503 Dealing with the Regulators-An International Perspective

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Faculty Biographies

Bruce W. Brown

Bruce W. Brown is the general manager, legal of the Australian Competition and Consumer Commission (ACCC) in Canberra, Australia. His responsibilities include the management of the branch, which provides in-house legal services to the commission in the areas of anti-trust law, corporate law, and administrative law.

Prior to joining the ACCC, Mr. Brown was a regional commissioner with the Australian Securities and Investments Commission (ASIC), and worked in its Tasmanian, Queensland, and Northern Territory offices.

Mr. Brown is the national vice president of the Australian Corporate Lawyers Association. He has a long association with the regulation of nursing in Australia, and is currently a national director of the Australian Nursing and Midwifery Council. He is also a writer and, while with ASIC, was commissioned to write the best selling investor education book Scams and Swindlers-Investment Disasters and How to Avoid Them.

Mr. Brown has two M.A.s and a J.D. from the University of Tasmania.

Bruno Cova

Bruno Cova is co-chair of the Milan, Italy office of Paul Hastings. He focuses his practice on mergers and acquisitions, securities law and corporate governance, energy matters, restructurings, and complex cross-border litigation.

He started his career as a private practitioner with international law firms in Milan and London, and was then general counsel of the exploration and production division of Eni SpA, chief compliance officer of the European Bank of Reconstruction and Development (EBRD), and group general counsel of Fiat SpA. Immediately prior to joining Paul Hastings, Mr. Cova was the chief legal adviser to the commissioner appointed by the Italian government to investigate Europe's largest financial fraud at Parmalat, and deal with the restructuring of the company. He has worked on several very significant energy matters in Italy, North Africa and Central Asia. In the field of M&A, he has been involved in most of the largest Italian deals of the last several years, including several cross-border ones, and has advised on friendly and hostile takeovers of Italian and foreign public companies. He has advised on the reform of the corporate governance of companies listed on the Milan Stock Exchange and other regulated financial markets.

Mr. Cova is a member of the council of the legal practice division of the International Bar Association. He is a contributor to, and member of the editorial board of, European law journals and lectures regularly in Italy and abroad. Mr. Cova received the British Council's European Young Lawyers Scheme Award. While he was its general counsel, Fiat received the European In-House Legal Team of the Year Award. He also received the Legal Week Award for his work at Parmalat.

Darren Gardner

Darren Gardner is managing partner of the San Francisco office of Minter Ellison, the largest law firm based in the Asia-Pacific and the 13th largest law firm in the world. Mr. Gardner also leads Minter Ellison's international employment law practice and he is the relationship partner for many of the firm's U.S. multinational clients, which include market leading companies across a range of industries. Working with U.S. multinational companies with operations in Asia, Mr. Gardner heads an experienced team with a proven track record in handling all types of employment law matters, from one-off questions to large-scale multi-jurisdictional projects across the region.

Mr. Gardner started his legal career working as an in-house counsel with Qantas Airways. He is registered as a foreign legal consultant (Australia) with the California Bar Association.

Mr. Gardner has a B.S. (Honors) and an L.L.B. from the University of New South Wales in Australia.

Ronald F. Pol

Ronald F. Pol is general counsel of Simultext Ltd and director of TeamFactors.com, in Wellington, New Zealand.

Formerly corporate counsel with New Zealand's largest public company, Mr. Pol was responsible for a wide range of legal issues and negotiations across New Zealand and Australia. After he left that company, he continued to provide strategic practice management advice to the legal department, and consulted on law firm and legal department relationship management, governance/compliance, and motivation of professional service providers. Prior to that, as group litigation counsel, he was responsible for major litigation and dispute management. Before that role he was in private practice with leading commercial law firms in New Zealand, London (England) and Hong Kong (on secondment).

Mr. Pol is immediate past president of the Corporate Lawyers' Association of New Zealand, the representative association for in-house counsel in corporate and government organizations, and recently completed several terms on the board and governing council of the New Zealand Law Society. He shares experiences with colleagues through articles in a wide range of legal and management publications in New Zealand, Australia, the U.K. and the U.S., including ACC Docket (The "Shoveling Smoke" column and substantive articles, including "Get More Value from Outside Counsel: Show them the Flipside", Apr 2003, and "Increase Legal Department Value: Establish a Goal Focus", Oct 2003). He was the only non-U.S. lawyer appointed to the ABA's Billable Hours Speakers' Bureau, following its comprehensive 2002 report on hourly rate billing.

Mr. Pol received his B.Com and LL.B. (Hons) from Auckland University.

