FACILITATING REASONING IN THE LAW

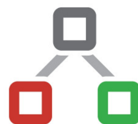
A preliminary survey of the opinion of corporate lawyers regarding the challenges they face in doing legal reasoning and the possible utility of visual diagramming [1]

"…a model of argumentation must be capable of clarifying the underlying assumptions and choices made in the decision process so that they can be submitted to critique." [2]

\- Eveline T. Feteris (2008)

"Complex reasoning and argumentation are central to legal practice. Software-supported argument mapping may be able to help lawyers reason and argue more effectively…it helps shift reasoning and argumentation into a semi-formal mode, a kind of 'sweet spot' between the laxness of everyday reasoning and the straightjacket of formal logic." [3]

\- Tim van Gelder (2007)



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[1] An inquiry commissioned by the Legal Workshop, Australian National University and conducted with the cooperation of the Australian Corporate Lawyers Association, in late 2008.
[2] Models for the Analysis of Legal Argumentation', *Informal Logic*, Vol. 28, No. 1. 2008, p. 5.
[3] 'The rationale for Rationale', paper at the workshop 'Graphic and visual representations of evidence and inference in legal settings', Cardoso School of Law, New York City, 28-29 January 2007.

Abstract

Lawyers engage in a great deal of reasoning. Understanding the reasoning of others about the law and communicating their own is their stock in trade. The Legal Workshop at the Australian National University is exploring a new technique called argument mapping and software tools created to make such reasoning more transparent and ease the workload on all involved with it, it. Argument mapping is a form of visual diagramming that focuses on processes of inference and the use of evidence. In late 2008, the Legal Workshop commissioned a survey of corporate lawyers to gather evidence as to the opinions of legal practitioners regarding legal reasoning and the use of visual diagramming. The survey was designed and conducted by Austhink Consulting and delivered on-line to the membership of the Australian Corporate Lawyers Association (ACLA). There were over 250 respondents. Their responses indicated very clearly that the use of visual diagramming of particular kinds could significantly enhance their productivity. The finding was stronger than might reasonably have been expected and suggests that further, in-depth research in this field could pay significant dividends.

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KEY FINDINGS

There were seven key findings of the survey:

1) The overwhelming majority (90%) of corporate lawyers use only *informal* methods, rather than best practice or in-house mandated procedures in sorting through complex material and preparing legal briefs.

2) Employers of corporate lawyers *invest very little* in new technology or training to better equip their legal staff to work economically and effectively.

3) A good deal of external legal advice is *difficult to follow*. Some 39% of corporate lawyers often have to go back to seek clarification from the providers.

4) The biggest challenges corporate lawyers see themselves having to deal with are in *understanding the reasoning* behind external advice (51%) and *communicating their own reasoning* to their managers (57%).

5) Only a small minority (15%) of lawyers are familiar with techniques for the *visual diagramming of reasoning* and very few (but about the same number) habitually engage in diagramming of any kind.

6) *No* respondents use software specifically designed to assist legal reasoning and of those who used software of any kind to support their thinking only 13% stated that they found this very useful.

7) Yet the overwhelming majority of respondents stated that their *productivity would be increased appreciably* (somewhat or very much) if reasoning (72%) or options (82%) were presented to them in the form of *specific kinds of visual diagram* using the software programs Rationale or bCisive developed by Austhink.

SCOPE FOR FURTHER RESEARCH

These findings would seem to suggest that further research in this area could be fruitful. Three areas of further research immediately suggest themselves:

a) *Tasks:* What exactly *are* the reasoning and comprehension tasks that actually cause the greatest difficulties in the preparation and dissemination of legal opinion and advice?

b) *Methods:* What kinds of 'informal' methods are used to deal with these tasks? Which such methods can be shown to be the more effective, if any? Why do most lawyers not have standard methods in common? What have they been taught, if anything, by way of formal or normative skills? Why do they not automatically use these? What are the costs to them and their employers of default reliance on informal methods? In particular, what is the relationship between risk minimisation and reliance on informal methods of analysis? Of those who use more standardized procedures, what evidence is there that these actually improve the results achieved? What would actually *constitute* such evidence?

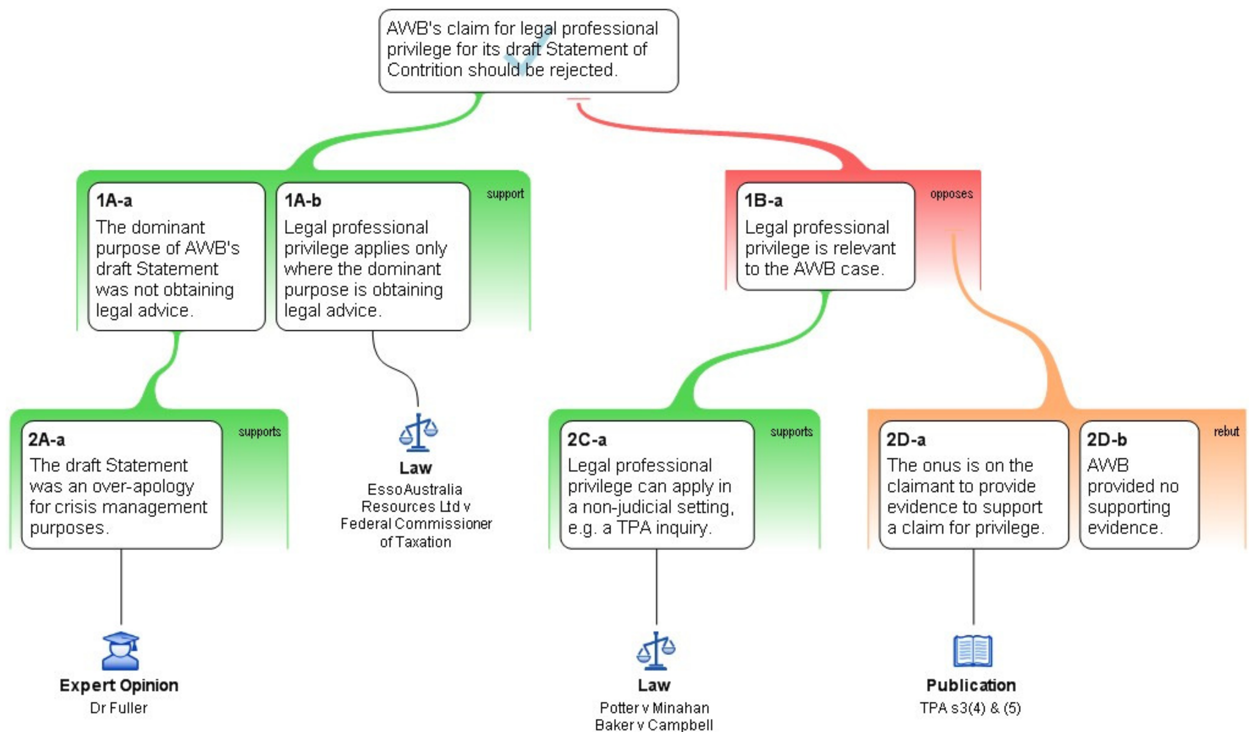
c) *Visual diagramming:* Why does visual diagramming of the kind presented in the survey seem likely to the overwhelming majority of respondents to improve their productivity, when the *same* majority indicated that they do *not* use formal methods as a rule, do *not* use diagramming in general, have *not* in the past found software very useful for most of their work and *never* use software specially designed to support legal reasoning? Will this response be confirmed from a much broader sample of lawyers and a larger suite of examples of legal work?

