



Deloitte Forensic Corporate Counsel Survey 2010

Do today's corporate
counsel hold all the cards?

“Once viewed as
the second tier
of the profession,
corporate counsel
are now calling
the shots...”

Zoe Lyon, Lawyers Weekly, 14 August, 2009

Introduction

Do today's corporate counsel hold all the cards?

In 2009 the global financial crisis brought with it unprecedented economic challenges.

These challenges forced corporate Australia to scrutinise many of the ways it does business. In particular, organisations were forced to focus acutely on cost control and improving business efficiency as a means of enduring external financial pressures.

Interestingly, the volatile times that have characterised the past few years may also have contributed to a positive shift in the perception of the role played by corporate legal counsel in the boardrooms of Australia.

The results of Deloitte's third annual Corporate Counsel Survey indicate that in recent years the status of corporate legal counsel in Australia has improved substantially. The data suggests that corporate counsel are entrenched as trusted advisors to senior executives, often in preference to external advisors. They now hold a broader, more complex range of legal and other responsibilities within the organisations to which they belong.

In this Survey of 200 Australian corporate legal counsel, Deloitte Forensic sought to determine whether corporate counsel do 'hold the cards' in the Australian legal profession.

Responses clearly indicate that corporate counsel increasingly 'hold the cards'. Not only has the standing of corporate counsel improved significantly, but the roles and responsibilities of corporate counsel in Australia have evolved substantially over the past five years.

The view of the general counsel that attended a roundtable discussion at Deloitte to consider the results, was that corporate counsel in Australia currently 'hold all the right cards', but until there is greater certainty in respect of corporate counsels' ability to maintain legal professional privilege, they will not 'hold all the cards'.

In 2010, Deloitte has extended the corporate counsel survey to five other regions, including the United States of America, the United Kingdom, Canada, Japan, South East Asia and South Africa. The results are expected to be released later in 2010.

Locally, Deloitte would like to thank the Australian Corporate Lawyers Association (ACLA) and its members for their ongoing support of the Survey and those general counsel that attended the roundtable discussion.

We hope that the Survey provides you with food for thought and we welcome your feedback.

Yours sincerely,

Nicholas Adamo
Partner

Deloitte Touche Tohmatsu
Forensic

Victoria Sweetman
Forensic Counsel

Deloitte Touche Tohmatsu
Forensic

Contents

Introduction	i
About this report	2
Executive summary	3
Survey results	5
A General counsel	6
1. Reporting lines	6
2. Seeking legal advice	7
3. Responsibilities	8
4. Influence	9
5. Perception	10
B In-house legal team	11
1. Outsourcing	11
2. Value of in-house legal teams	12
3. Delivery of advice	13
4. Legal risks	14
5. Regulator activity	15
6. Regulator communication	15
7. Litigation and disputes	16
8. Electronic records	17
9. The challenges associated with managing electronic records	18
Research methodology	19
About Deloitte Forensic	20
Contact us	21

About this report

Two hundred corporate counsel responded to a Deloitte DTermine online survey (Survey) between November 2009 and January 2010.

Respondents were either clients of Deloitte in Australia or members of the Australian Corporate Lawyers Association (ACLA).

This is the third Corporate Counsel Survey Report conducted by Deloitte since 2008. The survey respondents were asked a series of 22 questions. Some questions related to corporate counsels' current practices and others asked them to compare practices to five years ago.

In addition to the Survey, a roundtable discussion of the Survey results was held at Deloitte on 17 February 2010 and was attended by representatives of ACLA and seven general counsel from a range of private and public sector organisations.

Deloitte makes no representation or warranty about the accuracy of the information or how closely the information gathered in the survey will resemble actual practices by corporate counsel. Circumstances might have changed since the time this information was gathered, and this Survey does not take such matters into account.

All responses and weighting methods are confidential and only aggregate responses have been reported. We have compiled the information into a series of graphs and have drawn certain conclusions about corporate counsel based on a weighting that we have allocated to these responses. The graphs and our conclusions are based on the answers we received in the survey and the weightings given to those responses.

About Deloitte Forensic

Deloitte Forensic is the pre-eminent forensic practice in Australia. Our team of 195 staff brings together unrivalled multi-disciplinary expertise to assist clients. Our services include Deloitte Forensic Solutions, Deloitte Discovery and Deloitte Analytics.

For more information on their services, please refer to: **www.deloitte.com.au**

Executive summary

A General counsel

- **Reporting lines:** Five years ago, 40% of general counsel were members of their organisations senior management or executive team. This figure has increased to 63% today
- **First contact for advice:** Five years ago, 64% of senior management would first seek legal advice from their organisation's general counsel. This figure has increased to 92% today
- **Non-legal roles:** In the past five years, the number of non-legal roles held by a general counsel in an organisation has increased from approximately 2.4 roles to 3.7 roles. The most common non legal roles are company secretarial responsibilities, regulatory compliance responsibilities and risk management responsibilities
- **Influence:** 71% of respondents indicated that the general counsel of a large organisation is perceived to hold greater influence in a business environment as compared to a partner in a large law firm.
- **Public standing:** 77% of respondents agreed that in the past five years the standing of corporate counsel has improved in both the legal profession and the corporate community.

