

BEHIND THE TIMES

Reports of the death of the billable hour may be premature

Much has been written in recent times about the predicted demise of hourly billing – how in-house lawyers have stridently demanded a fresh approach to measuring value and how large commercial firms have allegedly ignored these calls and left themselves open to attack from smaller firms espousing innovative new fee structures. These are themes which have been presented as evidence of an irresistible shift in the way the profession views the question of billing.

But the latest survey of opinion in the in-house profession presents a problem for this theory. According to the 2010 *Legal Department Benchmarking Report*, a joint production of CLANZ,

ACLA and consultancy firm Team Factors, 53% of Australian in-house lawyers were either satisfied with hourly billing or were “unconcerned” on this issue. Remarkably, the equivalent figure for New Zealand in-house lawyers was 70%.

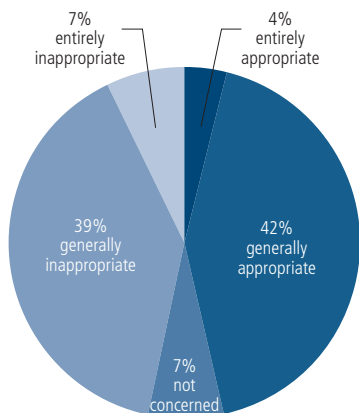
In-house lawyers may not be entirely enamoured with hourly billing, but nor does there appear to be a clear consensus that the industry should move away from it. Admittedly, support for hourly billing in Australia has dropped since the last equivalent industry survey was completed in 2008, but support has risen in New Zealand in that period.

The difficulties and client frustrations relating to hourly billing

the estimates. We have not had any particularly nasty surprises as yet using hourly billing.”

However, there are in-house lawyers who are keen to seek out alternative arrangements. Dymocks Group general manager for legal and compliance, Mark Buckland, is unimpressed with what he sees as the uncertainty associated with hourly billing. “When you seek quotes from other providers, you can get a quote and they stick to it, but not with lawyers,” he said. “I always test quotes I’m given by firms and then try and lock them into a fixed rate, but it’s hard to do.” Buckland gives priority to firms that offer fixed rates. “I don’t care if it ends up being a little bit more expensive [than the hourly

▶ HOW APPROPRIATE IS HOURLY BILLING FOR LEGAL WORK?



Source: ACLA/CLANZ Legal Department Benchmarking Report 2010

“I’m curious about the focus on alternative billing arrangements. It’s not a big issue for us. I don’t think we are struggling to keep on top of the estimates. We have not had any particularly nasty surprises as yet using hourly billing”

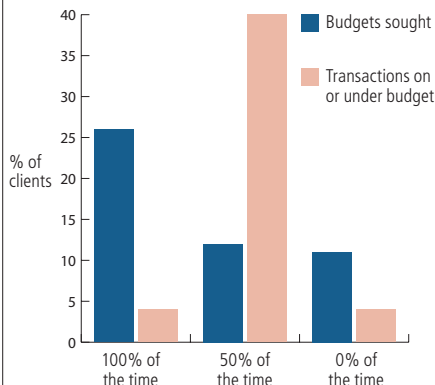
ANNETTE SPENCER, UBS

have been well documented. However, it may be the case that the level of client angst about hourly billing has been somewhat exaggerated. One general counsel who has been bemused by the attention the issue has received is UBS GC Annette Spencer. “I’m curious about the focus on alternative billing arrangements,” she said. “It’s not a big issue for us. I don’t think we are struggling to keep on top of

rate], because there will be times in the future when it is likely to be the other way around,” he said.

Commonwealth Bank general counsel David Cohen describes the billable hour as “doomed” and said that it was counter-intuitive to pay for time, as opposed to a result. However, he said that the billable hour was unlikely to disappear in the near future due to a high degree of acceptance in the

► **COST ESTIMATES: HOW OFTEN ARE THEY SOUGHT BY CLIENTS AND HOW OFTEN DO FIRMS MEET THEM?**



Source: ACLAI/CLANZ Legal Department Benchmarking Report 2010

market. George Weston Foods group general counsel Asia Pacific Tim Wong said that his perception was that law firms were not in a hurry to move too rapidly to new models of billing. That is an observation borne out by the study – lack of enthusiasm for or experience in managing alternative fee arrangements on the part of law firms were, according to most respondents, the main barriers to eliminating hourly billing.

The study noted that despite the extensive discussion of alternative fee arrangements, their “actual use remains relatively low.” The authors suggest that the in-house profession itself will need to be an active part of any change in billing practices. “Time and attendance is the default position for many firms,” observed CLANZ president Jeremy Valentine. “Organisations need to push the use of alternative billing arrangements.”