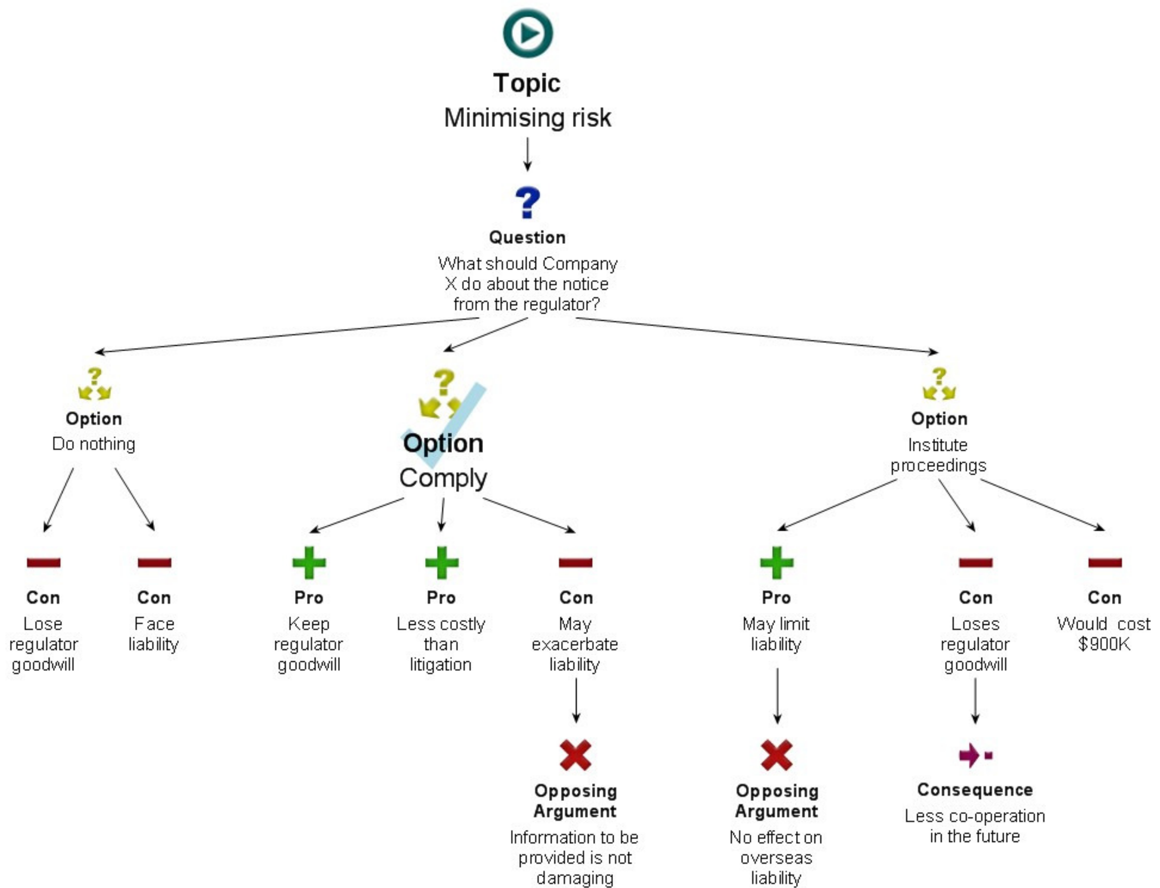
d) *Willingness to use diagramming software and investment in training:* The survey indicated that the great majority of corporate lawyers believe their productivity would be increased if external legal advice was presented to them in diagrammed form, or complemented by a diagram of the kinds shown in the survey. They were not asked would they see it as worth their while to learn how to do such diagramming for themselves. Given the uniform testimony that neither law firms nor government agencies seem to invest very much in training or new technology to enable their legal staffs to cope with workload, this is an area that demands close attention.

THE NATURE OF VISUAL DIAGRAMMING

To begin to answer the third suite of research questions, it is necessary to understand what visual diagramming in general and argument mapping in particular actually are. The simplest way to explain that in the present context is to show the two diagrams used in the survey; using them to explain the conventions employed in argument (and decision) mapping. A few further remarks about the evolution of such software tools may also be useful.

The two diagrams are shown opposite. The first was created using a program called Rationale (2.0). The second was created using a program called bCisive (1.0). Since then, a new program, bCisive 2.0, has been released, which combines the strongest features of both these earlier programs and other additional capabilities. All these programs derive ultimately from a research project initiated by Tim van Gelder in the late 1990s, then funded by venture capital from 2006. Rationale 1.0 and 2.0 were released in 2007, bCisive 1.0 in March 2008 and bCisive 2.0 in December 2008.





The Rationale 2.0 diagram is an **argument map**. As a visual diagram, it uses colour, line and position to make it easier for the eye to track and the brain to process what is going on with the data. As an argument map, it applies these general devices to the matter of evidence and inference. The colour conventions in use are green for a supporting claim, red for an opposing claim and orange for the rebuttal of an opposing claim. Just this alone makes it possible almost instantly for the brain to interpret what is happening inside the argument on display.

The conventions of line and position follow the rule of abstraction: the fundamental bone of contention is being upheld or undermined by the claims beneath it, so it goes at the top. The claims are then ordered hierarchically in terms of their generality or level of abstraction, with the more detailed claims forming the bottom line and the sources or 'authorities' on which these claims are based being shown in what we call 'basis boxes' (the blue icons at the base of the map).

Within the claim boxes, prose is constrained to follow two simple rules: (a) a single, declaratory sentence per box; (b) no use of reasoning words (such as and, or, but, however, because, therefore, so, since etc) within boxes,

because their work is precisely what is done by the conventions of colour, line and position. Claims that must work together to constitute a single reason (i.e. a basic claim and an assumption that goes with it in providing a valid inference to the contention it supports or opposes) go in separate (white) claim boxes, but are bracketed together inside a single (coloured) supporting, opposing or rebutting node.

