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EDITOR’S NOTE

This is the final issue of the Bulletin for 2001. The next issue will be published in February 2002. I would like to take this opportunity to thank the supporters of the Bulletin – ASIC, ASX and, in particular, our sponsoring law firms listed above. The number of individual subscribers has grown rapidly to over 2000 with a readership well in excess of this (as the Bulletin is distributed widely within companies, regulators, government departments and law firms).

I wish all of our readers an enjoyable Christmas and a happy and prosperous new year.

Professor Ian Ramsay
Editor

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) RESEARCH FINDS CORPORATE DISCLOSURE FAILURES

The Centre for Corporate Law and Securities Regulation has recently published a Research Report by Anne-Marie Neagle and Natasha Tsykin titled "'Please Explain': ASX Share Price Queries and the Australian Continuous Disclosure Regime".

Recent high profile corporate failures have highlighted the need to re-examine the adequacy of Australian corporate disclosure requirements. Continuous disclosure plays a vital role in the mechanism for information provision to the Australian capital markets, and in ensuring that the markets are fair and efficient.

The Australian Stock Exchange (ASX) continuous disclosure listing rule requires a listed entity to inform ASX immediately of any information concerning it that it becomes aware of that can be expected to have a material effect on the price or value of the entity's shares.

This Research Report contains the results of a study which investigates the compliance of companies with ASX's continuous disclosure regime. It also investigates what types of companies have difficulties complying with the regime.

The study examines all queries issued by ASX to companies which had unusual share price movements for the two year period 1999 and 2000. A total of 911 queries were issued by ASX during this period. The study examines the responses of companies to ASX queries as well as all announcements made by these companies in the period of 4 weeks following receipt of the ASX query.

The Report examines the characteristics of companies which received ASX price queries. These characteristics include:

- the industry of the companies
- the size of the companies
- the financial performance of the companies
- information disclosed by the companies following receipt of the ASX price query.

The Report highlights a number of law reform implications arising from the results of the study.

The Report has received extensive media coverage including an editorial in The Australian Financial Review and articles in The Australian Financial Review, The Australian, the Sydney Morning Herald, The Age, the West Australian, the Courier Mail, the Herald-Sun.

The Research Report can be purchased from the Centre for Corporate Law and Securities Regulation by contacting Ann Graham on tel (03) 8344 5281, fax (03) 8344 5285 or by email "cclsr@law.unimelb.edu.au". The cost of the Research Report is $50 including postage plus $5 GST ($55).

(B) SEC CAUTIONS COMPANIES, ALERTS INVESTORS TO POTENTIAL DANGERS OF "PRO FORMA" FINANCIALS

On 4 December 2001 the SEC issued cautionary advice that companies and their advisors should consider when releasing "pro forma" financial information. The SEC believes it is appropriate to sound a warning about the presentation of company earnings and operating results on the basis of methodologies other than Generally Accepted Accounting Principles (GAAP).

The SEC is also issuing an "Investor Alert" that describes how "pro forma" financials should be analyzed, including a reminder that they should be viewed with appropriate and healthy skepticism. Because "pro forma" financial information by its very nature departs from traditional accounting conventions, its use can make it hard for investors to compare an issuer's financial information with other reporting periods and with other companies.

The Investor Alert on "pro forma" financials and the Commission's release on cautionary advice on the use of "pro forma" financial information can be accessed on the SEC's website at <http://www.sec.gov> and then click on "SEC Issues Caution, Alert on Pro Forma Financials."

(C) HIH ROYAL COMMISSION COMMENCES PUBLIC HEARING

On 3 December 2001 the HIH Royal Commission commenced its public hearings. Justice Neville Owen of the Supreme Court of Western Australia has been appointed Royal Commissioner to inquire into the failure of the HIH Insurance group of companies. HIH was the second largest general insurer in Australia when it collapsed.

The Commission will examine whether decisions or actions of directors, officers or associated advisers contributed to the failure or were involved in any undesirable corporate governance practices. It will also examine the adequacy and appropriateness of arrangements for the regulation and prudential supervision of general insurance at Commonwealth, State and Territory levels.

Justice Owen is required to report on these matters and to recommend whether any changes should be made to the regulatory system by 30 June 2002.

The Royal Commission has published a series of background papers. The background papers include:

- Corporate Chart of the HIH Group of Companies
- A Chronology of Key Events
- A Profile of the General Insurance Industry
- Commonwealth Regulation of General Insurance
- Directors' Duties and Other Obligations Under the Corporations Act
- The Business and Financial Reports of General Insurers.

These background papers are available on the website of the HIH Royal Commission at <http://www.hihroyalcom.gov.au/reference/index.htm>

Also available on the Royal Commission's website is a transcript of the Commission's hearings.

(D) CANADIAN JOINT COMMITTEE ON CORPORATE GOVERNANCE ISSUES FINAL REPORT

On 22 November 2001, the Joint Committee on Corporate Governance (JCCG) released its final report, titled Beyond Compliance: Building a Governance Culture. Fifteen recommendations focussed on specific areas aimed at improving the effectiveness of governance in Canadian public corporations are outlined in the report. Key recommendations include:

- All boards should have an independent board leader who is chosen by the full board and who is an outside and unrelated director. This requirement should be a condition of listing on a Canadian stock exchange.
- The independent board leader should be accountable to the board for ensuring that the assessment of the CEO and the succession planning functions are carried out and the results discussed by the full board.
- All boards should develop and disclose a formal mandate setting out their responsibilities. Performance should be assessed against this mandate and the results of the assessment discussed by the full board.
- Outside board members should meet at every regularly scheduled meeting without management and under the chairmanship of the independent board leader.
- Independent directors of a public corporation remain responsible for protecting shareholders, even if the corporation is controlled by a significant shareholder. All parties must ensure the proper functions of governance are carried out.

Chaired by Guylaine Saucier, CM, FCA, the Joint Committee was established by the Canadian Institute of Chartered Accountants (CICA), the Canadian Venture Exchange (CDNX) and the Toronto Stock Exchange (TSE) to review the state of corporate governance in Canada and recommend changes to ensure Canadian governance practices are among the best in the world.

The report, reflecting recent developments in the United States, also makes recommendations to strengthen the role of audit committees and improve their relationship with external auditors.