There is no doubt that clients and firms will continue to work towards innovative new fee arrangements. Whether we are at the cusp of a crucial turning point, though, remains to be seen.

The art of estimates

There is an intimate link between hourly billing and the capacity of firms to adhere to a cost estimate for a particular matter, and law firms were found wanting on this front. In-house lawyers reported that firms rarely met or came in below estimate. When asked to indicate whether their law firm adhered to budget “more often than not” only a third of respondents



uk report

UK firms compete for panel roles

Rio Tinto, Nomura and Ireland’s National Asset Management Agency (NAMA) have reached the advanced stages of advisor reviews aimed at reducing costs and streamlining the number of law firms the three companies instruct.

UK firms Allen & Overy, Denton Wilde Sapte, DLA Piper, Eversheds, Macfarlanes, Nabarro, Simmons & Simmons, Taylor Wessing and Wragge & Co will sit on the NAMA’s advisory panel under a three-year term. The panel, which is divided into enforcement and refinancing, also consists of 64 Irish firms including Arthur Cox, Matheson Ormsby Prentice and William Fry. All firms were appointed to the panel by the Irish Government.

Rio Tinto’s current panel includes Linklaters, Herbert Smith, Baker & McKenzie, Sullivan & Cromwell and O’Melveny & Myers; and Australian firms Allens Arthur Robinson and Blake Dawson. Rio’s global review will be overseen by group executive of legal and external affairs Debra Valentine.

A&O continues to cut costs

Allen & Overy will sublet its premises at 40 Bank Street in Canary Wharf following the relocation of 200 staff to its City base. The firm has decided to

vacate the 64,500 sq ft space it has occupied since 2003 for cost-cutting reasons.

The firm maintained two banking groups at the Wharf – leveraged finance and structured and asset finance – and half of its global loans practice. A&O will sublet two out of the three floors at the wharf, while the top floor will remain in use by the firm for meeting rooms.

Last year the firm laid off 9% of its lawyers and support staff, including partners, which freed up space in the London headquarters for the relocation.

Ropes & Gray launch graduate program in London

US firm Ropes & Gray will expand its UK presence with the launch of a graduate training program in its London office. The move will see the firm shift away from its existing growth strategy of lateral hires in its London practice, with the introduction of a formal graduate recruitment process.

Set to commence in 2011, the program planning will be headed by client director Catherine McGonagle, in consultation with joint office heads Maurice Allen and Mike Goetz. However, Ropes & Gray says that it will take some time before the program becomes a primary recruitment source for the firm.



► ROUNDUP

- Clifford Chance senior partner elections will commence in October. Current CC senior partner Stuart Popham is expected to step down in December, retiring in 2011
- Norton Rose will launch its anti-trust, regulatory and competition practice in Italy with the partner hire of Linklaters’ Andrea Zulli
- McGuireWoods’ London based corporate associate Josefin Lonnborg was one of five lawyers advising Elin Nordegren in her divorce from Tiger Woods. Lonnborg is Nordegren’s twin sister
- Slaughter and May, Jones Day and Cleary Gottlieb have secured lead roles on BHP Billiton’s US\$40bn hostile bid for Canadian-based company Potash Corporation
- Cuatrecasas has appointed Inigo Rubio and Miguel Angel as managing partners to its London and New York offices, respectively
- Freshfields has hired former Brussels managing partner John Davies and Düsseldorf-based partner Martin Klusmann as co-heads of its global anti-trust, competition and trade (ACT) practice
- Simmons & Simmons has expanded its IP practice with the hire of Howrey City patent and regulatory partner Marjan Noor to its London office

Revenge of the client

In-house lawyers are under-resourced, under pressure to cut external spending and looking for better value from law firms. And it may well be specialist firms that stand to benefit most from this state of affairs

said that firms met this criterion. In-house lawyers are more likely to seek estimates prior to briefing law firms than they were two years ago. “We always ask for the firm to give us an estimate as part of our arrangement,” said David Cohen. He has implemented his own system for comparing estimates against the final bill and says that law firms miss the mark about 40% of the time.

Yet this is an improvement on the corresponding figure for 12 months ago, where there were accuracy issues with 55% of the estimates. “Law firms have a wealth of data on how much certain types of work will cost. I encourage firms to use that data and become analytical, so that they can give better estimates or even fixed-fee quotes,” Cohen said.

