

MODULE 9

Project Management of Large Litigation

9 Project Management of Large Litigation

The **objectives** of this Module are:

- To provide guidelines for the legal management of large and complex litigation
- To examine the special considerations for large and complex litigation
- To demonstrate the benefits of project managing large and complex litigation
- To identify common issues faced by project managers of large litigation in a government context
- To introduce the five stages of a better practice approach in the management of large and complex litigation
- To self-reflect on whether you have adopted any of the elements of the suggested better practice approach to project management of large and complex litigation
- To outline the process for determining the phases of a large and complex litigation
- To describe how the use of alternative dispute resolution can reduce the need for legal services
- To describe the important link between an agency's strategic objectives and project management
- To explain the project manager's role in establishing the most appropriate team for the litigation, having regard to the skills/resources available and needed
- To explore the benefits and constraints of different types of blended teams
- To explain the leading practice informed purchasing approach to selecting external legal providers for a piece of large and complex litigation
- To highlight the benefits of appointing an independent project manager to large and complex litigation
- To describe the issues around setting the budget for large and complex litigation
- To examine some approaches and tools used for project management of external legal service providers for large and complex litigation.

The **key learning concepts** covered in this section of the Module are:

- That project management of large and complex litigation delivers improved legal services and greater value for money for government
- That agency legal staff should be involved in large and complex litigation from the earliest stages
- There are five stages in the recommended better practice approach to legal project management
- Clearly defining the legal need and effective scoping of the work by defining principal legal and factual issues is a fundamental task that must be undertaken by a legal project manager
- That alternative dispute resolution is an alternative that should be considered to reduce the overall use of legal remedies
- Legal project managers must direct the approach and progress of the litigation so it is conducted in line with overall agency objectives
- The resources engaged must be appropriate to the size and attributes of the litigation
- Retaining independent counsel may be cost-effective, but there are special issues to be considered in their use
- Appropriate choice of external law firms should be based on specialisation, range and depth of resources

informed purchaser approaches must be introduced to external providers at the point of procurement

- Hourly rates without limits or caps and unreasonable disbursements are often the cause of cost overruns, and should be discouraged
- Requiring fee arrangements that provide better cost certainty from external providers
- Consider using independent counsel in conjunction with the external firm(s)
- Independent project management of large and complex litigation provides good project governance and can deliver increased savings for the agency
- There are a wide range of tools available to the legal project manager
- The legal project manager must appropriately manage provider relationships, share information and measure, monitor and refine the project management approach.

9.1 Introduction to legal project management of large and complex litigation

Legal project management of large and complex litigation can be used as part of the informed purchasing methodology to reduce risk and limit costs. This litigation has high potential for political, financial and/or reputational risk.

When large and complex litigation is effectively project managed, control of the project primarily rests with the client (government), rather than the law firm.

General Counsel in NSW Government agencies ranks legal project management of large and complex litigation as the informed purchaser method most likely to generate the greatest level of savings for government. They also identify it as the most difficult of the informed purchaser approach to implement.

Legal project management of large and complex litigation has delivered demonstrable savings for government: up to 20 to 25 per cent on large legal spends. Project management methodologies assist in the achieving of project objectives while minimising risks associated with such projects.

9.2 Defining project management of large and complex litigation

Large and complex litigation differs from day-to-day litigation. Project management of large and complex litigation is a set of management disciplines that can be used to help progress large and complex litigation within the time, cost and quality constraints. Project management is heavily focused on, first, defining the project's objectives and, second, scoping the legal work required to deliver the objectives. It then focuses on monitoring the litigation to identify as early as possible any risks or issues that might impact the timing, costs or quality as set out in the scope.

9.3 Defining large and complex litigation

Defining what is a large and complex litigation is an inexact science. Often, it is a matter for common sense. Early on in a dispute, it may not be obvious whether any litigation which may ensue is likely to be large and complex.



As a general proposition, the **quantum of the legal costs** is the most obvious measure of the size and complexity of litigation. The amount of costs at which litigation becomes large and complex will differ, but generally any litigation involving costs in excess of \$500,000 can be regarded as large. Examples of litigation likely to be categorised as large and complex include:

- Litigation where the size of the remedy sought exceeds \$1 million
- Contractual disputes where the value of the contract exceeds \$1 million
- Enforcement action where penalties/compensation exceed \$1 million
- Projects with significant political and/or reputational risk
- Litigation with multiple parties
- Litigation with significant discovery of electronic material
- Class actions or representative proceedings.