The bCisive 1.0 diagram is a **decision map**. It shows why one option is to be recommended ahead of two others in a given case, in order to minimise risk. Here there are no coloured nodes, only coloured icons. The icons are designed to be as intuitively clear as possible. Here we see those for topic, question, option, pro, con, opposing argument, consequence. The software includes quite a few other icons, from which the user can choose in creating a decision map. What the visual character of the diagram enables the eye and brain to do is to instantly see what is the thing to be decided, how many options have been considered, what are the advantages (pros) and disadvantages (con) of these options, which one is to be preferred and why.

It is not particularly surprising that practitioners would see such diagrams as enhancing their productivity. Assuming that the diagrams themselves have been competently prepared, they save the reader a great deal of work in deciphering and checking their comprehension of the reasoning involved in a given argument or decision. But even if the maps have not been competently prepared, they make it far easier for the reader to spot and then specify what is poorly drafted or simply missing and then to correct it. Thus, the technique can save time both in consuming and in communicating reasoning.

REASON FOR CONDUCTING THE SURVEY

The Legal Workshop at the Australian National University is a leading innovator in the delivery of legal education on line. Its Director, Gary Tamsitt, and his key staff are looking for ways to streamline and strengthen the *reasoning* of their students. There are a number of aspects to this challenge, but the idea of trying to incorporate argument mapping into their skill set by 2010 is seen as a key part of the project. Given how new such mapping is in the legal domain – or in general – it was decided in late 2008 to seek some empirical evidence as to whether practising lawyers would see the technique as useful to them. A set of 20 to 30 structured interviews was envisaged to begin with. ACLA's enthusiasm for the project made possible a much wider sampling, through an on-line survey, utilizing surveymonkey.

The survey, designed by Austhink, was intended to gather *preliminary, indicative data*. The aim was to learn:

- whether legal practitioners saw themselves as facing challenges in regard to the work of legal reasoning and

- whether, if they did, they would see visual diagramming as likely to be of much use to them.

As indicated above, the findings were rather striking and suggest that there is considerable scope for development of legal argument and decision mapping.

It is hoped that this preliminary research can be extended in the next couple of years. Meanwhile, a pilot project is being conducted by the Legal Workshop, with the objective of incorporating the use of argument mapping into the Graduate Diploma in Legal Practice by 2010. The results of this survey will be used to make the case for pursuing this pilot project and as a baseline against which to measure staff and student responses to both the concept of diagramming legal reasoning and specific architectures developed by Austhink for doing so. The software likely to be used for the pilot project will be neither Rationale 2.0, nor bCisive 1.0 (which were used in the survey), nor even bCisive 2.0 (launched at the end of 2008), but a version of bCisive customized for legal reasoning.

DESIGN OF THE SURVEY

It was important to the purpose of the survey to know whether or to what extent the respondents were a representative sample of corporate lawyers, in terms of their age, experience, and gender. The first five questions, out of 20, were, therefore, directed at establishing a demographic profile of the respondents. The main body of the survey was then designed to elicit information regarding the standard approaches to legal reasoning by respondents; the extent of their familiarity with any diagramming techniques and software programs created to facilitate the use of such techniques; their standard ways of processing legal advice from external lawyers; and their opinion as to whether the use of argument maps of specific kinds (samples being provided) seemed to them likely to improve their own productivity.

As soon as he was made away of the survey project, Peter Turner, CEO of the Australian Corporate Lawyers Association (ACLA) took a close interest in it and provided some sponsorship of it. The intention of the project from the beginning was to conduct a preliminary survey, of perhaps 20 or as many as 50 lawyers. The sponsorship by Peter Turner at ACLA made it possible to disseminate the survey questionnaire to a wider sample of corporate lawyers than had been anticipated in the original project design agreed by the Legal Workshop and Austhink Consulting. ACLA's membership numbers 2,500 lawyers and some 700 associates. ACLA conducts regular on-line surveys and gets between 10 and 15% response rates. In this case, 258 responded, which provided a population pool five to ten times larger than originally expected. Though only about 10% of the target population, this set of responses is more than enough for the findings to be thought-provoking and to suggest, broadly, both what may be the case and where further research could be instructive.

RESPONSE TO THE SURVEY

Demographic profile [Questions 1-5]

Experience: The range of experience was fairly even. 45% of respondents had had less than 5 yrs of experience, while 55% had had more than 5 yrs experience, 33% having had more than 10 years.
The overwhelming majority (83%) of respondents had worked for one or more large legal practices or for at least one corporation or government agency other than their present employer
Age: The age range was also fairly evenly distributed, with 47% aged between 22 and 40, while 53% were over 40, including 20% who were over 50.
Gender: The gender balance was slightly skewed towards women (53% to 47%), but this does not seem to be statistically significant, given that the ACLA membership is divided roughly 50/50 between male an female. It may indicate a slightly greater willingness on the part of female lawyers to respond to surveys in general or this survey in particular
Size of team: A clear majority of respondents (62%) worked either alone or in small teams of no more than 5 lawyers, while 31% worked in teams of between 6 and 50. Interestingly, while just over 2% worked in teams of between 50 and 100 lawyers, over 5% were in teams of more than 100 lawyers

Standard approaches to legal reasoning [Questions 6-8]

Q6: Response by employers to increasing pressures on legal staff

Only two respondents (0.4%) stated that their employer's response was to invest in training (so that their legal staff could work smarter rather than harder). Of these two, one was from a team of more than 100 lawyers.
The overwhelming evidence from the survey is that, when faced with increasing pressures on legal staff, employers of corporate lawyers do not invest in new technologies or training. They increase the size of the legal counsel team (22%), outsource more work to external lawyers (43%) or simply expect current staff to cope with the extra workload (33%).

Comment: On the face of it, this suggests that employers are unimaginative in the development and use of their skilled legal staff, but it may mean several things and it might be interesting to conduct closer research to pinpoint what is happening. Is the lack of investment in new technology and training due to widespread assumptions that there is no new technology available that would make any difference to the challenges they face, or that lawyers got their training before joining the employer and should not need

more? Is there a widespread assumption that such investments are generally a waste of time and money, or is it that there such things might, possibly, be beneficial, but it's not self-evident and there is no time (or inclination) to find out, by inquiring, testing and experimenting?

Q7: Methods used to process complex information and develop a legal brief

A very large majority of respondents (69%) stated that there is "an informal process" for doing this, while 21% stated that there are several different methods used by various members of the team. Fewer than 7% reported that there is an agreed process, such as a cycle of brainstorming, drafting, peer review and supervisory editing; and fewer than 4% responded that there is a highly structured process of developing the logical flow of an issue which all staff are required to follow.

Comment: Given the importance of reasoning in the law and the commonly reiterated complaint by law firms that even good law graduates often do not seem especially adept at critical thinking, these results surely warrant a closer look. They appear to suggest that across a broad cross section of in-house legal work there are no standard procedures for carrying out, staffing or refining legal reasoning.