Some firms are already beginning to heed this message. Corrs Chambers Westgarth partner Andrew Lumsden, for example, has developed a database of matters which provides a basis for the quotation of future work. “I use [the database] to cross-check a job against three similar matters we have been involved in, to make an accurate assessment of how much it will cost,” he said.

However, as legal matters can evolve in complexity, he added, there needs to be a certain degree of tolerance with estimates. “The legal costs are significant, but timing or efficiency and the value of the work are also important,” Lumsden said. “From my perspective, a conversation only on fees is overly one-dimensional.” **ALB**

If the halcyon days of the pre-credit-crunch era were the glory days for the commercial law firm, perhaps we are now witnessing the era of the corporate lawyer. The shifting of power in the law firm-client relationship and the increased capacity of the client to set the terms of the relationship have certainly become an accepted part of the industry landscape. The extent to which clients wield decisive control over the relationship and are prepared to use that power, however, remains the subject of some conjecture.

If the more extreme predictions are to be believed, the in-house profession in Australia and New Zealand is making preparations to desert the large national law firms *en masse*, in favour of specialist firms and increased internal resourcing. Some exaggeration is inevitable, particularly from those who have a vested interest to do so. The 2010 *Legal Department Benchmarking Report* therefore provides a timely – and more moderate – perspective on the industry and the likely beneficiaries of this emerging state of affairs.

Which firm?

In the belt-tightening post-GFC environment, specialist firms have been claiming ascendancy in the continuing quest to win more work from full-service firms. The usual argument advanced on behalf of specialist firms is that they are better placed to offer value, because they are not encumbered with the traditional overheads of national full-service firms. While this is a familiar argument in areas such as insurance and IP, the recent “cherry picking” of talent in the banking & finance area by Allen & Overy suggests that the concept has potential in other practice areas.

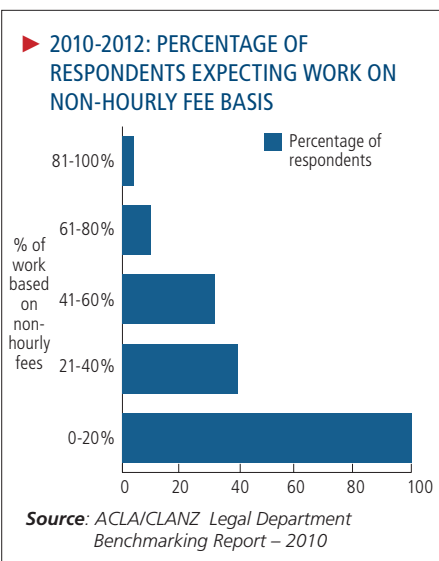
The 2010 *Legal Department Benchmarking Report* does provide a certain level of support for the theory that the tide is beginning to turn in favour of boutique and specialist firms.

While a clear majority of general counsels surveyed did not predict any changes to the type of law firm they used, 32% of respondents did say that they intended to increase their use of boutique or specialist firms, while only 5% indicated that they intended to use those firms less. By contrast, only 9% of respondents said that they would increase their use of national full-service firms while 30% said they intended to reduce their use of those firms. These results certainly give credence to frequently-made claims by specialist firms that they are winning work at the expense of national firms.

Ron Pol of Team Factors, which assisted with research into the report, says changes in which firms will receive work is a reflection of cost sensitivity. “Anecdotal evidence often indicated a perception that the big national full-service firms can sometimes be more expensive than specialist firms and local and regional firms,” he explained.

The study does not cover another familiar battle ground, namely the continuing rivalry between mid-tier and top-tier firms. Pol said that it would be difficult to conduct a survey on this topic because of the lack of a consistent definition of what constitutes the “top tier” or the “mid tier” for law firms. However, if cost pressures are causing clients to gravitate towards specialist firms it would not be unreasonable to infer, by the same logic, that clients would also gravitate towards mid-sized firms for the same reasons.

Those GCs interviewed by *ALB* were divided on this point. Qantas general counsel Brett Johnson said he has found both top-tier and mid-tier firms willing to negotiate on rates. In contrast, George Weston Foods group general counsel Asia Pacific Tim Wong said that he has found more flexibility with mid-tier firms “as they are keen to take work off the top-tier firms and their management structures allow a bit more flexibility to



negotiate.” Heinz Asia Pacific general counsel Carolyn Fox agrees that mid-tier firms will sometimes be more cost effective with certain types of work, but warns that it is a “mistake” to think mid-tier firms will always be cheaper. Echoing a theme raised by many GCs, Fox said that it is individual lawyers and their experience which mostly determines where work will go. If that is the case, the fortunes of all firms may well be intimately connected with their capacity to retain top talent.