B In-house legal team

- **Amount of outsourcing:** 59% of respondents indicated that the percentage of legal work outsourced to an external law firm has decreased in the past five years
- **Reasons for outsourcing:** The top three reasons for outsourcing legal work have not changed over the past five years. They are the need for greater specialist expertise, the need for additional legal resources and the complexity of the legal work
- **Value:** 61% of respondents believed that for an in-house legal team to best demonstrate value to their organisation they should strive to reduce external legal expenditure
- **Regulatory activity:** 82% of respondents reported an increase in regulatory activity in the past year. The most common form of regulatory activity was the service of subpoenas seeking document production
- **Dispute resolution:** Eighty-two percent of respondents indicated that their organisation's disputes are resolved by negotiated settlement. Five years ago this figure was 74%
- **E-discovery:** 59% of respondents have been required to produce electronic documents in the past year
- **Regulatory documentation requests:** 47% of respondents were not confident that they could produce all relevant electronic records in response to a legal or regulatory request to do so
- **Volume of records:** The most significant challenge faced by corporate counsel when dealing with electronic records was volume. Gaining the co-operation of business units to access electronic records and the preservation of legal professional privilege also remain key challenges.

Survey results

A. General counsel

1. Reporting lines of general counsel

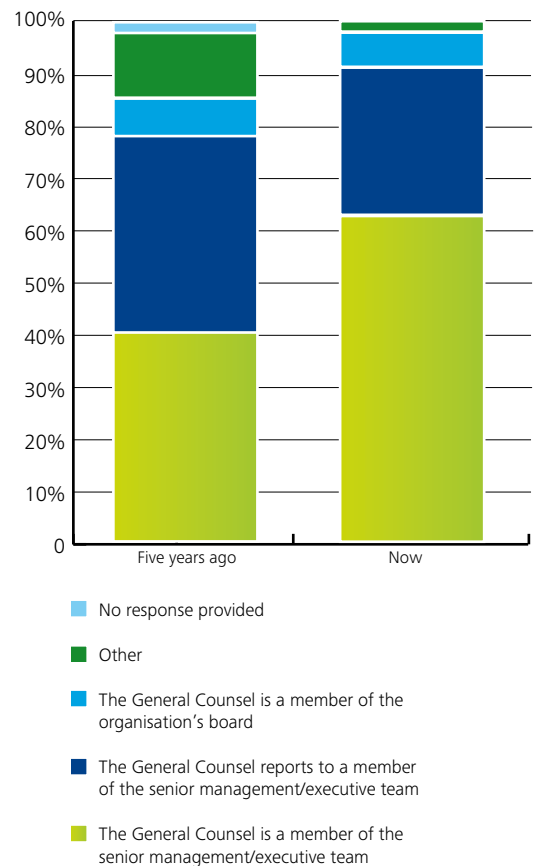
The respondents indicated that five years ago, only 40% of general counsel were a member of their organisation's senior management or executive team. This figure has increased over the past five years to more than 63% of general counsel holding senior management or executive team roles.

The corollary of this finding is that the percentage of general counsel who report into the senior management team has declined in the past five years from 38% to 28%. This presumably reflects the fact that in some organisations, the general counsel has been promoted to become a member of the senior management or executive team, whereas in the past they were direct reports to a senior management or executive team.

The number of general counsel holding board positions has remained virtually unchanged in the past five years, with the Survey revealing that both five years ago and today six percent of general counsel were members of the respondents' boards.

Figure 1

Which reporting lines apply to the most senior general counsel in your organisation?



Source: Deloitte Corporate Counsel Survey Australia 2010

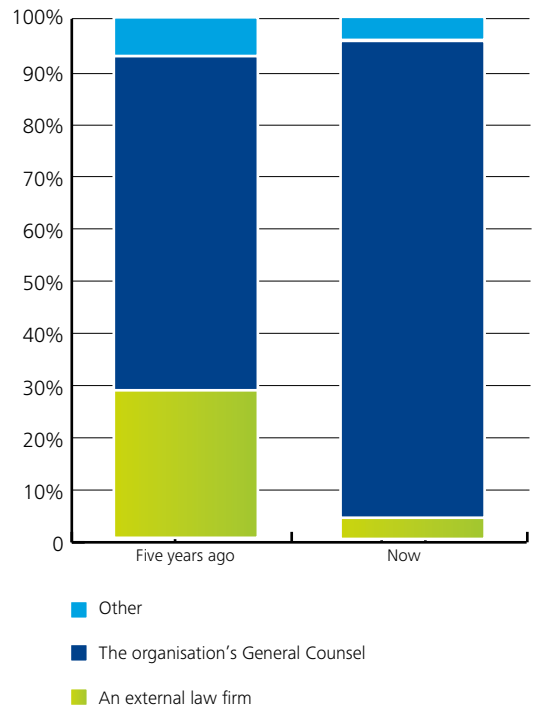
2. Seeking legal advice internally or externally

The Survey indicates that when senior management are faced with a serious legal or regulatory issue, they first seek advice from the organisation's general counsel before seeking advice from an external law firm.

Respondents indicated that five years ago they expected that only 64% of senior management would first seek legal advice from the organisation's general counsel. This figure has now increased to 92%.

Figure 2

If a serious legal or regulatory issue were identified in your organisation, from whom would your senior management first seek legal advice?



Source: Deloitte Corporate Counsel Survey Australia 2010

3. Responsibilities of the general counsel

The role and responsibility of an organisation's general counsel are increasingly expanding beyond just the provision of legal advice.

The Survey results indicate that over the past five years, both the nature and number of non legal roles held by general counsel have increased.

Overall, respondents to the survey reported that in addition to being an organisation's chief legal officer, the most common additional roles held by the general counsel include:

- Company secretarial roles and responsibilities
- Regulatory compliance responsibilities
- Risk management responsibilities.