9.4 Special considerations for large and complex litigation

9.4.1 Alternative dispute resolution

As noted in Blunn and Krieger's review of the Commonwealth legal services procurement⁶, the increased use of alternative dispute resolution techniques has the potential to decrease the need for legal services. By encouraging or mandating the use of ADR, some matters will resolve prior to the commencement of litigation. Clearly, some matters will only ever be resolved by legal means, but other may be resolved after the commencement of litigation through ADR. NSW Government staff should consult the Premier's Memorandum on ADR (94-25) *Use of Alternative Dispute Resolution Services by Government Agencies* when considering ADR.

9.4.2 Public Interest Immunity

Where agencies become involved in litigation, there is always the potential that documents potentially subject to public interest immunity claims may be sought by other parties to the proceedings through discovery, subpoenas or notices to produce. A document may be subject to public interest immunity claims where the disclosure of that document would harm public interest.

When estimating the cost and time required to conduct litigation, the legal project manager needs to be aware of the possibility that public interest immunity will become an issue in the proceedings. Public interest immunity claims are often challenged by other parties to the proceedings, and such claims often need to be determined by the court. Even then, the court's decision may be appealed by the agency or the party seeking access to the document/s subject to public interest immunity.

Examples of information that may be subject to public interest immunity include:

- Where the identity of a police informer may be revealed

⁶ Blunn, A and Krieger, S, *Report of the Review of Commonwealth Legal Services Procurement*, Canberra, 2009

- Where confidential methods of investigation used by law enforcement could be disclosed
- Where an ongoing investigation by a law enforcement agency might be compromised
- Where cabinet documents and other documents relating to high-level communications in government are sought to be disclosed.

Other government agencies will often need to be involved in determining public interest immunity, and may need to become involved in proceedings where public interest immunity is challenged. In particular, if access to cabinet in confidence documents is sought by a party to proceedings, Crown Solicitors will need to be informed, and will most likely seek to be heard at any hearing to determine public interest immunity claims.

If the principal agency that is a party to litigation has other agency documents in its possession, or inter-agency communications in its possession, it will generally need to notify affected agencies if access to such documents are sought in the proceedings. Affected agencies will need to be provided with the opportunity to assess relevant material for the purposes of identifying information potentially subject to public interest immunity. These processes are generally very time consuming, and can potentially delay the primary proceedings significantly. It is likely public interest immunity claims will need to be resolved in order for other parties to properly put their case or respond to the principal agency's case.

As a result, legal project managers in government agencies will always need to assess the potential for public interest immunity issues to arise in any litigation commenced by the agency, and take this risk into account when costing the litigation and determining whether to proceed.

9.4.3 Examples of issues which may arise in large litigation

The scenario below is an example of issues that may arise in relation to large and complex litigation:

Scenario

The Department of Revenue's enforcement division has received a referral from its surveillance arm regarding a suspected tax evasion scheme being conducted by several high net worth individuals. It elects to commence a formal investigation. Shelly Hart is the senior lawyer who has been assigned to project manage the investigation. Shelly sets about scoping the work, taking into account that this is likely to be a very high-profile case, and that the individuals being investigated are likely to resist the investigation every step of the way. She begins by scoping only the initial investigation phase, and identifying the level of resources needed for that phase. She then approaches agency management to identify the level of internal resources that would be available, and with this information, she determines that there would not be sufficient internal resources to manage the investigation.

She identifies that she needs an external legal service provider. However, three of the five firms on the agency's enforcement panel are conflicted from acting for the department on the project. She identifies that some of the specialist legal services required could be provided by senior barristers previously used by the department. She decides to use a combination of these barristers plus one of the non-conflicted panel firms, as both of the non-conflicted firms possess the requisite skills and experience.

Using the scoping document she had prepared, she asks the two panel firms to provide a capped fee quote for the initial investigation phase, with a risk collar. She receives these and she chooses the lower of the estimates.

Work commences on the initial investigation phase and Shelly institutes regular project team meetings, where the panel firm is required to report on its progress against the scoping document for that phase. Ultimately, the initial investigation phase is completed within the timeframes envisaged in the scoping document. Less resistance is encountered from the high net worth individuals than anticipated, and as a result the panel firm bills 20 per cent less than the capped fee.

9.4.4 What does this scenario tell us?

This scenario involves large and complex legal litigation and demonstrates the importance of effective project management of the litigation, and effective engagement with the external legal providers:

- Identified the scope of the litigation at the outset
- Addressed resourcing issues at an early stage
- Worked out the most efficient and cost-effective way of utilising internal and external resources
- Put a system in place for the coordination of the project and for communication between the internal and external legal service providers.