While the study has provided some encouraging evidence for specialist firms, it does not purport to describe the use of mid-size firms. Nonetheless, the argument raised by many mid-sized firms is that they see themselves as evolving into *de facto* specialists, covering more than one practice area but offering a greater level of specialisation than full-service firms. Maddocks (planning and environment) and Hall & Wilcox (employment/workplace) are prominent examples of firms which offer a broad range of services but are well-known for certain practice areas. Possibly it is these firms which clients had in mind when they indicated an intention to increase their use of specialists.

Whatever the definition of “specialist”, the study results appear to reinforce the view that it is the larger national firms which have the most to lose in the post-GFC market.

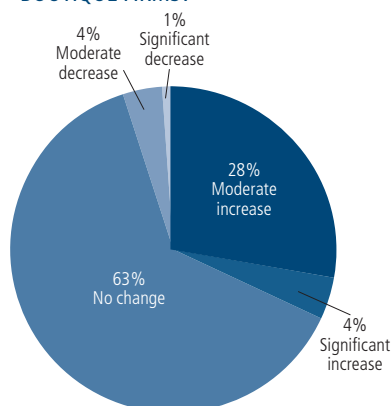
Team size

According to the study, most GCs are not expecting to reduce the size of their legal teams in the next two years. A significant proportion – 50% for Australian respondents, 43% for New Zealand respondents – expect their teams to grow. These growth predictions are not as robust as those which were made for the 2008 survey, but nonetheless remain strong.

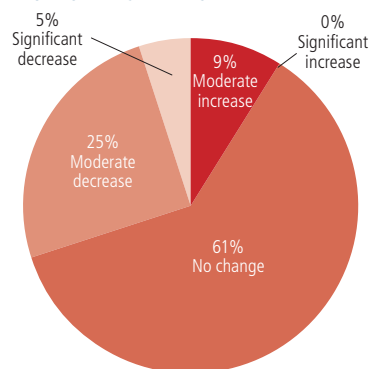
“I think this is part of an ongoing trend,” said CLANZ president Jeremy Valentine. “I think there are efficiencies you can create through having someone who actively understands the organisation’s objectives, because they are part of the team.”

However, only a minority of respondents (less than 10%) were planning a significant increase in the size of teams, which suggests that the push to increase team size may have

▶ DO YOU INTEND TO INCREASE OR DECREASE YOUR USE OF SPECIALIST/ BOUTIQUE FIRMS?



▶ DO YOU INTEND TO INCREASE OR DECREASE YOUR USE OF NATIONAL FULL-SERVICE FIRMS?



Source: ACLA/CLANZ Legal Department Benchmarking Report 2010

already peaked. Simpson Grierson chairman Kevin Jaffe says he has not seen a noticeable increase in the size of in-house teams. “If anything, they have stabilised or diminished a little because of the increased use of secondments.”

Nonetheless, the study does demonstrate that in-house teams are more likely to continue growing than not. Commonwealth Bank GC David Cohen is not looking to increase his team – in fact he’s decreased headcount over the past two years – but he can understand why other GCs would require more resources. “Over the past two years there has been an increase in the amount of government regulation. This is a big issue for corporations, and hence in-house legal departments,” he observed.

The increasingly complicated nature of the work is also another factor – Qantas general counsel Brett Johnson said he intended to increase the size of his legal and competition team “to reflect the increased workload and complexity”. ALB

news in brief >>

■ HDY APPOINTS NEW CHAIRMAN OF PARTNERS

Henry Davis York has appointed leading insolvency, commercial and banking lawyer Philip Crawford as chairman of partners. Crawford has worked with Henry Davis York for more than 30 years, during which time he has acted for major financial institutions and insolvency professionals.

The appointment comes as on the back of record growth in revenue for the firm – up 13% to A\$96m between 2009 and 2010. The firm has also bolstered staff numbers, and now has 155 lawyers and 48 partners. In June the firm announced 28 new senior appointments – including five new partners – plus the appointment of two banking & finance partners from with Corrs Chambers Westgarth.

■ BELL GULLY CHAIRMAN ELECTED TO LEAD BUSINESS THINK-TANK

Bell Gully chairman Roger Partridge has been elected as the new chair of the New Zealand Business Roundtable.

Partridge has been chairman of Bell Gully since 2007 and prior to that headed the firm’s litigation department for three years. He has been a member of the Business Roundtable since 2008 and was also a director of the Legal Research Foundation, a private law reform body, from 2001 to 2010.