The Joint Committee concludes that the existing TSE disclosure requirements and corporate governance guidelines, introduced in 1995, have been effective in contributing to improvements in corporate governance over the past five years. It recommends that the guidelines be reviewed and updated in light of its recommendations, and that the disclosure requirement and guidelines also apply to Tier 1 companies listed on the CDNX.

A copy of the final report can be downloaded at <http://www.jointcomgov.com>. Hard copies can be obtained by emailing info@jointcomgov.com.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC COMMENCES CIVIL PROCEEDINGS AGAINST FORMER ONE.TEL OFFICERS AND CHAIRMAN

On 12 December 2001 Mr David Knott, Chairman of ASIC, announced that ASIC has commenced civil proceedings in the NSW Supreme Court against three former officers of One.Tel Limited and the former Chairman.

The proceedings have been commenced against Messrs Jodee Rich and Bradley Keeling, the former Managing Directors of One.Tel, Mr Mark Silbermann, the former Finance Director, and Mr John Greaves, the former Chairman of One.Tel (the four defendants).

ASIC is seeking orders from the Supreme Court that each of the four defendants be disqualified from managing or being a director of any company for such period as the Court thinks fit.

ASIC is also seeking compensation of between $30 million and $50 million for the reduction in the value of One.Tel over a period of approximately eight weeks from 30 March 2001 to 29 May 2001 (being the period during which One.Tel continued to trade because of the alleged failure of the defendants to properly discharge their responsibilities).

The compensation claim excludes a further $50 million liability incurred over this period but which has been subject of a settlement between Lucent Technologies and the Administrator. Compensation recovered will be available to the liquidator of One.Tel, Mr Peter Walker of Ferrier Hodgson, for payment to creditors.

ASIC alleges that Messrs Rich, Keeling and Silberman had information or access to information regarding the financial condition of One.Tel that was withheld from the One.Tel Board and the market. ASIC alleges that their conduct constituted a breach of their duties as officers of the company.

ASIC alleges that the fourth defendant, Mr Greaves, breached his duty to exercise the standards of care and diligence required by the law of a company Chairman.

Evidence available to ASIC indicates that the true financial position of One.Tel was not known to the remaining directors of the company, Messrs Lachlan Murdoch, James Packer, Rodney Adler, Peter Howell-Davies and Pirjo Kekalainen-Torvinen, until shortly before the appointment of the administrator on 29 May 2001.

(B) ASIC ISSUES GUIDANCE ON FORECASTS

On 12 December 2001 ASIC released a draft policy statement on the use of prospective financial information, including financial forecasts, in prospectuses, disclosure documents and product disclosure statements.

'This policy statement continues ASIC's campaign to improve the level and quality of disclosure in prospectuses and other fundraising documents', ASIC Director Corporate Finance, Richard Cockburn said. 'The inclusion of financial forecasts that lack reasonable grounds is one of the most common reasons ASIC will put a stop order on a prospectus or other disclosure documents. Our concern has been confirmed by external studies that show prospective financial information is often unreliable. Our draft policy statement addresses these issues, and will provide assistance for companies issuing prospectuses in the future', he said.

ASIC will use the draft policy statement when assessing prospectuses and other fundraising documents until a final policy statement is issued. Copies of the draft policy statement are available through ASIC's website at <http://www.asic.gov.au> or by calling 1300 300 630. A copy of the regulatory impact statement is available on request.

Comments on the draft policy statement should be made by Friday 18 January 2002 and sent to:

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(C) RENE WALTER RIVKIN CHARGED WITH INSIDER TRADING

On 11 December 2001 Mr Rene Walter Rivkin, 57, of Bellevue Hill, appeared in the Local Court in Sydney charged with one count of insider trading in the shares of Qantas Airways
Limited (Qantas).

Mr David Knott, Chairman of the Australian Securities and Investments Commission (ASIC), said that the charge follows an investigation by ASIC into the circumstances surrounding trading in Qantas shares shortly before Qantas announced that it would take over the operations of Impulse Airlines.

ASIC alleges that Mr Rivkin contravened the insider trading provisions of the Corporations Act when, on 24 April 2001, he purchased 50,000 Qantas shares. The shares were purchased in the name of Rivkin Investments Pty Ltd, a company of which Mr Rivkin is the sole director. Mr Rivkin will next appear before the Court on 22 January 2002.

(D) ASIC CONCLUDES INVESTIGATION INTO AMP

On 6 December 2001 Mr David Knott, Chairman of ASIC, announced that ASIC had finalised its investigation into a suspected breach of AMP Limited's market disclosure obligations in July, and will be taking no further action.

ASIC's investigation followed an ASX referral relating to briefings of analysts by AMP during July 2001 and its subsequent publication of revised profit expectations for the year ended 30 June 2001. 'ASIC has found no evidence that non-public price sensitive information was released at the briefings, nor is there evidence that there was any insider trading in the shares of AMP prior to announcement of the revised profit expectations', Mr Knott said. 'On the other hand, ASIC considers that AMP probably did commit a breach of ASX listing rules between 23 July and 26 July and has obtained the advice of Senior Counsel to that effect. The breach was constituted by AMP's failure to notify the ASX of its view that there was an error in a number of analysts' forecasts of half-year investment income and profits. The breach occurred once AMP commenced private briefings with some of those analysts in which it sought to correct that error. However, even if ASIC is correct in concluding that the listing rules were breached, ASIC has been advised by Senior Counsel that there is insufficient evidence to establish that the breach was intentional, reckless or negligent as required in order to commence proceedings under the Act. It is disappointing that such a large company conducted analyst briefings that caused these problems. However I note that, soon after our investigation commenced, AMP amended its policy to introduce a prohibition on future selective analyst briefings preresult. This has been one of the most comprehensive investigations undertaken by ASIC in relation to disclosure obligations under the ASX listing rules and the Corporations Act. The investigation has again highlighted the complexity of the disclosure regime and the difficulty of satisfying the current requirements for disciplinary action', Mr Knott said.

During the course of the investigation, ASIC examined:

- key officers of AMP, including the Chief Executive Officer Mr Paul Bachelor and the Chief Financial Officer Mr Marc de Cure;
- five analysts who attended the July briefings;
- a number of dealers employed by broking firms whose clients traded AMP shares in the relevant period; and
- a number of institutions who traded in AMP shares.