Although the proportion of general counsel holding these additional positions has remained largely unchanged, the Survey reveals that the number of non-legal roles and responsibilities held by each general counsel has increased from an average of 2.4 roles per person to 3.7 per person.

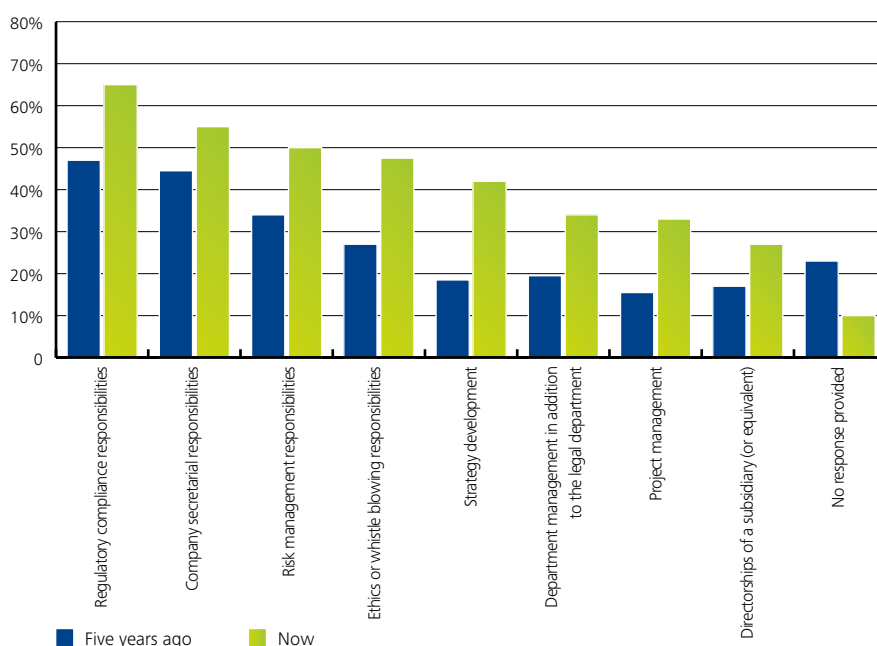
Some of these additional roles include managing ethics or whistle blowing programs, strategy development, project management responsibilities, holding directorships within an organisation and managing departments other than the in-house legal department.

In the past five years general counsel have increasingly taken on strategy development roles (five years ago 18% of general counsel held these roles; now this figure is 42%) and management of ethics and whistle blowing programs (five years ago 27%; now 48%).

Whilst the general counsel at the Deloitte roundtable discussion embraced the challenges that the expanded roles can bring, they were cautious about the impact that the new, non-legal roles can have on the independence of general counsel and the implications that this may have on their ability to seek and maintain legal professional privilege.

Figure 3

Please indicate whether the general counsel of your organisation has held or currently holds any of the following responsibilities



Source: Deloitte Corporate Counsel Survey Australia 2010

4. Influence of general counsel

The responses to this question has revealed a shift in the perceived status of general counsel in the past five years.

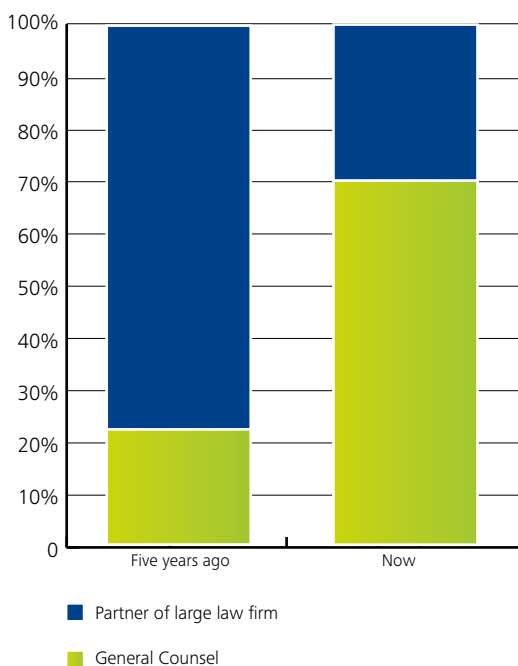
Respondents indicated that five years ago a partner of a large law firm would be perceived to carry greater influence in a business environment, when compared to a general counsel of a large organisation. Seventy-six percent (76%) of respondents held this view.

Today the perceived balance of influence has changed dramatically, with 71% of respondents indicating that a general counsel of a large organisation is perceived to hold greater influence in a business environment when compared to a partner in a large law firm.

Interestingly, the Australian Corporate Lawyer Association (ACLA) estimates that approximately 25% of all Australian legal practitioners now work as corporate counsel in either the private or public sector.

Figure 4

In your opinion, which role is perceived to carry greater influence in a business environment?



Source: Deloitte Corporate Counsel Survey Australia 2010

5. Perception of corporate counsel

The results also show that according to the respondents, the perceived standing of corporate counsel has significantly improved over the past five years.

