Knowledge Management, Law and Native Title[*]

Contents

1. What is knowledge management?

1.1. Basic definitions

There are many definitions for knowledge management (KM), of which the following provide a representative sample:

- "The process through which organisations generate value from their intellectual and knowledge-based assets… [it] involves codifying what employees, partners and customers know, and sharing that information among employees, departments and even other companies in an effort to devise best practices";[1]

- "A business activity… [that] encompasses identifying and mapping intellectual assets within the organisation, generating new knowledge for competitive advantage within the organisation, making vast amounts of corporate information accessible, sharing of best practices, and technology that enables all of the above";[2]

- "Applications… which create, capture, organise, access and use the intellectual assets of the organisation";[3]

- "A corporate knowledge store" and "organisational memory";[4]

- "Making use of the knowledge and experiences of staff… [so that] one person's knowledge becomes information for the next person to assimilate and add to his, or her, own repository of experiential learning";[5]

- "Getting the right knowledge to the right people at the right time so they can make the best decision";[6]

- "Systematic approaches to find, understand and use knowledge to create value";[7]

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[1] Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions
[2] Barclay and Murray – www.media-access.com/whatis.html
[3] Coakes, p. 581 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947
[4] Heath, in Coakes, p. 584 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947
[5] Coakes, p. 589 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947
[6] Petrash – http://books.google.com.au/books?id=34bu-X6YKAEC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false
[7] O'Dell – http://books.google.com.au/books?id=34bu-X6YKAEC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

These various definitions have some common threads. From them, a general, simplified definition of KM can be posited:

> *KM is:*
>
> > 0. *identification of <u>existing</u> knowledge of value; and*
> >
> > 0. *codification of that knowledge; and/or*
> >
> > 0. *sharing of that knowledge,*
>
> *in order to achieve increased results for both the business and the individual employee, and – where relevant – to encourage and generate <u>new</u> knowledge of value, creating a cycle which perpetuates itself.*

Generating new knowledge of value is a central aspect of the KM process according to some interpretations, despite the fact that some (generally earlier) commentators do not acknowledge this aspect. Thus, while simple 'identification, codification, and dissemination' processes are a large part of KM, creating a space for experimentation and the development of innovative new processes is also important.[8] KM may be as much about knowledge making as knowledge sharing.[9]

This evolution in KM theory has resulted in the identification during the late 1990s of so-called 'second generation' KM. First generation KM (or 'supply-side KM') is comprised of the basic knowledge sharing element. Second generation KM (or 'demand-side' KM) engages instead with the subsequent creation of new knowledge.[10]

1.2. The elements of knowledge management

1.2.1 Two types of *knowledge*

There are two types of knowledge with which KM is concerned.

The first is 'explicit' (or 'represented') knowledge. This is anything that can be documented, archived or codified, [11] and encompasses formal models, processes, rules and procedures which can be communicated externally.[12]

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[8] Christensen, p.16 – http://books.google.com.au/books?id=BxUU-23ESeUC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

[9] McElroy, p. xxiii – http://books.google.com/books?id=622olv3A9SEC&printsec=frontcover&dq=knowledge+management&cd=3#v=onepage&q=&f=false

[10] McElroy, p. xxiii to xxv – http://books.google.com/books?id=622olv3A9SEC&printsec=frontcover&dq=knowledge+management&cd=3#v=onepage&q=&f=false

[11] Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions

[12] Nonaka & Takeuchi in Lomax – http://www.knowledgepoint.com.au/knowledge_management/Articles/KM_AL001.html

The second is 'tacit' (or 'embodied') knowledge – the "knowledge residing in people's heads"[13]. This encompasses mental models, experiences, stories, rituals and skills residing in the individual and private mind.[14]

Tacit knowledge is valuable because it is unique to each person, and is responsible for innovation and real-time reactivity in decision-making. Tacit knowledge becomes more important in an environment of uncertainty, where an ability to 'think on one's feet' becomes a priority. The downside is that tacit knowledge is easily lost,[15] and its intangibility means that it is less diffusible.[16]

Explicit knowledge on the other hand is valuable in that it is not vulnerable to loss. It gives safety and security. It is definable, repeatable, auditable and simple to disseminate. Its main weakness is in its rigidity; it often offers only a basic solution to a given problem.[17]

While explicit and tacit knowledge are distinct, each can be used as an aid to acquire the other.[18]

1.2.2 Two types of knowledge *management*

Commentators identify two types of KM which roughly correlate with the two types of knowledge discussed above:[19]

    0. Management of information; and

    0. Management of people.

The 'information management' aspect of KM is generally concerned with the management of explicit knowledge. This aspect of KM is normally done using information technology.