ASIC also commissioned reports on market disclosure issues from an industry expert and consulted Senior Counsel on a range of issues.

Specifically, ASIC's investigation found that:

- There was no breach of the continuous disclosure rules by AMP prior to the analysts' briefings. Although information about investment income was likely to be price sensitive, this information was not required to be disclosed under the 'carve out' provisions of the ASX listing rules. The 'carve out' provisions allow information that is confidential or insufficiently definite not to be disclosed, or information that a reasonable person may not expect to be disclosed.
- A breach of the insider trading provisions of the Corporations Act could not be established because there was no evidence that non-public price sensitive information was provided during the briefings.
- It is probable that there was a breach of the ASX listing rules between 23 July and 26 July when AMP conducted analyst briefings. Prior to the briefings, AMP became aware that market expectations for the half-year investment income and profits were not in line with AMP's anticipated results and in some cases were based on a number of errors in analysts' calculations and assumptions.

During the course of the briefings, AMP staff sought to correct these errors based on public information and a number of analysts (although not all) subsequently amended their forecasts.

Once the analyst briefings commenced on 23 July, AMP should also have made a general disclosure to the market of its concerns. The failure to do so caused confusion in the market.

Any breach of the listing rules was corrected on 27 July when AMP released profit forecasts to the market, which were subsequently amended on 15 August 2001.

- In order for ASIC to commence proceedings under the continuous disclosure provisions of the Corporations Act, ASIC must demonstrate that the breach was intentional, reckless or negligent. In the opinion of Senior Counsel, there was insufficient evidence to satisfy those requirements.

3. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL RELEASES FINAL GUIDANCE ON LOCK-UP DEVICES

On 7 December 2001 the Takeovers Panel advised that it had released its final policy on lock-up devices. The final version follows public consultation on a draft which the Panel released on 2 August. Lock-up devices include Break Fees, No-Shop and No-Talk Agreements, and Asset Lock-up Agreements.

The Director of the Panel, Mr Nigel Morris, said that the Panel was pleased to have received very positive market response to the draft, and the underlying policy has changed little, although the text has been reworked in some areas to make it more useable, in response to feedback received.

The final policy remains primarily based on:

- fair and effective competition for control of companies;
- the interests of shareholders; and
- the Panel's role as a market regulator.

The principles that the final document affirms include:

- The Panel accepts the use of break fees in Australia, subject to the Panel's primary concerns about competition for control of companies.
- The Panel has said that, in general, it won't declare break fees and other lock-up devices unacceptable where they are, in the circumstances of the bid, reasonable, in line with the Eggleston Principles, and will not impede competition for the target company.
- Proper and timely disclosure is an important part of the protections for shareholders in the Panel's policy.
- The Panel's role is not to consider the legality or enforceability of break fees, but it will not intentionally facilitate a lock-up device that appears clearly invalid.
- The general limit on break fees is 1% of the bid value. 1% may be too high in the case of large bids and too low for some small bids.

The elements that have changed include:

- The Panel has placed somewhat less emphasis on the composition of break fees within the 1% cap.
- The Panel has narrowed the scope of the policy in the area of pre-emptive rights. It has limited this guidance to lock-up arrangements concerning assets where those lock-ups are entered into in the context of a bid. Other pre-emptive rights may be addressed in the guidance on frustrating action on which the Panel is currently working.
- The guidance note now also addresses break fee agreements between bidders and major shareholders in a target company.
- The emphasis on timing of No-Shop and No-Talk agreements has been removed. The period of restraint must be limited and reasonable, but may extend into the bid period where this is justifiable.

The Panel is very appreciative of the work that its subcommittee on the break fees policy has put into this project (Peter Cameron, Simon McKeon, Simon Mordant, Ian Ramsay and Trevor Rowe).

The final Guidance Note takes into account submissions on the draft which were received from: the Australian Institute of Company Directors; the Corporations Committee of the Law Council of Australia; the Securities Institute of Australia; Macquarie Bank Limited; and the Companies and Securities Urgent Issues Group of the Investment Banks and Securities
Association.

The document is available on the Panel's website at <http://www.takeovers.gov.au/Content/Policy/LockUpDevices.asp>

(B) NORMANDY No 4 - FRANCO-NEVADA COLLATERAL BENEFIT ISSUE

On 12 December 2001 the Takeovers Panel announced that it had declined an application by AngloGold for a declaration of unacceptable circumstances in relation to Newmont Mining's proposed bid for Normandy Mining. The application (Normandy 04) related to the value offered indirectly to Franco-Nevada shareholders for their interests in Franco-Nevada's 19.9% holding in Normandy (under the proposed Canadian law Plan of Arrangement) compared to the value offered directly to Normandy shareholders for their Normandy shares under Newmont's bid for Normandy.

The Panel is not convinced that the proportion of the value of Franco-Nevada which its shares in Normandy constitute is sufficient to assert that acquiring those Normandy shares was the primary purpose of Newmont's proposed acquisition of Franco-Nevada. Therefore the Panel is not convinced that it is appropriate to attempt to allocate different amounts of value to the different assets within Franco-Nevada to determine a separate amount which it could decide had been offered by Newmont to the Franco-Nevada shareholders in order to gain control over Franco-Nevada's Normandy shares.

However, it notes that in the analysis provided by AngloGold in its initial submissions to the Panel on 27 November, the Normandy shares are given a value (on a Net Asset Value basis) of less than 43% of the non-cash and bullion assets of Franco-Nevada. If the Panel were to accept this as a definitive value it would not consider that this would be a basis for treating the Normandy shares as the primary purpose for Newmont acquiring Franco-Nevada.

Even if it were possible definitively to determine the values of the different asset classes of Franco-Nevada, the Panel does not accept AngloGold's argument that the whole of any premium which might be ascribed to the proposed consideration for Franco-Nevada should be applied to Franco-Nevada's parcel of Normandy shares. The Panel considers that the royalty assets which comprise the majority of Franco-Nevada's other non-cash and non-bullion assets cannot reasonably be described as readily negotiable in the same way as cash and bullion and therefore cannot be discounted in the same way as cash and bullion when considering premia. Further, the Panel accepts the proposition that Franco-Nevada as an entity may well be appropriately valued at more than merely the sum of its current assets. It notes that both Franco-Nevada and Newmont shares have usually traded at prices well above net asset value. These considerations further reduce the feasibility or appropriateness of attempting to ascribe differing proportions of the value proposed to be offered to Franco-Nevada shareholders to different asset classes.