Project management is the recommended way to manage large and complex projects within the informed purchaser framework. The objective of the informed purchaser is to manage large and

complex legal projects to obtain quality legal services and value for money for the government's legal spend.



Exercise 13

Choose a piece of large and complex litigation in which you are or have previously been involved and answer the following questions about management of that litigation:

Does the litigation contribute to the achievement of your department's objectives?

Yes No Unsure

Have you clearly identified the agency's desired outcomes for the litigation?

Yes No Unsure

Have you clearly articulated the agency's desired outcomes and the role the litigation plays in achieving the agency's objectives to the internal and external legal team?

Yes No Unsure

Was the scope clearly defined in writing, and agreed upon?

Yes No Unsure

Do you have a clear legal budget for the legal costs for the litigation, or at least the current phase?

Yes No Unsure

Do you have any way of confirming that the panel firm is operating within the scope and its fee estimate?

Yes No Unsure

Are the division of role and responsibilities on the litigation between the panel firm and the in-house team clearly identified and communicated?

Yes No Unsure

Do project protocols exist for filing correspondence, Reporting lines and instructing the panel law firm?

Yes No Unsure

Is there provision in the project plan for any strategic review of the litigation?

Yes No Unsure

9.5 Better practice in large and complex litigation management



Project management of large and complex legal litigation involves five key stages:

- Define legal services needs and scope the legal work required to be undertaken
- Establish the team (in-house and external) and set task allocation
- Select external legal service providers (including counsel and project management)
- Work with the external team to set a budget and a timetable; and Ongoing project management including manage external provider relationships.

These stages are described in further detail below.

9.6 Define legal services needs and scope the work required to be undertaken

In this first stage, the legal project manager must establish the role that the litigation plays in the overall agency's strategic objectives. It is also necessary to clearly define the legal needs and scope the work. It is important to clearly understand the outcome that is being sought by government.

Some specific considerations are listed below:



- What is the nature of the dispute and what is the desired outcome(s)?
- How does the litigation assist with achieving the agency's objectives?
- What is the size and nature of the anticipated litigation?
- What legal and factual issues are relevant to the litigation, keeping in mind the desired outcome?
- What alternatives to litigation have already been tried or should be pursued?
- Has a risk assessment of the key approaches (litigation and alternatives) been conducted?
- What is the level of resources required to cost-effectively run the litigation – both internally and externally?
- What parts of the litigation should be outsourced? For example, electronic document management?
- How is the budget to be set?
- Can the litigation be divided into clear phases? For example, review and analysis, initiating processes, evidence preparation, pre-trial preparation, conducting the trial, responding to judgment.
- What form of ongoing project management should take place?

9.7 Scoping the work – a phased approach

In order to scope the legal work required to be undertaken, the project needs to be divided into phases, linked to milestones and/or outcomes. This enables the level of resources and tasks to be identified.

For large and complex litigation, the arrangement with the external legal resource will likely specify that a further estimate will need to be provided at the end of the first phase, when the proposed litigation is fully scoped.

The following gives a description of the types of phases likely to occur in large and complex litigation, and the likely involvement of an external provider at each stage.

9.7.1 Phase 1: review and analysis

This is a preliminary phase to identify courses of action. Information that is needed is the approximate volume of material to be reviewed (such as the number of potentially relevant documents and persons), resources available, the complexity of the dispute, and the timeframe over which the dispute has arisen.

This phase of review and analysis should be targeted based on the initial understanding of the dispute. This can be done with the assistance of a risk management framework, to identify and characterise potential risks, and potential ADR options. There are also several electronic tools available that can assist early case assessment such as NUIX, Ringtail and Clearwell.

The outcome of this phase is a decision whether to commence litigation, and the nature and scope of the litigation to be commenced.

The outcome of this phase will guide the rest of the project, so it is important to conduct as comprehensive a review as possible within resourcing constraints. This work is often undertaken by a mix of in-house legal resources and an external team.

9.7.2 Phase 2: initiating processes

Under this phase, the legal team must prepare the initiating process and supporting documents. Once the scope of the litigation is defined, this phase can be predicted with reasonable accuracy. This phase can be completely undertaken by external providers in conjunction with counsel. It is recommended there be in-house involvement to link any proceedings commenced with the agency's strategic objectives.

