



How do in-house counsel
manage in volatile times?
Deloitte Forensic in-house
counsel survey 2009



Introduction

To say that this year is shaping up to be a tough one for corporate Australia is an understatement. Some commentators have predicted that 2009 will bring the most difficult economic and social conditions since the end of World War II.

Much of corporate Australia is facing truly challenging times, with limited access to credit, share market turmoil, increased regulatory scrutiny and declining growth in local and foreign economies.

While Australia has up until now fared much better than the rest of the world, it is starting to experience a significant slowdown. In 2009, the AI Group / Deloitte National CEO Survey¹ of over 480 Chief Executive Officers shows management are focused on reviewing and executing sound business fundamentals to minimise risk, manage cash flow and bring down costs.

In this environment, the role of in-house counsel becomes critical – not only to manage the legal risks that emerge in volatile times, but in the face of strict expenditure control, to continue to demonstrate the value that in-house counsel add to their organisations.

In this context, Deloitte Forensic conducted a survey of the members of the Australian Corporate Lawyers Association (ACLA) in November 2008 in order to determine *“How do in-house counsel manage volatile times?”* Our thanks to ACLA and to the many that have contributed to this survey.

We welcome your feedback. If you have any questions or comments, please feel free to contact Victoria Sweetman on Tel: +61 (0) 2 9322 5146 or e-mail: vsweetman@deloitte.com.au

Yours sincerely,



Nicholas Adamo
Partner
Deloitte Forensic

¹ Australian Industry Group/Deloitte National CEO Survey: *“Business Prospects in 2009”*. A copy of this survey is available at www.deloitte.com.au

Survey results
The legal
environment

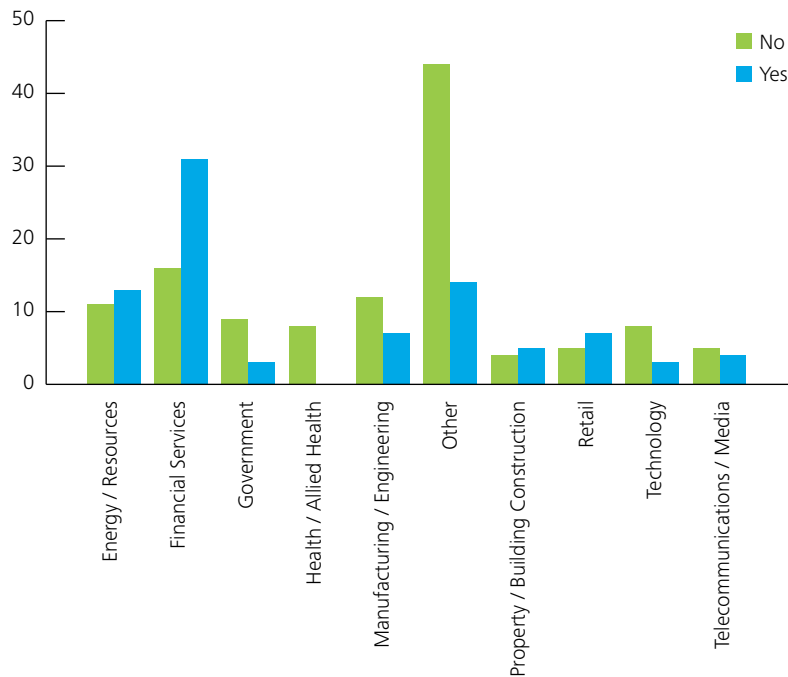
Demand for services

Forty one percent (41%) of respondents indicated that the current economic conditions have increased the demand for legal services within their organisation. This is reflected in the fact that just over half of the in-house counsel surveyed (53%) indicated that the number of hours they work per week has increased over the last 12 months.

Somewhat surprisingly, the majority of respondents (59%) did not believe that the current economic conditions have created a greater demand for in-house legal services.

However, these results do vary according to industry. Further analysis of the survey data according to industry type (Figure 1) reveals that respondents from the financial services sector have experienced much greater demand for their in-house legal services. Perhaps this reflects the fact that this industry has been most affected by the global financial crisis.

Figure 1
Question 9: Have the current economic conditions increased the demand for legal services in your organisation?