The Panel's decision in relation to attributing differing portions of the value of Franco-Nevada to different asset classes means that it is not feasible or available to assert that any of the value proposed to be offered for Franco-Nevada shares can be applied in the Minimum Bid Price Rule in section 621(3) of the Corporations Act. Similarly, the value proposed to be offered in the Plan of Arrangement cannot be taken to be an inducement that would be required to be disclosed under section 636(1)(i), or prohibited under section 623 of the Act.

Note:

AngloGold's analysis of 26 November, proposed a NAV of Franco-Nevada of C$2,342 million, of which C$628 million was ascribed to Franco-Nevada's royalty assets and C$501 million was ascribed to the market value of Franco-Nevada's Normandy shares as at 30 October 2001.

AngloGold has provided a further analysis based on the recently revised proposed Newmont offer, but the proportional values appear not to change materially under the revised analysis.

(C) NORMANDY No 3 - BREAK FEES

On 7 December 2001 the Takeovers Panel advised that it had declined to make a declaration of unacceptable circumstances in relation to one of the applications by AngloGold concerning the proposed bid by Newmont Mining Corporation for Normandy Mining (the Normandy No 3 application).

The Panel considers that the recent events concerning bids for control of Normandy indicate that there is active competition for control of Normandy, including since the announcement of the break fees and other lock-up devices agreed in a Deed of Undertaking between Newmont and Normandy. Therefore, the Panel considers it unlikely that the relevant break fees have materially inhibited competition for Normandy.

Under the Deed Normandy has agreed to pay a break fee of A$38.33 million to Newmont if a rival offeror acquires 50.1% of Normandy or if the Normandy board fails to recommend the proposed bid by Newmont for Normandy or recommends a rival bid. Normandy has also entered into certain "no shop/no talk" agreements, and agreed to provide a security bond for payment of the break fee.

The application contained a number of other issues in relation to the structure of the lock-up devices. However, in light of its views on the competition issue, the Panel did not consider it needed to give them detailed consideration and has declined to make any declaration in relation to them.

(D) NORMANDY No 2 - FRANCO-NEVADA PLAN OF ARRANGEMENT

On 6 December 2001 the Takeovers Panel advised that it had declined to make a declaration of unacceptable circumstances and final orders in relation to an application by AngloGold concerning the proposed bid by Newmont Mining Corporation for Normandy Mining (the Normandy No 2 application).

The application related to whether the Arrangement Agreement between Newmont and Franco-Nevada Mining should be disclosed to the market and to Normandy shareholders. The Arrangement Agreement sets out the implementation of a proposed merger between Newmont and Franco-Nevada under Canadian law by a Plan of Arrangement (the terms of which were announced on 14 November).

AngloGold asserted that the Arrangement Agreement should be disclosed as part of Newmont's substantial shareholding notice of 16 November. Newmont was required to give the substantial shareholding notice because it acquired a relevant interest in Franco-Nevada's 19.9% shareholding in Normandy by virtue of a call option granted to Newmont by Franco-Nevada.

The Panel considered the detailed submissions of the parties to the application as to the decision it should make in Normandy No 2, and the process for reaching such a decision. Because of its concerns about its ability to complete its consideration of the application if it did so, the Panel did not review the actual Arrangement Agreement. Rather it instructed its Executive officers to review the document and apprise the Panel of the nature of the document and its contents. On that basis, and considering the submissions received, the Panel decided that the Arrangement Agreement does not contain material information that Normandy shareholders and the market do not have, but which would be required for acquisition of Normandy shares to take place in an informed market.

The Panel considered that the intent of section 602(a) that the acquisition of shares in Normandy take place in an efficient competitive and informed market had not been frustrated and accordingly declined to make a declaration of unacceptable circumstances or orders requiring disclosure.

While the Panel considered the application of section 671B of the Corporations Act in the context of the proceedings, it did not find it necessary to make a decision whether the Arrangement Agreement should have been disclosed by Newmont with its substantial shareholding notice in order to comply with that section.

(E) NORMANDY No 5 - BROKER HANDLING FEES

On 6 December 2001 the Takeovers Panel advised that it had reached a decision on the application by Newmont Mining Corporation concerning the modified handling fees that AngloGold announced on 3 December. The modified handling fees were to be payable to brokers whose clients accepted AngloGold's offer for Normandy on or before 11 December 2001.

The Panel has decided that the modified handling fees proposed by AngloGold would be likely to have a coercive effect on Normandy shareholders, inducing them to accept AngloGold's bid prior to the close of its bid. This would also be prior to Normandy shareholders having the opportunity to consider the recommendation of the Normandy Board in response to AngloGold's revised offer. The Panel considered that this was against the intent and policy of the takeovers provisions of the Corporations Act. Accordingly, the Panel considered that the modified handling fees would give rise to unacceptable circumstances.

Following discussions with the Panel, AngloGold has undertaken to the Panel to withdraw the modified handling fee arrangement. Accordingly, the Panel considers that it would not be in the public interest to make a declaration of unacceptable circumstances in relation to the modified handling fees.

4. RECENT CORPORATE LAW DECISIONS

(A) IMPACT OF A CHANGE IN CIRCUMSTANCES ON THE APPROVAL OF A SCHEME OF ARRANGEMENT
(By Alex Vynokur, [Baker & McKenzie](http://www.bakernet.com))

Re James Hardie Industries Ltd [2001] NSWSC 888, Supreme Court of New South Wales, Santow J, 8 October 2001, revised 11 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/october/2001nswsc888.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

James Hardie Industries Ltd ("JHIL") decided to establish a new corporate structure, involving the exchange by JHIL shareholders of their existing investment in JHIL for an investment in a new parent company, James Hardie Industries NV, which is incorporated in The Netherlands ("the Scheme").

On 23 August 2001, the Supreme Court of New South Wales ordered that a meeting of shareholders of JHIL be convened on 28 September 2001 at 11.00 am to consider the Scheme.