■ MINTER ELLISON OPENS NEW OFFICE IN BEIJING

As foreshadowed by ALB last year, Minter Ellison has officially opened an office in Beijing. International managing partner Mark Green said the Beijing office was a natural extension of the firm’s footprint in China. “As China’s administrative, policy and regulatory hub, Beijing is an important centre,” he said. “Having a Minter Ellison office here is both a strategic move and the next logical step for us in China.”

Minter Ellison has had offices in Hong Kong since the early 1980s and in Shanghai since 1999. Its other overseas offices are in London and New Zealand through Minter Ellison Rudd Watts. The firm’s practice model in Greater China has been to focus on niche areas where the firm’s expertise allows it to provide a specialised service. “Our key focus in Beijing is to work with clients on outbound M&A and inbound and outbound investment opportunities,” Green added.

The team in Beijing will include partner Sam Farrands as initial chief representative, as well as lawyers Tim Knowles, Andrew Thomson and Kevin Zhou.



Restricted practice

Lawyers must be allowed to switch firms and advance their careers however they see fit. But they had better tread carefully, lest their former employer chases them down the road brandishing a restrictive covenant clause

Eight years ago, two high-profile partners from Hong Kong-based firm Deacons quit and joined US giant White & Case. The move sparked a bruising legal battle that lasted more than two years, including public hearings and confidential arbitration.

The parties eventually settled the case privately, but not before Judge David Gill had declared White & Case's behaviour "below the belt," and noted that the firm had shown a "cynical disregard for the rights of Deacons, putting profit before honour". The partners, with encouragement from White & Case, had tried to persuade Deacons clients to switch firms and had passed confidential information to the new firm while still working at Deacons.

With millions of dollars at stake, it is no wonder that firms choose to protect themselves with carefully drafted non-compete and non-solicitation clauses. But how effective are these in halting the kind of behaviour uncovered in *Deacons v White & Case*?

"They will be enforceable to the extent that they are reasonable and they seek to protect a partnership's legitimate business interests," says Shana Schreier-Joffe, partner and team leader at Harmers Workplace Lawyers.

"You can't indefinitely restrain [departing employees or partners]. It's a question of how long it would take for the firm to retain the clients themselves. Is that two months, three months or 12 months? The circumstances of a particular case are what drive the decisions in these matters. But more and more, the courts are willing to enforce restraints."



Shana Schreier-Joffe, Harmers

Non-solicitation is often much more likely than non-compete to be regarded as reasonable by the courts. "Non-solicitation [clauses] are ... much easier to enforce," says Fiona Loughrey, partner and employment law expert at Simmons & Simmons in Hong Kong. "Even [the judgment in] White & Case/Deacons acknowledged that members of the workforce should be allowed to advance their careers by moving, without due restraint, from one firm to another. Blanket non-compete, if it is included, should only be included for a very limited time."

Purely legal considerations aside, strategy is often employed by the disgruntled party. Internationally renowned law firm strategist Patrick McKenna recalls a number of lawsuits brought against departing partners

"You can't indefinitely restrain [departing employees or partners]. It's a question of how long it would take for the firm to retain the clients themselves. Is that two months, three months or 12 months?"

SHANA SCHREIER-JOFFE, HARMERS WORKPLACE LAWYERS

by North American firms. "I don't know that any of these suits have been particularly successful, but I think they are commenced simply to disrupt the lawyer who is leaving," he says. "After all, if you can question that lawyer's reputation or require them to take time away from their practice, that might disrupt their relationship with some important clients."

Client's choice

In the midst of arguing about what was breached and who was solicited, spare a thought for the clients. Like children stuck in the middle of divorces, ultimately it is perhaps their interests

that should be paramount. "The bottom line is that the client always has the final say," says McKenna, reporting that courts have shown that they are willing to rule against an injunction on the grounds that the injunction could harm the client's business.

This does not mean that lawyers who have moved on should approach their old firm's clients, simply by framing it as being 'in the client's best interest'. However, what if the lawyer in question just happens to be Google-ed by the client, who then tracks down the lawyer their own accord? Schreier-Joffe is suspicious of such claims. "Usually clients don't just approach without an invitation," she says. "How does the client know a partner's moved on? They usually have to tell them. What [the partner] says might be the breach that you can action," she says.

In any lawsuit it would be up to the plaintiff to prove that there had been a breach of an express or implied covenant, and in doing that there might be debate over reasonableness.

