Adapting to Change: Key Insights for In-House Counsel from Veteran GC David Cosgrave

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David Cosgrave, Of Counsel in Australia at the law firm Wasel & Wasel, is no stranger to navigating the complex and ever-evolving legal landscape. With years of experience serving as a General Counsel (GC), he understands the unique challenges and demands of the role. In a recent interview on The Corporate Counsel Show, Cosgrave shared his insights on hiring practices, risk management, and the role of in-house counsel in sensitive legal issues.

In-House Counsel: The Evolution and the Art of Adaptability

The role of in-house counsel has evolved significantly over the years, transforming from a strictly advisory role to an integral part of strategic business decision-making. This evolution calls for a new mindset, characterized by adaptability and a deep understanding of client motivations.

Reflecting on the changes in the legal field, an expert, David Cosgrave, provides some illuminating insights. With an extensive career as a General Counsel and currently Of Counsel at Wasel & Wasel, Cosgrave highlights that in his experience, the key to effectiveness in an in-house counsel role lies in understanding the nuances of motivations that drive various actors within an organization.

According to Cosgrave, the ability to truly comprehend the motivations of clients and stakeholders enables legal professionals to provide relevant and valuable advice. When

discussing legal issues that are not part of the everyday legal spectrum, such understanding of human motivations becomes critical. The ability to balance the risk with client goals is a skill that is refined with such understanding.

For example, consider a scenario where an athlete refuses to take a drug test. A legal professional, who has a grasp of the athlete's motivations and goals, would be better equipped to provide counsel that balances legal requirements and the athlete's interests.

Moreover, this capability to adapt, to understand motivations, and to balance risks with goals is not something that is confined to dealing with exceptional situations. Cosgrave emphasizes that it is the key to delivering optimal legal advice in all situations, thus reinforcing the need for in-house counsel to develop these skills and apply them in their roles.

Adaptability also implies a willingness to embrace the constant changes that are shaping the legal profession. In-house counsel roles today demand a heightened level of agility. This evolution can be largely attributed to the rise of technology, which has brought about new trends, developments, and challenges that are transforming the legal landscape.

Understanding and adapting to these changes is not just crucial for survival; it's also the key to leveraging the opportunities that come with these transformations. As Cosgrave articulates, the in-house counsel who manages to ride this wave of changes will have the upper hand in the new world of legal services. This adaptability may very well become the defining factor of success for in-house counsel in the years to come.

The evolving role of in-house counsel, thus, underscores the importance of a holistic approach to legal advice—one that

takes into account the motivations of clients, the balancing of risk with goals, and the willingness to embrace and adapt to change.

Technological Transformations: Rising to the Challenge

The proliferation of technology in every sector has necessitated a new level of adaptability and learning for in-house counsel. These professionals now need to grasp the fundamental working of emerging technologies to deliver optimal legal advice.

David Cosgrave's experience as the first external lawyer to the first internet service provider in Australia provides a fascinating lens to this reality. Having witnessed the internet's transformative impact firsthand, Cosgrave shares that it is essential for legal professionals to keep abreast of technology's fast pace, as it profoundly impacts the legal landscape.

In addition to an understanding of the current technology, Cosgrave highlights the need for legal professionals to anticipate the impact of future technologies. For instance, the advent of large language models like GPT and its successors could further transform the legal profession. Not only can these AI models automate routine tasks, but they also raise new legal and ethical questions, thereby challenging the traditional roles and practices of lawyers.

Yet, being tech-savvy is not about engaging in a never-ending arms race with emerging technologies. According to Cosgrave, it is more about understanding the basic principles of these technologies to navigate the legal challenges and opportunities they bring. This understanding allows legal professionals to strike a balance between leveraging technology and maintaining the human element in their work.

Cosgrave draws attention to a critical point in the discussion around technology and the legal profession – the importance of

maintaining an evergreen approach. This approach means focusing on perennial principles, those that remain relevant irrespective of the technological changes. These principles, such as understanding client motivations, balancing risk and goals, and embodying adaptability, have stood the test of time and will continue to guide in-house counsel amid technological upheaval.

