end of the story is that the limited work that was done did not reveal anything interesting, the client company was sold off as a listed shell and I believe the burnt-out wreckage of the plane is still sitting beside the airstrip at Stanley to this day.

The project was well-planned but failed to achieve its objectives through a mixture of unforeseen circumstances and bad luck. However, we can observe that if a project is not planned well, in the event of catastrophe it is likely that all stakeholders will be mired in litigation for years as they blame each other and lawyers argue over causes. Working to a detailed plan helps to pinpoint where things went awry. This feature alone should be sufficient motivation for lawyers to want to make sure engagements are managed in a disciplined way. Firms may not be able to avoid claims for negligent advice, but they should be able to reduce considerably the number of claims which arise out of the failure of their processes.

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