On 28 August 2001, the Information Memorandum was dispatched to all shareholders. The Information Memorandum disclosed that one of the significant benefits of having a new parent company incorporated in The Netherlands was that the existing 15% withholding tax imposed on dividends paid out of the United States (where approximately 80% of JHIL's earnings are generated) to Australia would be reduced to 5%, being the rate imposed on dividends paid from the United States to The Netherlands. The Information Memorandum stated that the proposed structure would still give a more favourable outcome in tax terms even if the US-Australia withholding tax was reduced to zero.

The day before the meeting of shareholders (27 September 2001) the Australian Federal Treasurer announced that he had signed a protocol with the US Ambassador to Australia under which changes are proposed to the US-Australia Double Tax Treaty. One of these changes is a proposed reduction in the rate of withholding tax on dividends paid from the US to Australia from 15% to 0%, provided all relevant conditions are met (the "Proposed Change").

The Treasurer's announcement was made after the expiry of the deadline for submitting proxy forms for the scheme meeting (that deadline was 11.00 am on 26 September 2001).

At the outset of the Scheme meeting on 28 September 2001, the Chairman noted the Proposed Change and broadly explained its effect. The Chairman also noted that the directors of JHIL had met before the meeting and confirmed that, in their view, the Proposed Change did not alter the merits of the proposed Scheme. The Chairman confirmed that the directors intended to vote unanimously in favour of the Scheme and recommended that all shareholders do the same.

At the Scheme meeting, 99.64% of the total votes cast were cast by proxy prior to 11.00 am on 26 September 2001. Of the shares voted at the meeting (as opposed to voted prior to the meeting by proxy), 98.9% were voted in favour of the resolution. Overall, a resolution in favour of the Scheme was passed by 92.4% of the shareholders voting.

The main question before the Court was whether to approve the Scheme, or to allow shareholders the opportunity to alter their vote in light of the Proposed Change.

(2) Decision

His Honour considered that it was not necessary for the Scheme to go back before members because:

(a) JHIL had previously disclosed the possibility of the Proposed Change in the Information Memorandum; and

(b) the company and the independent expert assert, and provide detailed analysis, that the Scheme is still advantageous; and

(c) in the circumstances, requiring a re-vote could jeopardise the Scheme altogether.

Adopting the test in Re Telford Inns Pty Limited (1985) 10 ACLR 312 at 315, His Honour took the view that reasonable shareholders would not alter their decision as to how to act on the Scheme if the Proposed Change had been announced prior to the proxy votes being submitted, at least to such degree as to be likely to alter the result of the meeting.

Thus, Santow J had to decide whether to:

(a) approve the Scheme on the basis that it took immediate effect, or

(b) have the Scheme come into effect on 11 October 2001 (which was the last date when the Dutch tax rulings for the restructure were still valid).

The latter alternative would allow for any objections to be put before the Court.

His Honour considered that it was desirable to provide the opportunity for objections to be raised, given the possibility that some further material fact might be put before the court. In addition, the Court required JHIL to give such publicity as was practicable in the short time available, of that opportunity to object, including by way of ASX announcement and the company's website.

On 11 October the Scheme was given approval, since no sustainable objections were brought before the Court.

(B) WHEN IS AN AGREEMENT BY ASSIGNEE OF A CHOSE IN ACTION A TRUST?
(By Dannielle Coleman, [Blake Dawson Waldron](http://www.bdw.com.au))

Emilco Pty Limited [2001] NSWSC 1035, New South Wales Supreme Court, Barrett J, 19 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/november/2001nswsc1035.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

The key issue is this case was whether the assignment of a chose in action to remit net proceeds of recovery to a liquidator for the benefit of creditors caused the chose in action to be held on trust.

Emilco Pty Ltd ("the Company") carried on a bakery business. In 1990 the Company's business premises were destroyed by fire. The Company was insured with Sun Alliance Australian Ltd ("Sun Alliance") and a claim was made against the policy. Liability was denied and the Company subsequently commenced proceedings against Sun Alliance in the NSW Supreme Court. In May 1991 the Company was wound up by order of the Court.

In 1992 Sun Alliance indicated a willingness to compromise the common law claim for $55,000. The liquidator, on behalf of the Company, was willing to accept the compromise. However, Mr Jaa Jaa, a director and shareholder of the Company offered to pay $55,000 on the condition that the chose in action, represented by the claim against Sun Alliance, be assigned to him. On 13 March 1992 the assignment took effect by deed ("the Agreement").

A provision of the Agreement was to the effect that if Mr Jaa Jaa received money from Sun Alliance in relation to the claim he would account to the liquidator of the Company for any balance remaining after the payment of his legal expenses. On 16 March 1992 Mr Jaa Jaa gave corresponding undertakings to the Court.

Mr Jaa Jaa was successful in his claim against Sun Alliance and received a payment of $550,000. When the liquidator became aware of this he referred back to the Agreement and Mr Jaa Jaa's undertaking to the Court.

The question for determination was whether Mr Jaa Jaa held on trust for the Company the balance of the funds received from Sun Alliance after the payment of reasonable solicitor/client legal costs and disbursements.

(2) Was there a trust?

In order to determine whether there was a trust Barrett J looked to the Agreement in the whole of its context.

Clause 7.1 of the Agreement provided:

"The Purchaser agrees that should he receive any funds whatsoever from Sun Alliance (or from any other personal or corporation assuming the engagements of Sun Alliance) in relation to the chose in action whether by way of judgement or settlement in the proceedings referred to in clause 1.1 above or otherwise he shall, after payment of reasonable solicitor/client legal costs and disbursements of those proceedings remit to the Liquidator the balance, if any, of such moneys, such moneys to be paid to the Liquidator for the benefit of creditors of the Vendor generally."

Clause 8 of the Agreement provided:

"The Purchaser agrees that he shall not without the prior written consent of the Vendor assign transfer or otherwise dispose of the chose in action."

Clause 8 contained an undertaking by Mr Jaa Jaa that he would not dispose of the chose in action without the Company's consent. Although Barrett J recognised that there were circumstances where such a clause would be void, this was not one of those circumstances. Clause 8 showed an intention that Mr Jaa Jaa was not to have an "absolute estate" in the chose in action. The qualification which he had accepted - that he would not dispose of the chose in action without the consent of the company - was framed in a way which indicated that the Company had an interest in him retaining it

In relation to clause 7.1 Barrett J stated that the intention of the parties was that:

"Mr Jaa Jaa should participate in the proceeds of successful prosecution of the claim against Sun Alliance only to the extent necessary to make him whole for costs and disbursements actually incurred. Otherwise the fruits of that success should be enjoyed by the creditors of the Company as a result of transfer of those proceeds to the Company's liquidator."