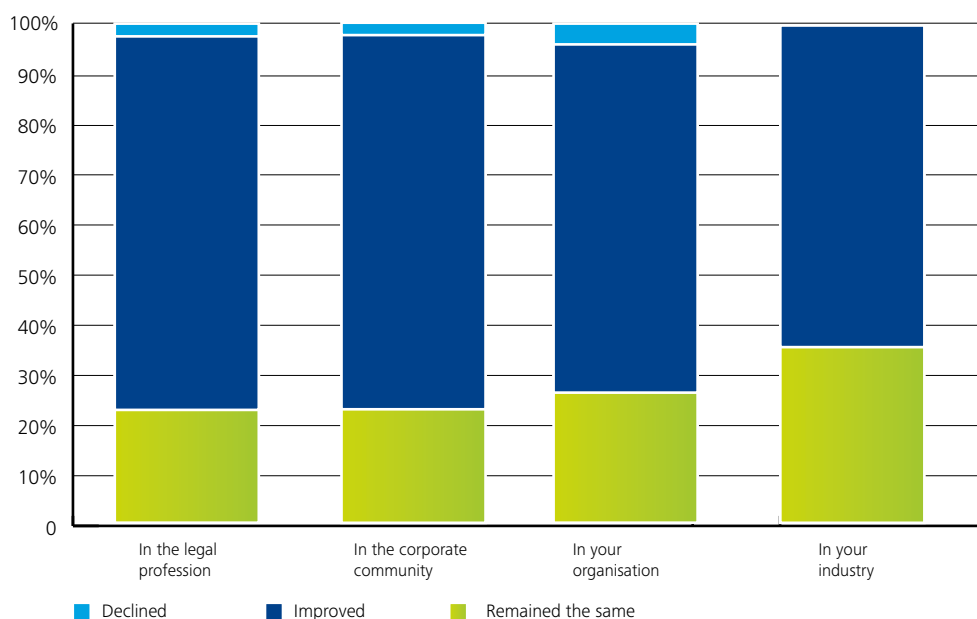
Seventy-seven percent (77%) of respondents indicated that in the past five years the standing of corporate counsel has improved in both the legal profession and the corporate community.

Seventy percent (70%) of respondents also indicated that in their view, the standing of corporate counsel has improved within their organisations. Sixty-four percent (64%) of respondents believed that the standing has also improved in the industries in which they work.

One general counsel at the Deloitte roundtable discussion suggested that this may be attributed to the fact that public and private sector organisations, along with the legal profession, better understand the value proposition of an in-house legal team and the benefits these teams bring to an organisation.

Figure 5

In your view, in the past five years has the perceived standing of corporate counsel changed in either of the following ways:



Source: Deloitte Corporate Counsel Survey Australia 2010

B. The in-house legal team

1. Outsourcing

The majority (59%) of respondents indicated that the percentage of legal work outsourced to external law firms has decreased in the past five years.

Only 18% of respondents indicated that the percentage of outsourced work has remained the same.

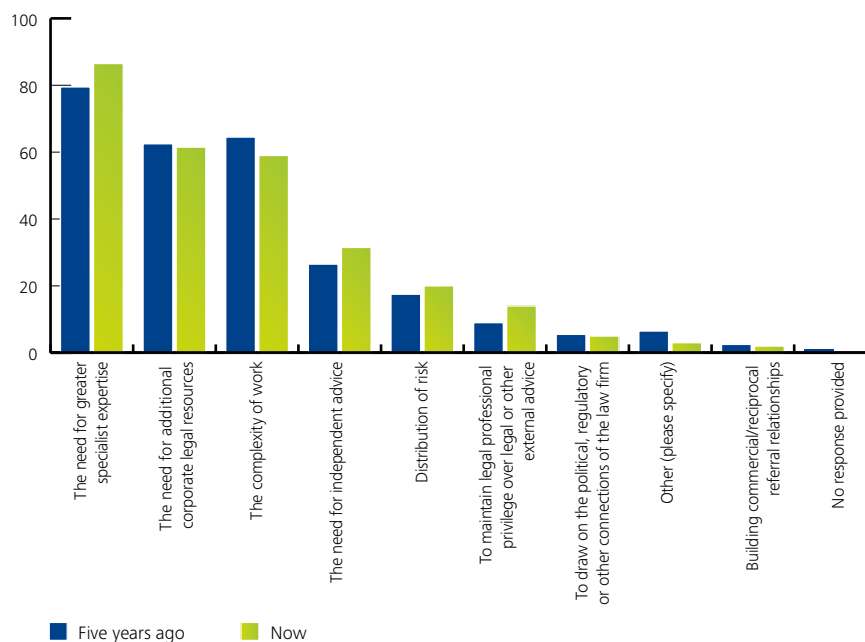
Over the past five years the reasons for outsourcing legal work to external law firms has not changed. The top three reasons for outsourcing are:

- The need for greater specialist expertise
- The need for additional legal resources
- The complexity of the legal work.

At the Deloitte roundtable discussion, the reasons for the decline in outsourcing generated much debate. Most agreed that the organisations they work within now have a clear expectation that outsourcing to an external law firm is the exception, not the rule.

Figure 6

From the following options, please rate those that best identify why you would outsource legal work to an external firm? Please identify up to three selections



Source: Deloitte Corporate Counsel Survey Australia 2010

2. Value of in-house legal teams

During times of financial pressure, business lines that do not directly generate income for an organisation are bound to face close scrutiny and will need to demonstrate their value.

In-house legal teams are not immune from this scrutiny.

The Survey revealed that 70% of respondents believe that in the past five years the ways in which corporate legal teams demonstrate value to their organisations has changed.

Survey respondents were asked to identify the top three ways in which they believed a legal team could best demonstrate its value.

According to Survey respondents, five years ago corporate legal teams best demonstrated value by:

- Achieving the best legal outcome for their organisations (60%)
- Reducing legal risk (58%)

- Achieving the timely resolution of legal problems (54%)
- Reducing external legal expenditure (53%).