Even if the output resulting from this state of affairs was exceptional, this would be interesting. One would want to know whether, by default, the informal processes used just happened to do the same things, or how they generated good results informally. But, as we shall see, there is plenty of evidence that work pressure is high and the greatest challenges to greater economy of effort are described, by the lawyers themselves, as stemming from problems in understanding the arguments of others, assembling reasoning and communicating it effectively to managers.

One might think that corporations and government agencies that employ in-house counsel would have an interest in learning what the range of informal techniques is, which ones appear to generate the best results and why, and then seeking to set in-house standards in order to spread the gains across their staffs. In the case of employers with only a single legal counsel or a small team, access to such information could be a useful component of recruitment and performance evaluation processes.

Q8: Capturing the essence of a complex brief

Consistent with the indication that the vast majority of lawyers use various unspecified informal processes in processing complex information and preparing a legal brief, 83% of respondents reported that in capturing the

essence of a complex brief they write detailed notes (14%) or prepare a summary or general outline (69%). Only 15% stated that they created a diagrammatic or tabular representation of the issues and none at all reported using any specialised legal support software. The remaining 2% stated that they did something else, but did not indicate what it was.

Comment: These two dominant procedures should not occasion any surprise, in a sense, since they are the default methods used by most educated people in all walks of life to try to extract the essence out of books, journal articles, memoranda and so on. What is striking is that lawyers are not different. In other words, this data would suggest that there is nothing about lawyers which makes them take a significantly different approach to the analysis of arguments than anyone else does. The content of the law and the conventions of legal practice doubtless affect the way they interpret the *significance* of what they read, but as for the processing of information itself and the absolutely core tasks of *reasoning*, they have not, in general, been taught, whether at university or in their places of employment, to do anything new or different. Either that or what they were taught as university students has had, at most, an indirect influence on what they actually do having graduated.

The fact that not one reported using any specialised legal software could mean any one or more of several things and it would be useful to the future of legal practice to ascertain which. It could mean simply that there is no software currently available that ideally suits the processing of legal argument. It could mean that such software is available, but is not penetrating the market, perhaps because of price, or usability problems; perhaps due to the strongly entrenched habits of lawyers being resistant its uptake, or to the unwillingness of firms and government agencies to invest in such technology (as we saw in the answers to Question 6).

It might be useful to learn more about this. To do so efficiently, it would presumably be helpful to establish what the problems are that lawyers are trying to overcome and what a software product would have to be able to do in order to make such difference in skilled hands that it would rapidly start to set a new industry standard. Some of the evidence from further into the survey throws at least a little light on these questions.

Familiarity with visual diagramming [Questions 9-11]

Q9: A large number (43%) of respondents indicted that they were familiar with mind mapping and more than 35% with decision mapping. Smaller numbers claimed familiarity with other techniques, such as argument mapping (15%), evidence mapping (13%) and dialogue mapping (5%). A

substantial number (37%) stated that they are no familiar with any diagramming techniques at all. Respondents were asked to nominate all that they were familiar with, so the figures do not add up to only 100%.

Comment: Several inferences might be drawn, at least provisionally, from this data. First, although a great many lawyers are familiar with the idea of visual diagramming, far fewer use it, going by the evidence in response to Question 8. One explanation for this may well be that the work they need to do is mostly reasoning and that mind mapping and decision mapping seem of limited utility in this regard. Another reason may be that, in order to get significant value out of such techniques, you need to be trained in them and, crucially, to have team members around you and managers above you familiar with such techniques and appreciative of the results they can provide. But the evidence suggests that there is almost no training provided by the employers of in-house lawyers and that they tend to work in informal ways using their own idiosyncratic approaches to reasoning.

The fact that 15% of respondents (38 of them in total) stated they are "familiar with" argument mapping is interesting and might be worth exploring further. There seems very little probability, on the other hand, that this 15% are the same 15% who stated that they use diagrammatic or tabular representations to capture the essence of a complex brief. This is in part because argument mapping, in general, unless understood in a very informal sense, is not yet widely used, whether in legal or other circles with any consistency or common conventions. Nonetheless, this datum will be worth bearing in mind when we consider the responses to the last few questions, where sample argument maps were actually presented to the respondents.

Q10: Actual use of diagramming techniques and software

While a substantial number of respondents stated that they were familiar with one kind of diagramming technique or more than one, the actual use of such techniques suggests that familiarity does not generally lead to use. Fully 24% of respondents stated that they never use visual diagramming, while a further 42% said they do it "infrequently". This still leaves a third of respondents, however, who do it often (29%) or even do it as their "standard practice" (5%). The curious thing is that here we have 34% stating that they use visual diagramming techniques often or as their standard practice, yet in answering the question "How do you most prefer to capture the essence of complex briefs?" only 15% said that they preferred to do so by creating a diagrammatic or tabular representation.

Comment: These two sets of responses are not necessarily contradictory, but the relationship between them would surely be worth teasing out. One

respondent wrote, for instance, that while visual diagramming is her standard practice, she is not familiar with any of the kinds of visual diagramming listed and never uses any software for diagramming. She did not specify what she does do, but her comment makes it plain that there is quite a bit of noise in the data as to who does what and how. The simplest reading of this data is that that 15% included the 5% (standard practice) and 10 out of 29% (often).

Q11: This is highlighted by the fact that, in answer to the next question ("If you *have* used some kind of visual diagramming software to create visual presentations or models of a complex issue, how useful did you find it?"), 65 responded, indicating that they had used software for this purpose, of whom only 13% stated that they had found it "very useful", with 49% saying "occasionally useful" and a notable 38% saying that it was "*not* useful". When we remember that *no-one* reported ever having used *specialised legal support* software, we might deduce that the low satisfaction rate with software tools may be a reflection of the **lack of software specifically adapted to what the lawyers need to do**. But the prevalence of "informal" methods for doing what they do (Q7) would suggest that there is no clear consensus among them about what is the best way to do legal research and reasoning. Unless that question can be answered tolerably well, designing specialised tools will remain a speculative business.

Processing external legal advice [Questions 12-17]

Q12. Asked whether, in general, the legal opinion or advice sought from external lawyers was clear and well presented, 47% of respondents declared that it was characterised, in general, by "clear judgments, supported by transparent logic". On the other hand, 22% stated that it was characterised by "clear judgments, but with complex or hard to follow reasoning"; while fully 31% declared that they believe such advice is generally characterised by "equivocal judgments, with complex or hard to follow reasoning." So, more than half the time, there are perceived deficiencies in the way external legal advice is communicated and **the most common deficiency is that the reasoning is complex and hard to follow**. This is a primary datum, to which we shall come back after looking at the rest of the evidence from the survey.