9.7.3 Phase 3: evidence preparation and pre-trial processes

Under this phase, the team must prepare evidence and conclude pre-trial and interlocutory processes. The evidence required should have been identified prior to the initiating process phase. Estimating the likely complexity and work involved in interlocutory matters such as discovery is much harder to estimate, as the volume of work required and the number of interlocutory issues depends in large part on the approach taken by other parties to the litigation. Risk analysis and contingency estimates may be of assistance in estimating possible time and resource requirements. This work can be undertaken by a combination of in-house legal resources, external law firms and counsel.

9.7.4 Phase 4: trial preparation

Under this phase, the team must review evidence in reply, prepare further evidence and prepare for trial. This phase cannot be accurately scoped until it is known whether the proceedings will be contested, and on what basis. As with phase 3, risk analysis and contingency estimates can assist in determining possible time and resource requirements. This work can be undertaken by a combination of in-house legal resources, external law firms and counsel.

9.7.5 Phase 5: trial

The likely amount of work involved in this phase should be known with a reasonable degree of certainty at some point through the course of phase 4. Counsel will be involved in the conduct of the trial and a combination of the in-house legal team and external firms may also be involved.

9.7.6 Phase 6: respond to judgment

Under this phase, the team should take action to enforce the judgment or consider whether to appeal. Depending on the outcome, counsel may need to be involved to advise on appeal prospects.

There may be further work after phase 6, dependent on whether appeals are lodged by any parties, and whether there are any issues relating to enforcement of the judgment. It is also not unusual in large litigation for arguments regarding the quantum of damages to be deferred until after a judgment on liability has been made. In any of these instances, counsel will need to be further involved.

9.7.7 Phase 7: project conclusion

Under this phase the project is concluded. This includes the return of material where necessary, informing relevant third parties, archiving project files, reviewing the course of the project to identify positives and negatives for future reference, and reviewing outcomes against objectives and against the agency's overall strategic plan.

It may also be necessary to resolve costs claims, which will usually involve a costs assessor. Briefing a costs assessor and obtaining a costs assessment can involve a significant amount of time, as all documents prepared in the course of litigation will need to be provided to, and reviewed by, the costs assessor.

By adopting and scoping a phased approach, the legal project manager must make an assessment of the optimum strategy to solve the problem or achieve the goal. This is done with regard to the resources available, the risks and their likelihood/impact, the desired outcome(s) and the objectives of the agency. Doing so will assist the project manager to determine how the project proceeds.

A case management tool for managing litigation costs by phase is provided at Appendix 2.

9.8 Establish the team (in-house and external) and set task allocation

The next stage in better practice for large and complex litigation management is to establish the team using the informed purchaser framework. The resources needed both internally and

externally to approach the project in the optimal manner must be identified. In turn, the availability of those resources must be determined. In establishing the team, the project manager must have regard to:

- The resources the agency is willing or able to commit to the litigation
- The skills and resources available in-house and the extent to which an agency wants to develop in-house expertise in managing major litigation
- The mix of skills and resources available externally (external firms, counsel, project management) and the level at which those resources are required
- The phases of the litigation, and the combination of resources available and required at each phase.

At this stage it may be necessary to factor in whether the appointment of a project manager is appropriate.

This information will then determine what external legal service providers are needed.

Some specific considerations for large and complex commercial litigation in establishing the team are:

- What resources are required to conduct the litigation – in particular the number and level of counsel?
- Are there sufficient resources for an internal legal team to instruct counsel?
- Is an external legal firm or blended internal/external team required?



The Blended Team Approach

An important aspect of the informed purchaser approach to project management of large and complex litigation is appropriately matching the rates being charged for the different types and levels of legal work within the litigation to that particular section of work.

A significant component of cost overruns in large and complex litigation is found in having over-skilled resources at high rates performing or overseeing routine or simple legal tasks.

However, even greater savings can be achieved by dividing sections of the work between in-house, independent counsel and external firms. By identifying early the most resources to handle discrete tasks, the legal project manager is able to assemble the most cost-effective team to achieve a quality outcome.

This combination of types of legal resources is called the 'blended team' approach.

For example, in a major piece of litigation, is a top tier firm required to conduct basic legal research on an issue if that research could just as effectively be conducted in-house or by a mid tier firm? Could independent counsel be engaged? Could these external providers work together as a project team for the benefit of the agency?

For an overview of relevant considerations in relation to the ‘blended team’ approach, refer to Table 7 in Module 6.3.5.