The 'people management' aspect of KM is generally concerned with the management of tacit knowledge, and is harder to facilitate. Whilst information management may simply involve moving and indexing data, the second involves "surfacing" the knowledge contained in people's heads and "leveraging it", by

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[13] Coakes, p. 589 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947

[14] Nonaka & Takeuchi in Lomax –
http://www.knowledgepoint.com.au/knowledge_management/Articles/KM_AL001.html

[15] Snowden, p. 56 –
http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

[16] Senge, p.71 –
http://books.google.com.au/books?id=Ckb6GcUq31MC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

[17] Snowden, p. 56 –
http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

[18] Cook & Brown, p. 56 –
http://books.google.com.au/books?id=TlDDsMwWl1gC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management&f=false

[19] Svieby, in Barclay and Murray – www.media-access.com/whatis.html

"motivating people to share their experiences and learning".[20] This can be done in a number of ways, including the 'shadowing' of an expert by a novice, joint problem-solving by an expert and novice, storytelling and trouble-shooting exercises.

1.2.3 Two types of knowledge management *strategy*

In terms of the strategies required to give effect to KM, two distinct types can again be identified in line with the bifurcation identified above:

   0. The 'push strategy'; and

   0. The 'pull strategy'.

The push strategy involves an individual explicitly encoding their knowledge into a shared knowledge repository – such as a database – as well as retrieving knowledge they need that other individuals have provided to the repository. This strategy is associated with the 'information management' aspect of KM. One problem with this type of strategy is that it necessarily relies on persuasion or coercion to encourage participation in the system.[21]

The pull strategy requires an individual to request knowledge from experts associated with a particular subject on an ad hoc basis. This strategy is associated with the 'people management' aspect of KM. A problem with this second strategy is that individuals with genuine expertise often keep their heads down for fear of being overloaded with enquiries, while attention-seekers may capitalise on the opportunity for self-promotion.[22]

1.2.4 Four types of knowledge management activity

Finally, commentators posit that there are four types of KM activity,[23] or rather, four modes of 'knowledge conversion':[24]

   ▪ Moving explicit knowledge from individuals to the community (relates to the 'push strategy'), also called 'combination';

   ▪ Moving tacit knowledge from individuals to the community (relates to the 'pull strategy'), also called 'socialisation';

   ▪ Changing tacit knowledge to make it explicit, also called 'externalisation'; and

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[20] Coakes, p. 589 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947; see also '1.6 Challenges of KM', below.
[21] Richard Veryard – http://rvsoapbox.blogspot.com/2010/01/intelligent-knowledge-management.html; see also '1.6 Challenges of KM', below.
[22] Richard Veryard – http://rvsoapbox.blogspot.com/2010/01/intelligent-knowledge-management.html; see also '1.6 Challenges of KM', below.
[23] Snowden, p. 54 –
http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false
[24] Nonaka, Toyama and Konno, p.26 –
http://books.google.com.au/books?id=TlDDsMwWl1gC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management&f=false

▪ Moving from use of explicit knowledge to use of tacit, also called 'internalisation'.

1.3. Evaluation of knowledge management

1.3.1 Relevant circumstances

Organisations may need a KM system where one or more of the following applies:[25]

▪ Reductions in staff and/or high staff turnover create a need to replace informal knowledge with formal methods to stop loss of knowledge (knowledge as a 'depreciable asset');[26]

▪ The amount of time available to gain experience and acquire knowledge has diminished;

▪ Marketplaces are increasingly competitive in respect of their knowledge assets and the rate of innovation amongst competitors is rising;

▪ Competitive pressures reduce the size of the workforce that holds valuable business knowledge available to each employer;

▪ More and more work is becoming information-based and increasingly complex.

