



305:Innocents Abroad—They Speak English, So Why Don't We Understand Each Other?

Susan N. Flook
Group General Counsel
The Body Shop International Plc

Darren G. Gardner
Partner
Minter Ellison

Ronald F. Pol
President, Corporate Lawyers Association of New Zealand
General Counsel, Simultext Limited

Peter J. Turner
Chief Executive Officer and General Counsel
Australian Corporate Lawyers Association

Anne D.F. Ward
Partner
Minter Ellison

Faculty Biographies

Susan N. Flook

Susan N. Flook is general counsel for The Body Shop International plc, a British company. The Body Shop produces skin and hair care products and accessories, which are sold in over 50 countries mainly through a franchise system.

Prior to that she was general counsel—intellectual property for Diageo plc (formerly Guinness plc), an international company, producing, distributing, and marketing branded consumer products and services throughout the world. She was previously group legal counsel and company secretary for CPC (United Kingdom) Ltd, the UK subsidiary of the American multinational food manufacturer, CPC International Inc. (now part of Unilever). In this position, she covered not only the UK legal function but also CPC's European intellectual property work and certain acquisition and transaction work in the UK, Central and Eastern Europe, South Africa, Denmark, Holland, and Italy. She was also CPC's representative on the UK Food and Drink Federations' Food Law Panel and through that organization has worked closely on behalf of the food and beverage industry with Lacots, Trading Standards, and Environmental Health Officers throughout the UK and Europe. Prior to working for CPC, Ms. Flook was division attorney for The Coca-Cola Export Corporation in its Australasian and Central Pacific Divisions located first in Sydney and then later in Hong Kong.

Ms. Flook is a founding director and a past president of the ACCA's European Chapter. She won the prestigious ACCA Member of the Year Award in 1999.

Ms. Flook gained her arts and law degrees from Sydney University.

Darren G. Gardner

Darren G. Gardner is managing partner of the San Francisco office of Minter Ellison, an Australasian based law firm and the 15th largest law firm in the world, as well as the largest law firm operating in the Asia Pacific region. Mr. Gardner heads the firm's international employment, benefits, and labor law practice. Minter Ellison is the firm of choice to provide the U.S. Society for Human Resource Management with its Asia Employment Law helpline. Working with U.S. multinational companies with operations throughout the Asia Pacific region, Mr. Gardner's team provides strategic advice which assists U.S. companies to manage their employment, labor, and benefits issues through the region. He heads an experienced team with a proven track record in handling all types of labor and employment matters, from one-off questions to large-scale multi-jurisdictional projects.

Formerly corporate counsel with Qantas, one of the world's leading airlines, Mr. Gardner joined Minter Ellison in 1997 and relocated to the US to assist the firm establish its New York office and subsequently set up the firm's operations on the US West Coast.

Mr. Gardner is the author of the Discrimination in Sport chapter in *Laws of Australia* and the Australian Employment Law chapter in the *International Employment Law Handbook*. Mr. Gardner regularly speaks on employment-related issues at conferences.

Mr. Gardner has a BS and an LLB from the University of New South Wales in Australia.

Ronald F. Pol

Ronald F. Pol is president of the Corporate Lawyers' Association of New Zealand ("CLANZ"), the representative organization for in-house counsel in corporate and government organizations. Mr. Pol provides strategic practice management advice to the legal department of Telecom NZ, New Zealand's largest listed company, and offers consulting services on law firm and legal department relationship management, corporate governance, and motivation of professional service providers.

He is also general counsel of Simultext Ltd.

Formerly corporate counsel with Telecom NZ, Mr. Pol was responsible for a wide range of legal issues and negotiations across New Zealand and Australia. Prior to that he was group litigation counsel, responsible for major litigation and dispute management for the telecom group. His private practice before that was with two leading commercial law firms; Russell McVeagh in Auckland and Slaughter and May in London.

He shares experiences with colleagues through articles in a wide range of legal and management publications in New Zealand, Australia, and the U.S., including an article in the *ACCA Docket*, "Get More Value from Outside Counsel: Show them the Flipside." He is currently 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 serves on the governing council of the New Zealand Law Society, and has recently become a leader in the Kea Scout troop of his 6 year old son, Oliver.

Mr. Pol received a LLB and BCom from Auckland University.

Peter J. Turner

Peter J. Turner is chief executive officer and general counsel of the Australian Corporate Counsel Lawyers Association based in Melbourne, Australia.

Previously, Mr. Turner was vice president—legal affairs of Foster's Group Limited and managed its legal department. Before that he lived and worked in Europe, the U.S., and Asia as senior in-house counsel for the Royal Philips Electronics Group.