For example, as artificial intelligence becomes more integrated into legal processes, there may be ethical and legal considerations that challenge established norms. An evergreen approach would ensure that in-house counsel maintain professional ethics and provide sound, balanced legal advice, despite the transformative effects of technology.

In-house counsel, thus, stand at the intersection of technology and traditional legal principles. The challenge and opportunity lie in embracing technology, understanding its impact, and adapting to the changes it brings, all while staying rooted in the evergreen principles of the legal profession.

The Evolving Role of General Counsel and the Legal Technician

As we continue to navigate through the rapid changes in technology, business environments, and societal norms, the roles of General Counsel (GC) and other legal professionals are also evolving. David Cosgrave suggests a shift from the traditional legal roles to a more goal-oriented approach to better serve clients.

Cosgrave mentions a trend of decreasing tenures for GC roles, shorter than the average CEO. This trend might be attributed to various factors such as increasing demands of the role, rapid changes in the business environment, and the stresses of managing risk in uncertain times. To succeed in this ever-changing landscape, GCs must adapt to new challenges and continuously learn and grow.

The traditional approach of focusing solely on legal risk is no longer sufficient. According to Cosgrave, GCs must balance risk management with goal achievement. This balance requires understanding the business's objectives, the risks involved in achieving these objectives, and providing legal advice that guides the business towards its goals without unnecessary legal exposure.

This shift in approach is a substantial transition from the traditional risk-averse mindset, requiring GCs to don a dual hat of a lawyer and a business advisor. Thus, the GC's role is expanding from providing legal advice to becoming strategic business partners, contributing to the organization's growth and success.

Another essential aspect of this evolving role is the differentiation between a lawyer and a legal technician. Cosgrave emphasizes that this understanding is crucial for in-house lawyers to adapt to future changes. The ability to distinguish between legal advice (a lawyer's domain) and the procedural handling of legal issues (the legal technician's domain) will become increasingly important, especially with the rise of legal technology solutions.

A lawyer's role extends beyond knowing the law; it involves interpreting the law in the context of the client's situation, considering the risks and goals, and providing comprehensive advice. On the other hand, a legal technician focuses on the procedural aspects, which are increasingly being automated.

Adapting to this changing landscape requires an open mindset and a willingness to learn and grow. Embracing new technologies, adapting to new roles, and maintaining an evergreen approach to legal practice will ensure that in-house counsel continue to deliver value and effectively serve their clients.

The legal profession is at a crossroads, with exciting

opportunities for those willing to adapt and grow. It is, therefore, a mix of optimism and apprehension, as GCs and other legal professionals navigate this changing landscape. But with adaptability, agility, and a focus on perennial principles, they will not only survive but thrive in this new era of law.

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Public procurement construction contract forms under the Austroads and the Australasian Procurement and Construction Council (APCC) Guide

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The Austroads and the Australasian Procurement and Construction Council (APCC) published in 2014 the Building and Construction Procurement Guide – Principles and Options, which outlines the various standard forms of contracts for different delivery models, as well as the dispute resolution procedures

available.

The most commonly used standard form of contract for major works construction is AS2124-1992. It is widely used for straightforward infrastructure projects in the civil (road and bridge) and non-residential building sectors. This contract form provides general conditions of contract that govern the rights and obligations of the parties involved. The traditional contract, which is the most common form of a construction contract, is an example of this.

In addition to AS2124-1992, other standard forms of contracts also exist. For instance, GC21 is the standard form of construction contract that is prescribed for use by NSW state agencies, and it is also used in the ACT. NPWC3-1981 is the National Public Works Committee form of contract (Edition 3), which was published in 1981 and is still in use by member agencies in the NT (both sectors) and VIC (road and bridge sector only). AS4000-1997 is the standard form that replaced AS2124-1992, but it has not been widely taken up by member agencies, particularly in the civil (road and bridge) sector.