Source: Deloitte

Regulatory activity

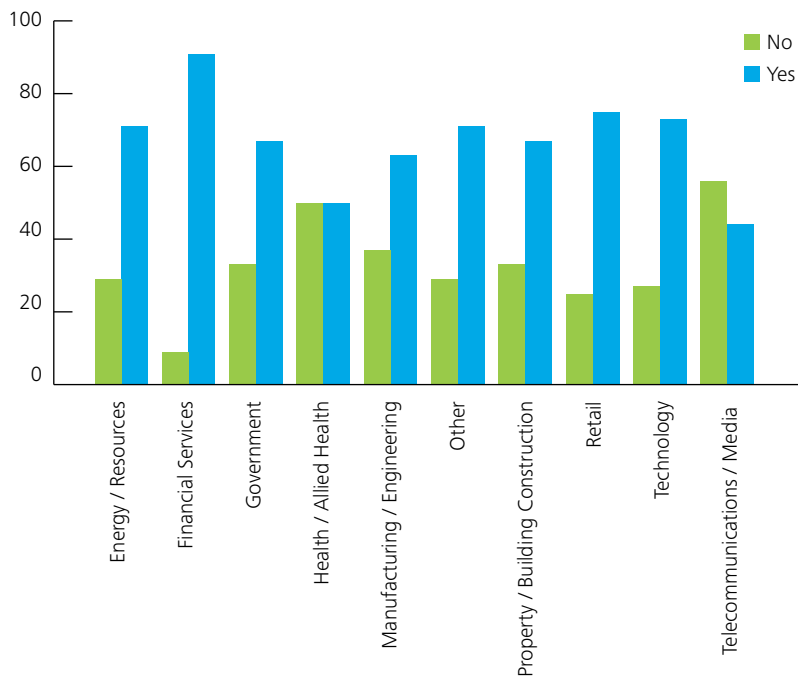
Seventy two percent (72%) of respondents to the survey expect to see an increase in regulator activity in the next 12 months.

This result would seem to be consistent with local and international governments demanding that their respective regulatory bodies utilise their investigative and enforcement powers in the wake of the global financial crisis.

Further analysis of the data according to industry type (Figure 2) reveals that the industries holding the strongest concerns are in the financial services and retail sectors. Survey respondents in the telecommunications and health industries were the least concerned.

Interestingly, 20% of survey respondents indicated that providing regulatory compliance legal advice is one of the busiest areas of their legal practice. They also believe that the demand for advice about regulatory compliance will increase in the next 12 months.

Figure 2
Question 14: Do you expect to see an increase in regulator activity in the next 12 months



Source: Deloitte

Litigation and disputes

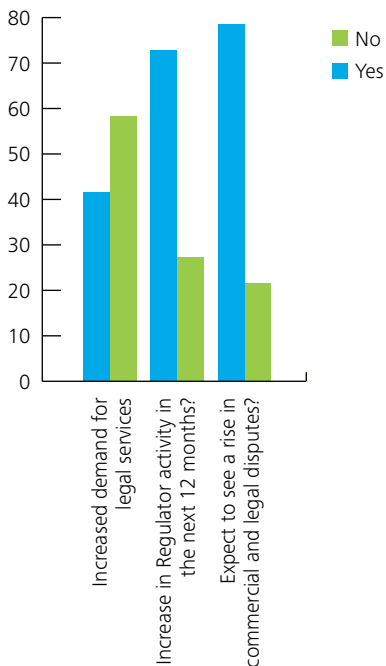
Traditionally, tougher economic times lead to more litigation. Consistent with this, 78% of survey respondents expect to see an increase in commercial and legal disputes in the next 12 months (Figure 3).

Most significantly, however, 93% of the respondents expect to have their organisation's disputes resolved by a negotiated settlement, as opposed to judicial determination by a Court.

The general counsels that attended the Deloitte Roundtable to discuss the survey results endorsed a preference to settle legal disputes by negotiated means. One of the key reasons for seeking settlements was the belief that achieving a negotiated settlement allows organisations to preserve and maintain stakeholder and customer relationships.

93% of the respondents expect to have their organisation's disputes resolved by a negotiated settlement.

