

# Counsel<sup>to</sup> Counsel

*Connecting Corporate Counsel & Leading Law Firms*

## **Counsel to Counsel Forums 2004**

Key findings: Hong Kong, Sydney and New Zealand 2004



## A selection of law firms and companies involved in the C2C programme in Asia and Australasia in 2004.

### LAW FIRM CO-HOSTS:

Clifford Chance LLP  
Debevoise & Plimpton LLP  
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Paul, Weiss, Rifkind, Wharton & Garrison LLP  
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ABN Amro Bank N.V.  
AIG  
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AMP Limited  
Arab Bank Australia Limited  
Australian Corporate Lawyers Association (ACLA)  
Australian Stock Exchange (ASX)  
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BT Financial Group  
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## Introduction and Background

The aim of LexisNexis Martindale-Hubbell's *Counsel to Counsel* programme is simply to bring together senior in-house counsel and leading law firms from around the world to share best practices and openly discuss topical management issues. Sessions, which are facilitated by Martindale-Hubbell, are 'business-like' yet informal and typically attract fewer than twenty senior in-house representatives which helps ensure a lively and engaging debate.



To date, over 50 forums have been held in Europe, North America, Asia and Australasia. The LexisNexis Martindale-Hubbell *Counsel to Counsel* programme is now widely recognised as the main point of reference for management best practice within the profession.

The *Counsel to Counsel* programme now includes a bi-monthly magazine, "*Counsel to Counsel*" distributed in the US with Corporate Legal Times and available free to in-house counsel worldwide. Details of the "*Counsel to Counsel*" magazine, and the *Counsel to Counsel* Calendar of Events 2005 can be found on page 10.

## ***The 2004 Summary of Findings***

For delegates attending *Counsel to Counsel* forums, perhaps the opportunity to network and share best practices are the most important and valuable. With the demands being made of in-house counsel continuing to grow against a backdrop of frugal budgetary control, it is hardly surprising that for many in-house counsel finding the time to attend these sessions is not so easy. That said, there appears to be a growing number of counsel who recognise the value of taking 'time-out' and return to attend sessions as and when they are held in their general proximity.

The purpose of our Summary of Findings reports is to provide a digest and record of key discussion points and 'take-aways' from sessions held. These can then be openly shared with those not able to attend.

This particular report captures findings from sessions held in the second half of 2004 and gives an indication of the priority issues exercising the minds of senior in-house at this time.



This summary report covers three forums held in the Pacific region in October 2004 – one in Hong Kong and two in Sydney, held shortly before the IBA's (International Bar Association) annual conference in Auckland, New Zealand.

# Forums 2004

## ***Hong Kong Forum, October 2004***

### ***Managing the legal function across borders***

This particular subject was one of 2004's 'hot-topics' and was discussed at no fewer than three *Counsel to Counsel* events in 2004 (Chicago, Montreal and Hong Kong). It was clear that this is a particularly important issue for those in-house counsel who have to deal with numerous jurisdictions on tight budgets. Delegates welcomed the chance to hear how others dealt with the typical management challenges presented by this situation, such as how to build a world class legal department, partnering with outside lawyers to add value whilst controlling costs and tackling all the issues surrounding risk management and corporate governance.



The session in Hong Kong was moderated by Derek Benton, Director of International Operations for Martindale-Hubbell. Attendees there and at the *Counsel to Counsel* sessions throughout the year shared best practice on structuring the in-house legal department. These summarised findings were presented by Derek at the IBA conference in Auckland.



The key points taken from this session were:

- A more strategic approach – have a proactive role in the organisation's business and demonstrate value added;
- Remote management – improving internal communications and operations in a dispersed organisation through the legal staff reporting structure and local business units' relationship to corporate general counsel;
- Greater alignment with the business requirements – positive co-ordination with business teams; timely delivery and aligning management style to the corporate culture.

The importance of demonstrating value was highlighted by one delegate in Hong Kong, who reminds her team that the legal function is a luxury. *"There are companies without lawyers at all and they will sign whatever they need to sign. So what is all this money and effort spent on managing the risks that the company is facing? You are only as good as the real value you deliver to your client."*

Some encouraging news from the Hong Kong session was that China is catching up with North America and Europe when it comes to the availability of good quality external counsel, although, it was acknowledged that there are still substantial gaps away from the big cities. Where a couple of years ago Hong Kong-based law firms would have had to handle acquisitions in China themselves, they now feel confident enough to engage a local firm and merely supervise proceedings, thereby cutting costs for the client.

Using local lawyers is always going to be necessary to some degree – as one delegate said: *“It would be ideal if we could engage a law firm that could look after our interests around the world, but it does not happen.”*

The general consensus was that the main challenge is to get local lawyers to think more globally. Sarbanes-Oxley was given as the obvious example of where global thinking is essential. One delegate pointed out: *“The rules apply equally to all companies, so all companies need to comply. However, the simple fact of the matter is that one size does not fit all. Companies, particularly in Asia – including local multinational corporations with worldwide business interests – do not have compliance people or an internal audit function on the ground in all places.”* This puts a huge risk management burden on in-house counsel to create internal controls.



