

Ashurst

# Eye of the storm: General Counsel take the lead in crisis management

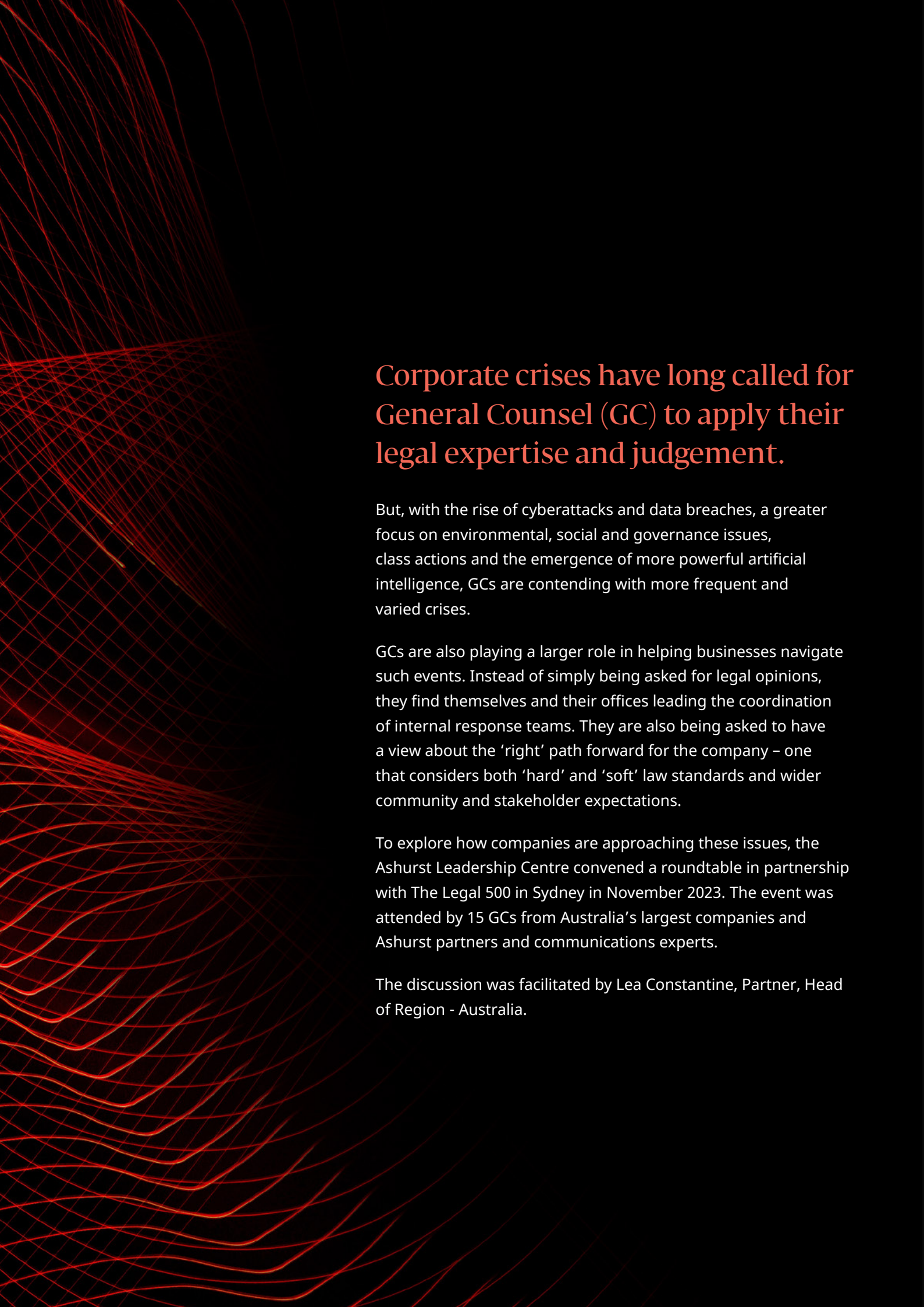
Ashurst Leadership Centre

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Outpacing change

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## Corporate crises have long called for General Counsel (GC) to apply their legal expertise and judgement.

But, with the rise of cyberattacks and data breaches, a greater focus on environmental, social and governance issues, class actions and the emergence of more powerful artificial intelligence, GCs are contending with more frequent and varied crises.

GCs are also playing a larger role in helping businesses navigate such events. Instead of simply being asked for legal opinions, they find themselves and their offices leading the coordination of internal response teams. They are also being asked to have a view about the 'right' path forward for the company – one that considers both 'hard' and 'soft' law standards and wider community and stakeholder expectations.

To explore how companies are approaching these issues, the Ashurst Leadership Centre convened a roundtable in partnership with The Legal 500 in Sydney in November 2023. The event was attended by 15 GCs from Australia's largest companies and Ashurst partners and communications experts.

The discussion was facilitated by Lea Constantine, Partner, Head of Region - Australia.

## Counsel must now wear many hats

One roundtable participant said it was now typical for directors to turn to the GC as a first port of call. “Where there is a crisis, and the board is there, they start with us,” she said. Another said, “I’ve seen my role go from discrete advisory to one of steward.”