Jill Schatz

Jill Schatz has served as in-house counsel for various public and private corporations and is currently the vice president law, general counsel and corporate secretary for OnX Enterprise Solutions Inc., a

leading technology solution provider located in Thornhill, Ontario and publicly traded on the TSX. She has obtained a broad range of corporate-commercial and securities in-house legal experience and is regularly involved in counseling on IT, IP, employment, litigation, and M&A matters.
Past in-house roles include four years as vice president law, general counsel and corporate secretary for Cybersurf Corp., a Calgary-based Internet service provider and software development company also listed on the TSX; ten years with ICI Canada Inc., the Canadian subsidiary of ICI PLC in England; and three years with TransCanada PipeLines Limited.

Ms. Schatz is active in the corporate counsel community and has served as past-president, vice president, treasurer, and member of the board of directors of the Canadian Corporate Counsel Association (CCCA). She currently serves on the executives of the IT and e-commerce section of the Ontario Bar Association as well as the Toronto Chapter of the CCCA.

Ms. Schatz obtained her J.D. from the University of Toronto Law School, her M.B.A. in Finance from the Rotman School of Management, University of Toronto, and her LL.M. in International Trade and Competition Law from Osgoode Hall Law School.

Dealing with the Regulators – An International Perspective

'A Few Insights'

Insight 1 – Overseas regulators tend to think and act in similar ways, and they may know more about your industry and company than you may realise.

The natural instinct of regulators is to operate in a similar manner, regardless of which country their jurisdiction covers or which industry they regulate.

Therefore, regulators of air transport, health services or anti-trusts in various countries will often talk and think in similar ways. For example they will all, to varying degrees, publish guidelines or other statements of how they interpret their laws and how they will enforce them. They will also almost all have statutory compulsive powers that will be subject to procedural restrictions. Most of them will be obliged to provide you with a written statement of reasons if they exercise a regulatory discretionary power in a way that is adverse to what you sought.

This characteristic is primarily a result of the common features of regulatory work and the natural desire of regulators to have uniformity for the sake of certainty. But it can also be increased by other factors. It may be even greater, for example, where countries share the same language, or political and legal systems, or are closely linked in geographic terms.

Additionally the so-called 'elephant and mouse' syndrome may apply in some circumstances. Canadian regulators, for example, often face pressures to follow the lead of the US in areas that have cross-border impact such as energy and securities regulation. This may mean in some instances that, if you propose to deal with a regulator in country A, you may also need to be familiar with the regulatory views of larger country B.

When dealing with overseas regulators, therefore, general counsel can take some comfort from this general instinct of regulatory agencies to operate in ways that are broadly like what they may be familiar with in other contexts.

Notwithstanding the fact that they may reach different decisions from time to time because of cultural or legal differences, there are a range of mechanisms and relationships (formal and otherwise) which are in place that contribute to regulatory uniformity and common knowledge between countries.

At the most extreme, they include the establishment of bi-national or multi-national agencies. For example, a bi-national regulator (FSANZ) has been established to regulate food standards in Australia and New Zealand. In Europe, the EU Commission could be seen as a similar regulatory tool on a much larger scale.

A less comprehensive but far more common tool of formal regulatory uniformity is the treaty or the MOU. Usually, treaties are at the state level. For example, earlier this year, Australia and Canada signed a treaty to recognise each other's assessments about the safety and quality of new pharmaceuticals seeking to enter the markets of both countries. MOU's are more commonly entered into between the agencies themselves. For example, Australia's competition regulator (the ACCC) has an MOU with the UK Office of Fair Trading.

Sometimes, such treaties or MOU's may even be backed up with legislative teeth. For example, a number of years ago the Australian Parliament passed the *Mutual Assistance in Business Regulation Act 1992* ('MABRA') and the *Mutual Assistance in Criminal Matters Act 1987* ('MACRA'), which provide vehicles for regulators in Australia to use information gathering powers locally for the benefit of overseas regulatory agencies. These enactments have been used in order to secure and provide information for US regulators in particular.

In rare circumstances, the powers of different regulators can even be used to leverage the information that may be made available to others. A more powerful foreign regulator can actually have access to information that might not be legally available to the home-country regulator, thus allowing the latter an opportunity through official information exchanges – subject to any legal restrictions – to be a better informed and thus more effective regulator in respect of what is happening on their home turf. In many circumstances, for example, US regulators have powers often not available to their European and other western counterparts, and can get hold of much more information than others and more successfully obtain lifting of legal privilege claims.