More positively, another delegate reported seeing a quick learning curve among firms across Asia, with people becoming much more familiar with compliance issues. It was also suggested that rather than being daunted by the challenge of creating internal controls for global corporations with far-flung business interests in order to manage risk, in-house counsel should embrace it. One delegate said in-house lawyers frequently found themselves in the position of having to make decisions to allocate legal resources against potentially competing risks. Rather than trying to defend everything, they should pick their battles by deciding where the big risks were and concentrate on them.

The forum shared best practices for setting up risk management frameworks to assure consistency of quality and service across jurisdictions. One international bank has global project teams rolling out risk management programmes for Sarbanes-Oxley and Basle II. In countries where businesses do not have in-house counsel, the role is typically given to someone in risk management or compliance working closely with the senior business team, and the bank's head of legal works out a risk profile for them and ensures they have an established contact with a number of high quality local lawyers.

# Forums 2004

## **Sydney C2C Forums, October 2004**

### ***Corporate Counsel's Growing Role of Gatekeeper: Corporate Governance, Ethics and Reputational Risk Management***

Delegates met in Sydney for two packed forums moderated by Derek Benton and Leigh Dance, President of ELD Project Marketing International Inc.



While the topics discussed ranged from cross-border litigation and the power of mediation to the increasingly demanding role of in-house counsel in risk management and corporate governance, both discussions frequently touched on concerns about reputation. Company executives are far more aware of how problems of non-compliance and any kind of dispute can quickly damage their reputation and cost them dearly. The in-house legal team is often at the heart of the action to assure this does not happen.

Various ways of doing this were brought to the table, including:

- The legal and risk team of one major financial organisation developed a reputation risk 'watch list' covering a raft of issues, each with a nominated owner in charge of an action plan;
- A company with operations in countries including: Vietnam, India and Indonesia (where corporate governance practice is fairly new) set up a corporate-wide compliance program. A risk enterprise framework covers internal controls and financial reporting and risk audits flag up potential problems early;
- Another organisation saw a change management program as key in getting over the message that risk management was not just something the legal department did, but an intrinsic part of the business.

A couple of delegates reported that their organisation's motivation to manage risk more carefully came as a result of a crisis. They and many other attendees agreed that in-house counsel now had higher profile relationships with audit and other committees and that directors are more aware of their responsibilities.

### ***Privilege under attack***

A topic of concern at a *Counsel to Counsel* forum held in Washington, DC in September, where privilege is something on which in-house counsel seem to be taking two very different stands – either resigning themselves to act as if there is no professional privilege or vigorously defending its preservation. One of the latter group at the Sydney session commented: *"An important part of corporate governance is to ensure that open, candid legal advice can be given up the line without the loss of legal professional privilege."*



Several examples were given of the ways in which privilege is being eroded: US regulators expecting a company to do its own investigation, hire advisers and produce reports to give the regulator a road map to decide which direction to move in; and the Australian Prudential Regulation Authority (APRA) and ASIC, two of the main financial services regulators in Australia, trying to get organisations to generate more reports up the line on possible breaches of the law. (ASIC has a new policy under which they want breaches reported even before legal advice is obtained).

**The burden of regulation**

Regulatory intervention is already seen in a negative light, but the overall consensus was that it is going to get worse before it gets better. One delegate described the regulators as “almost shadow directors”. All agreed that the more general counsel can share about how to deal with it, the better.

**The role of outside counsel**

The role of outside counsel was discussed in both forums, in terms of them having a useful part to play in managing reputational risk situations and managing cross-border litigation. But you have to know how to choose the right lawyer, especially when they are working outside of your jurisdiction and be able to take their advice on trust.

**Do’s and Don’ts for Outside Counsel – What In-house Counsel Want**

**Communication**

- Know your client and their business
- Insist on clear instructions, no assumptions
- Liaise with in-house lead lawyer, not with business/advisers
- Report regularly on status, no (budget) surprises!
- Prepare review meetings based on completed staff work.

**“Enough is just enough”**

- Direct answers, no five-page memos;
- Short essay, no grand opus;
- Good work, not perfect work unless specifically requested;
- Adequate staffing.

**Source: “Managing the Legal Function: Best Practices.” Presentation by Derek Benton at the IBA Auckland Conference**



# Forums 2004

## Sydney C2C Forum, October 2004

### **Managing Cross-Border Disputes and Litigation in a Mad, Mad World**

*"Most disputes can be seen as a web, from which you have to find your way out without too many tangles."*

How to get out of the dispute tangle without damaging a business relationship you may well wish to continue, was one of the issues debated at the Sydney *Counsel to Counsel* forum dealing with cross-border litigation.