Another delivery model is the design and construct (D&C) contract form, which is commonly used in D&C projects. AS4300-1995 is the most commonly used standard form of contract for this delivery model. However, other jurisdictions use agency templates or custom-designed agreements, such as GC21, NPWC3-1981, or modified versions of AS2124-1992.

Construction management is another delivery model used in the non-residential building sector. Modified versions of AS4916-2002 or AS2124-1992 are used in various jurisdictions. VIC agencies use either amended Department of Health construction management contracts or custom-designed agreements. In the civil (road and bridge) sector, construction management has only been used for road and bridge works procurements in the ACT, with a custom-designed agreement based on a standard ‘Project Management Agreement’

(PMA) being the form of contract.

The managing contractor delivery model is commonly used in the non-residential building sector. Modified versions of GC21 are used by NSW, SA, and the ACT. Other jurisdictions use agency templates or custom-designed agreements, such as the 'Managing Contractor Design and Construction Management' contract, which is the most common form of contract used for this delivery model in QLD. In the civil (road and bridge) sector, the managing contractor delivery model is currently only used in the NT, along with one previous use in VIC, supported by custom-designed agreements.

Direct managed arrangements in the construction industry utilize many different styles of contracts, predominantly short-form in-house trade agreements. Standard forms of contracts are not available for the Early Contractor Involvement (ECI) delivery model. However, some jurisdictions, such as QLD and WA, have their own form of contract based on two separate agreements for Stages 1 and 2, which have been extensively tailored on a case-by-case basis to meet the requirements of each project.

The alliance delivery model has a template 'Project Alliance Agreement', which was recently released by the Department of Infrastructure and Transport, to be used as the basis for contract documentation for all alliances, unless prior approval is given. For public-private partnership (PPP) delivery models, high-level commercial principles are described in the National Public Private Partnership Policy and Guidelines, which must be taken into account by member agencies as part of the drafting process for any standard or custom-designed PPP contracts. PPPs are outcome-based rather than prescriptive with respect to specifications, performance standards, etc., and as such, standard forms of contract are not available. However, agencies may have their own form of contract, such as in NSW, where the member agency utilizes in-house template PPP or Build Own Operate Transfer (BOOT) deeds

customized to accommodate project requirements.

Professional services arrangements in the construction industry are based on various forms of contracts, depending on the jurisdiction. AS4122-2010 is used by two jurisdictions (SA and TAS) as the basis for their professional services arrangements. The TAS agency also uses a whole-of-government 'Standing Offer for Services' form of contract for panel arrangements. The WA agency uses the 'Request Conditions and General Conditions of Contract' (2012), which is a document by the Government of Western Australia, Department of Finance. The remaining member agencies have their own standard in-house forms of contracts, which are tailored for each procurement. APCC member agencies use a mixture of AS4122 (2000 and 2010 versions), agency templates, and custom-designed agreements to secure their professional services arrangements.

Dispute resolution procedures in the construction industry in Australia are available to parties to help resolve disputes that may arise during the course of a project. These procedures aim to provide an efficient and cost-effective way to resolve disputes, without resorting to litigation. There are several dispute resolution procedures available, including negotiation, mediation, arbitration, and litigation.

The construction industry in Australia has various standard forms of contracts for different delivery models, which provide guidance on the contractual arrangements between the parties involved in the project. AS2124-1992 is the most commonly used standard form of contract for major works construction, but other standard forms of contracts also exist. Dispute resolution procedures, such as negotiation, mediation, arbitration, and litigation, are available to parties to help resolve disputes that may arise during the course of a project. By understanding the various contract forms and dispute resolution procedures available, parties can work together more effectively, and disputes can be resolved efficiently and effectively.