Mr. Turner is former chair of the corporate counsel's committee of the International Bar Association and was on the council of the business law section of that association. He is the convener of the International Roundtable of Associations of Corporate Counsel and was on the organizing committee of the Commonwealth Law Conference held in Melbourne in April.

Mr. Turner has a BA and JD from Melbourne University and an MBA from Sophia University in Tokyo.

Anne D.F. Ward

Anne D. F. Ward is a corporate partner in the Melbourne, Australia office of Minter Ellison, LLP. Minter Ellison is a leading law firm in the Asia Pacific Region and the 15th largest law firm in the world. Ms. Ward advises some of Australia's major corporations across a range of industries

including manufacturing, retail, banking, and financial services. Ms. Ward is currently the firm's lead partner to Coles Myer Ltd, Australia's largest retailer.

Ms. Ward has spent over 20 years in private practice with commercial law firms in Australia. During that time, she has been involved in numerous cross border transactions involving negotiations in Hong Kong, Singapore, India, Europe, the United Kingdom, and the United States of America.

In addition to her legal practice, Ms. Ward is sought after as a non-executive director and currently holds board positions with a statutory corporation, a not-for-profit medical research institute, and the manager of a substantial premium red winegrape vineyard in south eastern Australia. She frequently shares her knowledge at presentations to organizations such as the Committee for Economic Development of Australia, the Australian Institute of Company Directors, and Chartered Secretaries Australia.

Ms Ward received a BA and an LLB from the University of Melbourne, Australia.

ACCA 2003 ANNUAL MEETING

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Innocents Abroad - They Speak English, So Why Don't We Understand Each Other?

*Cynthia*

Cynthia's heart sank. Her first big project in her brand new job as Vice-President Legal of Fortune 500 company Portal Corporation, is of all things a major acquisition in the Asia Pacific, code named Project Down-Under. While she'd dreamed of holidaying in Australia, doing deals with the likes of Steve Irwin, Rupert Murdoch or Russell Crowe was not something they taught at law school.

Immediately Cynthia took a deep breath, smiled brightly at her boss and said *'they speak English, surely it can't be that different to doing a deal in the US, just a bit more travel time.'*

Deep down she started to worry because she knew her lack of offshore experience was the one area of weakness in her otherwise impeccable CV.

Cynthia was right to worry, they may speak English but she suspected there were as many differences as similarities. Then she started recalling recent media stories about the difficulties of pulling off complex deals outside the US and that article in the June 2003 issue of *ACCA Docket* about the jurisdictional challenge multinational's often face. And then she glanced at the September edition of *Docket*, with Tom Yih's face staring at her. Cultural differences might just make a difference, even when they speak English.

Cynthia was renowned for her networks and she started working them to find herself an experienced mentor. She tracked down George J Collins, a veteran of 30 years in handling offshore deals for HF Corporation, now in the top ten of Fortune 500 companies with a global network. George agreed to meet over lunch. It was a lunch that changed Cynthia's life.

*George J Collins*

As Cynthia outlined her challenge to George he leaned back with a battle weary

George's Top 10 Mistakes

1. *It's just like a deal in the US.*
2. *It'll be done by Christmas.*
3. *I won't need to go there much – I can brief local outside counsel from here.*
4. *We can do most of the contract drafting here and send it down the line.*
5. *We're the senior player so we call the shots.*
6. *My cousin's got a friend who's a lawyer in Australia – he can do it.*
7. *Labor issues won't be a problem – we've sacked lots of people before.*
8. *Australia is so far away they probably don't have any anti-trust issues.*
9. *US law will prevail.*
10. *Not knowing what you don't know.*

sigh and said *'you're just where I was when I first started on offshore deals and boy I wish I knew then what I'm about to share with you now.'*

As Cynthia listened to George's Top 10 Mistakes her jaw dropped. She had mentally ticked off all George's mistakes, except the last one, as things she wouldn't need to worry about. She leant forward and looked intently into George's eyes and exclaimed *'surely you're exaggerating'* to which George replied *'I wish I was but there is no one size fits all global model for cross-cultural and cross-border deals, trust me on this, but there are a number of steps you can take to improve your chances of getting the deal done, who knows it might even be done by Christmas!'*

George's Wise Counsel

1. **Due diligence, due diligence, due diligence, due diligence**

 - 1.1 Do your own due diligence on the deal, determine the deal breaking issues (in close consultation with local counsel – after all they live there).
 - 1.2 Work hard to select the right outside legal counsel – don't do it over the phone as ultimately they can be the difference between the deal getting up or falling over (or, put another way, whether you look good in the eyes of your boss or not).
 - 1.3 Understand that there is much more than just legal issues involved. The culture and the business and regulatory environment in the country that surrounds the deal will be very important, particularly if there are workforce issues at stake.
 - 1.4 Have the courage to accept that things may well be done differently to the way they're done in the US but that doesn't make them wrong or inadequate.
 - 1.5 Even when speaking the same language misunderstandings and confusion are just as prevalent – almost better to imagine your English speaking counterpart is as mysterious as a non-English speaking one.
 - 1.6 Look at the deal (and its sensitivities) through local eyes.