With the aid of facilitator Leigh Dance, delegates debated the power of mediation versus litigation in achieving this end. With the work of in-house counsel increasingly becoming international, it follows that disputes become increasingly complex. One attendee gave an impassioned plea for keeping disputes out of the courts, citing his 500 Fortune company's 10-year, \$60 million IP dispute with a competitor, which ended in deadlock and, finally, an agreement to settle.



This company established a best practice group for dispute management and decided that by developing strong mediation skills and a structured approach to controlling disputes themselves, rather than handing over control to arbitrators and judges, they would avoid ever going down that road again. It now boasts an 85 to 90 per cent solution rate, even taking into account very complex cases, and, along with the competitor they once faced in court so often, has signed an industry dispute procedure.



Not everyone agreed mediation was always the answer. It was suggested it could be seen as an admission of having a weak case. But delegates did agree that where a business relationship needed to be continued, it was a sensible option.

*"The effects of litigating are hugely destructive to the business relationship. You go to court and say all sorts of nasty things; it's divisive. If you want a relationship going forward, then a quick, sharp mediation may be the most effective way of maintaining it,"* said one delegate.

It was agreed that mediation only stands a chance when both sides have a will to resolve the dispute, otherwise both sides end up entrenched and the argument that mediation saves you money definitely falls apart.

Getting involved early is also key to a successful resolution. It was put by one delegate that by sending the legal team out to complainants and talking the issue through straightaway his organisation stood a far better chance of stopping things escalating out of control. Taking the stand that the customer is always right might cost a few thousand dollars to fix an issue, but this has to be set against the alternative scenario where an embittered adversary starts paying out tens of thousands in legal fees and becomes determined to take on a big organisation and win. He summarised his organisation's viewpoint: *"Our approach has been to try and do the opposite of what big companies are seen to do."*

## **IBA Auckland Conference, October 2004**

**Managing the in-house legal function; Best Practices** was the subject of a presentation given by Derek Benton, Director of Operations at Martindale-Hubbell International to the IBA conference in Auckland, New Zealand.



He provided delegates with best practice ideas which tackled top of mind issues for corporate counsel worldwide: the most effective law department structures, working more closely with business units and partnering with outside lawyers to add value and contain costs.

### **Structuring the in-house department:**

**WE SAY:** We are a “functional support group”

**THEY SAY:** “...that is sometimes functional but more rarely supportive”

Getting closer to the business was a key element, Derek explained, with trust and respect functions of alignment and credibility. He gave these pointers:

- Do your homework / research;
- Act like an owner of the business;
- What business are you in and how well do you know it?
- Could you sell your products?
- Who are your competitors and where are they positioned compared to you?

Derek looked at how to build a strong relationship with outside counsel, taking as his example the policy of Akzo Nobel, the international pharmaceuticals, coatings and chemicals corporation:

- Professionals to be managed by professionals;
- For legal core tasks which cannot be performed by Legal-IP, a limited number of preferred outside law firms will be retained in the relevant companies for the relevant businesses;
- Selection process in consultation with the business units and on basis of the Steering Group Outside Counsel’s selection criteria;
- All law firms need a good understanding of:
  - Group legal/organisational structure and business lines;
  - Organisation and operation of Legal Affairs department;
  - Code of conduct and compliance policies;
  - Akzo Nobel model transaction documentation.



# Forums 2004

## ***Counsel to Counsel Forums 2005***

LexisNexis Martindale-Hubbell continues to work closely with leading law firms and corporate counsel organisations such as the IBA, ECLA and ACLA.

Building on the success of the last four years, LexisNexis Martindale-Hubbell will for 2005 continue to expand its *Counsel to Counsel* programme, with sessions scheduled in The Netherlands, Asia, Latin America, Scandinavia, Japan and China.

### ***Calendar of forums for 2005:***

- Amsterdam – 23 February
- London – 12 April
- Mexico City – May (date tbc)
- Stockholm - 2 June
- Brazil – 13 June
- Tokyo – 8 September
- London – 11 October
- Singapore - 9 November
- China - November (date tbc)

### ***Discussion topics to include:***

- Bring compliance and risk management to the business;
- Damage control – Corporate counsels role in containing and resolving corporate crisis;
- Balancing local and regional law in business today;
- Best practices in managing the legal department;
- Reducing risk, realising value – compliance risk management in a post-SOX world;
- Managing your IP assets as a global portfolio;
- E-discovery, document management and knowledge management.

### ***How to participate in our Counsel to Counsel programme***

If you are interested in taking part in a *Counsel to Counsel* forum in 2005 please visit <http://c2c.martindale.com> or contact Paul Chapman at Martindale-Hubbell International on +44 20 7868 4867 or by email at [paul.chapman@martindale.com](mailto:paul.chapman@martindale.com)

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*The photographs presented in this brochure were taken at Martindale-Hubbell's Counsel To Counsel forums in Hong Kong and Sydney.  
For more information see <http://c2c.martindale.com>*

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