Clearly, however, the information that can be passed on by one regulator to another is always restricted by statue and common law. It is worth noting, for example, that US regulators are generally regarded amongst overseas regulators as the hardest to get information out of because of their stringent information sharing laws, but they are also the keenest to get information from their overseas counterparts.

Below the formal statutory frameworks are the international relationships. These are formalised through regulators forums, in which regulators regularly meet to develop consistent approaches to regulatory issues and inform each other. A regulatory forum exists for pretty well every area of activity you can think of – including, most probably, the business that your company is in. Examples of some of the larger, better known international regulatory forums are:

- International Competition Network;
- International Consumer Protection Enforcement Network;
- International Organisation of Securities Commissions.

The formal links created by these organisations are particularly strong among regulators in UK/Europe, Asia, North America and Australia/New Zealand where, presently, many of your companies would have branches.

The more subtle links come from the personal networks that are created between the regulators.

Many regulatory agencies exchange staff with their counterparts in other countries. In the past twelve months, for example, the ACCC has had staff seconded to or from U.S., Canadian, New Zealand and British (including Irish) agencies. At various times, it has also received secondments from Asian regulators. This pattern is not limited only to competition regulators and would be replicated in virtually any area you can imagine.

Similar patterns of staff exchange occur in Europe between the EU Commission and domestic regulators, particularly in the anti-trust area.

Then, there is also the high level expatriate network, or the 'brotherhood of regulators', which is often surprisingly widespread. For example:

- The Dubai based Financial Services Authority is almost completely staffed at the higher echelons with former regulators from the UK, Australia, New Zealand and Canada. Qatar has also recently started recruiting from the same areas to establish its own authorities.

- Andrew Proctor, the CEO of the UK Financial Services Authority, was formerly the director of compliance for the Australian Securities and Investments Commission, and until very recently was the managing director of the Hong Kong Stock Exchange.

- John Palmer was the Superintendent of Financial Institutions for Canada until 2001, when he took up a position as deputy managing director of the Singapore Money Authority. Most recently, he worked as a consultant to the Australian Prudential Regulatory Authority during a royal commission into the collapse of a major insurance company in Australia.

- John Feil, the current executive director of the Australian National Competition Council, is the former general manager of the New Zealand Commerce Commission.

It is worth noting, however, that US regulators do not tend to go as far afield as their other English speaking cousins.

The major conclusion to reach from considering the above is simple - don't ever think that regulatory agencies operate in silos apart from each other. When you come knocking, they may already know a lot more about your industry and your company than you realise – or they can often do so in a very short period of time.

In particular, don't bother trying to 'game' regulators in various countries by providing them with different data or arguments. It is standard procedure for regulatory agencies dealing with a cross-boundary issue to regularly swap what information they can within legal constraints, and often attempt to confirm the data they have been given by a company through speaking to each other.

Insight 2 – But the most effective way to deal with an overseas regulator is through having someone on the ground.

Notwithstanding all of the above, when it comes to the final decision to be made by an overseas regulator that may affect your company, culture and setting are critical. Even if regulators in two countries are enforcing exactly the same laws, there can be subtle practical differences which lead to unexpected results if you are not familiar with the local setting. You can very easily end up being blind-sided with an adverse decision you did not expect. This means that there is no better asset than local knowledge, because the differences in the regulatory framework (whether cultural or legal) will more often be what brings you unstuck.

For example, when the competition regulators in Australia and New Zealand were considering the merger of QANTAS and Air New Zealand on the Trans Tasman route, the merger laws they were applying were (for all relevant purposes) exactly the same. The two regulators effectively reached the same decision – to reject the merger. However, when the airlines

appealed the decisions in their respective countries, there was a surprise. In Australia the appeal was heard by a specialist competition tribunal which included economic members as well as a judicial member. They upheld the appeal on a de novo hearing and said the merger was not anti-competitive and could proceed. In New Zealand, the appeal was dealt with under normal Administrative Law principles and went to the New Zealand Supreme Court – a single judge – as a straightforward issue of judicial review and statutory interpretation. The New Zealand court decision went the other way, being to not set aside the regulator's original decision.

A case study that would be more familiar to US lawyers is the GE/Honeywell merger proposal, where the merger was approved in the US, but rather famously rejected by Mario Monti of the EU Commission. At least in that case there were some differences in the applicable statutes, and additionally the practices and economic theories applied by the two regulators for assessing the competitive impact of a concentration were different.

In Europe, regulators in different countries tend to only apply common statutes if the legislation derives from EU directives or regulations. In such cases, although there exists a theoretical possibility that two regulators might reach different conclusions, the affected parties could always refer the matter to the European Court of Justice to secure a final resolution of the matter.