1.3.2 Benefits of knowledge management

A good KM system:

▪ Fosters innovation,[27] skills development and a collaborative business environment[28] (including quick integration of new employees)[29] by encouraging the free flow of ideas;

▪ At the same time, fosters conformity by disseminating 'best practice' and encouraging adherence to it;[30]

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[25] Macintosh, in Barclay and Murray – www.media-access.com/whatis.html

[26] Lomax – http://www.knowledgepoint.com.au/knowledge_management/Articles/KM_AL001.html

[27] Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions

[28] Ardichvili, Page and Wentling, p. 65 – http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796

[29] Ardichvili, Page and Wentling, p. 71 – http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796

[30] Mueller in Coakes, p. 580 – http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947

- Improves client service by streamlining operations (i.e. minimising unnecessary processes and duplication of effort, thereby shortening response times);[31]

- Boosts business revenue by increasing client satisfaction through efficiency gains;[32] and

- Enhances employee retention rates by recognising the value of individual employees' knowledge, thereby raising self-esteem and job satisfaction. [33]

1.3.3 Challenges of KM

I)   Challenges inherent in establishing any KM system may relate to the following:

- It can be difficult to get employees to *contribute* to the KM system. This can be due to a fear of criticism or of misleading colleagues through irrelevancy or inaccuracy, to a mentality focussing on 'knowledge as an individual's private asset and competitive advantage',[34] or simply mistrust (this is compounded when the contributor has never met other users of the KM system face-to-face);[35] and

- It can also be hard getting employees to *use* the KM system. This can arise from an unwillingness to change habits or an unfamiliarity with technology,[36] the existence of a tight-knit group which believes it already has all the required solutions,[37] the fact that some problems are 'process-oriented' and therefore difficult to duplicate electronically,[38] or again due to mistrust (and, again, this mistrust is only compounded when the user has never met the contributors to the KM system face-to-face); [39]

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[31] Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions
[32] Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions
[33] McLure and Faraj, in Ardichvili, Page and Wentling, p. 66 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796
[34] Ardichvili, Page and Wentling, pp. 64; 69 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796
[35] Ardichvili, Page and Wentling, p. 72 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796
[36] Ardichvili, Page and Wentling, p. 66 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796
[37] Ardichvili, Page and Wentling, p. 71 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796
[38] Ardichvili, Page and Wentling, p. 71 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796
[39] Ardichvili, Page and Wentling, p. 72 –
http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796

II)   A KM system also:

- is costly and time-consuming to establish;

- requires ongoing maintenance;

- can result in 'information overload', or lack of high-value information;

- may conflict with corporate security restrictions, confidentiality requirements and similar concerns – often leading to questions being asked as to the neutrality of the facilitator of the KM system;[40]

- can present difficulties in converting tacit knowledge to explicit knowledge (how can a system replicate the problem-solving process of an expert?);[41] and

- can become another burden on time and resource poor employees.

In summary the challenges of constructing a good KM system exist on both practical and abstract levels.

In terms of practical challenges, those outlined above at II) are the most apparent. These challenges largely reflect the 'information management' aspect of KM.

The challenges described above at I) are more abstract. The problem of creating and maintaining trust in the KM system is an aspect of the 'people management' aspect of KM. The response to this challenge is to target and either develop or modify the 'corporate culture' amongst the KM system users.[42] This may involve significant organisational change.

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[40] Hase, Sankaran and Davies –
http://www.actkm.org/userfiles/File/actKMjnl/2006/Overcoming%20barriers%20to%20Knowledge%20Management-%20Visiting%20the%20Dark%20Side%20of%20Organisations.pdf
[41] Berckman – http://www.cio.com.au/article/6262/when_bad_things_happen_good_ideas; see also Durrance, p. 31 –
http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false
[42] Barclay and Murray – www.media-access.com/whatis.html

2. What does knowledge management mean in the legal context?

2.1. The importance of KM for lawyers

The practice of law is a 'knowledge businesses', which relies on both explicit knowledge (for example precedent documents) and tacit knowledge (in the form of their 'human capital' – lawyers) to a significant degree. KM is therefore an essential tool in the legal field.

Lawyers have struggled, at least until very recently, with the formal notion of KM. KM strategies and systems in this context have been haphazard, "rarely explicit, rarely documented, and rarely related to the hard issues of making money".[43] In the case of law firms specifically, reasons may include one or more of the following:

- A law firm generally bills by the hour, or in some cases, by the 6-minute block. If, as a result of KM processes, its lawyers become significantly more productive in that hour then the firm is forced to pass those savings on to its clients and hence lower its income. It has been remarked that "knowledge management may be good for individual productivity but bad for [legal] industry economics". [44] This has meant that KM has at times been resisted by partners heavily reliant on the so-called 'partner compensation model' that many firms run on. It is important to note, however, that in the case of NTRBs, where income is largely circumscribed, this argument does not apply or in fact could be reversed.