Figure 3
Questions 9, 14 and 15: Demand for legal services, increase in regulator activity and rise in commercial disputes



Source: Deloitte

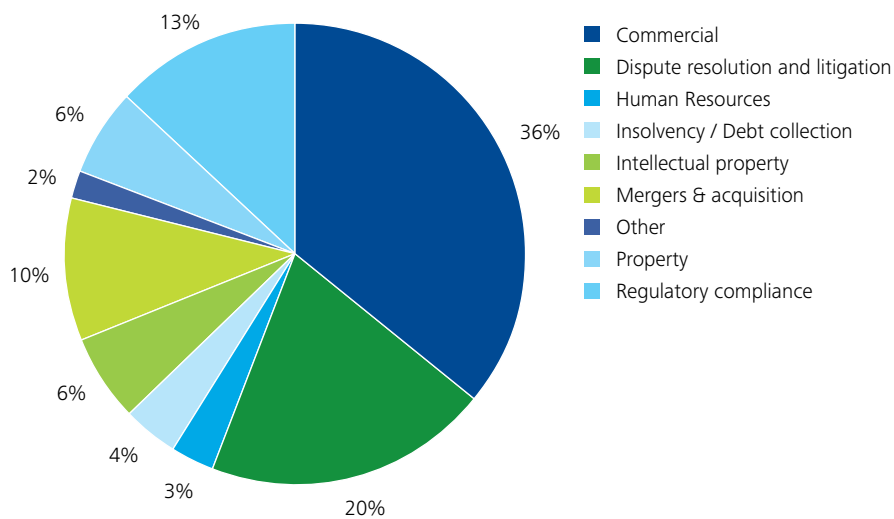
Busiest areas of practice

The survey results indicate that currently the three busiest areas of legal practice for in-house counsel are:

- commercial advice
- regulatory compliance
- dispute resolution and litigation.

The survey respondents predicted that these three areas would remain the busiest areas of in-house legal practice in the next 12 months (Figure 4).

Figure 4
Question 13: What do you expect to be your top three busiest areas in the next 12 months? (Weighted Average)



Source: Deloitte

The busiest areas of in-house legal practice for the next 12 months are expected to be commercial advice, regulatory compliance and dispute resolution and litigation.

Budget

Our respondents held disparate views as to the fate of their legal budgets over the next year.

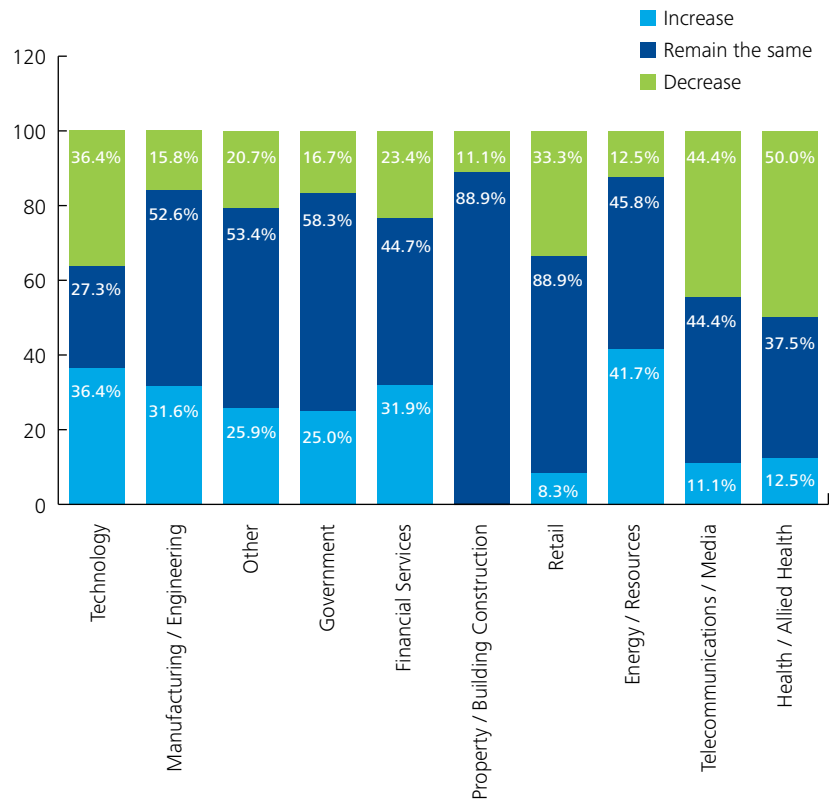
Fifty percent (50%) expect that their legal budgets will remain unchanged over the next 12 months.