This, coupled with the indications in clause 8 that Mr Jaa Jaa did not intend to assume unfettered ownership of the chose in action, led Barrett to the conclusion that:

"[O]nce the proceeds of the claim came into Mr Jaa Jaa's hands, they would not become his beneficial property. Rather, he would hold them subject to a trust resembling a "Quistclose trust" (Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567) requiring him to pay the liquidator for the benefit of the Company's creditors the balance remaining after recoupment of relevant expenses."

In relation to the chose in action Barrett J stated that as the proceeds were subject to such a trust, the chose in action, as it existed before realisation of its proceeds, was also subject to a trust. His reasons for concluding this were as follows:

(a) It was a mutual and expressed understanding that Mr Jaa Jaa could not do as he wished with the chose in action.

(b) Mr Jaa Jaa was obliged to keep the chose in action unless the company consented to him disposing of it.

(c) Mr Jaa Jaa was not free to apply the proceeds of the chose in action except by payment to the specified person for the specified purpose subject to prior recoupment of his expenses.

In Barrett J's opinion his conclusions were consistent with the decision in Agnew v Commissioner of Inland Revenue [2001] 2WLR 45 where the Privy Council advised:

"[W]hilst a debt and its proceeds are two separate assets,...the latter is merely the traceable proceeds of the former and represent its entire value. A debt is merely a receivable; it is merely a right to receive payments from the debtor. Such a right cannot be enjoyed in specie; its value can be exploited only by assigning it for value to a third party. An assignment or charge of a receivable which does not carry with it the right to the receipt has no value"
Accordingly if the proceeds of a chose in action in the nature of a debt are seen to be intended to be the subject of a trust which will attach to them immediately they materialise, then the chose in action must be taken to be likewise subject to a trust

(3) The effect of the subsequent bankruptcy?

Another relevant aspect of these proceedings was that on 23 July 1993 Mr Jaa Jaa became bankrupt. He obtained discharge from bankruptcy on 3 August 1996. Barrett J considered the effect of that subsequent bankruptcy on the trust funds.

Barrett J recognised that pursuant to section 58(1)(a) of the Bankruptcy Act 1966 (Cth) upon Bankruptcy the "property of the bankrupt" is vested immediately in the official trustee. However, section 116(2)(a) excludes "property held by the bankrupt in trust for another person'.

Barrett concluded that upon assignment to Mr Jaa Jaa the chose in action became subject to a trust in favour of the liquidator for the benefit of the Company's creditors. Accordingly Barrett J concluded it was 'property held by the bankrupt for another person' and was excluded from the operation of s116(1) by s116(2)(a).

(4) Was the Company entitled to relief?

The Company was found to be generally entitled to the declarations that it sought. However, Barrett J stated that on true construction of clause 7.1 it was the liquidator by name to whom the entitlement accrued and it should be declared that he, taking as a liquidator, was both entitled and bound to apply the moneys received for the benefit of the creditors generally.

He also went on to say that the terms of the trust were delineated by reference to the interests of the Company's creditors. The words 'for the benefit of the creditors of the Vendor generally', were wide enough to encompass both payments in or towards the satisfaction of creditors' claims as proved and admitted and also the defraying costs of bringing the winding up to a point of finality so far as the claims of creditors were concerned.

(5) Mr Jaa Jaa's application under section 564 of the Corporations Act 2001 (Cth)

Mr Jaa Jaa also sought orders which would put him in a preferred position to other creditors in relation to debts owed by the Company. He relied on section 564 of the Corporations Act 2001 (Cth) ("Corporations Act") which he stated applied on the basis that he had entered into and implemented the arrangements of 13 March 1992, and in light of the favourable outcome which had been reached in mediation with Sun Alliance. Mr Jaa Jaa asserted that the chose in action was 'protected or preserved by the payment of money or the giving of indemnity by creditors" and as such fell within the second part of section 564(a).

Although Barrett J recognised that a chose in action could be property for the purposes of the second part of section 564(a) he stated that Mr Jaa Jaa's application was premature. Section 564 'permitted the court to make such orders as it deemed just with a view to giving the creditor or creditors whose money has been outlaid in protection or preservation an advantage over others in consideration of the risk assumed by them'. Barrett J cited a number of considerations which the authorities considered necessary for the Court to take into consideration in a claim under section 564. One such consideration identified by all the authorities was the 'relativity between the debt of the indemnifying creditor and debts of all other creditors. Because the respective position of the claimants had not been finalised by the liquidator a section 564 claim was premature.

(6) Was Mr Jaa Jaa a creditor?

A claim under section 564 would also rely on the assumption that Mr Jaa Jaa was a creditor.
Barrett J referred again to the Bankruptcy Act and stated that upon being declared bankrupt all property owned or vested in Mr Jaa Jaa became the property of the official trustee by operation of section 58(1)(a) of the Bankruptcy Act, subject to the exceptions in section 166(2) and elsewhere.

In his affidavits Mr Jaa Jaa deposed that debts owed to him by the company were in the form of loans made by him personally prior to the company going into liquidation. Barrett J stated that there was no apparent reason why the Bankruptcy Act provisions would not have operated to divest him of that debt when he later became bankrupt. Had the loans been made by him out of funds of the Trust the situation may have been different but there was nothing in the evidence to suggest that.

Accordingly the debt owed to Mr Jaa Jaa by the Company at the commencement of the winding up ceased to be vested in him at the commencement of his subsequent bankruptcy at which point it became vested in the official trustee. Furthermore the debt was not re-vested to him when he was later discharged from bankruptcy. This had been made clear by the Court of Appeal in Daemar v Industrial Commission of New South Wales (No 2) (1990) NSWLR 178 approving the decision of Needham J in Pegler v Dale [1975] 1 NSWLR 265.

Therefore in the absence of any action by the official trustee to restore in him the debt owed by the Company Mr Jaa Jaa was not a creditor in whose favour a claim under section 564 could be made.