This doesn't just mean local outside counsel. If you have them, use your local in-house counsel too, and draw on local in-house counsel networks. Also develop a relationship with in-house counsel on the other side. Sometimes you'll find that they speak more of a common language than outside counsel, especially if they're more focused on the technical legal aspects of the deal than the commercial deal itself.

- 1.7 Recognise that in Australia and New Zealand business media often has an aggressive approach to big business from offshore acquiring local icon companies and brands. And if land is involved, the political ramifications escalate, not to mention indigenous rights issues in countries such as Australia and New Zealand.
- 1.8 Hasten slowly, check and double check assumptions.
- 1.9 Accept it will take longer than you think and plan accordingly.
- 1.10 Make humour your friend (they do in Australia, New Zealand, and sometimes even in England!).

Clarify your company's motivations for the deal and don't assume local counsel will know your company's way of doing business, commercial drivers and goals.



2. Approaching the deal

- 2.1 Communicate your expectations clearly.
- 2.2 Clarify your company's motivations for the deal and don't assume local counsel will know your company's way of doing business, commercial drivers and goals. The company may be a household name in the US but locally it may not be known.
- 2.3 Be upfront with local counsel about the indicative timetable and get them to reality check it – avoid their reality check at your peril!
- 2.4 Together with local counsel (both inside and outside) understand the imperatives and the business of the counterparties in the deal.
- 2.5 Settle on an agreed negotiating strategy (and team) taking into account local practices.



Listen to your local counsel when it comes to composition of the legal team particularly around team size and expertise required.

- 2.6 Take advice on whether a Heads of Agreement, Memorandum of Understanding or Terms Sheet is appropriate for the deal, recognising that often in some countries deals move straight to contract, with a compressed timeframe.
- 2.7 Agree a protocol to report progress and to whom – be sure local counsel know what issues will be elevated to you and ensure your local counsel understand your sign off and approval processes.
- 2.8 Clarify what will be sought from local counsel by way of sign-off at the conclusion of the deal (for example, how will side letters be dealt with?).

3. The Local Counsel team

- 3.1 Listen to your local counsel when it comes to composition of the legal team particularly around team size and expertise required – legal teams in Australia and New Zealand are usually a lot smaller (and just because you have an antitrust expert and an employment counsel, don't suppose that the sole lawyer on the other side is unprepared – she may have local expertise in both areas, and more).
- 3.2 Unlike in the US where deals often seem driven by lawyers, in Australia and New Zealand this is less frequent as lawyers are used more as advisers not drivers.
- 3.3 Determine how involved you want the local counsel to be in strategies – it's tempting to assume that your US legal team should handle tactical and commercial strategy from the US and seek specific technical legal advice from local counsel – an approach which can lead to misunderstandings, timeline blow-outs and escalating costs. The strategy may well be driven from 'home', but should include local counsel or risk 'tactics' adversely affecting 'strategy'.



Do not try and impose the style of drafting with which you are more familiar in the US because it will simply make it more difficult for your contracts to be interpreted or enforced.

4. Contract drafting - divided by a common language!

- 4.1 Stylistic differences between the US approach and English speaking jurisdictions offshore which have embraced the principles of 'plain English' drafting mean that essential information is included but information considered unnecessary is often excluded.
- 4.2 When reviewing plain English contracts don't be fooled by the apparent simplicity of the drafting.
- 4.3 Do not try and impose the style of drafting with which you are more familiar in the US because it will simply make it more difficult for your contracts to be interpreted or enforced in the local jurisdiction.
- 4.4 The look and feel of documents should reflect the local 'user-friendly' practices and aid contract management going forward.

