

Inhouse Counsel

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General Editor's note

James Halliday BAKER & MCKENZIE

In this month's edition of *Inhouse Counsel*, our expert panel of authors looks at a range of consumer law, "soft" influencing and marketing skills and other topics of interest to in-house counsel including the following:

- Organisations often enter into sponsorship agreements providing cash and/or in kind contributions, varying between hundreds of dollars and millions of dollars, to another party for certain rights and benefits. **Caterina Cavallaro** (Sydney Water Corporation) reviews some of the key issues facing in-house counsel when drafting sponsorship agreements.
- Earlier in 2016, the Australian Competition and Consumer Commission (ACCC) placed an interim ban on the sale and supply of hoverboards in Australia after they were linked to a number of spontaneous fires. **Nick Cooper, Kate McNally** and **Henry Johnston** (Clayton Utz) review the terms of the ban in the context of the Australian Consumer Law and discuss the key takeaways from it.
- **Jeremy Hyman** (Baker & McKenzie) explores the LinkedIn phenomenon and offers some invaluable tips on how to build your digital footprint using LinkedIn and other online methods. The author discusses some aspects of the long-term planning needed to raise your profile and describes the benefits which start to flow once online success begins to occur.
- **Felicity Menzies** (Culture Plus Consulting) discusses the essential competency of the "influencing skill" for in-house counsel. The author explains

how influence involves engaging and persuading others through building trust and rapport and other factors. The author also discusses the essential skills needed for in-house counsel to demonstrate cultural intelligence in making and responding to requests and resolving conflict across cultures.

- From 12 November 2016, the consumer unfair contract term provisions set out in the Australian Securities and Investments Commission Act 2001 (Cth) as well as in the Australian Consumer Law (ACL) contained in Sch 2 to the Competition and Consumer Act 2010 (Cth), will apply to standard form "small business contracts". **Melissa Monks** and **Igor Bakhilov** (King & Wood Mallesons) analyse the operation of these rules and offer some valuable tips for in-house counsel who are drafting contracts affected by the new regime.
- **Tom Logan, Thyme Burdon** and **Verity Quinn** (Australian Competition and Consumer Commission (ACCC)) offer a valuable review of some of the current enforcement issues in consumer law including some recent enforcement action taken by the ACCC across a range of issues, including in relation to overseas-based traders seeking to exclude the ACL, truth in advertising, unfair contract terms, product safety issues and others.



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Influencing effectively across cultures

Felicity Menzies CULTURE PLUS CONSULTING

A 2015 research study¹ published jointly by the Australian Corporate Lawyers Association (ACLA) and Corporate Lawyers Association of New Zealand (CLANZ) reported that an essential competency required for transitioning from law firms to in-house counsel is “influencing skill”. Ninety-nine per cent of the 351 senior in-house lawyers surveyed for the report agreed influencing skill is essential for in-house counsel, ranking it above strategic thinking, translating complex into simple communications, broad business understanding and commerciality, and excellent technical legal skills.

An effective influencer can impact others’ behaviours, attitudes or decisions without force or direct authority. Influence involves engaging and persuading others through building trust and rapport, effective communication and demonstration of value, which in turn, depend on your ability to understand the values, motivations and communication style of your counterpart and to adapt your influencing style accordingly.

The workplace has changed dramatically over the last two decades, and skill sets must align with this new environment. Today, we frequently interact with people who do not share our assumptions, values or behavioural norms. Increasingly, our exchanges are with individuals from a wide range of cultural backgrounds, both at home and across borders. As we become more interdependent in our work lives, cultural differences in attitudes, values, beliefs and norms for appropriate behaviour increase the complexity of our exchanges.

As workplaces become more diverse, cultural differences in values and communication styles present new challenges for in-house counsel. To be an effective influencer in today’s business environment, in-house lawyers must demonstrate cultural intelligence — the knowledge, skills and abilities needed to communicate appropriately and effectively with people of other cultures. Communicating appropriately involves interacting with others in a manner that conveys genuine interest and does not violate their cultural values, beliefs or norms. Communicating effectively involves successfully achieving the goals of the interaction.

Without knowledge of how culture affects your own and others’ behaviour, you interpret the world through your own cultural lens, failing to attribute differences in actions and beliefs to cultural influences. Knowledge of cultural differences helps you to overcome cultural blind

spots. You can better explain and predict the responses of others. This prevents confusion and anxiety in diverse settings. Also, by increasing your understanding of the intentions, behaviours and viewpoints of diverse others, knowledge of cultural differences tempers the activation of negative stereotypes and prejudices that can threaten rapport and breed distrust.