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Australia FIRB commercial land foreign investment guidance 2023

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Overview

In January 2023, the Foreign Investment Review Board issued a series of guidance notes to assist investors and stakeholders in their engagement with foreign investments in Australia. As a foreign investor, it is crucial to understand the intricacies of the Australian Foreign Acquisitions and Takeovers Act 1975, which requires foreign persons seeking to acquire an interest in commercial land to obtain foreign investment approval.

Developed commercial land has a monetary threshold of $310 million, while sensitive commercial land has a threshold of $67 million. However, if the foreign person is from a certain free trade agreement partner, the threshold is $1,339 million, regardless of the land's sensitivity. It is important to note that even if the proposed investment falls below the monetary threshold, foreign investment approval is still required if the land is considered "national security land."

Commercial land is defined as land in Australia, including any building on the land, or the seabed of the offshore area, other than land used wholly and exclusively for a primary production business or land on which the number of dwellings that could reasonably be built is less than 10. For an acquisition of vacant commercial land to be approved, it is generally conditional on the land being put to productive use within a reasonable timeframe. Additionally, an exemption certificate covering acquisitions of vacant commercial land for the purpose of undertaking a primary production business or residential development is conditional on Australian investors having an equal opportunity to invest in that land through an open and transparent sale process.

Foreign persons must keep records relating to certain actions concerning their foreign investment for up to five years. Applications for foreign investment approval must be submitted electronically on the Foreign Investment Review Board (FIRB) website and are supported by further guidance. A fee is payable for all foreign investment applications.

Breaches of foreign investment law may attract significant penalties, including infringement notices, civil, and criminal penalties. However, Part 3 of the Foreign Acquisitions and Takeovers Regulation 2015 provides a number of exemptions where an acquisition of commercial land may not be considered a notifiable action, a significant action, and/or a notifiable national security action, and may thus not need to be notified to the Treasurer.

Foreign persons must not take a notifiable and significant action or a notifiable national security action until they have received foreign investment approval for that proposed action. A proposed investment will be screened for foreign investment approval under the national interest test if it is a notifiable and significant action. If the proposed investment is a notifiable national security action and not also a significant action, it will be screened under the

narrower national security test.

The Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken, even if they do not inform the Treasurer about it. Certain foreign investments that are not notifiable actions or notifiable national security actions may be reviewable national security actions. Where a reviewable national security action is not notified to the Treasurer, the action may be called-in for review if the Treasurer considers that the action may pose a national security concern. Foreign persons can choose to extinguish the Treasurer's call-in power by voluntarily notifying reviewable national security actions. The National Security Guidance Note outlines investment areas that may raise national security concerns, where investors are therefore encouraged to voluntarily notify.

Uderstanding these guidance notes is crucial for any foreign investor looking to engage in commercial land investments in Australia. Ensuring that all necessary steps are taken to comply with foreign investment approval requirements will mitigate the risk of incurring penalties or having investments called-in for review.

Thresholds for commercial land investments

When it comes to investing in commercial land in Australia, foreign persons are required to obtain foreign investment approval, and the monetary threshold for such investments is based on the consideration for the investment, not the value of the land. The applicable threshold is dependent on whether the land is vacant or developed, whether it is considered sensitive land, the nationality of the investor, and whether the foreign person is a foreign government investor.

For foreign government investors, there is a $0 threshold for all types of commercial land. Private investors from certain free trade agreement (FTA) partners, except Hong Kong, have a

$0 monetary threshold for investment in vacant commercial land and a $1,339 million threshold for investment in developed commercial land. For private investors from Hong Kong, there is a $0 threshold for investment in vacant commercial land, a $67 million threshold for investment in sensitive developed commercial land, and a $1,339 million threshold for investment in developed (non-sensitive) commercial land.

For private investors from India, the threshold is $500 million for investments in developed (non-sensitive) commercial land acquired predominantly for the supply of a service through a commercial presence in Australia. All other private investors have a $0 threshold for investment in vacant commercial land, a $67 million threshold for investment in sensitive developed commercial land, and a $310 million threshold for investment in developed (non-sensitive) commercial land.