Barrett J noted that it was possible for Mr Jaa Jaa to re-capture his status as a creditor for the purposes of section 564 of the Corporations Act through an appropriate transaction with the trustee. However, in the absence of this his section 564 application must fail.

(C) SCHEMES OF ARRANGEMENT AND THE POWERS OF ASIC
(By Jennifer De Leo, [Blake Dawson Waldron](http://www.bdw.com.au))

Re Homemaker Retail Management Ltd [2001] NSWSC 1058, New South Wales Supreme Court, Barrett J, 19 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/november/2001nswsc1058.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

The key issue in this case was the content of a scheme of arrangement that the court was asked to approve under section 411 of the Corporations Act 2001 (Cth). The scheme was one component of a broader plan under which all securities issued by Homemaker Retail Management Ltd would become vested in GPT Management Ltd. Under the terms of the scheme, the security holders were to receive $1.59 as consideration for each security.

Affidavit evidence put before the court showed that all of the procedural steps required for the scheme of arrangement to be approved had been met, and that the security holders' votes were substantially in favour of what had been approved. However, Barrett J was concerned by the content of clause 7.6 of the scheme which was in the following terms:

"The company may subsequently vary the scheme, so long as:

(a) the variation does not adversely affect the rights of the security holders;

(b) a Senior Counsel of not less than three years' standing confirms that in his or her opinion, the variation does not adversely affect the rights of security holders

(c) the variation is approved by ASIC; and

(d) the variation is lodged with ASIC."

Clause 7.6 was a provision for variation of the scheme terms and was intended to operate after the scheme had become binding for an indefinite period. Barrett J was concerned by both the breadth of the clause and the role that it envisaged for ASIC.

(2) Clause 7.6

(a) The breadth of clause 7.6

Counsel for Homemaker Retail Management Ltd asserted that clause 7.6 had been included in the scheme of arrangement with the intention that it be a 'slip rule' to avoid the kind of difficulty which came before the court in Re AGL Gas Networks Ltd (2001) 37 ACSR 441. In that case a deadline set by scheme provisions governing the post-approval implementation phase was missed by a few minutes and there was no mechanism, short of seeking relief from the court, for the trifling and inconsequential non-compliance with the terms of the scheme to be rectified. However, Barrett J stated that the proposed clause 7.6 would have gone far beyond any 'slip rule'. It would have had a very broad operation, accommodating any variation whatsoever which fell within the specification defined by the words 'does not adversely affect the rights of security holders.'

The breadth of the proposed clause 7.6 was illustrated by the following example put to Counsel by Barrett J. His Honour asserted it was arguable that the wording would accommodate a change which substituted the provision requiring payment of $1.59 cash per security upon implementation of the scheme for a provision for the payment of some significantly higher sum in a year's time with interest at a generous rate in the meantime. Barrett J noted that such a change might not 'adversely affect' the 'rights' of security holders even though altering them, however, an essential feature of the expectations engendered by the scheme and its explanatory statement - receipt of money upon implementation - would have been varied in a way which, from a commercial viewpoint was radical. Although not, by comparison, adverse so far as rights are concerned, such a substituted provision might have caused some members to take a different commercial view of the scheme.

(b) Notice to security holders

Barrett J noted also that clause 7.6 and its effect were not referred to in the explanatory statement sent to security holders in advance of the scheme meeting. Members were therefore not on notice of its potentially far reaching operation. He asserted that this brought to the fore a particular aspect of the court's function in approving a scheme of arrangement. Barrett J cited the judgment of McClelland J in Re Price Mitchell Pty Ltd [1984] 2 NSWLR 273 where, in the context of a creditor's scheme, he stated that:

"Those creditors who agree to a scheme are likely to be influenced largely by their perception of the broad economic consequences of the scheme, with particular reference to what proportion of their debts are seen as recoverable under a scheme as compared with a winding up, and perhaps to pay little attention to the technical or machinery aspects...They may rely on the approval of the court as a sufficient safeguard against defects at the technical or machinery level. For that reason, as well as for the purposes of protecting the interests of creditors who have not agreed to the scheme and yet will be bound by it, the court will ordinarily seek to ensure...that the scheme does not without sufficient reason include provisions which may create inroads upon, or modify, the benefits which a creditor bound by it legitimately expect to obtain under it."

Barrett J asserted that when the court was put on notice of a machinery provision which was capable of altering those 'dominant commercial elements' the court was bound to consider, at the least, whether the material placed before the members had sufficiently brought to their attention the possibility of such alteration. Further, even if the possibility of such alteration had been sufficiently identified and explained, there was still a clear and firm predisposition of the court not to favour provisions allowing schemes to be changed after they have received court approval. Barrett J cited the judgment of Santow J in Re NRMA Ltd (2000) 33 ACSR 595 where he stated:

"The use of conditions subsequent to bring about termination of a scheme of arrangement needs to be distinguished from a scheme containing machinery which could lead to variation of its terms. Courts will generally not approve schemes which carry within themselves machinery for variation of their own terms...Clarity and certainty are thus the touchstones. Provided that clarity and certainty are present on the face of the scheme and no new decision making process intrudes after court approval, it does not matter that different results may emerge in different eventualities. A key question is whether the scheme is, according to its own terms, self-executing in the sense that certain results follow in certain defined events."

Barrett J asserted that clause 7.6 clearly and unambiguously contemplated the intrusion of a 'new decision making process.' It was a provision of broad operation carrying within it the potential to bring about alterations to what, in light of the explanatory statement and the debate at the scheme meeting, was properly regarded as the defined commercial transaction. Further those alterations would have come from the decisions of the company alone. Barrett J stated that it was not sufficient for members to have an assurance that any change would not adversely affect their rights. Members were entitled to know that the arrangement which had been presented to them was the arrangement that would be implemented.

(c) The role of ASIC

Barrett J was also concerned about the role of ASIC under the proposed clause 7.6. The clause contemplated that ASIC would both approve a variation of the scheme and accept lodgment of a document in relation to it. Barrett J commented that he did not see how this proposal could have worked as ASIC's powers and functions are those conferred on it by statute, principally the Australian Securities and Investments Commission Act 2001 (Cth). The statutory scheme from which ASIC derives its jurisdiction does not contemplate that it may undertake functions which parties to contracts or other binding stipulations may choose to confer upon it.