But there are a number of areas that are not subject to EU legislation and there it is still quite possible for regulators to reach different conclusions. They would invariably be acting on the basis of different laws.

At times, fundamental differences in regulation can arise out of cultural or political differences that exist between otherwise similar countries. The Cuba situation is an obvious instance; in Canada and the US differences that led to conflicting blocking and anti-blocking legislation on both sides of the border impacting on whether companies on either side could have dealings with Cuba and the impact on their executives to enter or carry on business in the US.

Many companies have also fallen into the trap of putting too much faith in the 'elephant and mouse' syndrome, and have assumed that a submission that suited the requirements of the regulator in (large) country B will also satisfy all the requirements of the regulator in (not quite so large) country A. Time always needs to be taken to tailor any submission to make sure it meets the specific needs of the relevant regulator.

The regulatory differences may be subtle, and relate more to how a decision is reached than what the decision may be. For example, the amount of information required by a food standards regulator in country A may be significantly more than is required in country B, just to get the same authorisation from both of them and even if the statutory standards look the same on paper. Often, you may not get a sense of these kinds of differences just by reading their laws or their publications.

Equally, it may be surprisingly easy to secure a meeting with a very senior regulator in one country (perhaps even the Chairperson or a Commissioner) to discuss a matter, whereas in another country, it may be quite impossible because the senior regulator acts in a quasi-judicial manner and rarely meets or negotiates directly with any party. At best, you may be able to meet with a project officer who will be drafting a recommendation for the board or the statutory office holder to consider.

Even the willingness of the regulator to travel may differ from country to country. Putting it at its broadest, for example, Australian regulators in many industries are generally less willing to travel to meet with companies than their Canadian counterparts, unless it is required for an investigation. Often, the company will be expected to travel to meet with the regulator.

Because of the cultural and legal differences, when it comes to dealing with an overseas regulator, there is no strategy better than having someone 'on the ground', whether that person is a lawyer or a consultant, or your own branch manager. But when selecting and managing that local person, you should note particularly the following points.

Insight 3 –What you should look for in a local representative, and how you should manage the project

A general counsel is ordinarily looking for particular attributes when selecting a person or firm to represent their company in dealings with an overseas regulator. Often, these attributes are determined more by the needs of the client company than those of the regulator. When planning the project and selecting a representative, however, it would be wise for a general counsel to also consider the needs of the regulator as part of the equation.

There are certain common characteristics that the regulator will be looking for or expecting in a local representative. They will generally want to deal with someone who:

- 'Knows their stuff' (both local laws and their overseas client);
- Knows how the regulator thinks;
- Has the proper level of authority/delegation to deal with the matter, including making commitment on behalf of the company up to a certain level;
- Is always available[1];
- Can deal with the matter in a seamless manner (ie the regulator does not like dealing with head office (US) on some parts of the matter, a US law firm on other parts, and a local lawyer/consultant on others).

There is one other characteristic which experienced observers have differing views on. It is whether the regulator prefers to always work with a local person whom they know well. There is no doubt that there can be advantages in appointing a local who has credibility with the regulator. Often, that credibility is based upon the facts that the local lawyer knows the regulator's needs very well, and that the regulator has found from experience that the local lawyer can be trusted and does not play games with them. There are countervailing factors that need to be considered though. First, there is a risk that, if the local representative frequently deals with the regulator on particular issues for overseas clients, they can end up adopting a 'cookie cutter' approach which they may apply to your matter. This may mean they will assume too much and not know when to seek instructions from their client. The other big risk you may run is that you may appoint someone who you understand has often dealt with the regulator and is well known to them (and may even be a former regulator) – but their reputation within the regulatory agency may not be what you assume it is. The regulator

[1] One practical hint to keep in mind is that, if it is necessary for you to deal with the overseas regulator, you should make sure the inconvenience of any cross time zone video or telephone conference with the regulator that may become necessary is worn by you, not them. Ordinarily, if you are dealing with a regulator overseas, it means your company is in trouble, or you want something. So it is wise to ensure that any personal discomfort is borne by you.

will never tell you what they think of a particular local lawyer, so you will need to use alternative means of checking on reputations and the quality of their work.

Even if the US based general counsel for the company does select a person with all the above attributes, the project can still falter if the general counsel does not keep a tight rein on the local representative/lawyer, or does not brief them properly.

From the regulator's point of view, if it becomes apparent that the local lawyer is not singing the same tune as their US based client, (particularly if the US client has to countermand their local representative's instructions) then it is highly likely the regulator will lose patience.