- A law firm could traditionally rely on long-standing relationships with its clients and, indeed, its employees.

- There were, in the past, fewer national (or for that matter international) law firms – each firm traditionally stayed within the boundaries of one city.

- There was less time pressure in the past deriving from instant communication tools, such as email, mobile telephony and facsimiles. [45]

However, the law, like any other marketplace, has become more competitive, with firms now battling against local, national and international competition to provide the

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[43] Parsons, p. 17 – http://books.google.com/books?id=e3-aYFbxYiEC&printsec=frontcover&dq=knowledge+management+and+law&lr=&cd=2#v=onepage&q=&f=false

[44] Davenport, in Parsons, p. 6 – http://books.google.com/books?id=e3-aYFbxYiEC&printsec=frontcover&dq=knowledge+management+and+law&lr=&cd=2#v=onepage&q=&f=false. This paradox is noted here, but will be discarded at this point as it is irrelevant to this larger project. For one thing, NTRBs are not so focussed on raising their income. But for another thing, this paradox is now largely outdated anyway, for the reasons outlined in 2.3.

[45] Rusanow, p. 9 – http://books.google.com/books?id=Ql2UVZdzVIoC&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false

best services for a lower fee than their counterparts,[46] battling to retain staff, and struggling to keep abreast of new technology and the plethora of information deriving from it. KM has an important role to play in this context.[47]

2.2. *Knowledge* in the legal context

It is worth highlighting that lawyers, like all 'knowledge workers', have two outputs: written outputs (documents – a form of explicit knowledge); and verbal outputs ('airtime' – a form of tacit knowledge).

Types of legal explicit knowledge include:[48]

- legal texts;

- legislation;

- case law;

- commentary;

- letters of advice;

- legal briefs; and

- transactional documents (deeds and agreements).

Types of legal tacit knowledge include:

- knowledge about legal issues;

- knowledge about methodology and processes;

- knowledge about industry trends, opportunities and challenges;

- knowledge about existing and potential clients;

- knowledge about competitors; and

- knowledge about the firm and its staff.

The types of knowledge involved in the practice of law can further be categorised as:[49]

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[46] Rusanow, p. 9 –
http://books.google.com/books?id=Ql2UVZdzVIoC&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false
[47] Eklof, Spieler & Tukh – http://www.virtuallawjournal.net/?nodeid=31&lang=en
[48] Rusanow, p. 71 –
http://books.google.com/books?id=Ql2UVZdzVIoC&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false

- Administrative data – which includes all of the nuts and bolts information about firm operations, such as hourly billing rates for lawyers, client names and matters, staff payroll data, and client invoice data;

- Declarative knowledge – knowledge of the law, the legal principles contained in statutes, court opinions and other sources of primary legal authority;

- Procedural knowledge – which involves knowledge of the mechanics of complying with the law's requirements in a particular situation, for example what documents are necessary to transfer an asset from Company A to Company B, or what forms must be filed where to create a new corporation; and

- Analytical knowledge – which pertains to the conclusions reached about the course of action a particular client should follow in a particular situation. Analytical knowledge results, in essence, from analysing declarative knowledge (i.e. substantive law principles) as it applies to a particular fact setting.

Administrative data is most likely to be explicit, while the other categories are more likely to constitute tacit knowledge.

2.3   Knowledge *management* in the legal context

The following are KM strategies which have been used by law firms to accommodate that explicit knowledge ('push strategies'), and leverage the tacit knowledge ('pull strategies'):

'Push strategies' can involve the use of:

- precedent documents and forms;

- a 'best practice' library;

- wikis (i.e. collaborative blogs);

- project methodology documents; and

- practice group intranet sites ('portals').

'Pull strategies' include:

- meetings and conferences in which knowledge is shared;[50]

- 'lessons learned' seminars and debriefings at the conclusion of a matter;

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[49] Edwards and Mahling – http://www.bsos.umd.edu/gvpt/CITE-IT/Documents/Edwards%20etal%201997%20Toward%20Knowledge%20Mgt%20Syss%20in%20t%20Legal%20Domain.pdf

[50] Kay & Bailey, p. 15 – http://members.optusnet.com.au/~briney001/LPM_1104_Conversations.pdf

- seminars from expert third parties (including regulators, judges, counsel, commentators, and consultants);

- skills and expertise locators (i.e. who knows what? Who has appeared before Justice X in jurisdiction Y? Who has worked with counsel Z?);