"There were a lot of things in the move from Deacons to White & Case



Fiona Loughrey, Simmons & Simmons

which were clearly done without it occurring to them that anyone would find out," Loughrey says. "The discovery process uncovered a lot of relevant evidence. If there has been a breach of a covenant not to solicit clients or colleagues, the relevant parties are going to have to come clean and give evidence in the witness box."

Most firms try to avoid taking these matters to court. Airing the partnership's dirty laundry in public is not good for anyone's business. "Often these things are resolved behind closed doors, because both sides want the client, and you don't want the client involved," says Schreier-Joffe.

"It's perfectly possible for a good lawyer with a following to get a new position with a new firm. In moving, though, they should conduct themselves in a particular way"

FIONA LOUGHREY, SIMMONS & SIMMONS

Unwritten rules

As the legal services industry becomes increasingly competitive, ethical boundaries are constantly shifting, or at least being tested. Some believe it's a matter of every firm for itself, with no expectation or guarantee of loyalty beyond what is absolutely required by law. "I guess I've seen it all," says McKenna. "I've seen firms interview potential laterals only to really get at uncovering competitive intelligence. I've seen firms recruit one individual only to really get a handle on bringing in an entire group. I've seen firms propose a merger only to recruit the handful of true business originators."

The problem as McKenna sees it is that leading modern law firms are made up mostly of laterally hired partners. "Only around 30% of the partnership is truly homegrown," he says. "The culture is now built upon a foundation of nothing more than money, and that makes it difficult to build any sense of traditional partnership camaraderie."

According to Loughrey, *Deacons v White & Case* was important in that it reinforced acceptable standards of behaviour in an age of increased headhunting and firm-hopping. "It was an example of what can happen, and the risks involved if a new employer and a team of people talk to each other," she says. "It's perfectly possible for a good lawyer with a following to get a new position with a new firm. In moving, though, they should conduct themselves in a particular way."

Provided departing lawyers have open communication with their former employers, uphold their fiduciary duties, and refrain from divulging confidential information or using the resources of their old firms, they should be free to take advantage of all the opportunities of the open marketplace – with impunity. **ALB**



us report

US associate salaries flat-line

The latest survey has revealed associate salaries were largely flat between 2009 and 2010. US\$160,000 remained the median starting salary for associates at large law firms in Chicago, Los Angeles, New York, and Washington DC, but in Boston and San Francisco the median salary dropped to US\$145,000. In the south, the median salary at big firms also fell below US\$160,000 to US\$135,000.

Overall, more law firms offered first-year starting salaries of US\$130,000 to US\$145,000 than last year – even in markets where US\$160,000 was the median starting salary. The results confirm legal starting salary is now much higher compared to those seen at the depth of the financial crisis.

Hammonds-Squire Sanders talks advance

The much-publicised merger between Hammonds and Squire Sanders, which is expected to be confirmed on 1 January 2011, could create a firm comparable in size to that other recent trans-Atlantic teaming - SNR Denton. Hammonds has a PEP figure of GBP364,000 (US\$569,000) and revenues of GBP118m (US\$184m), while Squire Sanders has PEP of US\$795,000 and revenues of US\$545m.

The trans-Atlantic merger nears completion after

long-term consideration on the part of both law firms to enter each other's market base. Hammonds currently holds an existing relationship with US firm Holland & Knight for referral work, and in 2008 set up a committee which looked into opportunities for the firm in the US market. Squire Sanders' interest in the UK and European markets saw the firm enter into a number of unsuccessful merger talks – with Denton Wilde Sapte in 2009 and the now-defunct Coudert Brothers in 2004.

Hammonds managing partner Peter Crossley, non-executive chairman David Hearn, and Squire Sanders chairman James Maiwurm are leading the merger talks between the two firms.

Kirkland adds nine lawyers to partnership

Reflecting continued growth seen in London, Kirkland & Ellis has added nine lawyers as partners in its London office, effective 1 October. The partnership boost is spread across several practice areas, including corporate, tax, funds, restructuring and arbitration. The additions will mean Kirkland's partner promotions this year are higher compared with 2009, when only three City partners were promoted out of a firm-wide total of 51.

Kirkland & Ellis currently has 90 lawyers in its London office, which account for approximately 6% of the firm's global headcount.