Always remember that, even though a regulator is obliged and expected to deal with all parties in a fair and even handed manner, if they draw the conclusion that their time is being wasted because of poor communication between lawyer and client, then they are naturally more likely to give priority to another matter where their time is not being wasted. Remember that regulators only have a finite amount of time in each day, and often you are competing with others to get a share of that time.

Also note that the more experienced a regulator is in dealing with the legal community, the less likely they are to be patient with a lawyer who appears to be poorly briefed or does not have an appropriate level of delegation from the US company. This is particularly going to be the case among business regulators.

There is one exception to the above principles. From time to time, and even with the best briefing in the world, the local lawyer may not have sufficient intimate knowledge of the company's workings to be able to answer a regulator's more detailed or technical questions, which may require a dialogue rather than a written answer. In those situations, the regulator may wish to discuss a matter with the head office people (usually in the legal area). It is important for you that, in those situations, the local lawyer does not act as a 'blocker' to the regulator's desire to communicate directly with the company. A good local lawyer would know when it is wisest to facilitate that kind of contact, rather than appear to be standing in the way. A bad one would regard any direct contact between regulator and the overseas client as a loss of their control of the process – which is illusory in any event.

In this regard, 'team management' by the general counsel of the process and the people is critical.

The most dangerous local lawyer you can use is the 'eager' lawyer – that person who wants to 'win' for their client at all costs or get a better deal for their client than even the client wanted.

Occasionally, a local lawyer will seek to impress an overseas client by embellishing their instructions or taking advantage of an unanticipated opportunity to get what they think is a better deal for their US client out of the regulator. This short term benefit can backfire if the regulator senses that they have been 'gamed' or 'conned'. The long term consequences can be even more serious if the project involves subsequent dealings with regulators in a number of fields or a number of countries. It is likely, for example, that other regulators will be quickly appraised of the matter and your company may face a less open reception at its next visit. (See 'Dealing with multiple regulators' below).

Dealing with a regulator is very different to dealing with a private party on the other side of a commercial transaction. They don't ordinarily see issues in terms of won or lose.

There is also a risk that the regulator will start to form a view that the local lawyer is a loose cannon, and may contact the US company to verify the lawyer's instructions or even advise them that they will not continue to deal with that representative.

The general counsel has to be sensitive to these risks and trust their instincts. If what the local lawyer is reporting or recommending to you doesn't seem reasonable, probe further. It may be necessary to visit the local lawyer and attend a meeting with the regulator to get an accurate sense of whether the advice and services you are getting are in fact what they are being touted as, and that the lawyer is sticking to the script.

Insight 4 – Dealing with multiple regulators.

The importance of the need for the home company headquarters staff and the local people to work together expands in a geometric progression if it is necessary to deal with multiple regulators in a number of countries – such as a stock exchange, a securities regulator, competition and anti-trust regulators, banking regulators and an industry specific regulator. The potential for there to be political complexities to the matter will also magnify, because the nature of the political issues may vary from country to country.

There is a significant need to be as consistent as possible in your dealings, while at the same time being able to exploit whatever advantage the local regulations or culture may offer you. Consistency as far as possible is necessary to ensure that the outcome of one matter does not have a negative impact on an issue being handled by a different regulator in the same country or another country, or does not open the way to additional litigation.

In the Parmalat matter, for example, the team had to strategise and prioritise very early in the life of the project, taking into account the very different timetables, powers and attitudes of regulators in a number of countries. The challenge was made even greater because the international, high profile nature of the matter meant that it attracted even more attention from regulators (and politicians and the media) than might have been ordinarily expected.

In a corporation's life, one will have to deal with regulators routinely (e.g. to apply for drugs licences, or to notify normal corporate changes) or in the context of a major matter or even a corporate crisis. While the finite, day-to-day matters can probably be best handled by the company's own staff, when a major overseas project or an overseas crisis looms, the outside advisers can be critical. It is important that they have experience with multi-jurisdictional regulatory matters of a similar kind, and that they work in absolute co-ordination with, and under the leadership of, the company's general counsel.

Regulatory problems are often the reason why a company cannot achieve its business objectives (e.g. GE/Honeywell, EdF/Montedison) and an effective management of the team handling the project is of the utmost importance. Very often, the media and reputational side are very important as well and teams will need to be multi-disciplinary to address all possible angles.

Further insights – the results of a survey orf general counsel and regulatory counsel in New Zealand, who often face similar issues dealing with regulators enforcing similar legislation faced by counsel in the US and elsewhere, will also be made available to attendees and discussed at the session.