One quarter (25%) of the survey respondents anticipate that their legal budgets will increase in the next 12 months, with 25% expecting a decrease.

Many respondents within the same industries had polarised views as to their budget expectations.

Forty two percent (42%) of respondents from the 'Energy and Resources' sector and 36% from the 'Technology' sector expect an increase to their legal budgets (Figure 5). In contrast, respondents from the 'Health' and 'Telecommunications / Media' sector expect a decrease in their legal budget (50% and 44% respectively).

Figure 5
Question 11: In the next 12 months, do you expect that your organisation's legal budget will:



Source: Deloitte

Human resources

The survey reveals a shift in the anticipated number of new hires for in-house legal teams. Consistent with the pressure to reduce overheads and expenses, fewer legal departments are expecting to employ new staff in 2009.

Sixty three per cent (63%) of respondents have hired additional lawyers in the past 12 months, but in the next 12 months only 40% expect to be hiring.

Indeed, the general counsels at the Deloitte Roundtable discussion believed that the recruitment landscape has changed from November 2008, when the survey was conducted. All of the general counsels agreed that if the survey was repeated in March 2009 the expectation of being in a position to hire additional legal staff would be low.

Deloitte Consulting's Human Capital practice is of the view that while a credit crisis may last a year or two, the talent crisis in Australia will remain for the next decade. In the downturn of 1987, redundancies were commonly utilised to reduce company costs. However, when the market recovered, many companies were faced with significant labour shortages.

Perhaps with this in mind, several general counsels at the Deloitte Roundtable reported that rather than reducing head count, they are seeking to reallocate existing legal resources to meet demand in busy practice areas or are looking to utilise contract lawyers.

While a credit crisis may last a year or two, the talent crisis in Australia will remain for the next decade.

The value of in-house counsel

Organisational priorities

Giving timely and accurate legal advice is just one facet of an in-house counsel's role. In many companies, in-house lawyers are the organisation's 'problem solvers'.

With this in mind, the survey asked respondents to prioritise the factors that they considered the most important when seeking to solve a problem confronting their organisation.

Of the six options provided, the respondents believed that achieving the best commercial outcome was the most important when seeking to resolve a problem (Figure 6). However, this was closely followed by:

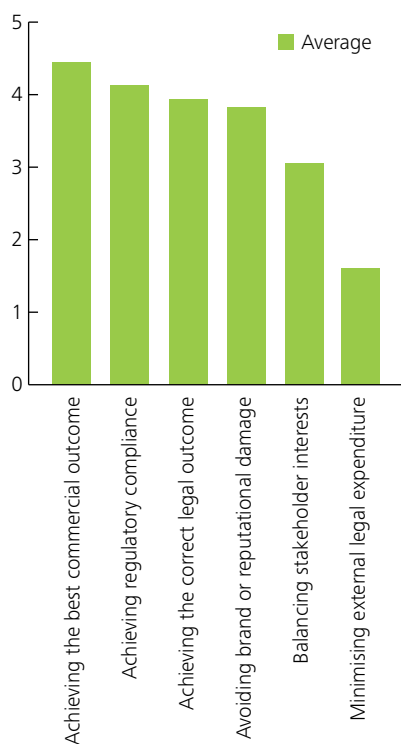
- achieving regulatory compliance
- achieving the correct legal outcome
- avoiding brand or reputational damage.

Notably, balancing stakeholder interests and minimising external legal expenditure were seen as the least important of the options.

When this issue was discussed at the Deloitte Roundtable, the general counsels were in agreement that focusing on reducing external legal costs 'per se' was unhelpful. General counsels instead seek to focus on extracting value for money from their external legal advisers.

General counsels seek to focus on extracting value for money from their external legal advisers.

Figure 6
Question 21: As in-house counsel, please rank the following factors in order of importance when you are seeking to resolve a problem that faces your organisation



Source: Deloitte

Demonstrating value

Predictably, many organisations across Australia and globally have responded to the global financial crisis by looking for ways to cut expenditure and to extract greater value from existing resources.