Q13. Can this deficiency be compensated for by the corporate lawyers? Much of the time, by dint of their own work, they say it can. Significantly, fewer than 1% of respondents stated that they never needed to seek clarification from the providers of external advice regarding their reasoning. However, fully 60% stated that they "seldom" felt the need to do so, which suggests that much of the time, when the reasoning is complex and hard to

follow, they tough it out for themselves. However, a substantial minority (over **39%) stated that they often had to seek such clarification**. Taken in conjunction with the evidence that complex and hard to follow reasoning is the most common deficiency in external legal advice, this data naturally prompts the question: *What, then, could be done about this?*

Q14. As a way into that question, the survey asked: "How significantly would your workload be eased if their reasoning was presented to you clearly and concisely?" Since 47% had stated that, in general, it already is, the answers to this question are a useful indication of the margin for improvement. Fewer than 5% said that it would not affect their workload "at all". These few presumably have a small number of external lawyers who provide good, clear advice anyway. It's hard to make sense of the response otherwise. More interesting are the 53% who said it would ease their workload only "marginally". This would seem to suggest that for some (perhaps 6% of the total number of respondents) the "complex and hard to follow reasoning" they find in external advice is not a serious problem. This leaves 36% who declared that it would ease their workload "significantly", while just under 6% were "unsure".

Comment: The concept of **"marginal utility"** comes into play here. It would, of course, be absurd to suggest that legal reasoning is, in general, done badly. The question is, given the complexity of many matters and the pressure on lawyers and their employers, where can gains in efficiency and clarity be made? The fact that so substantial a proportion of corporate lawyers express concern about the reasoning they find in externally provided legal advice, that most use only "informal" methods themselves in preparing legal briefs, that most are unfamiliar with diagramming techniques and none use or have found software custom made for doing legal reasoning and case work, while, finally, more than a third believe their workload would be eased significantly if legal advice was submitted clearly and concisely, suggests that there is **scope for innovation and improvement** in the way legal reasoning is done.

Q15. We then turned from asking about external legal advice to asking about the communication and presentation of such advice to management. The overwhelming majority of respondents (more than 86%) stated that they were required, as a rule, to present their own recommendation and reasoning on the matter in hand, after **critically evaluating** the external advice. Small minorities declared a different expectation: just under 6% that their management wanted only to hear the recommendation by the external lawyer; while just over 8% stated that they were expected to provide the external lawyer's recommendation and the underlying reasoning for it, but without offering an evaluation of the case.

This being the case, one might have thought there would be a premium on clearly structured advice. To be sure, as we saw, this is what 47% of respondents think they generally receive. But **given that** the majority of respondents find that complex and hard to follow reasoning is chronic, that many feel a need to seek clarification from the external providers and that almost all have to evaluate the reasoning in question, surely what we seeing here is the elements of a strong case for the marginal utility of well structured legal advice from external lawyers. It would **save time** in seeking clarification, **facilitate the evaluation** process and, at a minimum, better **enable** such **reasoning to be passed on** clearly and easily.

Q16. This last point – how advice is passed on – was our next question. Here, as with Q9 (familiarity with types of visual diagramming), respondents were asked to nominate as many answers as were applicable. In a significant number of cases (35%) the answer was simply that they were required to pass on the written advice provided by the external lawyers. This is markedly inconsistent with the data from the preceding question, unless it is interpreted as meaning that, **along with** their own summary and evaluation of the advice, 35% of the respondents are required to also pass on the original written advice.

Comment: The overlap between this figure and the data from Q15 imply that roughly a quarter (21% of the total = a quarter of 86%) of those who are asked to present their own recommendation and reasoning, based on a critical evaluation of the external advice, are also asked to forward the original written advice. Interestingly, though 86% are required to present their own recommendation and reasoning, only 70% are required to do this in writing. Often such advice is communicated by means of an oral briefing (49%) or an oral briefing supported by a power point presentation (9%).

Q17. Asked 'What is the greatest challenge you face in presenting the advice' – whether in writing, orally or orally but with a power point presentation in support – the majority (57%) stated that it was "**communicating the reasoning *behind* the recommendation** clearly and succinctly." This compares with 24% who said it was communicating the recommendation and 19% of respondents who said it was communicating their evaluation of the external lawyer's recommendation. Once again, how to handle **reasoning** efficiently and effectively is the key issue. Moreover, even though 50% of respondents claimed that external advice is generally presented to them already clear and transparent, 57% state that communicating that "transparent" reasoning to their managers is their greatest challenge. Why? One would like to know what goes wrong here.

Measuring the utility of legal reasoning (Question 18)

Q18. In an effort to establish where the marginal utility of innovation and improvement in the drafting, evaluation and communication of reasoning in the law might specifically be found, we asked: "What is the leading measure of the value of legal work in your organisation?" The question was not fine grained and the answers provide evidence only at a very high order of generality, but it is worth noting that most specified risk minimisation (46%), followed by value-adding to strategic decision making (40%). Only 10% identified cost reductions as the measure, while 4% were unable to specify the measure.

Comment: The emphasis on risk reduction invites close examination, given the earlier data about reasoning, clarification and informality. If, in 46% of cases, risk minimisation is the key measure of legal work, while in 50% of cases, external legal advice is hard to follow or equivocal in its recommendations, what is the **risk premium** deriving from the informal processes used in 70% of cases to hammer out advice and the fact that in 63% of respondents seldom feel the need to seek clarification from external lawyers? More fundamentally, the question that this data raises is: what standard of clarity would actually minimise risk and, at the same time, reduce workload? What methods might it be both feasible and useful to adopt – or invent – to meet such a standard?

Response to actual, simple argument maps (Questions 19-20)

Q19. Against all this background data, what the survey then sought to elicit, in a very simple and provisional way, was whether argument mapping, as developed by Austhink Consulting itself, looked as though it could contribute to the setting of the above kind of new standard. Respondents were shown the following prose passage and then "the logical gist of the same opinion in visual form" and asked "How much would it help your productivity if you were presented with argument summaries in such a visual form?" A striking 41% said "very much", while a further 31% said "somewhat". Only 6% said "not at all."