Resolving conflict across cultures

Individualism-collectivism is the main dimension used to explain differences between cultural groups. Individualist cultures have an independent self-construal; members of individualist cultures define themselves in terms of “I”. In contrast, collectivist cultures have an interdependent self-construal; members define themselves in terms of “We”. In individualist cultures, “self” is distinct from “others”, but in collectivist cultures, “self” is inclusive of others.

Individualism characterises developed Western economies, including North America, Western and Nordic Europe, the United Kingdom, Ireland, Australia, New Zealand, and white South Africa. Collectivism characterises more than two-thirds of the world’s population across Asia, Africa, the Middle East, and Central and South America.

There are notable cross-cultural differences in communication patterns and conflict management strategies related to individualism-collectivism and the concept of face. “Face” is a person’s positive social image, and “facework” refers to communicative strategies used to present one’s face and to maintain, support or challenge another’s face. Individualist cultures display a greater preference for the positive maintenance of self-face, whereas collectivist cultures display a greater preference for the positive maintenance of other-face. Communication in an individualist culture is concerned with self-promotion, whereas a collectivist culture is concerned with modesty and maintaining harmony in social relations.

Members of individualist cultures favour competitive conflict management strategies. An individualist approach to conflict involves pitting opposing parties against each other in a win-lose context where the most dominant, assertive and forceful party wins an argument. In those settings, workplace debate is viewed positively and is encouraged as a strategy for stimulating diversity of

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thought and reducing groupthink — sub-optimal thinking that results from the tendency of a cohesive group to avoid critical scrutiny of ideas for the sake of social harmony.

In contrast, in collectivist settings, workplace conflict is deeply countercultural. Members of collectivist cultures prefer cooperative approaches to conflict management. A cooperative approach to conflict emphasises collective goals and success rather than a comparative assessment of individuals' arguments. In cooperative conflict, group members share their ideas, take the perspective of others, confirm their commitment to resolving the conflict for mutual benefit, and integrate diverse perspectives to create new solutions that are acceptable to all parties. In some collectivist contexts, conflict is avoided altogether to preserve relational harmony.

Cultural differences in conflict resolution strategies threaten rapport and the ability to engage and persuade others. Cultural dissonance refers to the discomfort experienced when an individual is required to act in a manner inconsistent with his or her cultural values, attitudes, beliefs or norms. Even simply observing behaviours inconsistent with one's cultural preferences can cause anxiety. Individuals who socialise in more individualist and competitive cultures may unintentionally cause offence or anxiety if they adhere to a forceful or dominating approach to conflict resolution when working with colleagues from more collectivist and cooperative cultures. Similarly, individuals who socialise in more collectivist and cooperative cultures may struggle to exhibit the assertiveness required to sway opinions and compel the behaviours of their more individualistic colleagues.

To improve your effectiveness when seeking to influence people who are more assertive and competitive in their social exchanges than yourself:

- Practice being more forceful in voicing your opinion and ideas.
- Expect to be challenged and be prepared to defend your position.
- Do not take objections personally — remember that it is your message that is being scrutinised and criticised, not you.

To influence people who are less assertive and more collaborative in their social exchanges than you:

- Deliberately seek their viewpoint.
- Be prepared to make compromises and look for a win-win outcome.
- Use less force in communicating your message and objections.

- Employ inclusive language like “we”, “our” and “shared”.
- Wait for a private moment to voice disagreement or criticism and do so diplomatically.

Making and responding to requests across cultures

Speech acts are the basic units of communication with a social function, for example, requests, compliments or promises. In different social and cultural settings, there are distinct ways of composing speech acts. The greatest difference is directness versus indirectness, which relates to cultural dimensions low-context and high-context respectively.

A low-context culture is one in which meaning is inferred from actual words used. In low-context cultures, direct speech is common, and speech is clear and exact. The meaning of an utterance in a low-context culture is usually its literal interpretation and does not vary with context. In these cultures, directness, clarity, honesty and frankness are valued. A preference for direct speech is reflected in sayings such as “Get to the point”. Examples of low-context cultures include individualist countries like the United States and the nations of northern Europe. However, even across individualist countries, there are variations in the preference for indirect versus direct speech. Dutch speakers are more direct than British speakers.

In contrast, in high-context cultures, there is a preference for indirect speech. In high-context cultures, meaning is inferred from the context or setting rather than the words used. The contextual cues relevant to interpreting messages include:

- social status;
- social relationships;
- relationship history;
- setting; and
- non-verbal behaviours like eye contact, facial expressions, body language and use of silence.