9.9 The effective use of in-house resources

Often, in-house legal staff do not have the time or specialist expertise to conduct a major and complex project in its entirety. However, the in-house team will usually be able to contribute some expertise and should not be overlooked. The in-house team will also usually be more cost-effective for the agency.

Crucially, the in-house legal team will have an in depth understanding of the particular legal framework within which the agency operates. This includes a full understanding of model litigant requirements and the agency’s obligations regarding information it has obtained pursuant to its functions and powers. The in-house team will also appreciate the particular challenges that are faced by government legal teams, which may not be accounted for in advice or timeframes provided by external legal providers.

In addition, the agency may have prioritised the development of an in-house capability to manage major projects. In this case, members of the in-house team could ‘shadow’ or receive mentoring from staff from external firms or project managers.

Consistent with the informed purchaser approach, the legal project manager should consider what work can be done in-house. Considerations include the availability of staff to assist, their experience and expertise, and how the in-house resources will complement the external team.

9.10 Select external legal service providers (including counsel & project management)

Based on the assessment made in the previous stage, it is necessary next to select the external legal services provider(s). The selection of these resources should be made on informed purchaser principles.



Some questions that should be answered, in order to effectively determine which firm(s) to approach and what information to provide, are:

- What type, level and breadth of external resources are required from the external legal services provider (niche, mid tier or top tier)?
- What level of experience with this kind of litigation is necessary?
- What type of firm is needed to conduct the external aspects of this litigation?
- Are there any parts of the litigation that would be most effectively conducted by briefing independent counsel?
- Would asking selected panel firms to submit proposals in response to a litigation scoping document be beneficial?
- Is an independent project manager needed?
- What fee arrangement is appropriate for the work to be undertaken?

It is at this stage that the in-house lawyer responsible for the litigation needs to prepare the project scoping document on which to brief external legal providers to enable them to respond with questions and prepare litigation/phase cost estimates.

All the principles of informed purchasing should apply when procuring these services. Specifically:

- It is at the point of procurement that innovative informed purchaser arrangements must be encouraged – it is much harder to implement these arrangements after the services have been costed and agreed
- Significant savings can be achieved by encouraging or mandating innovative fee arrangements/value-adds in provider's cost estimates
- Informed purchasers must be clear at the point of procurement what they expect from external legal service providers (counsel and firms) in terms of service and resourcing levels
- Different types of firms with different attributes and expertise are suited to different types of litigation – understanding what kinds of firms an agency requires for its legal work is a key role of the informed purchaser
- Significant savings can be achieved by encouraging firms with competitive rates, providing they have the appropriate resources and skills capacity.

9.11 Legal firms

A key consideration for the legal project manager is the type of external firm(s) to engage. The consideration here, in accordance with the informed purchaser model, is whether to engage niche, mid tier or top tier firms⁷.

A further consideration is the characteristics of the case. For large and complex litigation, generally only mid tier or top tier firms (ideally working with independent counsel and in-house staff) will have the skills and resources available for the project. There are, however, niche litigation firms that are able to handle large-scale litigation.

When considering approaching a firm, the informed purchaser should have already determined what type of firm (niche, mid tier, top tier or regional) is best suited to take on the litigation. The legal project manager should also have scoped the work and determined the phase(s) in which the firm could contribute.

Other considerations the agency needs to make in the selection of the firm is:

- Experience and expertise: does the firm have relevant experience in the type of litigation?
- Availability of specific resources at the firm
- Is the firm's insurance sufficient relative to the value of the project?
- Conflicts of interest
- Previous performance on similar litigation.

It may be useful to invite selected panel firms to submit detailed proposals, including proposed methodologies, for handling large and complex litigation. The request for proposal process still requires the instructing lawyer to provide a detailed scoping document on which the selected firms can provide a response dealing with all aspects of the

What type of firm is needed to conduct the external aspects of this litigation?

⁷ This is often restricted by the types of firms represented on the legal panel.

scoping document (e.g. resourcing, cost, risk, timeframes, milestones and other deliverables).

In the first instance, the legal project manager should use only the firms available on their agency legal panel. Under the cluster panel arrangements for NSW Government, any agency may, in certain circumstances, access any firm on any of the eight NSW cluster panels, broadening the range of firms available.

Regardless of approach, it is very important at the point of instructing external legal service providers that your requirements and protocols for ongoing management of the litigation are communicated. This may include:

- Preferred evidence management protocols/systems
- Communications protocols
- Frequency and style of reporting requirements
- Fee arrangements
- Non-chargeable value-adding activities
- Billing requirements
- Other tools and processes that the legal project manager deems necessary.