- professional development programs (or 'continuing legal education');

- mentoring programs (including 'rotations' through a series of practice groups) for junior lawyers;

- 'communities of interest' or 'communities of practice' (which may span different practice groups and locations);[51]

- casual conversation; and

- the physical design of offices to encourage knowledge sharing.[52]

2.4   Benefits of KM in the legal context

In the legal context, a good KM strategy and associated system:

- reduces document drafting time;

- increases research capacity;

- helps the lawyer navigate through large amounts of information and locate the most relevant information;

- leads to better professional development for the lawyer;

- moves expertise out of the minds of a few and into the hands of the firm's staff in general; [53]

- encourages 'pro-active/preventative lawyering' and eliminates intra-firm competition by facilitating knowledge sharing amongst and across working groups;

- attracts better clients.

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[51] A 'community of practice' have been defined as "a group of people who are informally bound to one another by exposure to a common class of problem" – Manville, in Edwards and Mahling – http://www.bsos.umd.edu/gvpt/CITE-IT/Documents/Edwards%20etal%201997%20Toward%20Knowledge%20Mgt%20Syss%20in%20t%20Legal%20Domain.pdf

[52] Rusanow, p. 28 – http://books.google.com/books?id=Ql2UVZdzVIoC&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false

[53] And especially because law is precedent driven, expertise can play an important role in the speed and quality of the outcome a new matter – Eklof, Spieler & Tukh – http://www.virtuallawjournal.net/?nodeid=31&lang=en

These benefits result in:

- increased client satisfaction and loyalty;

- increased job satisfaction;

- a better organisational culture; and

- increased revenue or decreased costs.

2.5 Challenges to good KM in the legal context[54]

There are numerous challenges to good KM in the legal context, many of these relate to the issue of organisational culture:

- The problem of *individuality*. Lawyers rely on their own unique knowledge base and may be unwilling to share the fruits of their labour;

- The problem of *time pressure*. Time is money in a law firm; any time spent sharing knowledge and experience is time not spent billing.

- The problem of *success*. Success can be the enemy of innovation; many larger law firms have done very well in the past without any recourse to KM.

- The problem of *organisational structure*. KM requires 'horizontal integration' across practice groups, whereas law firms are traditionally integrated vertically, in practice group 'silos';[55]

- The problem of *attitude*. Lawyers can be resistant to change. They are used to relying on precedents and past history, and the legal system is not focused on innovation. The rule of law requires any changes to happen slowly.[56]

- The problem of *security, ethics and confidentiality*.

- The problem of *differing needs*. Lawyers' KM needs vary as they progress through their career and as they develop expertise in different areas of the law. A KM system needs to address these varied and specific needs.[57]

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[54] Edwards and Mahling – http://www.bsos.umd.edu/gvpt/CITE-IT/Documents/Edwards%20etal%201997%20Toward%20Knowledge%20Mgt%20Syss%20in%20t%20Legal%20Domain.pdf
[55] Gillies – http://www.kmworld.com/kmw05/Presentations/B203_Gillies.pdf
[56] Kabene – http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/kabene/kabene.pdf
[57] Interview with Sal Messina – http://www.amplifi.com/KMcourse/Ind%20Interviews/Sal%20Messina.doc. See also – http://www.lexisnexis.com/presscenter/hottopics/kminfirms.pdf

2.6   KM databases in law firms

The average law firm has numerous databases to facilitate its business processes – time management and financial systems, document repositories, and client relationship management platforms. However, at the typical firm, those databases:

- consist in a mixture of paper and electronic formats;

- are not 'networked' (i.e. do not work with each other);

- are physically or geographically dispersed;

- are rarely organised in such as way as to facilitate easy retrieval of knowledge (for example, by topic or keyword); and

- do not provide the context in which that knowledge is to be used (meaning, for example, junior lawyers can become confused when asked to work without guidance on templates).

Setting up a database using KM methods is the first step in fully implementing a KM strategy at a law firm. Such a database may contain all of the types of legal explicit knowledge (listed at 2.2 above), as well as:

- best practice precedents;

- information about methods, techniques, routines and processes;

- policy documents;

- strategy documents;

- white papers containing knowledge on the industry and its various actors;

- copies, transcripts and recordings of presentations and other 'airtime';

- library references; and

- curricula vitae for all lawyers.

A database is the best way to structure, categorise, filter and organise explicit knowledge and make it accessible for a given community. It is the best way to achieve 'combination' knowledge conversion (see 1.2 above), and thereby access the many benefits of KM (see 1.3.2 and 2.4, above).