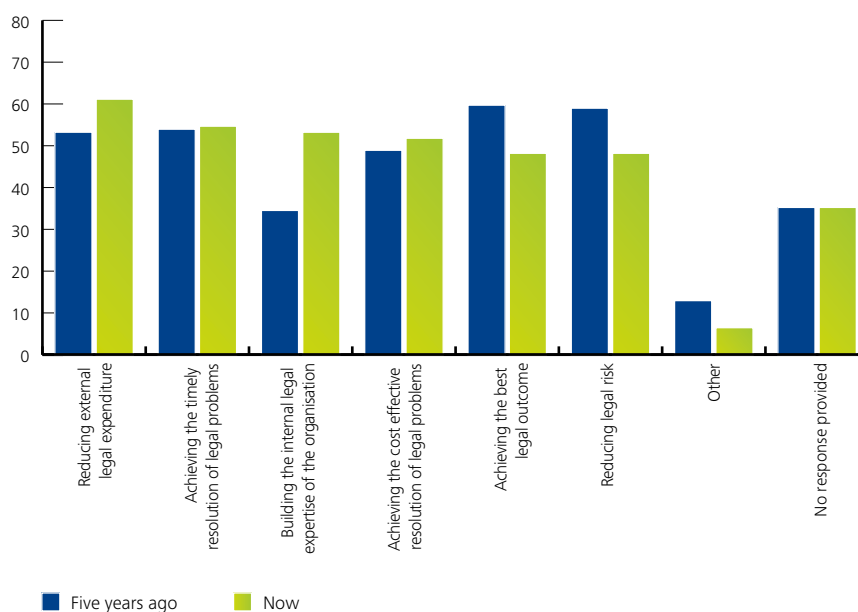
Perhaps not surprisingly in the current economic climate, the order of these priorities has changed so that to demonstrate value, corporate legal teams strive to:

- Reduce external legal expenditure (61%)
- Achieve the timely resolution of legal problems (55%)
- Build the internal legal expertise of the organisation (53%)
- Achieve the cost effective resolution of legal problems (52%)
- Reduce legal risk (48%).

Several general counsel at the Deloitte roundtable discussion believed that having a good in-house legal team actually gives companies a competitive advantage and that senior management teams were increasingly recognising and rewarding this value.

Figure 7

Please select the top three activities or outcomes you feel are the most demonstrative of value



Source: Deloitte Corporate Counsel Survey Australia 2010

3. Delivery of advice

Ninety-five percent (95%) of survey respondents believe that corporate counsel have influenced the way in which external law firms provide legal services. Specifically, 52% of respondents believe they have exercised some influence, while 43% believe that they have exercised considerable influence.

This influence has affected the methods by which external advisors deliver advice and other services to corporate counsel, with almost two thirds (64%) of respondents indicating that the methods external law firms and professional services firms use to deliver advice have changed.

Five years ago, legal and other advice was most often set out in formal written reports (36%) and oral advice given either in a conference (14%) or over the telephone (13%).

Today, the prevalence of formal written reports has diminished dramatically to about 6%.

Not surprisingly, the predominant form of legal advice is now delivered by email (38.5%). The provision of oral advice over the telephone has increased in popularity for almost 26% of respondents.

As shown from other Survey results, the preference for email and electronic communication can raise other challenges for corporate counsel in relation to the use, management and retention of electronic records.

4. Legal risks facing organisations

The respondents were asked to indicate which of the following posed the greatest risk to their organisations:

- Maintaining regulatory compliance
- Defending against shareholder class actions
- Complying with stock market disclosure obligations
- Maintaining security of organisational and employee data
- Handling, managing and retaining of electronic records
- Preserving legal professional privilege.

The 2010 Survey reveals that maintaining regulatory compliance of an organisation is the greatest legal risk faced by the corporate counsel surveyed.

When comparing the responses of 2010 Survey to those of the 2009 inhouse counsel Survey, the key risks remained consistent.

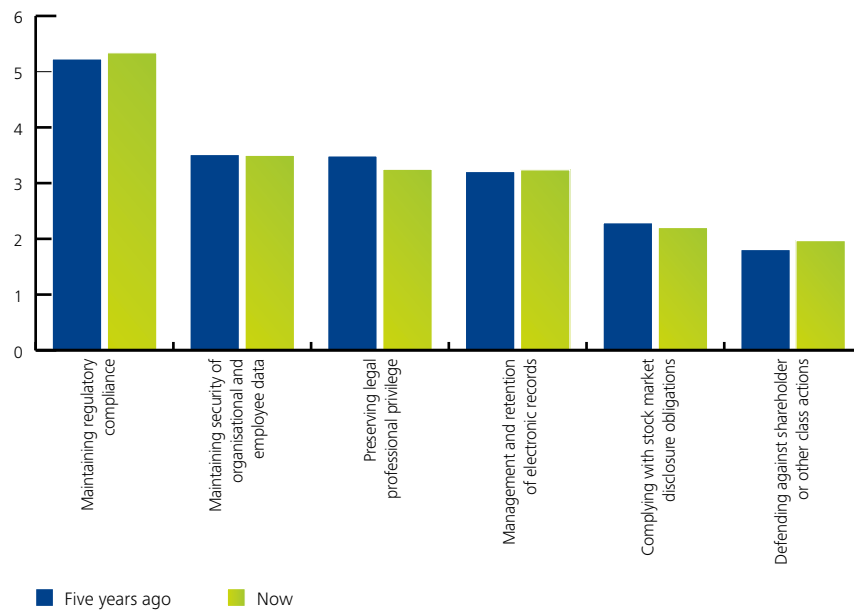
In both the 2009 and 2010 Surveys, respondents ranked the following risks as having similar priority:

- The maintenance and security of organisational and employee data
- The preservation of legal professional privilege
- The handling, managing and retaining of electronic records.

