



Monday, October 19
11:00 am–12:30 pm

902 Major Dispute Management for Non-Litigators

Stephen Bendeich
General Counsel
Hydro Tasmania

Andrew Forstenzer
Executive Vice President and General Counsel
Crump Group Inc.

Genevieve Hancock
Senior Counsel
New Zealand Department of Internal Affairs

Faculty Biographies

Stephen Bendeich

Stephen Bendeich is the general counsel of Hydro Tasmania (a government owned hydro-electric electricity generator), in Hobart, Tasmania, Australia. Mr. Bendeich leads a team of in-house lawyers handling corporate, energy trading, market regulation, merger and acquisition, construction and engineering, and general commercial legal issues.

Before joining Hydro Tasmania, Mr. Bendeich was a partner in an Australian national law firm, Deacons, where he commenced practice after graduation and practiced in general commercial and energy related areas.

Mr. Bendeich is a director of Australian Corporate Lawyers Association, the Australian equivalent of the ACC, and is president of its Tasmanian Division (ACLA's smallest).

Mr. Bendeich holds a BA and LL B, with honors, from the University of Melbourne.

Andrew Forstenzer

Andrew Forstenzer is executive vice president and general counsel for Crump Group, Inc., parent of Crump Insurance Services, Crump Life Insurance Services and Ascensus, a leader in retirement plan administration. Crump's employees operate out of offices in the US and Bermuda.

Before joining Crump, Mr. Forstenzer worked at Marsh & McLennan Companies, Inc., a publicly held, global leader in delivering risk and insurance services. In various roles, most recently as vice president – senior litigation counsel, he was responsible for handling corporate and overseeing litigation legal matters for various Marsh affiliates. Prior to Marsh, Mr. Forstenzer worked for Damson Oil Corporation, an American Stock Exchange company, most recently as senior vice president and assistant general counsel. At Damson, he was in charge of public and private limited partnership syndications and legal compliance for an NASD member broker-dealer. Earlier, he served as in-house counsel for a regional investment securities firm and as staff attorney for the US Department of Transportation.

He is a frequent lecturer on Errors & Omission prevention and has spoken at various industry associations such as NAPLSO, PLUS and ALFA.

Mr. Forstenzer received a BS from the Wharton School at the University of Pennsylvania, a Juris Doctorate from Villanova University Law School, and an LLM in Corporation Law from New York University School of Law.

Genevieve Hancock

Genevieve Hancock holds the position of senior counsel at the Department of Internal Affairs in New Zealand. She works primarily in the technology law area, advising on technology law strategy and policy, advising on the procurement of IT hardware, software and services, and negotiating IT contracts for the benefit of the New Zealand government.

Ms. Hancock started her career as a litigator at the national compulsory accident insurance corporation in New Zealand. She then worked with New Zealand law firm Bell Gully, first in the litigation team and later with the commercial side of the firm, in the areas of public sector and intellectual property and technology. As a senior associate at Bell Gully, she advised on, and managed the full range of disputes, from significant and long-term litigation, to appearing in mediations and providing submissions for independent expert determination. Prior to joining the Department of Internal Affairs she was general counsel of Unisys New Zealand.

Ms. Hancock was the president of the Corporate Lawyers Association of New Zealand (CLANZ) from 2006 to 2007. She continues to be on the managing committee of CLANZ and involved with the New Zealand Law Society and is also a board member of Downstage Theatre Trust, an independent theatre company in New Zealand.