Many lawyers will remember that during the last serious economic downturn entire in-house legal teams were retrenched in an effort to reduce overheads. Indeed some major Australian companies have already significantly reduced their staff.

As a result, in-house legal teams must demonstrate the value they add to their organisation more than ever.

“There is a real risk in this financial crisis. My fear is that management will evaluate the value of the legal divisions by head count and bottom line rather than the value they add.”

Peter Turner, CEO, Australian Corporate Lawyers Association

Respondents to the survey were asked to identify how best their in-house legal team demonstrates value to their organisation.

In-house counsels' ability to 'reduce legal risk' and to 'achieve the timely resolution of legal problems' were regarded by respondents as most demonstrative of value. (Figure 7)

Perhaps surprisingly, 'reducing external legal expenditure' was regarded as the least important of the five options by the in-house counsel respondents.

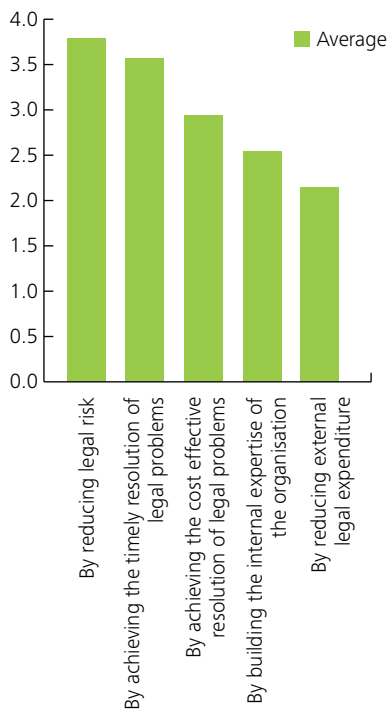
This result was endorsed by the general counsels that attended the Deloitte Roundtable. Each held the view that whilst closely managing external legal expenditure was a critical part of a general counsel's role, extracting value from external legal service providers gives greater benefits to an organisation than simply controlling external legal costs.

Time sheets

Traditionally within the broader legal profession, the 'value' a lawyer brings to the practice has been measured by time utilisation based on time sheets.

Interestingly, only 22% of in-house counsel survey respondents indicated that their organisation uses time recording systems or time sheets. The small number of in-house legal teams using time sheets may suggest that they are not perceived to be an appropriate measure of the value that in-house counsel add to their organisation.

Figure 7
Question 22: In what ways does your legal team best demonstrate its value to your organisation?



Source: Deloitte

Utilisation is not necessarily a good measure of the value that in-house counsel add to their organisation.

Legal risks

The survey respondents indicated that in-house counsel best add value to their organisation by reducing legal risk. But what are these risks?

Respondents were asked to prioritise the following issues in terms of the greatest legal risk posed to their organisation:

- maintaining regulatory compliance
- the rise of shareholder or other class actions
- continuous disclosure obligations
- security of organisational and employee data
- the management and retention of electronic records
- the preservation of legal professional privilege.

Of the six options provided, respondents concluded that maintaining regulatory compliance is the greatest legal risk currently facing organisations.

Survey respondents ranked the following risks as having similar priority:

- the security of organisational and employee data
- the preservation of legal professional privilege
- the management and retention of electronic records.

Managing continuous disclosure obligations and dealing with the rise of shareholder class actions were regarded by respondents as lower priorities.

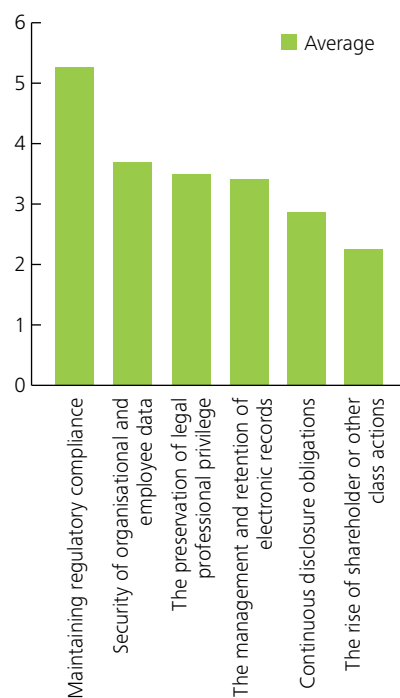
The need to preserve legal professional privilege in respect of the communications of in-house counsel has been a long running challenge for the profession. It is fundamental to the value proposition of in-house counsel that they can provide their clients with privileged legal advice without needing to retain external legal counsel.