The results of both the current and previous year's Surveys indicate that complying with stock market disclosure obligations and defending against shareholder class actions are regarded as less serious legal risks.

Figure 8

Please prioritise the issues from the list below according to which pose the greatest possible legal risk to your organisation



Source: Deloitte Corporate Counsel Survey Australia 2010

5. Regulator activity

Last year's survey foreshadowed an expected increase in regulatory activity during 2009.

Not surprisingly, 82% of this year's survey respondents reported that they had seen increased regulatory activity in the past 12 months.

Eighty-three percent (83%) of respondents indicated that the regulators' primary activity in the past year was conducting investigations.

According to respondents, other forms of regulator activity were the:

- Service of subpoenas for document production (37%)
- Seeking of formal undertakings (31%)
- Filing of civil legal proceedings (28.5%)
- Service of subpoenas to interview witnesses (24.5%).

Survey respondents noted that five years ago, regulatory activity took the form of:

- Conducting investigations (74%)

- Serving subpoenas for document production (32%)
- Seeking formal undertakings (20.5%);
- Serving subpoenas to interview witnesses (10.5%)
- Filing civil proceedings (16%).

In line with current market conditions, the Survey respondents have identified that regulators are currently most interested in:

- Breaches of directors' and officers' duties (51.5%)
- Breaches of competition/anti-trust laws (50.5%)
- Breaches of stock market disclosure rules (37%)
- Breaches of insider trading laws (30%).

General counsel that attended the Deloitte roundtable discussion agreed there had been a considerable increase in regulatory activity in the past year and that they did not expect this to decrease during 2010.

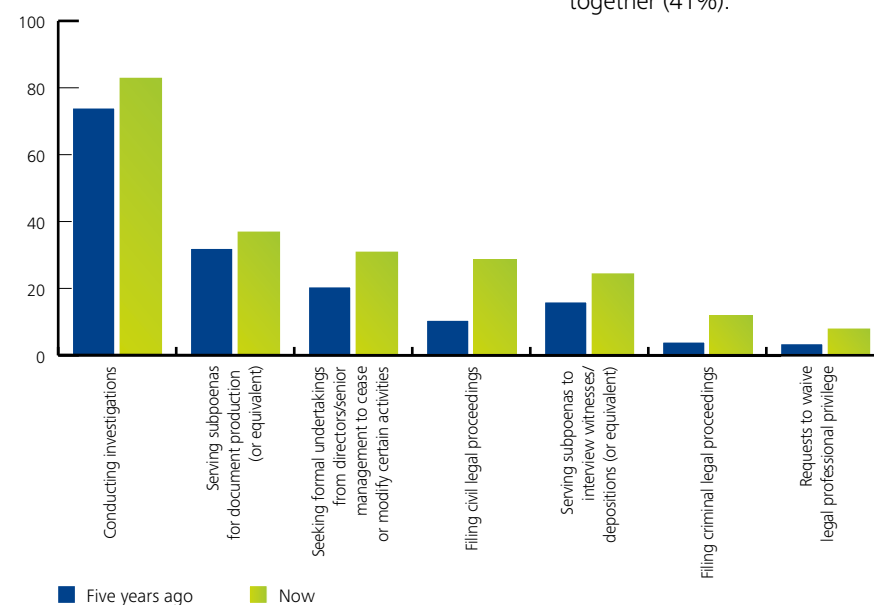
6. Communicating with regulators

Respondents to the Survey believe that corporate counsel play a significant role when communicating and dealing with regulators.

Ninety percent (90%) of respondents stated that communications with regulators are handled exclusively by corporate counsel (48%) or by corporate counsel and external law firms together (41%).

Figure 9

In your experience, what is the focus of the regulator's attention?



Source: Deloitte Corporate Counsel Survey Australia 2010

7. Litigation and disputes

The corporate counsel surveyed in the last survey expected to see an increase in commercial and legal disputes in 2009, presumably instigated by the tougher economic times that accompanied the global financial crisis.

This prediction would appear not to have come to pass.

Respondents have indicated that there has been little or no increase in the number or volume of large litigated disputes (involving more than \$US5m) during the past five years.

Not only is there less litigation, but respondents confirmed the trend towards resolving legal disputes by negotiation.

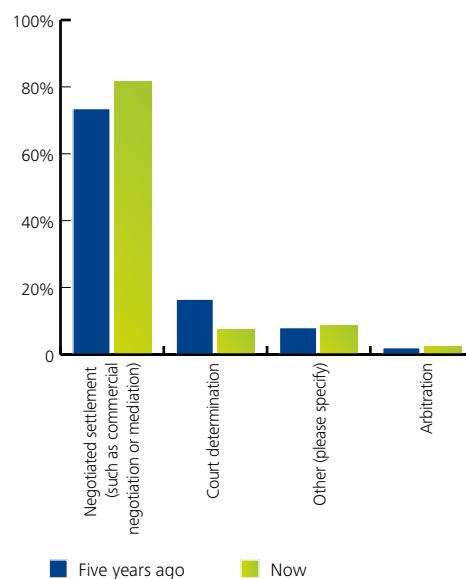
In the past five years, respondents reported an increase from 74% to 82% of all disputes being resolved by negotiated settlements, as opposed to judicial determination.

This result is consistent with the 2009 Survey where 93% of respondents expected to see their organisation's disputes resolved by a negotiated settlement.

The general counsel that attended the Deloitte roundtable discussion echoed the Survey's findings. They agreed litigation is now regarded as an option of last resort.