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COURSE OUTLINE

- Managing major (complex and varied) disputes
- Highly emotive environment
- Uninitiated get lost in the fray
- End up in court without having managed the process or properly explored alternatives
- Ways to efficiently manage disputes to meet organization goals and objectives; to avoid costly and unnecessary litigation – evaluate strategies for approaching individual disputes
- Dispute management alternatives
- Tips on how to manage the process and outside counsel

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THREE COMMON CAUSES OF DISPUTES

- Misunderstandings
- Assumptions
- Failure to “Find an ending”

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AVOIDING LITIGATION – ROOT CAUSE ANALYSIS

- Seek to avoid repetition of actions leading to mistakes and possible future litigation
- Possible root causes – the real reason for a specific effect, problem or condition
- “4 Ps” – Policies, Procedures, People, Plant (equipment)
- Analyze existing problems so that corrective or preventive action can be taken before a “litigation” dispute arises

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DOCUMENTATION & E-MAIL

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O.K. - now answer one simple question...

DOES YOUR TELEPHONE HAVE A PROPER TELEPHONE NOTE PAD BESIDE IT ?

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No ? - GET ONE !
And start using it today

But it's not much use without one of these...



Always make sure you have a pen in hand when the 'phone rings

→ Full notes of all that is said (including telephone numbers) should be kept. Something that seems insignificant now.....

MIGHT BE CRUCIAL EVIDENCE IN 3 - 5 YEARS TIME

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E-Mail Communications

- Think about the purpose of each communication and to whom it is being sent before you click "send".
- Be careful when replying to chain e-mails.
- Privileged communications should be marked as such and sent only "to" Legal with a "cc" to everyone else.
- Document retention - Remember to print out a hard copy for the file or otherwise ensure retention as required.

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ALTERNATIVE DISPUTE RESOLUTION

Basic ADR options:

- Negotiation
- Mediation – Voluntary or Court-Mandated
- Contractual Arbitration
- Judicial Arbitration

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NEGOTIATION

- Direct between/ among principals
- Delegation to counsel vs. involvement of business principals
- Commercial relationships

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MEDIATION

- Participation by business principals (decision-makers) and counsel
- Mediator lacks authority to “decide” – role is to facilitate discussion toward a possible, amicable resolution
- Mini-trials vs. separate discussions/ negotiations through the mediator

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ARBITRATION

- Non-Binding – mediation with a “decision-maker”
- Binding - with limited judicial review

Contract clauses – variations on desired procedures

High-Low Agreements – floor and ceiling within which arbitrator is authorized to settle

- Baseball – Arbitrator’s authority is limited to low or high option – nothing in between.
- Night Baseball – same as above but without arbitrator’s knowledge of high and low figures – resolution at whichever number comes closest to arbitrator’s “award”

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ARBITRATION

- Med-Arb – Mediation followed by binding arbitration if no amicable resolution achieved
- Medaloe – Like Med-Arb, but arbitrator’s decision is limited to high/low ranges as above
- Arb-Med – Arbitration proceeds – but before sealed arbitrator’s result is made known, parties are given a chance to mediate a resolution. If they fail, sealed decision stands
- Judicial Arbitration – Non-binding, but if appealed and appealing party does not improve position, they bear liability for costs.

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ELEMENTS OF DISPUTE MANAGEMENT

1. The commercial objective
 - what do you want to achieve?
2. Information
 - what happened?
3. Legal opinion
 - what are the (possible) outcomes?
4. Legal process
 - how do these outcome occur?

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WHO IS INVOLVED?

- Setting the commercial objective
 - commercial operators
 - management/executive
 - Board
- Collating information
 - commercial operators
 - others involved in events
 - technical experts
- Legal opinion and process
 - external advisers