Jo En Low from Ashurst added, “When things go wrong, there are a lot of different interests and groups within a business that feed into an effective response. Managing all of those often lands at the GC’s door.”

The group believed that the central but relatively independent position of the GC and their team put them in a good position to perform the greater functions expected of them.

“We are across so much of the business and different roles,” said one GC. “You do get a good helicopter view of the business.”

Another GC noted that his team’s role in managing compliance meant he regularly spoke to internal leaders about processes and responses. This flowed on to discussing model responses to an emergency or full-blown crisis. “We do spend a lot of time talking to people about the ‘right’ thing to do,” he said.

## Five steps for effective crisis management

1

### First focus on the problem

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The first step in any crisis, the group felt, is to seek to resolve the crisis itself rather than focus on communications management or attribute responsibility to third parties.

“It is very common to think that crisis management is about media management, when in fact it almost never is,” said Tracey Cain, CEO of H/Advisors APA. “Crisis management is about resolving the crisis and communicating directly with stakeholders about matters that concern them.”

One GC added that, “Our approach is to solve the problem first and think about the root causes second.” He noted that this often meant not getting distracted by discussions about who the business could sue for creating the issue.



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## Collect quality information – and check its accuracy

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Gathering as much information as possible about the situation and verifying its accuracy is essential. The key is to ensure that all communications (including internal updates used to brief decision makers) are accurate and based on verifiable facts. GCs and their teams should also be prepared to be upfront about any limitations relating to the information.

“All you can say is what you know or what you are going to find out,” said one GC.

It was observed that this was often easier said than done, with GCs likely to find themselves under extreme pressure to support the business to ‘say something’ to the media, regulators, staff, shareholders or other stakeholders.

The group also noted that, no matter what information the business shared during a crisis, it was essential to strike the right tone and communicate authentically. Businesses should especially avoid being seen as defensive or unwilling to take responsibility, and focus instead on the impact of the crisis on people.

“Most of the time, those most affected by a crisis are people,” said Low. “It can be easy to forget that in the heat of the moment.”


3

## Don’t panic – you may have more time than you think

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One GC noted that there was usually a reasonable amount of time available to work through a crisis. “People always feel that there is no time, but there often is,” he said.

Effective GCs also took time early in a crisis response to consider how the crisis could play out over the following six to 12 months, said Nicholas Mavrakis from Ashurst. “It is important to identify all the stakeholders’ interests as the basis for a roadmap for the GC, management and the board,” he said. “It’s very important to be disciplined and to be accurate with representations during the heat of a crisis.”



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## Prepare a playbook

An effective crisis response starts well before an event, with well-prepared companies conducting scenario planning, creating crisis-response playbooks and practising using them.

These playbooks should map out potential crises – ideally in alignment with the board's risk appetite – and describe how the company should respond. They should also define what constitutes a 'crisis' that would result in the playbook being used.

John Macpherson from Ashurst Risk Advisory noted that regulators such as Australian Securities and Investments Commission (ASIC) and Australian Prudential Regulation Authority (APRA) were increasingly focused on the need for companies to show how they were prepared for cyberattacks in particular. This included the creation of playbooks.

"You can now find yourself being marked by a regulator on the quality of your crisis preparation and response," he said.

At the roundtable, some GCs also noted that it was important to focus on the composition of emergency response teams. The roles and responsibilities of team members should also be crystal clear. "You need to have clear delegations and know who can make what decisions," one commented.

However, there was also an awareness of the limitations of these mechanisms. According to Cain, "Playbooks are essential, but crises never play out in a predictable fashion. Effective playbooks are ones which look at the nuances, such as where has this happened before and what did they do that worked? That way, the playbook is a workable guide rather than an irrelevant prescription that doesn't match your crisis."

Other advice shared by the group included pre-writing crisis communications material, such as media releases and stock exchange announcements. One GC said his business also pre-prepared customer offers so they could be rolled out quickly if there was an issue.

Macpherson added that companies often failed to think broadly enough when deciding what risks to prepare for. "The idea of a black swan is almost always a myth," he said. "The pandemic, for example, was one of the most predicted health crises of the past 50 years, yet it still caught many businesses by surprise."

## Cultivate the right culture

Finally, the group agreed it was vital to build a company culture that encouraged information sharing to support the early detection of issues that could become crises.

GCs noted that individuals were often reluctant to notify senior managers about problems and that there could be significant cultural differences between jurisdictions. The varied treatment of whistle-blowers and expectations about sharing information with managers in different countries were given as examples.

"You need to tell us if there is something you're worried about," said one GC. She added that she found it effective to run practical role-modelling exercises with staff to ensure they understood appropriate behaviours.

Other GCs highlighted that building relationships with various internal teams, spending time with them and ensuring that the office of the GC was approachable were also crucial in cultivating the right culture.

### Learn more

To discover more about curated programs for boards and executives, please visit the Ashurst Leadership Centre at <https://www.ashurst.com/en/who-we-are/ashurst-leadership-centre/> or contact **Maja Reid**, Ashurst Leadership Centre.

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