Figure 10

Traditionally, how have your organisation's commercial or regulatory disputes been resolved?



Source: Deloitte Corporate Counsel Survey Australia 2010

8. Electronic records

There has been a proliferation in the use of email and other electronic forms of communication in the past five years. This increase has posed particular challenges for corporate counsel and the organisations to which they belong.

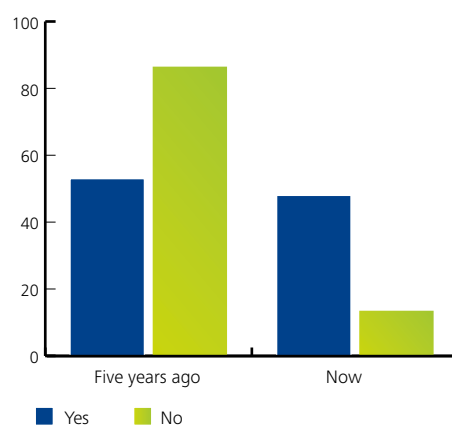
Survey respondents indicate that the number of organisations that have policies for the management and retention of electronic records has increased considerably, from 53% five years ago to 86% today.

The need for these policies is apparent, given that 59% of respondents have been required to produce electronic documents to regulators or in the context of litigation in the past 12 months. This figure is consistent with responses to the same question in the 2009 Survey, where 56% of respondents had been required to produce documents in electronic form in the past 12 months.

Corporate counsel are more confident now than they were five years ago of being able to produce all relevant electronic records when required (from 21% of respondents being able to do so five years ago to 53% now). However, almost half of the corporate counsel surveyed (47%) were not confident that they could produce all relevant electronic records in response to a legal or regulatory request to do so.

Figure 11

Does your organisation have a policy on the management and retention of electronic records?



Source: Deloitte Corporate Counsel Survey Australia 2010

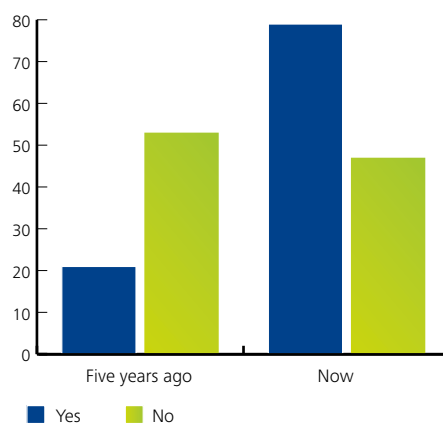
9. The challenges associated with managing electronic records

The majority of Survey respondents agreed that they faced challenges when gathering, sorting and preserving electronic information. The most significant challenge faced by corporate counsel over the past five years is the volume of electronic documents (80.5%) followed closely by the time (60%) and cost (55.5%) of gathering the information.

Gaining the co-operation of business units to access electronic data, and the preservation of legal professional privilege, remain key challenges.

Figure 12

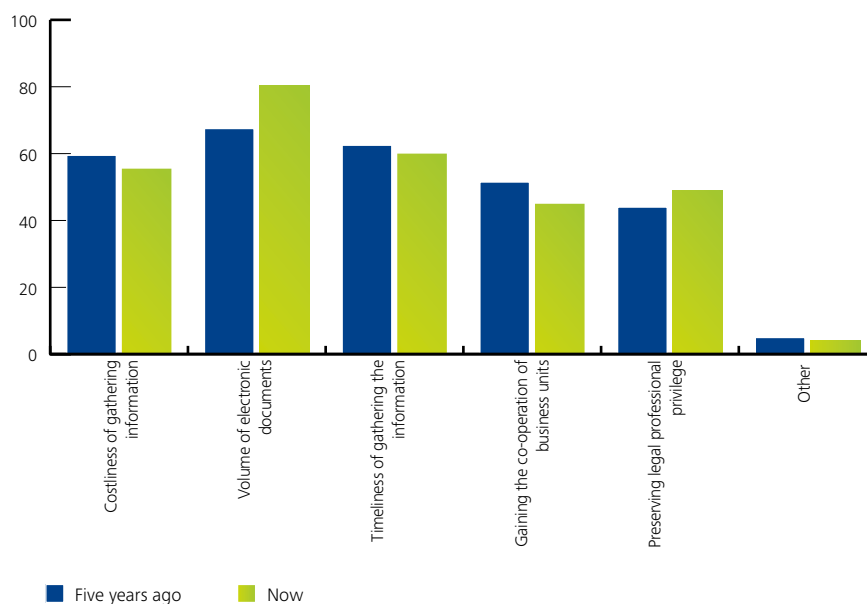
If your organisation had to respond to a legal or regulatory request to produce documents, are you confident that you could identify and produce all relevant electronic documents?



Source: Deloitte Corporate Counsel Survey Australia 2010

Figure 13

In the past five years, has your organisation faced challenges when gathering, sorting, and preserving information related to litigation matters?



Source: Deloitte Corporate Counsel Survey Australia 2010

Research methodology

Demographics

The research findings of this report are based on an online survey and research conducted by Deloitte Forensic in December 2009 and January 2010, compiled from responses by members of the Australian Corporate Lawyers Association and Deloitte clients.