In-house counsels' ability to claim privilege for the advice they provide has been a topic of debate within legal and political circles for many years. It is not surprising that the survey respondents regard the loss of legal professional privilege as a significant legal risk.

Maintaining regulatory compliance is the greatest legal risk currently facing organisations.

Figure 8

Question 23: Please prioritise the issues from the below list in terms of the possible legal risk they pose to your organisation.



Source: Deloitte

Electronic records

The survey results reveal that the rise of electronic communication and data storage is perceived to have created significant legal risk for organisations.

At the Deloitte Roundtable discussion, general counsels indicated that breaches of data security had the potential to bring about not only reputational damage but significant financial loss. Recent cases in the United States and United Kingdom involving the loss or theft of electronic data bear this out.

Similarly, in Australia, the credibility of some organisations has suffered significant brand damage as a result of their apparent failure to retain successfully, and then produce on demand, company records.

The production of electronic records to regulators and for use in litigation is clearly on the rise. More than half of the survey respondents (56%) indicated that their organisation has been required to produce documents in electronic form in the past 12 months.

However, two thirds (62%) of survey respondents indicated that they are not confident that they could identify and produce all relevant electronic documents in response to a legal or regulatory request.

In-house counsels' concern is not surprising and is probably well founded given the volume of electronic data created and stored by most organisations on a daily basis.

At the Deloitte Roundtable most general counsels recognised that in-house counsel need assistance from IT and data experts to ensure that their legal obligations to produce electronic documents are met. This may be why more than half of the survey respondents (53%) believed that electronic production and discovery will increase the costs of litigation.

“Corporate in-house counsel are increasingly placing a greater value on the benefits of being eDiscovery compliant to help come to terms with the identification, recovery and understanding of all available sources of electronic evidence in a timely and cost effective manner.”

Nicholas Adamo, Deloitte Forensic Partner

Legal disputes

Retaining external experts to assist in-house counsel to avoid legal risk or resolve legal problems is not new. Traditionally, in-house lawyers have retained external law firms to provide legal advice or to supplement in-house resources.

However, almost 80% of survey respondents indicated they retain external consultants for non-legal advice. Similarly, in terms of the use of non-legal subject matter experts, a further 16% of respondents recruit the appropriate resources in-house. Finally, a small percentage (4.8%) arrange a secondment to access the expert advice.

As outlined on page 5, 93% of in-house counsel survey respondents anticipate their organisation's legal disputes will be resolved by negotiation, rather than judicial determination.

“The Deloitte experience indicates that in-house counsel are engaging external consultants to assist with dispute negotiations.”

David Watt, Deloitte Forensic Partner

Research methodology

The research findings of this report were based on primary research conducted by Deloitte Forensic in November 2008, compiled from members of the Australian Corporate Lawyers Association attending its National Conference in Sydney in November. This was then further supplemented by an on-line survey of its ACLA members in early December 2008.

There were 209 respondents.

The most common profile of respondents is a practitioner with more than 10 years experience (60% of respondents), having worked in an in-house role between two and six years (33.3%) with up to five corporate counsel (53.3%). The respondents were employed in a wide range of organisations and industries.