By this stage, Cynthia was wondering how she was possibly going to manage. But there was more to come. "*Luckily for you Cynthia*" confided George, "*HF Corporation has just completed a string of acquisitions in Australia and New Zealand. I can share with you some really specific differences in the legal systems down there that you are going to need to know for Project Down-Under.*"

George's 10 key hints for Project Down-Under

1. **Anti-trust and competition issues**
Australian anti-trust legislation is much more detailed than the US. Project Down-Under will probably need approval from the Australian Competition and Consumer Commission (ACCC). You are going to need an expert Australian lawyer to steer you through the approval process.
2. **Labor and employment law**
The protection provided to employees is vastly different in Australia and New Zealand. There is no "at-will" employment in either country. There are a variety of statutory obligations



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for employers. Unions can be highly influential in the work place and can be critical of acquisitions by foreign companies. Appropriate labor and employment strategies are critical and communications with employees and trade unions require sensitive handling.

3. **Environmental protection laws**

As Project Down-Under involves some large industrial manufacturing plants, you are going to have to cope with tough local laws relating to contamination, remediation and environment protection.

4. **Corporate governance and reporting requirements**

Stock exchange reporting requirements and market disclosure practices are very different down under. You are also going to have to deal with local business media who may be quite aggressive and hostile.

5. **Due diligence investigations**

Although the approach to due diligence investigations will seem very familiar to you, there are likely to be subtle differences.

6. **Warranties**

The trend in Australia and New Zealand is for very focussed warranties and the drafting style can be very different.

7. **Good faith**

There is no statutory definition of "good faith" in Australia and no statutory obligation to act in good faith in the performance of commercial contractual terms. Be aware of how this may colour the negotiations.

8. **Contract drafting**

Top notch Australian and New Zealand lawyers all use a "plain English" drafting style. They tend not to use side letters.

9. **Approach to litigation**

There seems to be a different approach to litigation and dispute resolution down under. If you do end up considering litigation, you will find the Court processes are quite different.

10. Confidentiality and discovery

Australia and New Zealand have developed detailed common law rules relating to confidentiality and legal professional privilege which protect documents from discovery in litigation.

Cynthia left the lunch with her head swimming. There was so much to learn in a short time. She opened her lap-top and started to interpret George's wise counsel into a checklist for Project Down-Under.

Months pass and Cynthia finds George's wise counsel to be very useful. Along the way she has engaged an Australian firm to act for Portal Corporation on Project Down-Under. She's also spoken briefly with the in-house lawyers for the other side. Cynthia is struck by how similar and yet different these lawyers are from their US counterparts. The lead partner at the outside counsel firm, Dave, has a laid back manner, is laconic, self deprecating but is completely on top of the project, anticipates the curve balls that keep getting thrown at him and makes it plain to Cynthia that he and his team are relishing working on the project.

The team working on the project is also alarmingly small by US standards and the negotiating style is different too. As to the documentation Cynthia's frustration with Dave and his team's drafting style was reaching boiling point until she realised that the local practice is for much shorter, plain english contracts which do not attempt to nail down every point in painstaking detail. Cynthia realised that if she kept trying to impose US-style contracts she jeopardised the transaction proceeding within deadline.

As the negotiations grind on Cynthia has noticed just how hard lawyers work in Australia and New Zealand. She thought only New Yorkers worked these sort of hours but in Sydney, Melbourne and Auckland where much of the negotiating and due diligence has taken place she's been struck by the 24 x 7 ethic that's on display and supported by round the clock administrative support. It's also been great that both countries are in opposite time zones than back home. Rather than a disadvantage (even



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The relationship between in-house lawyers on both sides has certainly helped keep Project Down-Under on track.

if they are both ahead of the US!), Cynthia's been able to have work done in Australia/ New Zealand, then New York, and back again – averaging about 20 hours straight, day after day. The other side is clearly exhausted just trying to keep up.

The other difference which has taken some getting used to is that in Australia and New Zealand the lawyers don't seem to drive the deals as much as they do in the US. Or they don't appear to – as Cynthia has a yarn with Dave over a few ales she's come to understand the subtlety of the Australian and New Zealand way which often sees the lawyer taking what appears to be a back seat role but which is still all about putting options to the client designed to enable the client (Cynthia) to make informed choices based on the pros and cons.

As Cynthia reflects on how the project is going she's pleased to see that the camaraderie she's experienced working on projects with other in-house counsel is just as strong with her Australian and New Zealand colleagues. The relationship between in-house lawyers on both sides has certainly helped keep Project Down-Under on track. Cynthia is confident she's made some life-long friends with her down-under counterparts and looks forward to returning the hospitality they have showered her with when they visit the US.

As she ticks off the differences and similarities Cynthia's mind turns to the cost of legal services in Australia and New Zealand - it seems cheap with going hourly rates for top notch partners in top notch firms being anything from US\$220 to US\$400 depending on the area of legal specialty.