➔ ROUNDUP

- Skadden, Holland & Knight, Kirkland & Ellis and Weil Gotshal will advise on the US\$4bn sale of Burger King to 3G Capital. The sale will see the fast-food chain return to the private sector, after it went public with an IPO in May 2006
- Reed Smith has opened a shipping practice in New York with the hire of Holland & Knight partner Lars Forsberg. Forsberg's background is in admiralty law, litigation and dispute resolution
- Freshfields has signed a new lease for East 53rd Street at 601 Lexington. At 110,000 square feet, the new New York office is 50% larger than the current space
- Jenner & Block and Davis Polk have won lead roles on General Motors' IPO. The listing comes a year after the company emerged from bankruptcy
- MoFo has added Mayer Brown structured finance and capital markets partner Elana Hahn to its London finance department
- Nixon Peabody has promoted four lawyers to its partnership, including finance counsel Roland Diniz to its US arm, and restructuring lawyer Daniel Sklar to its UK arm
- Chadbourne & Parke has expanded its capital markets practice in Russia and the Central and Eastern Europe (CEE) with the hire of White & Case's CEE capital markets head Simon Morgan in Moscow

TOO MUCH CLASS?

by John Blair – General Counsel, Air New Zealand Ltd

As if the growing greed inspired by class actions wasn't bad enough already, recent developments are about to make it worse

If you've ever suffered a burglary and the sense of rage at your own space having been violated by an intruder stealing your hard earned possessions, you will begin to understand the sense of being on the wrong end of a class action.

The particularly egregious USA-style of legalised extortion⁽¹⁾ appears to be taking root now in the Australian psyche, fed of course by law firms who typically stand to gain far more than any of their clients. The tactics are well established; find an "angle", get as much media coverage as possible, sign up all the clients you can, close off the class to "tail-coaters" who won't agree to your 40% cut of the loot – let the defendants work out the costs of defending the action and wait for the settlement offers. If your angle can capture a number of defendants, all the better.

Erin Brockovich gave us all a warm fuzzy feeling about what clever and tireless crusaders these charitable minded lawyers are on behalf of the downtrodden classes, but did you notice the size of the cheques they won for themselves at the end of this Hollywood fantasy? More to the point – did you wonder about the fact that those large sums were paid out of the compensation due to the real sufferers?

at \$5m with a preferred starter of at least \$25m.

An Australian litigation funder assures its prospects that it "provides access to justice for the victims of corporate misconduct, advocates changes to law and procedure ... so that victims of anti-trust behaviour can seek redress through the courts, ensuring better corporate governance for all". Interestingly their three page invitation implies massive damages recoveries but nowhere does it mention anything other than underwriting the "costs of recovery proceedings". Handing over 30–40% of your share of the damages is no doubt well understood to be a "cost", but you have to delve into their website for that information.

The real "cost" of course is to the wider population of consumers in the economy as the hapless corporate victims of this perversion of "justice" line the pockets and support the executive jets of the lawyers while having to cut their own costs or increase their profit margins to settle claims. These rarely involve small sums. In the USA, settlements of class actions including legal defence costs and management time run to billions of dollars every year – all ultimately what I believe economists refer to as a "deadweight loss" to society.

"Two of my greatest regrets are having to settle two class actions"

JOHN BLAIR, AIR NEW ZEALAND LTD

Class action lawyers will tell you they are "the keys to the courtroom for the common man" – a quote I heard directly from one of the "best" of them. Strange how the common man has to have a potentially rather lucrative claim to share with the lawyers before those keys will be handed over. Of course they will try to pick winners; fair enough. But the stakes generally start

But wait! To be fair, there is a place for class actions. Despite my cynicism there is a grain of truth in providing affordable access to litigation for many to whom justice and compensation would otherwise be denied. Class actions *per se* are undeniably an efficient way for the courts to manage multiple claims based on broadly the same facts and legal issues.



From both a professional legal and a corporate perspective, the objectionable element is the greed. The thin veil of altruism fools few. If such actions were about justice there would not be the "ambulance chaser" strategy taking advantage of naive or otherwise vulnerable clients and extracting large percentages of the proceeds. Likewise the claims which lawyers know have no real merit but which they shrewdly assess as being impossibly costly to disprove, or claims where the plaintiffs have no real concern to claim but are encouraged to pursue "money for nothing".

Australia (until recently), New Zealand and the UK have managed to sustain legal systems without the need to resort to this type of litigation. This article is not the opportunity to explore

the pros and cons of representative versus class actions, but it is concerning to note the current challenge in the UK where a claim by US lawyers against British Airways is attempting to interpret Court Rules as allowing USA style class action⁽²⁾. The High Court would have none of it, but the matter is on appeal.