Establishing a KM database at a law firm carries with it its own challenges:

- The issue of corporate culture, as addressed under 1.3.3. The availability of electronic knowledge exchange does not automatically induce a willingness to share information and build new intellectual capital. Major changes in incentives and culture may be required to stimulate use of a database.[58] It is

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[58] Nahapiet & Ghoshal, in Gottshalkke –
http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_3/gottschalk

therefore important to determine what types of knowledge intended database users need to share, and how to encourage them to share, before considering technological issues.[59]

▪ Practical problems post-setup of the database. Incorrect use of the database can lead to duplicated documents, meaningless titles, incorrect selection of document type, and lack of contextual descriptions, among other things.[60]

▪ There is also the problem of 'information overload'. Organisation members collectively acquire significant quantities of information on an ongoing basis. If all such information were to be transmitted to all parts of the organisation, its members would quickly be inundated.[61]

▪ Conflict with corporate security restrictions, confidentiality clauses and ethical concerns. 'Knowledge stealing' has been acknowledged as a factor to overcome with any KM database.[62]

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[59] Berckman – http://www.cio.com.au/article/6262/when_bad_things_happen_good_ideas. See also Feher, p.303 –
http://books.google.com/books?id=T6bbktGZvQQC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false
[60] Kennedy & Friedmann – http://www.abanet.org/lpm/lpt/articles/ftr06042.html
[61] Anand et al., in Gottshalke – http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_3/gottschalk
[62] Feher, p.301 –
http://books.google.com/books?id=T6bbktGZvQQC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

3. Knowledge management and native title

3.1. Commentary linking KM with native title

There is very little literature on the topic of knowledge management in the native title context. Subject to the examples given below (see 3.2.1. to 3.2.3.), detailed consideration linking knowledge management and the practice of native title is essentially non-existent.

The primary exception to this is the 'Report into the professional development needs of Native Title Representative Body lawyers' published in 2005 (the Potok report).[63] The Potok report notes that:

"The professional development revolution that has taken place in law firms over the past decade has not yet been adopted comprehensively throughout the NTRB system. In recent years, law firms around the world have realised that the historical system of apprenticeship and on-the-job-training as the primary, and sometimes sole, form of developing lawyers' skills is no longer suitable. It may have been appropriate in the past (before fax machines, word processors and emails), but today legal practice moves too quickly. To complement mentor relationships, law firms now deliver training, capture knowledge in the form of precedent databases and make other professional development opportunities and tools available. This is to ensure that lawyers can 'hit the ground running' and satisfy the needs of their clients, their employers and the courts."

The Potok report goes on to examine these approaches and their associated benefits as they would apply to NTRBs. Among other things it specifically proposes the development of a precedents database for NTRB use.

3.2. KM in action in native title practice

3.2.1. The ATNS Project

The Agreements, Treaties and Negotiated Settlements (ATNS) project,[64] run out of the University of Melbourne, is a project "examining treaty and agreement-making with Indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. The project also examines the process of implementation and the wider factors that promote long term sustainability of agreement outcomes." The ATNS project has a database "which links together current information, historical detail and published material relating to agreements made between Indigenous people and others in Australia and overseas."

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[63] Available at http://www.auroraproject.com.au/Links/2005_April_Report_Exec_Summary.pdf.
[64] Available at http://www.atns.net.au/

3.2.2. NTRB projects

Various NTRBs have their own internal KM projects in operation.

Queensland South Native Title Services

Queensland South Native Title Services (QSNTS) embarked on a KM project in early 2009 to improve the retention of corporate memory and put in place mechanisms to facilitate succession for their NTRB.[65]

QSNTS purchased an off-the-shelf Electronic Document and Records Management System called TRIM, and configured it to their specific needs with the assistance of an external consultant. This system was able to cater for the various departmental needs in its default format, but needed to be specially configured to allay concerns relating to conflicts of interest. The system was thus configured to store information in discrete 'containers', within which security is preset to enable or deny access to specific persons.

Implementation of the database was made difficult by the fact that few staff had any experience with a system such as TRIM before. One-on-one training sessions, as well as a one-day workshop, were carried out to address this. Additionally, there was initial resistance to the roll-out and uptake in the system took about 3-4 months to get to an acceptable level.

QSNTS now employs an internal administrator for the TRIM system on a full-time basis. Training in the system is included as part of the staff induction process and each staff member is provided with a user manual for the system.