When receiving a proposal from a law firm, it is important to carefully review any assumptions or caveats to the proposal. This should identify any contingencies. You need to consider whether these are reasonable in the circumstances or too open-ended.

The scoping document needs to outline these and other requirements of the firm in advance, so that there are no surprises – and no excuses – when the project manager comes to implementing these processes.

In the case of a very large or complex litigation, it is often most appropriate to initially scope the first one or two phases – and then scope each subsequent milestone as it develops. [See further at section 9.9]

9.12 Independent counsel

The use of independent counsel is a common complement to a blended in-house/external team, most often in litigation. When selecting independent counsel, the legal project manager should adopt the following approach:

- Identify the nature of the work required (such as advice, drafting, strategic or advocacy)
- Identify the skills and experience required of the independent counsel
- Give consideration to any relevant guidelines for the engagement of counsel (such as gender policy, procurement guidelines).

It is possible to retain independent counsel on reduced rates for large and complex matters, particularly where there will be a substantial amount of non-court work over a long period of time. Care should be taken when discussing rates with independent counsel, and the relevant procurement policies within the agency should be applied.

Many in-house lawyers have a preference for directly engaging external counsel to assist with large and complex litigation. This can be a cost-effective measure to obtain additional legal resources for the litigation, as some highly experienced counsel may offer far more competitive rates than senior associates at some private law firms.

However, the legal project manager should consider the skills of the external counsel being retained versus the skills needed for the conduct of the litigation.

For example, counsel are generally very skilled at settling pleadings and evidence. However, some barristers are not very effective at preparing initial drafts of evidence such as affidavits. It is not something that barristers generally do in their day-to-day practice, and can be substantially different from the process of reviewing affidavits that have already been drafted.

Another consideration is that counsel often prefer to work independently. Consequently, briefing six barristers to conduct interviews and prepare evidence may prove ineffective, due to a lack of communication between counsel, and a lack of standardised approaches.

A further point to consider is that external firms can have preferred counsel. It is important that the agency remains in control of the selection of the external team, including counsel.

9.13 The legal project manager

The appointment of a legal project manager who is also an informed purchaser is the cornerstone of the informed purchasing approach to large and complex litigation. This person may be someone from the in-house team or an external specialist legal project manager, acting for the agency.

One of the reasons supporting the appointment of an external legal project manager is that it frees the in-house staff to focus on the strategic direction the litigation is taking. Also, an independent project manager will not be hindered by organisational decision-making process. Appointing a project manager who is delegated the authority to manage the litigation within boundaries set by the agency is one of the most cost-effective measures to keep the litigation on track and within budget.

Whether in-house or external, the project manager must coordinate numerous tasks for a large and complex piece of litigation, including:

- Working with internal stakeholders to determine the litigation's objectives and outcomes, and where these fit into the agency's overall strategic direction
- Scoping the litigation and conducting a thorough risk analysis of the different legal options for handling the litigation
- Instituting protocols and strategies for case management, communications, evidence/document management, project management and monitoring/review, for the smooth progress of the litigation
- Designing and selecting the appropriate team and determining the fee basis for the various external components of the team
- Coordinating communication and the sharing of information on the litigation across the team, including the in-house team and other stakeholders
- Project managing the inputs of the team into the litigation, managing the inputs to keep the litigation on track to meet its clear objectives
- Monitoring providers' financial performance, including monitoring costs and scrutinising invoices, and taking pre-emptive action to avoid cost overruns
- Measuring and monitoring providers' qualitative performance, and taking remedial action to improve performance and reallocating tasks where necessary
- Conducting appropriate reviews throughout the life of the litigation and at the litigation's conclusion, so that the desired outcomes are delivered and that lessons learned are incorporated into future litigation.

9.14 Conflict of interest

When appointing any legal service provider, it is imperative to consider conflicts of interest.

Consider the following scenario:

Scenario

A Department sends a request for proposal to its panel firms to provide advice on commencing proceedings against the private contractor and to conduct any such proceedings. Flancy & Associates responds to the Request for Proposal. Flancy & Associates advised the Department on the drafting of the contract for a regional hospital, and were retained to advise on any issues that arose through the course of the construction works. In Flancy & Associates' proposal, the firm's previous role is identified as a reason why the firm should now be retained to advise on proceedings against the private contractor. Flancy & Associates do not identify their previous role in the matter as a potential conflict of interest.