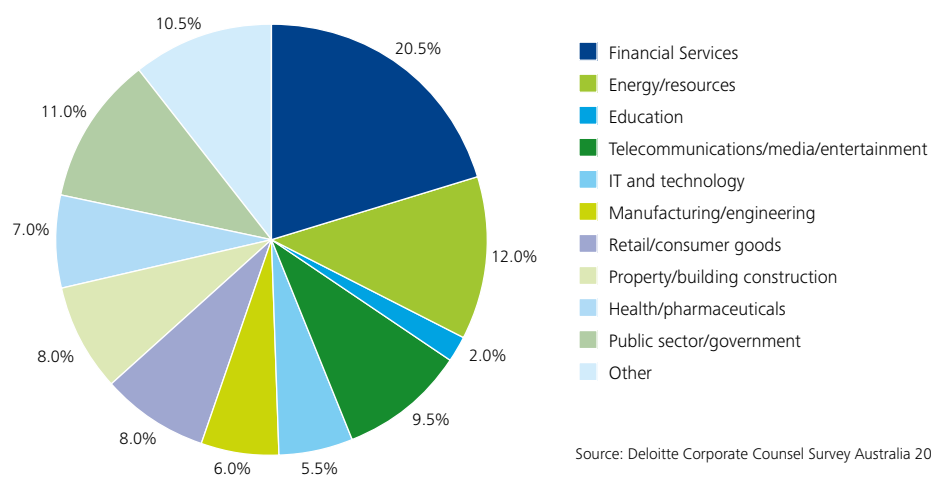
There were 200 respondents.

The most common profile of respondents is a legal practitioner operating in the role of General Counsel, Chief Legal Officer or equivalent (45%), having worked in the role for three to five years (31.5%).

A large number of the respondents (48%) work for either a company listed on a stock exchange or a local subsidiary of a listed company. The remainder are split mostly between private companies (small and large combined to 22%) and government/public sector organisations (23%).

Figure 14

Respondants by industry



About Deloitte Forensic

Sometimes you need more than just good legal advice...

Deloitte Forensic provides the following services:

Deloitte Forensic Solutions

The Deloitte Forensic Solutions team provides investigative, financial and computer forensic support at all stages of a commercial, legal or regulatory dispute - from preliminary factual investigations to litigation support, and if required, expert testimony. The Deloitte Forensic Solutions team can assist corporate counsel with:

- 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
- Commercial and insurance disputes
- Regulatory investigations
- Responding to the threat of class actions
- Business and family law valuations
- Business interruption claims
- Royalty investigations
- Electronic data recovery
- Electronic data conversion
- Computer forensics – including the collection, preservation, analysis and presentation of electronic evidence.

Deloitte Discovery

Deloitte Discovery helps corporate counsel control the costs and mitigate the risks associated with the discovery process by:

- Maintaining chain-of-custody records and tracking activity to address authenticity of data and process concerns
- Providing experienced teams to recommend and implement solutions that fit the case at hand (and not a “one size fits all” solution)
- Coordinating discovery efforts including documentation for process reproducibility and transparent reporting
- Applying sophisticated techniques and use of software designed to meet the specific and unique requirements for each project
- Maintaining data security protocols, including the use of government-level data encryption
- Providing large-scale, redundant hosted environments for storage and access to discovery documents
- Providing around-the-clock customer service from Deloitte’s e-Discovery Technology & Innovation Centre
- Assisting companies in the development of litigation readiness programs. These programs can help companies to respond efficiently and effectively when faced with discovery requests.

Deloitte Analytics®

The Deloitte Analytics® 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. Deloitte Analytics® assist in-house counsel with:

- Quantification of loss and damage
- Legislative compliance (tax, payroll, superannuation etc)
- 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 bench marking for in-house legal teams.

Contact Us

Anthony Viel

National Forensic Leader
Tel: + 61 (0) 2 9322 7474
Email: aviel@deloitte.com.au

Frank O'Toole

National Leader, Forensic Solutions
Tel: + 61 (0) 2 9322 7328
Email: frotoole@deloitte.com.au

Nicholas Adamo

National Leader, Deloitte Discovery
Tel: + 61 (0) 2 9322 3045
Email: nadamo@deloitte.com.au

Mark Woodley

National Leader, Deloitte Analytics
Tel: +61 (0) 2 9322 7573
Email: mawoodley@deloitte.com.au

Victoria Sweetman

Forensic Counsel
Tel: +61 (0) 2 9322 5146
Email: vsweetman@deloitte.com.au

Contact us

Deloitte
225 George Street
Sydney NSW
Australia

Tel: +61 (0) 2 9322 7000
Fax: +61 (0) 2 9322 7001

www.deloitte.com.au

About Deloitte

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in 140 countries, Deloitte brings world class capabilities and deep local expertise to help clients succeed wherever they operate. Deloitte's 165,000 professionals are committed to becoming the standard of excellence.

Deloitte's professionals are unified by a collaborative culture that fosters integrity, outstanding value to markets and clients, commitment to each other, and strength from diversity. They enjoy an environment of continuous learning, challenging experiences, and enriching career opportunities. Deloitte's professionals are dedicated to strengthening corporate responsibility, building public trust, and making a positive impact in their communities.

Deloitte refers to one or more of Deloitte Touche Tohmatsu, a Swiss Verein, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/au/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu and its member firms.

About Deloitte Australia

In Australia, Deloitte has 12 offices and over 4,500 people and provides audit, tax, consulting, and financial advisory services to public and private clients across the country. Known as an employer of choice for innovative human resources programs, we are committed to helping our clients and our people excel. Deloitte's professionals are dedicated to strengthening corporate responsibility, building public trust, and making a positive impact in their communities. For more information, please visit Deloitte's web site at www.deloitte.com.au.

Liability limited by a scheme approved under Professional Standards Legislation.

Designed and produced by Aqua Media, AM_Syd_03/10_040821

© Deloitte Touche Tohmatsu Ltd, March 2010. All rights reserved.