Central Desert Native Title Services

Central Desert Native Title Services (CDNTS) has developed a set of 'Document Management and Filing Procedures'. The CDNTS document is a relatively simple and concise document setting out the procedures to be followed when a file or document is opened or closed (as well as for archiving, amending and naming). It also sets out the process for the organisation of internal, incoming, outgoing and precedent or template documents.

3.2.3. AIATSIS

Grace Koch, of the Native Title Research Unit at AIATSIS, published a report in 2008 entitled the 'Future of Connection Material'.[66] This report found that valuable and irreplaceable connection material was decaying and dispersed throughout the native title field. The solution to this, it was argued, was good KM system to organise and catalogue the nature and location of connection material.

The report found that the more established NTRBs such as the Northern Land Council, Central Land Council and the Kimberley Land Council have comprehensive cataloguing and internal management systems for their documents, as well as

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[65] http://ntru.aiatsis.gov.au/conf2009/papers/KatieHandford.pdf.

[66] http://ntru.aiatsis.gov.au/publications/reports%20and%20other%20pdfs/Future%20of%20connection%20material%20GK70408ed.pdf

collection managers or librarians. Other NTRBs are in the process of digitising their holdings. Those NTRBs who have experience in collection management have valuable information to share with NTRBs newer to the field.

The report also found that:

- Documents for inclusion on the KM system should be assessed for duplication, uniqueness of material, and general value in relation to the rest of the collection.

- Full-time positions should be created for juniors to undertake the KM processes at NTRBs.

- A set of protocols should be drawn up to standardise basic principles and procedures as well as giving guidance to NTRBs regarding issues of confidentiality, access and use.

- Development of a comprehensive and workable database is crucial to the efficient operation of an organisation.[67]

3.2.4. NNTT database

The NNTT has a database of ILUAs registered with it online.[68] This database does not contain a significant amount of detail about the ILUAS referred to within it.

3.2.5. ACIL Consulting

ACIL Consulting, in conjunction with Indigenous Support Services, in 2001 released a report on 'Agreements between mining companies and indigenous communities'. They compiled about 140 agreements in total for the purposes of the Report (of which only one was sanitised due to confidentiality concerns), and stated that following the release of the Report they intended to construct a database of agreements on their website. This seems never to have eventuated, however, and there is no sign of such a database, or mention of the Report itself, on their current website.[69]

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[67]

http://ntru.aiatsis.gov.au/publications/reports%20and%20other%20pdfs/Future%20of%20connection%20material%20GK70408ed.pdf

[68] See http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Search.aspx

[69] See:http://www.aciltasman.com.au/index.php

4. Putting KM into practice in native title: a step-by-step guide

This section draws on the matters explored above to create a KM strategy for implementation with NTRBs.

A key part of this strategy involves the creation of a database, particularly in relation to agreement precedents.

Step one: draft the KM strategy

Consider the following when drafting the strategy:

1. Identify the broad aims and challenges specific to NTRBs, and outline how the KM system will support those aims and address those challenges.

2. Identify the scope of knowledge the KM system will manage. Identify the 'critical' knowledge which needs to be managed. Consider the types of legal explicit and tacit knowledge involved, and the other information which may be suitable for inclusion on a database, as discussed above.

   It is likely that the knowledge the system will manage will be mainly 'transactional documents' – that is, agreement precedents. However, the system may also attempt to manage tacit knowledge, in the form of knowledge about methodologies and processes involved in negotiation of agreements.

3. Identify the barriers (within NTRBs and more broadly) that will need to be addressed by the KM system.

   Barriers may include:

   - time-poor employees;

   - resource-poor NTRBs;

   - relatively high turnover of staff;

   - lack of junior staff to do low value-added work;

   - resistance to change and or to link regional NTRB activities with broader and longer-term outcomes;

   - poor communication of tacit knowledge;

   - explicit knowledge in a mixture of paper and electronic formats which are not 'networked' and are in dispersed physical locations; may be poorly organised; and do not provide the context in which they are to be used;

- potential incompatibility of various electronic tools already in use (both within and between NTRBs);

- offices in remote locations;

- legal conflicts of interest (i.e. multiple overlapping claims at the one NTRB);

- mixing of skill sets (i.e. anthropological vs legal staff);

- prevalence of confidentiality concerns;

- prevalence of sensitive information in agreements – such as cultural heritage and financial information; and

- presence of many different classes of agreements – including agreements driven solely by compliance with the NTA versus agreements influenced by social impact policies of specific (larger) resource companies.