Here is the prose:

> 26. The proper approach to the construction of a statute which authorizes the issue of compulsory process requiring production of documents in respect of which legal professional privilege might be claimed is addressed in the majority judgment (Gleeson CJ, Gaudron, Gummow and Hayne JJ):

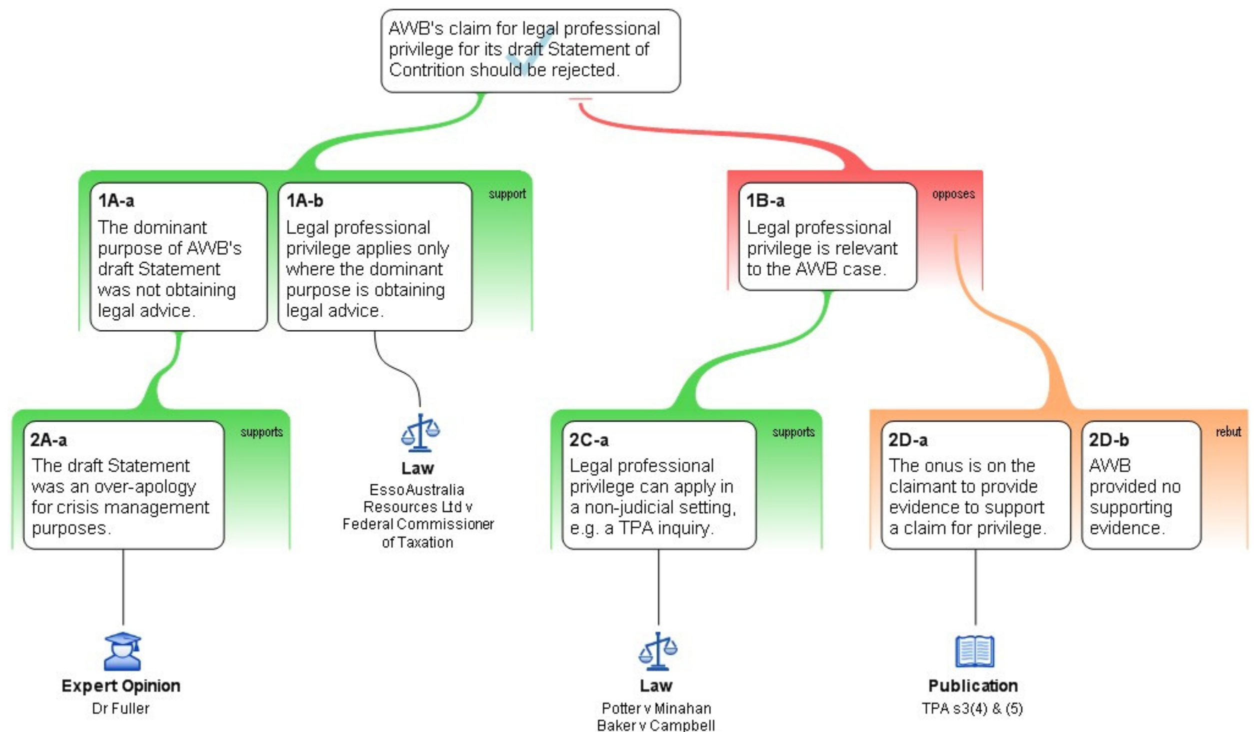
Legal Professional Privilege

9. It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. It may here be noted that the "dominant purpose" test for legal professional privilege was recently adopted by this court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* in place of the "sole purpose" test which had been applied following the decision in *Grant v Downs.*
10. Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the process of discovery and inspection and the giving of evidence in judicial proceedings. Rather and in the absence of provision to the contrary, legal professional privilege may be availed to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the Act provides. Thus, for example, it was held in *Baker v Campbell*, that documents to which legal professional privilege attaches could not be seized pursuant to a search warrant issued under s 10 of the Crimes Act 1914 (Cth).
11. Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which in this Court can be traced to *Potter v Minahan*, was the foundation for the decision in *Baker v Campbell.* It is a rule which, subject to one possible exception, has been strictly applied by this Court since the decision in *Re Bolton: Ex parte Beane.* Cases in which it has been applied include *Bropho v Western Australia, Coco v The Queen* and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd.* The possible exception to the strict application of the rule was the decision in *Yuill*[30] ...
41. I see no reason why an established claim for legal professional privilege should not be considered a "reasonable excuse" for negation of the obligation to produce documents because of the operation of s 3(5) so as to deny the operation of s 3(4) in respect of those documents to which the claim is established. ...
44. It is beyond doubt that the onus of establishing the claim for legal professional privilege lies on the party asserting it. That is so as a matter of construction of s 3(4) and (5) of the Act, and authority. …

79. There remains the question of whether the claim of legal professional privilege is established on the evidence placed before me in relation to exhibit 665.
80. In my view, it is not. The evidence of Dr Fuller makes plain that the document was prepared for the dominant purpose of considering whether a strategy of apology would be adopted by AWB. It was not prepared for the dominant purpose of obtaining legal advice.
81. The affidavit of Ms Rosemary Peavey does not contradict that evidence, nor does it establish any basis for the claim. At its highest, it contains her unsupported conclusion. That is not sufficient to establish a contested claim for legal professional privilege. …
84. The formal orders I propose to make are:

a. The claim for legal professional privilege in respect of exhibit 665 is rejected; and
b. The non-publication order made pursuant to s 6D in respect of exhibit 665 is revoked.

Here is the visual representation, prepared in Austhink Consulting's software program Rationale:

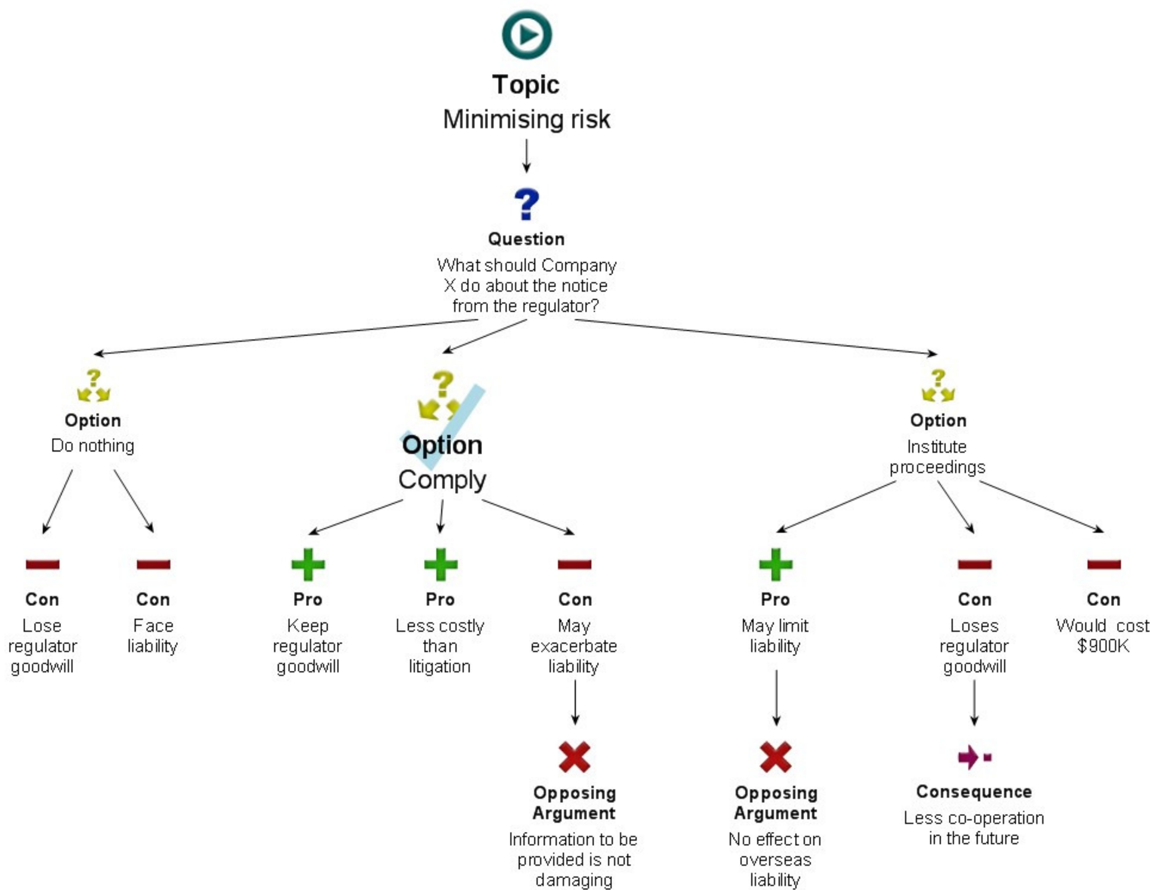


Comment: Given the earlier data about lack of use of software, relative lack of familiarity with diagramming techniques, relatively infrequent use of them, minimal awareness of argument mapping and problems in handling reasoning and communicating it, these figures are quite striking. Remember

that none of the respondents reported ever having used specialised legal support software (Q8) and only 13% declared (Q11) that they found whatever diagramming software they had used to be "very useful". Yet no less than 72% saw substantial value in this particular form of diagramming and 41% very considerable value.

Q20. Finally, respondents were shown "a visual summary of a recommendation from among a range of options" and asked "How much would it help your productivity if you were presented with recommendations in such a form?"

Here is the visual diagram. This was prepared in Austhink Consulting's software program bCisive:



<u>Comment:</u> In this case, the results were even more striking. While the same 6% said "not at all", fewer (9% compared with 15% in Q19) said "minimally" and fewer (3% compared with 7% in Q19) were "unsure". An impressive 40% said "very much" and another 42% said "somewhat".

The relationship between these responses and a research project top establish the marginal utility to lawyers of visual diagramming will be evident. This preliminary survey data *could* have indicated that overwhelmingly lawyers thought such diagramming would *not* make any difference, or were *unsure*, or perhaps that it would minimally improve their productivity. Instead, it showed an overwhelmingly positive response to visual diagramming in the context of questions about the handling of reasoning in legal work. This strongly suggests that further research should be undertaken – and indeed funded - to closely explore the marginal utility of diagramming to legal reasoning.

THE SURVEY OF COPRORATE LAWYERS
[Distributed on-line to members of the Australian Corporate Lawyers Association (ACLA) in October 2008]

Preamble:

This survey is anonymous, but for statistical analysis purposes the first few questions cover your demographic profile. There are then 15 questions which ask about your experience with matters related to (1) the processes used to manage complex briefings (2) the logic, clarity and utility of the legal opinion or advice you receive from external lawyers; and (3) the challenges you face in crafting such opinion or advice into a form that meets the needs of your board, senior management or supervisors.

Demographic profile:

1. Have you been working as a corporate or government lawyer for:

   (a) Less than 2 years
   (b) 2 to 5 years
   (c) 5 to 10 years
   (d) More than 10 years

2. Before you started work with your present employer, had you:

   (a) Come straight out of university
   (b) Been working in a small legal practice
   (c) Worked in one or more large law firms, but not in government or as a corporate lawyer
   (d) Worked for at least one other corporation or government agency

3. Are you aged:

   (a) Between 22 and 30
   (b) Between 30 and 40
   (c) Between 40 and 50
   (d) Over 50

4. Are you:

   (a) Female
   (b) Male

5. Does the corporate legal staff of your company or agency in Australia consist of:

   (a) Just you
   (b) Between 2 and 5 lawyers
   (c) Between 6 and 50 lawyers
   (d) Between 51 and 100 lawyers
   (e) More than 100 lawyers

6. Which of the following best characterizes the way your organization responds to increasing pressures of legal work?

   (a) By increasing the size of the legal counsel team
   (b) By outsourcing more work to external legal firms
   (c) By expecting current staff to cope with the extra workload
   (d) By investing in technologies
   (e) By investing in training

Preparing a brief

7. How do you most prefer to capture the essence of complex briefs?

   (a) Writing detailed notes
   (b) Preparing a summary or general outline
   (c) Creating a diagrammatic or tabular representation of the issues
   (d) Using specialized legal support software
   (e) Other: Please elaborate

   ……………………………………………………………………
   ……………………………………….

8. How would you characterize the methods used in your organization to process complex information and develop a brief?

   (a) There is an informal process

(b) There are several different methods used by the various legal counsel teams
(c) There is an agreed process, such as a cycle of brainstorming, drafting, peer review, revision and supervisory editing
(d) There is a highly structured process of developing the logical flow of an issue which all staff are required to follow

9. Which of the following kind or kinds of visual diagramming is or are familiar to you? (Please select all that apply)

(a) Mind-mapping
(b) Evidence mapping
(c) Dialogue mapping
(d) Argument mapping
(e) Decision mapping

10. How often have you (and your team) tried using visual diagramming techniques to clarify your own or someone else's ideas (on paper, on a whiteboard, with post-it notes or software etc)?

(a) I never use visual diagramming techniques
(b) I do it infrequently
(c) I do it often
(d) It is my standard practice

11. If you have used some kind of visual diagramming software to create visual presentations or models of a complex issue before, how useful did you find it?

(a) Not useful
(b) Occasionally useful
(c) Very useful

Please specify which software programs you have used:

…………………………………………………………………………
……………………..