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THE FEEDBACK LOOP

- How everyone comes together

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graph LR
    info[information] --- plus1[+]
    obj[objectives] --- plus1
    plus1 --- circ((+))
    circ --- opinion[opinion]
    opinion --- process[process]
    process -.-> obj
  
```

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WHAT CHALLENGES/RISKS DO PEOPLE PRESENT?

- **Delivery**
 - how do you ensure that the commercial objective is set and monitored?
 - how do you ensure that you obtain the necessary information?
 - how do you ensure that your legal advice delivers your commercial objectives?

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WHAT CHALLENGES/RISKS DO PEOPLE PRESENT?

- **Objectivity**
 - how do you ensure that the commercial objective is best for business?
 - how do you ensure that the information you obtain is accurate and complete?

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WHAT CHALLENGES/RISKS DO PEOPLE PRESENT?

- **Consistency**
 - how do you ensure that the commercial objective is maintained?
 - how do you ensure that you continue to have access to information?
 - how do you ensure that you do not have to change horses?

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WHAT CHALLENGES/RISKS DO PEOPLE PRESENT?

- Efficiency
 - how do you ensure that decisions are made effectively?
 - how do you allocate resources?

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Outline

- Reformed litigator
- Where litigation fits
- How to add value to your organisation
- The decision to enter into litigation
- Management of litigation
- The place of strategy
- When to open settlement discussions
- Controlling costs
- Effective reporting

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Litigation trends

"One of every 10 companies spends \$10 million or more on litigation annually (excluding settlements). One of every five of companies with \$1 billion or more in revenues spends \$10 million or more."

Fulbright & Jaworski, Fifth Annual Litigation Trends Survey Findings.

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Where litigation fits

	Negotiation/ Mediation	Arbitration/Indep Expert Decision	Court
Influence	✓	<input type="checkbox"/>	✓
Cost	✓	<input type="checkbox"/>	✗
Precedent value	✗	<input type="checkbox"/>	✓
Relationship	✓	✓	✗
Timeframe	✓	<input type="checkbox"/>	✗
Solution flexible	✓	✗	✗
Solution final	✓	✓	✓
Transparency	✗	✗	✓
Confidentiality	✓	✓	<input type="checkbox"/>
Expertise decision maker	✗	✓	<input type="checkbox"/>

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Take your pulse first

- Elements of dispute
- Organisation's goals and objectives?
- Chart alternatives
- Who has authority to decide?
- Pick counsel

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Select the right counsel

- Fix the team
- Span of resources
- Wise head on your wavelength
- Strong sub-seniors do bulk work
- What experts & witnesses

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Fix your strategy

- Feed in goals and elements of dispute
- What must you avoid/obtain?
- What is the worst case scenario?
- Check insurance coverage

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Plan

- What key steps will you take?
- What will the other side likely do?
- When will you entertain settlement?
- How much will you settle for?
- Resource plan?

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Proactively manage

- Don't be managed by the process or the other party(ies)
- Constantly review strategy and plan
- Push counsel be intimate and proactively advise
- Know the procedural options yourself
- Few surprises

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Examples of proactive procedural steps

- Strike-out
- Joining additional parties
- Open offer settlement

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Controlling costs

- Costs haunt more than the outcome
- Fix costs for as many steps as you can
- Otherwise use actively managed estimates
- Risk/reward payments
- Directly source high resource activities?
- Consider best method disbursements
- Staffing plan

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Reporting by external attorneys - overview

- SWOT analysis
- Strengths
- Weaknesses
- Opportunities
- Threats

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Reporting by external attorneys - costs

- Total fees to date
- Total disbursements
- Chart fees per attorney
- Estimates/fixed cost next steps
- Total budget

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Reporting by external attorneys – likelihood of success

- Provide percentage likelihood of success
- Don't accept "sitting on the fence"
- Depending on circumstances may be excluding 45 – 60 percentages
- If it was their money?
- Re-state the objective

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ACC Extras

Supplemental resources available on www.acc.com

Flying Blind Through the Storm of the Century: Recommendations for
Forecasting and Managing Litigation Expenses.

ACC Docket. May 2009

<http://www.acc.com/legalresources/resource.cfm?show=207095>

804 Best Practices for Preventing Litigation.

Program Material. March 2006

<http://www.acc.com/legalresources/resource.cfm?show=20291>

Preventive Law for Small Law Departments and Generalists.

Program Material. July 2008

<http://www.acc.com/legalresources/resource.cfm?show=20744>

Please note, these additional resources are provided by the Association of Corporate
Counsel and not by the faculty of this session.