4. Draw up a protocol to standardise basic principles and procedures as well as giving guidance to NTRBs re confidentiality; sensitive material and conflicts of interest.

5. Identify the approach to be taken with respect to KM.

   These questions will need to be answered:

   - Will knowledge be managed centrally, or decentralised to each NTRB, or a hybrid of both?

   - Will the KM facilitator be someone at AIATSIS, or someone within each NTRB, or both?

6. Create a structure that KM will take within each NTRB.

   Identify who will lead KM at each NTRB, whether there will be any dedicated KM staff or whether it will become an additional role for existing employees. Identify what current functions of the NTRB will be rolled out under the banner of KM. Ideally, a full time position should be created at the junior level for a person to take charge of KM processes at an NTRB. If such a position is not viable, then secretaries or junior lawyers should at least gather what KM information they can as part of their routine duties in opening or closing files.

7. Address how KM will fit into the larger NTRB network structure.

   - Who will the KM leader (if there is one) report to?

   - What will be the relationship between the KM and administrative functions?

   - What will KM look like between the anthropological and legal practice groups?

8. Work out what the KM database will look like.

   - Do NTRBs already possess the relevant KM technological tools, or will tools need to be acquired? Many NTRBs already have internal KM systems in place, using software such as FileMakerPro and TRIM.

- Can improvements be made on existing tools?

9. Outline what the KM initiative will cost.

- How does this weigh up against the costs of <u>not</u> undertaking KM activities?

Step two: target senior management

Secure each NTRB's support for the strategy at the highest level.

Step three: deploy the technology

A database is the best technological method of initially implementing a KM strategy. Some initial tips for setting up a database include:

- Every item of information you can envisage adding to the system should fit comfortably into one category or sub-category;

- Every list of items within a subcategory should be mutually exclusive (i.e. no item on the list would fit equally well in another sub-category's list); and collectively exhaustive (i.e. the list is complete);

- The user should be able to navigate to any item of information with three or fewer mouse clicks, regardless of the starting point;

- The user should be able to navigate to any item on the list with little or no scrolling.

- Users should have access to the source of the knowledge or be able to identify the creator of the knowledge (to increase trust in the system);

- It must be easy to view the history of the item in the system: what date it was added; the date of any revisions; the frequency with which it has been used; and the situations in which it has been used (again to increase trust in the system);

- The software must be able to extract useful knowledge whilst retaining the confidentiality and security of relevant information. At least some parts of the system must support restricted access;

- All firm members should be able to share knowledge easily; the system should capture knowledge without the need for much additional effort from the creator;

- The system should be appropriate for use by persons with all variety of legal and technological skill;

- The system needs to support subject matter indexing;

- Any type of technology supporting the KM process should fit in seamlessly with the routine work of lawyers or risk rejection;

- An off-the shelf system will not work without some modification to allow for the specific outcomes you want out of it;

- Keep in mind that each NTRB may already have some database technology and internal management system in place.

Step four: implement the KM strategy

A. Short term implementation

1. Address the formal issues of KM structure and organisation. Amend position requirements and NTRB organisation to ensure that the KM system can start smoothly.

2. Educate the managers and lawyers in use of the system. Listen to their needs and concerns and consider amendment of the system if required. To encourage uptake of the system in the initial stages, consider a rewards system. Rewards may encompass the compensation system, the career progression system and budgeting. Having someone in an NTRB who is a real advocate for KM is also a help.

3. Begin the technological process. Capture and share the most critical of each NTRB's explicit knowledge on the database. Make sure that confidentiality, sensitive material and conflict of interest concerns have been addressed before documents are published.

4. Address the most basic barriers to KM within and outside the organisation.

B. Medium term implementation

1. Ensure that there is a consistent approach to KM across the various NTRBs.

2. Address the more complex (often cultural) barriers to KM within and outside the organisation.

3. Evaluate the strengths and weaknesses of the KM technological system. Ensure the knowledge on the database is valuable, is titled and contextualised appropriately, and is not duplicated. Beware also of information overload.

4. Consider broadening the focus to deal not only with explicit knowledge KM, but also tacit knowledge KM.

C. Long term implementation (3-5 years)

1. Focus on implementing initiatives to sustain the KM culture and practices built up to that point.

2. Review the database periodically to ensure currency and accuracy of knowledge.