Figure 9
Respondents by industry sector

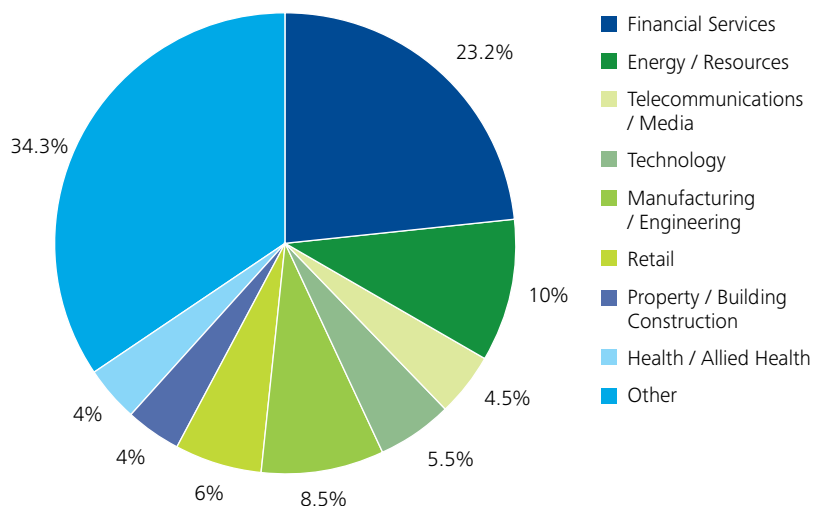
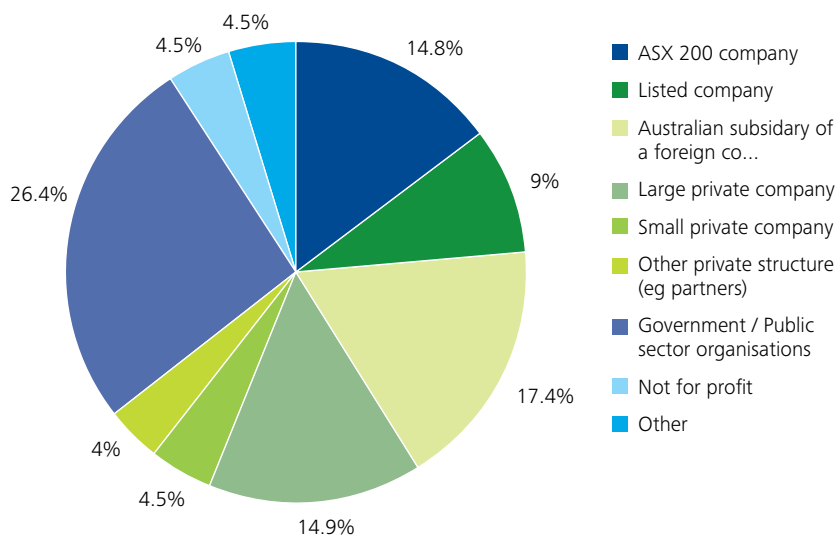


Figure 10
Respondents by type of company



Contact us

Forensic Foresight is about creating frameworks for managing commercial disputes, litigation and regulatory issues before they occur, as these are key components to help corporate counsel's plan ahead so that they win commercially, not just legally.

In addition, we provide the following services:

Dispute Solutions

The Dispute Solutions team provides accounting and financial advice through all phases of a dispute from preliminary investigations to settlement negotiations, and if required, expert evidence in Court. The Dispute Solutions team can assist in-house counsel with:

- commercial and insurance disputes
- regulatory investigations
- responding to the threat of class actions
- business valuations
- business interruption claims
- royalty investigations.

Forensic Data®

Deloitte Forensic Data® is Australia's largest team of recognised forensic technology experts helping in-house counsel to navigate legal, regulatory and statutory investigations by the identification, recovery and understanding of all available sources of electronic evidence in a timely and cost effective manner.

The Forensic Data® team specialises in:

- data recovery – recovery of data from all forms of corrupted or damaged electronic storage media
- data conversion – conversion of both legacy storage media and data formats
- computer forensics – including the collection, preservation, analysis and presentation of electronic evidence
- electronic discovery – the forensically sound collection, indexing and presentation of electronic data.

Financial Crime

Deloitte's Financial Crime team provides specialist advice and solutions to help in-house counsel manage a broad spectrum of financial crime matters including:

- government and corporate fraud investigations
- workplace misconduct investigations
- international bribery and corruption investigations and risk management
- financial crime risk including fraud risk management, strategy and policy development, education and training, risk management plans
- anti-money laundering program reviews and risk assessments
- counter-terrorism financing, and economic trade sanctions compliance
- global asset tracing and recovery.

Analytic Insights®

The Analytic Insights® team has the skills and technology to analyse large volumes of electronic data and provide objective insights relating to legal disputes, compliance and operational efficiency. Analytic Insights® assist in-house counsel with:

- quantification of loss and damage
- legislative compliance (including tax, payroll and superannuation)
- expense and corporate credit card compliance
- share registry analysis and class action support
- insider trading detection
- price fixing determination and testing
- quantification and analysis of legal expenditure
- cost base analysis and benchmarking for in-house legal teams.

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