Finally the deal is nearing completion and George gets a call on 23 December from Cynthia. *'You're not going to believe this George but I'll be home for Christmas and, thanks to your advice, the deal has gone smoothly but I've got some new learnings I thought you'd like to hear.'* When Cynthia and George got together for a celebratory lunch Cynthia has George fascinated by her tales.

Cynthia's tales of down-under



1. Australia is the driest, flattest, hottest, climatically aggressive of all inhabited continents on earth.
2. New Zealand isn't part of Australia.
3. Australia is the size of the mainland States of the United States; New Zealand is about two-thirds the size of California.
4. Australia has more things that can kill you than anywhere else in the world and New Zealand doesn't (for example, of the world's ten most poisonous snakes all are Australian, five of its creatures are the most lethal of their type in the world.) By contrast, New Zealand has just one spider that hardly anyone's ever seen.
5. Close to 20 million people live in Australia and one in four is either an immigrant or the child of an immigrant. New Zealand has around 4 million people and 16 per cent of its population are of indigenous Maori extraction.
6. Australia has 38,000 lawyers of whom 20 per cent work as in-house lawyers and New Zealand has about 8,500 lawyers of whom nearly 15 per cent work in-house.
7. Down-Under lawyers are very well educated, have an incredible service ethic and are inexpensive by comparison to US lawyers.
8. Australia's legal industry is highly competitive and the law firms are huge with six firms having upwards of 1,000 lawyers.
9. Australians and New Zealanders are very similar – friendly, love their sport, cosmopolitan, self deprecating, competitive and love to socialise. Just don't ever suggest to them how similar they are!
10. The legal systems aren't so different – in Australia it's based on English common law, within a parliamentary democracy in a federal system, it's very similar in New Zealand, and both are similar to the US, where it's based on English common law with judicial review of legislative acts within a federal republic with a strong democratic tradition.

After a New Zealand Cloudy Bay sauvignon blanc and a cabernet sauvignon from Australia's Hunter Valley, Cynthia and George decide to write a brief joint roadmap to a successful cross-border project. Cynthia's cellphone interrupts and when the call finishes she beams at George and says *'that was my boss she's giving me Portal's next big offshore project and this time it's in Korea, ever done a deal there George?'*

Roadmap to a Successful Cross-Border Project

STEP 1 DUE DILIGENCE

- Understand the commercial requirements of the project and appreciate the impact of any specific cultural and legal considerations of the system where the deal will be done.
- "Common Law" is something we *don't* all have in common.
- Make sure you ask the right questions and that the answers reveal the 'full picture'.
- Don't make assumptions – particularly in a 'familiar' system. It is the 'small' idiosyncrasies that will trip you up.

STEP 2 CONSTRUCTING THE LEGAL TEAM

- It's all about people, people, people.
- Who will do what and how – strategic and technical legal advice (can local counsel do both)?
- Choose local lawyers who you trust and who have a demonstrated track record and specific capability.
- Once you are happy with your selection, let the local lawyers guide you on the appropriate size and composition of the local team.
- Don't forget to balance in-house and external skills to optimise effectiveness and efficiency.
- Remember: the focus is *where the business is* not necessarily where the head-office is.

STEP 3 SET EXPECTATIONS

- Set realistic timeframe expectations for getting the deal done.
- Communicate, communicate, communicate – communicate expectations and requirements to local counsel clearly – make provision for local considerations in any timetable.
- Manage *both* the bosses expectations *and* the resources and skills of local counsel.
- Contracts differ: different styles, different concepts, different interpretations.
- Recognise that adopting the local style will assist interpretation and enforcement in that country.

STEP 4 GETTING THE JOB DONE

- Beware of getting tied up in the process and losing sight of the outcomes.
- Be flexible – be sensitive to the fact that a US approach may not work.
- Test advice but also listen to the locals – they practise there and have done this before.
- Law is not necessarily the same and not always as important as local customs.
- Crisis management and disaster recovery is an absolutely key role of counsel!

Authors

Peter Turner

*Chief Executive Officer and
General Counsel*

Australian Corporate Lawyers Association

Tel: +61 3 9530 6166

e-mail: ceoaccla@aol.com

Ronald F Pol

President

Corporate Lawyers' Association
of New Zealand

Tel: +64 4 498 9478

e-mail: ronald.pol@clanz.org

Anne Ward

Partner

Minter Ellison Lawyers

Tel: +61 3 8608 2061

e-mail: anne.ward@minterellison.com

Darren Gardner

Partner

Minter Ellison Lawyers

Tel: +1 415 869 6401

e-mail: darren.gardner@minterellison.com

Note: The authors appreciate the contribution of Trish Carroll from Minter Ellison in assisting with this paper's preparation.