High-context cultures typically have collectivist values. These are cultures, for example, China and India, in which group cohesiveness is valued over individual expressiveness. In high-context cultures, “white lies” and hiding your true thoughts are preferable to damaging another's face or threatening group harmony.

The use of direct and indirect speech is a significant source of cross-cultural misunderstanding. In low-context cultures, a “no” comes out directly as a no, and a “yes” comes out directly as a yes. In high-context cultures, disagreement is seldom expressed explicitly. A negative intention may be expressed as “maybe” or “yes” or phrases like “I will try” and “We will see what

we can do”. Negative intentions might also be conveyed non-verbally through the use of body language, eye contact or silence.

To members of high-context cultures, speakers from low-context cultures can appear:

- verbose;
- confrontational;
- insensitive;
- blunt;
- rude; and
- less credible.

To members of low-context cultures, speakers from high-context cultures can appear:

- vague;
- uncertain;
- unsociable;
- deceitful;
- evasive; or
- ignorant.

To improve your effectiveness when seeking to influence people who are more indirect than you, use hints and suggestions and avoid direct requests, definitive statements and explicit objections. For example, use “Shall we come back to this?” rather than “I don’t agree to this” and use “Let’s take a closer look at this” rather than “I want you to do this”. Pay more attention to your own and other’s body language and other non-verbal cues including silence and tone. To improve your effectiveness when working with people who are more direct than you, pay more attention to the clarity and completeness of the information presented rather than the phrasing of your message. Be direct and specific with your requests. Do not hide bad news. Express disagreement explicitly.

Building trust across cultures

There are also cross-cultural differences in the formation of trust. Trust has two components:

- affective-based trust; and
- cognitive-based trust.

Affective trust involves how emotionally secure you feel that the other party has your interests at heart. Affective-based trust is based on emotion and develops from warm relationships and friendships while cognitive-based trust develops from the demonstration of competence. Cognitive trust involves confidence in one’s skills, abilities and experience. You enter into business relationships when you trust that person has the skills and knowledge to do a good job.

In individualist cultures, business is conducted on the basis of cognitive trust. In those cultures, transactions come before relationships and business decisions occur quickly on the basis of assessments of competence and reliability. Individualist cultures are more concerned with what you do than who you are.

In relationship-based, collectivist cultures, affective trust plays a greater role in business decisions. In those cultures, relationships come before transactions. In relationship-based cultures, many meetings might be needed before business is transacted. In initial meetings, business issues may not be addressed at all. Discussion is focused on assessing the character and intentions of the potential business partner. Business decisions are formulated slowly as the parties get to know each other personally. Collectivist cultures are more concerned with who you are, rather than what you do.

Building relationships can seem tedious for members of individualist cultures. In those cultures, deadlines and punctuality are valued. It can be particularly difficult for members of individualist cultures who are travelling for business and are struggling with jet lag and time zone differences to cope with the social demands of collectivist cultures. Members of relationship-based, collectivist cultures, on the other hand, can feel rushed and pressured by members of task-based, individualist cultures. The eagerness of members of individualist cultures to conduct business before relationships have had a chance to develop can breed distrust and suspicion.

To improve your effectiveness when working with people who are more relationship-orientated than you:

- Invest time and effort in building personal relationships.
- Make a deliberate effort to share personal information and get to know your counterpart beyond their work roles.
- Be flexible with deadlines and do not force business decisions before relationships have developed.

To improve your effectiveness when working with people who are more task-orientated than you:

- Emphasise your competence.
- Highlight your experience, knowledge and reliability.
- Focus on project goals, objectives, outcomes and efficiency.
- Respect your counterparts’ privacy and expect that they may not consider your personal relationship when making business decisions.

Effective interactions across cultures are possible, albeit not easy. Our cultural frames are deeply embedded, largely unconscious, highly resistant to change, and

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aggressively defended. Cultural intelligence involves great determination and perseverance, an understanding of and genuine respect for how we are similar and different, a heightened perceptual ability to detect cultural subtleties and nuances, and an authentic and skilful response to cultural differences.



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with expertise in cultural intelligence. Felicity is an accredited facilitator with the Cultural Intelligence Centre, LLC and the author of the forthcoming book, A World of Difference: Leading in Global Markets with Cultural Intelligence. Felicity has over 15 years of experience working with and managing diverse workforces in blue chip companies in Australia, Singapore and the United Kingdom and is a member of Chartered Accountants of Australia and New Zealand. Felicity also holds a Bachelor of Commerce and a Bachelor of Arts in Psychology.

Footnotes

1. Australia Corporate Lawyers Association and Corporate Lawyers Association of New Zealand *In-house Counsel Report: Benchmarks and Leading Practices* (2015).