Legal services providers and legal practitioners are generally required to avoid any conflict of interest. A conflict of interest, as defined in various professional rules (e.g. Revised Professional Conduct and Practice Rules 1995 for legal practitioners in NSW) can include acting against a former client, acting for more than one party in a matter, and avoiding conflicts between a client's and a practitioner's own interest.

In addition to any applicable professional standards, most RFTs or requests for proposal will also include an express term requiring legal services providers to identify any potential conflicts of interest they may have. While legal services providers clearly have an obligation to actively avoid conflicts of interest, it is still important for a panel manager to actively assess if external legal providers retained on a matter have are conflicted.

This is primarily because a legal service provider may define potential conflicts of interest differently to an agency. An agency is often very sensitive to potential conflicts and the impact this can have on the agency's reputation – more so than legal service providers' commercial clients. In addition, there is the potential for tension between a legal services provider's desire to obtain work and their obligation to avoid conflicts of interest.

Sometimes, a legal services provider will identify a conflict of interest, but set out a strategy to manage that conflict of interest. This is most often proposed by the implementation of 'Chinese walls': where those individuals or areas in the legal services provider that have the conflict do not communicate with those individuals or areas of the firm acting for the agency. Though Chinese walls can be a valid method for managing conflicts of interest, an agency must very carefully assess the suitability of retaining a legal services provider who has a conflict of interest. Chinese wall arrangements can be ineffective in practice.

Panel managers should set out clear protocols for the identification of potential conflicts of interest by legal services providers when they are tendering for particular matters. Where a conflict is identified by a legal services provider, at the first instance, the panel manager should not consider that provider for the matter. In situations where it is not possible to avoid retaining a legal services provider that has a conflict of interest, arrangements for managing the conflict of interest should be set out in detail and communicated to all parties and relevant stakeholders, and those arrangement should be regularly reviewed and audited.

9.15 Set a budget and a timetable

One of the central tasks of the legal project manager is to set the budget for each external provider and each phase of the work. This is an ongoing task, especially if the phased approach to scoping is adopted.

It is most important to consider setting fee caps for each phase of the project so costs are contained at phase level. Accepting hourly rates without a fee cap or limit, or indeed with only an indicative range, is not an approach that is likely to deliver value for money to government. When negotiating with external firms and counsel for major and complex litigation, the full suite of innovative fee arrangements should be considered. Innovative fee arrangements are discussed in detail in Module 5.10.1.

The budget should be determined by the resources required for each stage.

A sample case management plan that can be used in large and complex litigation appears at Appendix 2.

9.16 Ongoing project management including managing external provider relationships

Once the scope has been established, the team has been identified and the legal service providers have been appointed, it is the legal project manager's role to manage the litigation. The legal project manager can use informed purchaser and project management principles to do this.

It is important to be clear early that communication and efficient document management are cornerstones of the project management approach.

Questions that can assist to formulate the project management approach are:

- Who will be the project manager (in-house or external) for this litigation?
- What project management tools (e.g. electronic data room/evidence management protocols, project management software, Gantt charts) are needed to assist in efficiently managing the litigation?
- What tools are needed to identify potential roadblocks and areas of delay?
- What kind of pricing structure delivers the best value for money for this type of litigation?
- What relationship management, document management and communications protocols are needed for the efficient management of this litigation?
- What will be the role breakdown between in-house and external providers, and how will this be communicated?
- How often will the litigation be reviewed and what will be the process for this?

Project management skills enable the informed purchaser to effectively manage litigation on time and within budget.

9.16.1 Project management tools

Project management software, Gantt charts and contingency analyses can be very useful in identifying the major tasks and potential sources of delay in litigation. They assist the project manager in managing the inputs to major tasks and sub tasks and identifying where the litigation is at any point in time.

There are commercial project management tools available such as MS Project and HP Project. Alternatively, tools can be created by the informed purchaser using simple spreadsheets.



A sample Gantt chart, the visual output of project management software, is included here.

Figure 6: Sample Gantt Chart

9.16.2 Electronic evidence analysis and management tools

There are several electronic tools that can greatly facilitate the effective review of evidence, particularly electronic evidence. Such software can eliminate duplicates (where an email is sent to ten recipients, only one version of the email is displayed, rather than ten identical copies from ten different mailboxes). Hard copy evidence can be processed using an optical character recognition (OCR) process in a timely manner. Informed keyword searches can then be used to narrow large volumes of electronic and hard copy material down to manageable volumes which can be manually reviewed. If time constraints and resources are known, keyword searches can be tailored to match the number of documents to be reviewed to the resources available. As the litigation progresses, more targeted keyword searches can be run to identify specific material.

