

# LEGAL DIRECTOR

## ROUNDTABLE

A counsel to counsel forum of in-house lawyers in Sydney, Australia offered a chance to share concerns on reputation, risk and the regulators. Derek Benton and Leigh Dance moderated the discussion and report on the event

# The Sydney agenda

Whichever corner of the world an in-house lawyer is working in the worries are the same — keeping up with the regulators, managing risk and costs. A recent gathering of the heads of legal departments of more than 50 of Australia's largest companies, organised by Martindale-Hubbell, the Australian Corporate Lawyers' Association and the International Bar Association (IBA), gave in-house counsel Down Under the opportunity to air their concerns.

As in North America and Europe, Australian corporate executives and their boards are highly attuned to problems of non-compliance and various kinds of disputes that can quickly affect reputation. A damaged reputation can hurt share price, divert productivity, lower employee morale and poorly reflect on the company's leadership. And these counsel know all too well that the head of legal is nearly always at the centre of it.

One major financial organisation asked their legal and risk team to develop a reputation risk 'watch list'. The watch list covers a raft of issues, each with a nominated owner in charge of an action plan. It has not been easy to convince mid-level managers that this effort was good for the business and not just another laborious process, but the in-house lawyers found it necessary that business managers take responsibility as well.

Singapore's SembCorp Industries charged its general counsel, Linda Hoon, with creating a company-wide corporate governance plan. Hoon explained the challenge of doing this in countries in which Sembcorp operates and where corporate governance practices are fairly new, such as China, Vietnam, India and Indonesia.

In late 2003, SembCorp had developed a risk enterprise framework, covering internal controls and financial reporting. The internal controls require clearly defined parameters of how material risks, including legal risks, are reported. There are risk audits and potential problems are flagged early. The legal department creates risk profiles, which identify the top 10 risks. It then analyses how they can be mitigated and seeks to execute risk mitigation plans across projects within SembCorp.

### Crisis creates risk awareness

For another organisation, the motivation to manage risk more carefully came in the wake of a crisis, when an investment enterprise (to which the company was connected via an alliance) was accused of market-timing issues by US regulators. The allied company was shaken to its core, with resulting resignations including the CEO and general counsel. The Australian financial concern received damaging media coverage purely by association — although it had done nothing wrong.

Another general counsel agreed that out of adversity comes improvement, and referred to their recent market disclosure policy. It arose out of investigations into the company's change from a mutual society to a publicly listed company. "The response was to develop a market disclosure policy that dealt not just with continuous disclosure but also financial market communications generally," he explained.

Many of the Australian in-house counsel feel that they have higher profile relationships with audit and other committees of the board than in the past, and that directors are more aware of their responsibilities.

### Is privilege eroding or just under attack?

And then there is the issue of privilege. There seems to be a split between in-house counsel who have resigned themselves to act as if there is no professional privilege, and concerned in-house counsel who vigorously uphold and defend the preservation of privilege. One banking counsel said: "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."

One driver of this concern is the number of Australian companies that must be Sarbanes-Oxley compliant. Stories were told of US regulators that expected the 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.

Many attendees were concerned about



From left to right: Gail Hambly, group general counsel, John Fairfax Holdings; David Coben, general counsel, AMP; and Tim Bendall, partner, Mallesons

recent actions of two of the main financial services regulators in Australia: the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC). APRA is trying to get organisations to generate more reports up the line on possible breaches of the law. ASIC has a new policy under which it wants breaches reported even before legal advice is obtained.

### Getting help from outside

Many Australian corporate lawyers appreciate the role outside counsel play in managing reputational risk situations. "It is not abrogating responsibility to the lawyers, because at the end of the day that lies with the one who makes the decision," pointed out the general counsel of a major insurance company in Australia. He added: "But I found it very useful to have them help guide us through it, actually sitting there in the room with us, with the executives."

Many Australian counsel operate across south Asia, and the varying laws and approaches to privilege makes the job harder. Denis Brock, a Hong Kong partner with Clifford Chance, gave the example of discovery. "If you have disclosure of documents in country A, can you use them in country B? Under English law, not until they have been deployed in court there, and that aspect could affect the order in

which you choose to fight your battles." He went on to warn that "clients have to be very careful about what documents are being created, whether they are protected by laws of privilege in country A but not in country B, and whether both types of privilege, which are generally recognised in Commonwealth countries, are equally protected in other jurisdictions."

We asked how in-house lawyers how they judge the quality of advice they receive when it is not their jurisdiction. John O'Sullivan, general counsel of Commonwealth Bank of Australia, commented: "Good lawyers can usually make a reasonable judgement about how good the advice is without necessarily knowing the local law."

He added that he is predisposed to accept advice if it is logical, clearly written in plain English and covering all the obvious points. If it did not meet those basic requirements, more probing might be necessary.

O'Sullivan chose an Australian firm to manage a major piece of cross-border litigation across the region. "Apart from the fact that they are cheaper than the international (English and American) firms, I find they are very skilled and sophisticated. They also had an understanding of my disclosure and regulatory needs," he explained. Strict communication protocols were set up very early, and specialist advice on the laws of different countries

was co-ordinated by the external counsel.

"I was really attracted by the thought that I have a Sydney partner who gets all the reports in from Hong Kong. There is a Hong Kong manager who liaises with the Sydney partner and the Sydney partner rings me regularly and tells me what's happening. I can get them down to my office in five minutes flat. It's very convenient," O'Sullivan explained.

### The regulatory crunch

One last question to the Australian corporate lawyers was: will the regulatory pendulum keep swinging against us: will the burden of regulation get heavier: or will we eventually have some relief? The consensus was that it will eventually get better, but for a while it will either get worse or stay the same. And that led to an even broader consensus: to adjourn for cocktails and continue the debate over a drink.

Derek Benton is international operations director of Martindale-Hubbell International and Leigh Dance is president of ELD Project Marketing International. Companies represented included: ABB Australia, AIG, BT Financial Group, Caltex Australia, Commonwealth Bank of Australia, Ernst & Young, ING Australia, Rinker Group, Telstra and Thomson Asia Pacific Holdings

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