Of greater concern and closer to home, the New Zealand Government is reported to be considering introduction of class actions based on the same model as Australia has adopted. This is seemingly being done under a carefully considered CER approach of “let’s not think about why we are doing this, we should just follow Australia’s lead”. Happily, more in-depth thinking is applied here in sporting endeavours than in politics. Matters such as undermining the attractiveness of New Zealand to foreign investors and the regard for our legal system or the lack of any identified need for class actions are mere irrelevancies in the world of politics. A platform that looks like “free justice for the common man” wins more votes than economic common sense. The fact that outside the USA, Australia is the jurisdiction in which a company is most likely to be sued, is unlikely to figure in the equation.

So, back to the start of this article – how can it get worse?

Australian class actions operate on an “opt in” basis where any party can join at any time. This is considered to deter some actions due to the dislike that litigation funders have for parties to free ride on actions without signing up to share the spoils and because of a potential exposure of parties opting in, to an adverse costs award – something that, to the surprise of many lawyers, is not a consideration in USA.

ALB recently reported⁽³⁾ that NSW is proposing law changes to make class actions more attractive. A “closed class” approach would secure the position of litigation funders, enabling them to have sharing agreements with all plaintiffs. The fact that the changes are being welcomed by a known class action firm should be warning enough to NSW business that this is not going to be good for them and they should actively participate in the current consultation process.

An even more sinister development has gone largely un-noticed in this

corner of the world. The Financial Accounting Standards Board is currently proposing that public companies be required to report potential losses from any class action lawsuits. In other words, not even a reasonable assessment of what you might expect to settle for (the current requirement if such an assessment can be made with sufficient reliability to make a provision), but a worst case estimate. What a dream for class action lawyers! Don’t overlook the fact that if such an estimate proves to be materially overstated or understated, there will be another class action waiting in the wings on behalf of misled shareholders. This is idiocy even by Californian standards and not surprisingly the Association of Corporate Counsel is rounding up some heavyweight opposition. But if it happens in the USA accounting standards, watch this space in Australasia.

But wait ... there’s more! Corporate counsel and all non EEA⁽⁴⁾ qualified lawyers will (or should) all be reading articles of rightly outraged analyses of the Akzo decision from the Court of Justice of the European Union⁽⁵⁾ denying again the right of professional privilege to in house counsel and non EEA qualified lawyers. There are already a number of reported cases in the EC where companies have been fined for breaches of competition laws based on written legal advice from in house counsel to senior management or board members. The same advice from EEA external counsel would undoubtedly have attracted legal privilege.

The Akzo decision, although affirming the prevailing position of recent years, now declares open season for class action lawyers to try their luck on European companies where one of the first items demanded in discovery will be “All correspondence on the matter between management and in house counsel and any advisor not a lawyer qualified to practise in the EU”. What better evidence of a legal liability than your own lawyer advising you that you have sinned? Sadly in-house

“External counsel face the dichotomy of sympathising with the difficulties of their clients while delighting at this growing stream of work”

JOHN BLAIR, AIR NEW ZEALAND LTD

counsel will be inevitably constrained from putting their best and strongest advice in writing, ironically exposing companies to even greater risk of inadvertent breaches of the law which counsel might have helped to avoid. The decision reflects perverse, if any logic.

Corporate counsel need to be on their toes to watch some of these trends and understand the implications. External counsel face the dichotomy of sympathising with the difficulties of their clients while delighting at this growing stream of work. And grow it will.

Just as the recommended strategy of defeating terrorists, kidnappers and blackmailers is never to negotiate, so it is with class action opportunists. That is not to say that if there is a legitimate and provable claim it should be fought on principle just because it is a class action. Common sense and commercial reality dictate settling valid claims as cheaply as you can. However in the absence of any legitimate, substantiated claim, simply folding to the pressure of litigation cost, litigation risk and management time – the trump cards always played – is a short-term win and a long-term cost. The perceived soft touch will be a target again and again. Remember too, particularly in this era of litigation funding, that class action plaintiffs also make calculated commercial decisions assessing ongoing costs against the potential recoveries and litigation risks. They don’t have exclusivity over the strategy of running up costs and putting up hurdles to raise the odds. In most cases they have no intention of ever seeing the alleged issues go to trial. It is a poker game – you have to put money on the table to call the bluff.

1. “extort – get by force or threats or intimidation etc” *The New Little Oxford Dictionary*

2. *Emerald Supplies Ltd v British Airways plc*

3. “New laws to make class actions more attractive in NSW” – *ALB Legal News*, 9 August 2010

4. *European Economic Area*

5. *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission (C550/07 P)*