9.16.3 Classifying and standardising common tasks

Classifying and standardising common tasks assists with developing robust cost and time scopes and estimates. The informed purchaser uses classification and standardisation tools to break down the tasks involved, so that more accurate estimates and benchmarking comparisons may be made.

For example, for litigation it is possible to estimate how many documents a person can review per day, or estimate the time to prepare a first draft for simple and complex affidavits. Doing this can also assist in benchmarking a panel firm's performance.

Below is an example. It is an affidavit resource requirements matrix.



Affidavit Resource Requirements

	Draft	Settle	Execute	Wait time	Total FTE days	Total days
Simple	1	1	1	10	3	16
Moderate	7	2	1	14	10	34
Complex	15	3	1	17	19	55

Number of Affidavits Estimated to be Required

	No.	FTE time	Total time
Simple	25	75	250
Moderate	14	140	196
Complex	20	380	340
Total	59	595	786



Exercise 14

A government agency has terminated a contract with a private contractor for the refurbishment and expansion of a regional public hospital. The contract was terminated after the private contractor failed to meet several milestones set out in the contract. The hospital is still incomplete, and only a small section is open and operating. The general counsel of the agency, Ronald Reagan, wants to commence litigation to recover losses resulting from the private contractor's failure to deliver the hospital in accordance with the contract. The agency appreciates that the contractor will likely sue the government for breach of contract.

He approaches a top tier firm on the agency's legal services panel to request that they provide advice on the agency's recovery options and prospects.

The firm agrees, and provides a 47-page analysis and scope of services, with multiple pages of limitations, exclusions and risks. In the costs disclosure, the hourly rates of partners, senior associates, junior associates, paralegals and secretaries are listed, along with disbursements. The estimate was presented as a range for different phases, the highest end of the range was \$1.9 million over two years, the estimated period of the work, plus disbursements. The cost estimate was approved and work commenced, with the general counsel being the sole internal resource to the project from the agency. The general counsel also had to complete his usual duties, and received a monthly written update from the panel firm. After 18 months, proceedings had been commenced, but a trial date had still not been set. The private contractor is strongly contesting the proceedings, and costs of \$3 million have been incurred, with the possibility that the trial will not commence within the next 12 months.

What are the likely causes of the costs blowouts? What techniques and tools could have been used to control costs? What steps should Ronald take to reassess the scope and cost of the litigation?

(Online answers provided at

http://www.lsc.lawlink.nsw.gov.au/lsc/documents/doc/informed_purchaser_answers.doc)

9.16.4 Risk management tools

There are a number of risk management tools and standards that can assist with identifying key risks and contingencies. These tools can help with assessing cost estimates and scopes provide by panel firms, and are also of assistance when scoping the project. They should also be regularly revisited and updated throughout the progress of the project.

A sample risk management matrix is below:

Figure 7: Sample Risk Matrix 2

Extreme					
Major	5	1			
Moderate			2	3	
Minor				4	
Insignificant					
	Rare	Unlikely	Possible	Likely	Almost Certain
	High Impact Risk			Low Impact Risk	

1. Agency fails to achieve desired outcome (i.e. litigation/project unsuccessful)
2. Reputational risk to agency and government
3. Costs exceeding estimates significantly
4. Significant delay over estimates
5. Change in circumstance removes relevance of litigation or project to desired outcome.

Further information on managing provider relationships is presented in Module 6.3.

9.16.5 Share Information

To keep the litigation focused on its objectives, the project manager must use the communication protocols established for the litigation's stakeholders (internal and external) such as regular project team meetings, use of electronic data room, distribution of written reports, maintenance of shared project plans.

Further information on sharing information and regular team meetings is presented in Module 6.4.

9.16.6 Measure, monitor and refine

The legal project manager should regularly measure, monitor and refine the legal approach to the litigation in accordance with informed purchaser leading practice principles. The project manager should:

- Monitor progress against the project plan
- Assess strategic approach to determine if it is still appropriate and whether the litigation is on track to achieve desired outcome in accordance with the litigation plan
- At or near the conclusion of each phase, scope the next phase/s as appropriate and agree appropriate fee arrangements with external legal resources
- At the conclusion of the litigation, assess performance by reference to project plan and scoping documents, identify what worked and did not work for future reference.

Further information on continuous improvement and measuring, monitoring and refining is presented in Module 6.11.