



**BELL GULLY**

The image shows a modern office interior. On the left, a blue rectangular sign with the text 'BELL GULLY' is mounted on a light-colored wooden slatted wall. To the right, a meeting area features four dark brown leather chairs with silver frames arranged around a small, round, white table. Large windows in the background offer a view of a coastal landscape with a body of water and distant hills under a clear sky.

# Meet the Regulator – Issues for counsel

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# Overview

**Dealing with regulators – what should counsel (in-house and external) be doing?**

- **Isolate the key issue(s) as quickly as possible.**
- **Resolve those issues as efficiently as possible.**
- **Minimise issues in the first place (via training, etc.).**

## Isolating the key issue(s) in dispute

- **A critical first step when dealing with all regulators. But not always easy.**
- **Strategy for dealing with the regulator depends on the circumstances, and can be influenced by whether the regulator is in:**
  - “Investigating Mode”, e.g. merger clearance or market conduct investigation based on a complaint; or
  - “Proving Mode”, e.g. view formed there is a breach and legal proceedings imminent.

## Notice of investigation into conduct

- **Do not assume alleged conduct “Would never happen at our firm”. That response:**
  - will delay identification of any issues;
  - will frustrate (in a bad way!) the regulator – who may well already have extensive information from other sources; and
  - will ultimately increase cost.
- **Attitude should be “I’d like to think there’s none of that at our firm, but we will keep an open mind.”**

# Engaging with the regulator

## General Rule

- **Be “firm but fair” – remember that if one party ‘ups the ante’ the other will follow.**
- **Remain flexible – objectives of the business (and of the regulator) can change throughout the process.**

## Issues counsel and clients face

- **Regulators should not underestimate what's involved in trying to uncover untoward conduct in a business.**
- **Regulators should be open about their concerns – confidentiality should be able to be managed.**
- **Huge cost trying to address issues which are not in fact issues for the regulator, or which fail to address the regulator's concerns.**
  - **Helpful new Commerce Commission Process guidelines in the merger context.**

## During the 'investigating' phase

- **Aim to maintain a good working relationship with the investigating team.**
  - **Allows greater insights into the regulator's thinking, its approach and what it sees as the issues.**
  - **Allows for the opportunity to have a greater influence on the regulator's reasoning.**
  - **Client often reliant upon the investigating team passing balanced, clear and dispassionate messages to the final decision-makers, e.g. Commissioners themselves.**
- **Evidence, not advocacy, will prevail. Don't over-egg the arguments.**
- **Stay in touch with the investigators – don't rely solely on written communications.**

## What can in-house do?

- **Manage the internal people.**
- **Often sensible to secure a commercial “point person” to assist.**
  - Process can quickly become overwhelming (although remember privilege issues).
  - Hard, factual information from the business will prevail.
- **Work with external counsel to target the issues:**
  - **Regulator information demands.**
    - Identify early any need for extensions, clarifications or amendments where justified.
  - **Remain open to the regulator’s thinking.**
    - Plan to meet and discuss with the regulator where possible.
    - Consider the regulator’s objectives – e.g. provide information in tranches to address timing concerns.
    - Think of ‘educating’ the regulator, not simply denying allegations or contrary views.

# Timeframes when consent is sought

- **Commercial parties value certainty.**
  - They don't like matters they can't control.
- **But timing is often in the hands of the regulator.**
  - Response should be to meet (and exceed) the regulator's timeframes for information, responses, etc.
  - Increases the likelihood the regulator will accommodate timing.

## Minimise issues in the first place

- **Train, train and train.**
- **Build a compliance culture.**
- **Perception of breach can be very costly – throw-away comments in emails, etc.**
- **Extent of training often raised by the Commission during interviews.**