For all investments in national security land, the monetary threshold is $0, regardless of the investor. Commercial land is considered vacant commercial land if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods, or livestock.

Vacant commercial land investments

As part of the national interest test, the Treasurer will generally ensure that vacant commercial land is put to productive use within a reasonable timeframe and that 'land banking' does not occur. If an application for vacant commercial land is approved, it will generally be subject to conditions such as the land being developed, continuous construction of the proposed development commencing within five years of completing the purchase of the land, and the land not being sold, transferred, or otherwise disposed of before the development is completed.

Foreign persons must not dispose of the land until

construction is complete, but the sale of a completed stage of the development and the sale of blocks within a newly developed subdivision are exceptions. These development conditions ensure that ‘land banking’ does not occur, and the land will be put to productive use. The conditions imposed will be considered on a case-by-case basis to ensure that they do not unduly hinder the legitimate commercial practices of the proposed investment while still ensuring that the land is put to productive use.

Developed commercial land investments

Foreign investment in commercial land that is already developed and has a substantive permanent building on it is subject to stricter screening procedures, especially if the land is deemed sensitive or hosts critical infrastructure. In Australia, developed commercial land is defined as any commercial land that is not vacant and is legally fit for occupancy by people, goods, or livestock. Such land is often used for industrial, commercial, or residential purposes.

The screening of foreign acquisitions of developed commercial land depends on various factors, such as the kind of business it is used for, the nationalities of the investors, and whether the land is classified as sensitive or not. If any of the above mentioned factors apply, a lower monetary screening threshold will apply.

For example, if a foreign person intends to acquire commercial land that will be leased to the Commonwealth or any other government body, the screening process will be stricter. Similarly, if the land is going to be used for sensitive purposes such as uranium extraction, nuclear operations, or the storage, handling, or disposal of security-sensitive biological agents, the screening will be more stringent. Other critical infrastructure uses such as public infrastructure, telecommunications networks, and storage of critical servers for financial institutions also attract tighter scrutiny.

The screening process aims to ensure that foreign investments in sensitive or critical commercial land do not pose a risk to Australia's national interest. This is achieved through various measures such as limiting foreign ownership and control of critical infrastructure, ensuring land is put to productive use within a reasonable time frame, and preventing "land banking" or holding onto land without developing it. The specific conditions and restrictions will vary based on the circumstances of each investment and the degree of sensitivity of the land.

Exemption certificates for commercial land

Foreign persons seeking to make multiple acquisitions of commercial land in Australia can streamline the approval process and reduce regulatory burden by applying for a Land Exemption Certificate under section 58 of the Foreign Acquisitions and Takeovers Act 1975. This certificate grants up-front approval for a program of acquisitions, eliminating the need to seek separate individual approval for each investment. However, a financial limit will apply to all exemption certificates, which will be determined on a case-by-case basis.

While exemption certificates are a beneficial mechanism for foreign investors, it is important to note that the standard conditions applying to acquisitions of vacant commercial land, such as commencing development within five years, will continue to apply regardless of whether the land was acquired through an individual no objection notification or an exemption certificate.

Exemption certificates are generally issued for 12 months to first-time exemption certificate holders, and longer durations may be considered for investors who have a demonstrated compliance history with the foreign investment framework. However, it is worth noting that exemption certificates are intended for foreign persons proposing to engage in a high

volume of acquisitions. As such, a certificate will not usually be granted where the number of likely acquisitions is small and it would be reasonable for the foreign person to notify them separately.

In cases where a program of land acquisitions may include land that is ‘national security land’ or may otherwise give rise to national security concerns, foreign persons can also apply for a National Security Exemption Certificate under sections 43BA and 43BB of the Foreign Acquisitions and Takeovers Regulation 2015. These exemption certificates can cover acquisitions of land that are otherwise notifiable national security actions and reviewable national security actions. However, before granting one of these exemption certificates, the Treasurer must be satisfied that the taking of the action or kinds of actions by the foreign person would not be contrary to Australia’s national security.

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