The external lawyer

12. In general, is the legal opinion or advice you receive from external lawyers notable for presenting:

    (a) Clear judgments supported by transparent logic
    (b) Clear judgments, but with complex or hard to follow reasoning
    (c) Equivocal judgments, with complex or hard to follow reasoning

13. How often do you need to seek clarification from external lawyers of their reasoning?

    (a) Never
    (b) Seldom
    (c) Often

14. How significantly would your workload be eased if the reasoning was presented to you clearly and concisely:

    (a) Not at all
    (b) Marginally
    (c) Significantly
    (d) Unsure

Delivering the advice to business decision-makers

15. How do your CEO, senior management or board like you to present external advice?

    (a) To provide only the external lawyers' recommendation
    (b) To provide the external lawyers' recommendation and the underlying reasoning, without your evaluation
    (c) To present your own recommendation and reasoning to them, having critically evaluated the legal advice

16. In what form(s) do you usually present advice from external lawyers to your supervisor, management or board? Please tick all that apply:

    (a) The written advice provided by the external lawyers
    (b) Your own written summary and evaluation of the advice
    (c) An oral briefing
    (d) An oral briefing supported by a Power Point presentation

17. What is the greatest challenge you face in presenting the advice?

    (a) Communicating the recommendation clearly and succinctly
    (b) Communicating the reasoning behind the recommendation clearly and succinctly
    (c) Communicating your evaluation of the external lawyer's reasoning

18. How is the value of legal work in your organization measured?

    (a) Value added to strategic decision-making
    (b) Risks minimised
    (c) Cost reductions
    (d) Other? Please elaborate

    ……………………………………………………………………………
    ……..

19. Here is a summary of a legal opinion in prose and the logical gist of the same opinion in visual form. How much would it help your productivity if you were presented with argument summaries in such a visual form?

    (a) Not at all
    (b) Minimally
    (c) Somewhat
    (d) Very much
    (e) Unsure

Legal Professional Privilege

9. It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. It may here be noted that the "dominant purpose" test for legal professional privilege was recently adopted by this court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* in place of the "sole purpose" test which had been applied following the decision in *Grant v Downs*.
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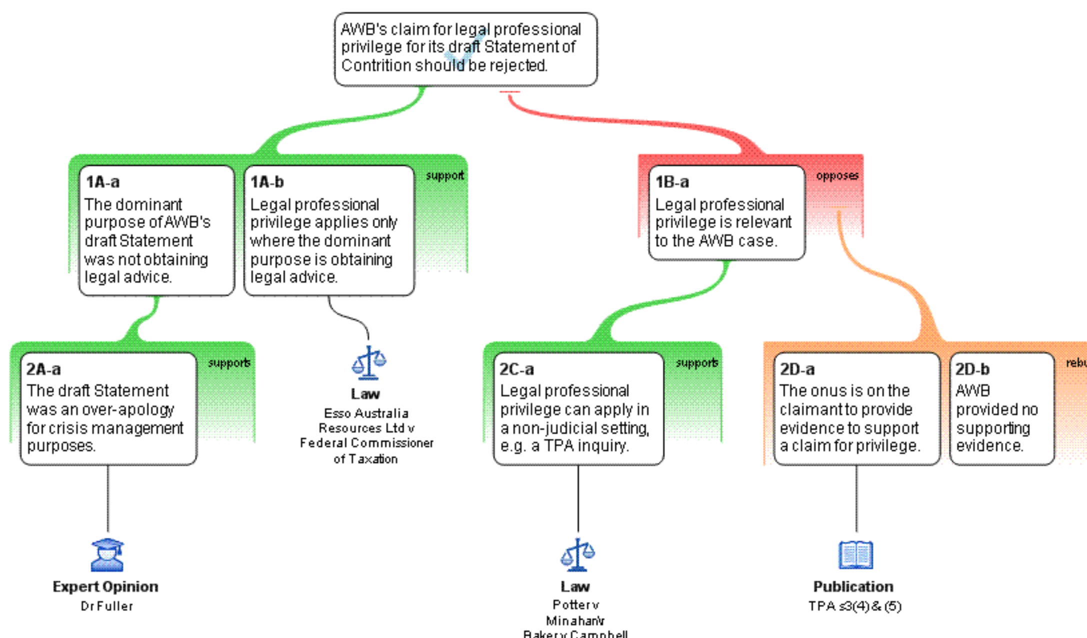

20. Here is a visual summary of a recommendation from among a range of options. How much would it help your productivity if you were presented with recommendations in such a form?

(f) Not at all
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(h) Somewhat
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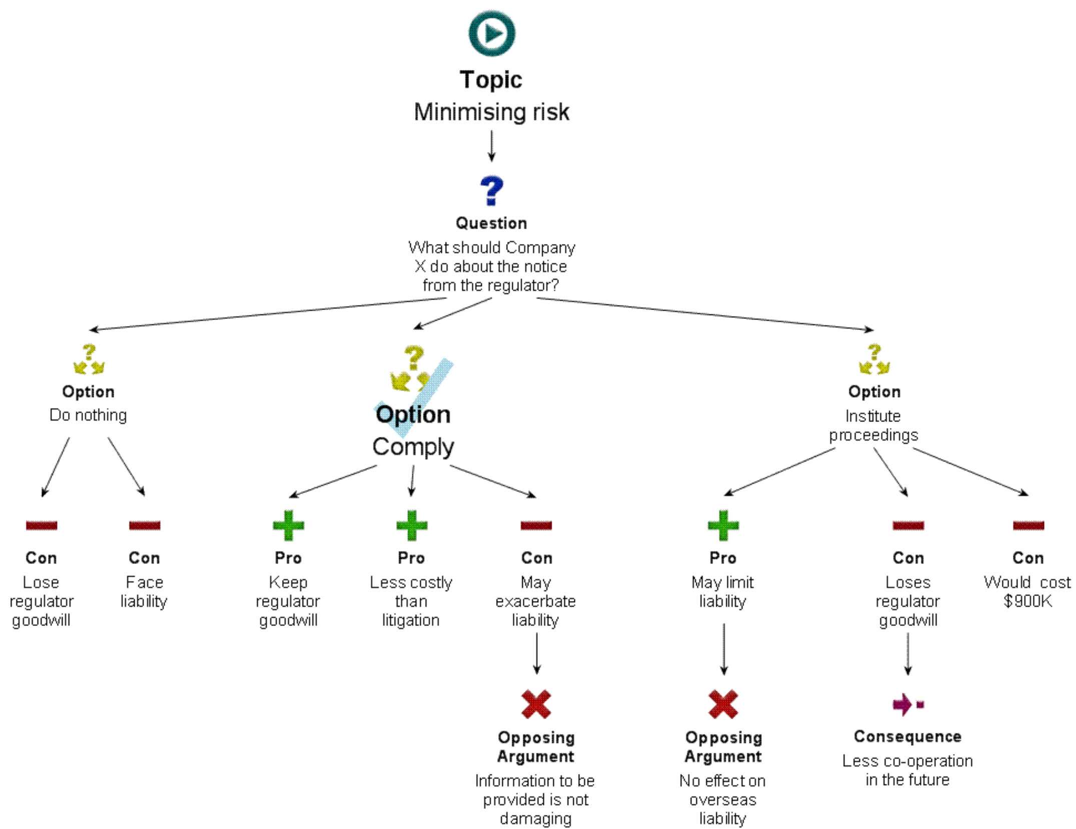

COMMENTS ON THE SURVEY AND REPORT