Barrett J noted the judgment of Mitchell J in Re Buka Minerals NL (1983) 8 ACLR 507 and stated that a scheme of arrangement, once approved by the court is, by force of section 411(4) binding on both the members of the body and the body. It does not and cannot bind ASIC or any other outsider. Barrett J again cited the judgment of Santow J in Re NRMA Ltd. In that case Santow J was addressing a proposed mechanism to ensure that a particular representation made by an outsider to the scheme was given some binding effect. One possibility involving ASIC was dealt with as follows:

"I also considered whether the representation should be converted to an undertaking and, if so, to whom. ASIC were unwilling to receive it as an undertaking because it considered that it was unclear what powers it would have to enforce such an undertaking."

Barrett J stated that this extract was a reflection of the limits to the functions and powers of ASIC to which he had been referring.

(3) Conclusion

Barrett J approved the scheme of arrangement with clause 7.6 removed. Clause 7.6 was deleted as it:

(a) lacked the necessary clarity and certainty required; and

(b) proposed to offer ASIC a role that it was not empowered by statute to fulfil.

(D) LEGAL PROFESSIONAL PRIVILEGE AND IN-HOUSE LEGAL ADVISERS
(By Katie Higgins, [Mallesons Stephen Jaques](http://www.msj.com.au))

Southern Equities Corporation Ltd (in liquidation) v Arthur Andersen & Co (No 6) [2001] SASC 398, South Australian Supreme Court, Debelle J, 23 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/november/2001sasc398.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) The application

Arthur Andersen & Co ("Arthur Andersen") applied to the court for the production for inspection of certain documents which Southern Equities Corporation Ltd (in liquidation), previously Bond Corporation Holdings Ltd ("BCHL"), claimed were privileged from production on the ground of legal professional privilege. The liquidator of Southern Equities Corporation Ltd had previously brought a negligence action against Arthur Andersen in connection with the conduct of an audit of the BCHL group of companies.

BCHL claimed legal professional privilege in respect of a number of documents on the basis that they were prepared or received by its "in-house legal advisers". Although all held qualifications in law and some held current practicing certificates, only one of the in-house legal advisers had been employed as the BCHL group's legal counsel. The others held office as either directors or non-legal executives of various companies within the BCHL group.

(2) Characterising the relationship between BCHL and its in-house legal advisers

For legal professional privilege to attach to the communications between BCHL and its in-house legal advisers, the relationship between BCHL and each respective employee had to be characterised as that of client and lawyer: that is, the relevant communications had to be made in the course of a confidential and professional relationship in connection with professional matters and arising as a result of BCHL consulting the relevant employee in a professional capacity. Debelle J considered that a key factor in determining the nature of this relationship was whether the legal advice given possessed the necessary degree of independence.

Characterising the relationship between BCHL and the respective in-house legal advisers potentially involves issues in relation to corporate personality, touched on by Debelle J when he considered whether a director of a number of companies within the BCHL group could ever provide the company with professional legal advice in an independent capacity. Debelle J considered that, as the directors of a company are essentially its "corporate mind", any legal advice given to a company by its directors will subsequently lack the necessary degree of independence to attract legal professional privilege. Debelle J did not explore this line of argument further as it was not relied on by Arthur Andersen.

(3) Extending the application of legal professional privilege from the public to the private sector

The High Court has previously acknowledged that communications made or received by legal officers in government employment may attract legal professional privilege, provided that the communication is in the context of a professional relationship (Waterford v The Commonwealth of Australia (1987) 163 CLR 54 ("Waterford"); Attorney-General (N.T.) v Kearney (1985) 158 CLR 500 ("Kearney")). Based on obiter in Waterford and Kearney, Gillard J extended the application of legal professional privilege to in-house legal advisers in the private sector in Australian Hospital Care Pty Ltd v Duggan (No 2) [1999] VSC 131.

Although expressing his misgivings, Debelle J accepted that the principles expressed in Waterford and Kearney in relation to government lawyers could be extended to apply to privately employed in-house legal advisers (Debelle J's reservations related primarily to whether a privately employed in-house legal adviser could ever possess the necessary degree of independence to justify their communications with their employer being subject to legal professional privilege).

(4) Examining the validity of BCHL's claim for legal professional privilege

Debelle J examined the nature of each employee's position to determine whether the relationship between the relevant in-house legal adviser and BCHL could be characterised as that of lawyer/client. Debelle J found that directors and executive officers who were closely involved with the operations of BCHL could not have been in the position to proffer independent legal advice. Similarly, Debelle J found it unlikely from a practical perspective that persons employed as personal assistants would have the time to act as a legal adviser and, if they did so act, any advice given would have lacked the required degree of independence.

Debelle J did not find it of particular significance that some of the BCHL employees held practicing certificates in determining whether the advice given was in a professional and independent capacity. Notwithstanding that these employees may have been involved in producing legal documents or commenting on legal issues, Debelle J stated that legal professional privilege would not attach if they did so in their capacity as managers or executives of the company.

Debelle J was however prepared to find that the absence of a practicing certificate was indicative of the fact that the legal advice lacked the necessary degree of independence to attract legal professional privilege, drawing on dicta of the High Court that the adviser, in the absence of a practicing certificate, was not subject to "professional obligations and discipline".

Accordingly, Debelle J found that Arthur Andersen had discharged its evidentiary burden of establishing facts which, prima facie, rebutted the presumption that the documents produced or received by these employees were privileged. Debelle J subsequently ordered that these documents be brought to the court for his inspection in order for him to determine whether the claim for legal professional privilege was valid.

However Debelle J was prepared to find that communications involving BCHL's senior legal counsel were privileged as Arthur Andersen had not been able to show that this employee had held any other office in addition to that of senior legal counsel or been involved in the business activities of BCHL.

(5) Comment

Debelle J's decision indicates that, although legal professional privilege may extend to communications made by an in-house legal adviser, the legal adviser must be acting in the capacity of an independent legal adviser, detached from the duties or interests that are a necessary part of other aspects of their position.

This means that solicitors will be required to take into account both the content of a particular communication and the capacity in which the communication was made or received when considering whether a particular communication is subject to legal professional privilege. This will involve considering, from a practical perspective, whether a distinction can in fact be made between the different roles of an employee. Debelle J noted that this would be a difficult inquiry in the context of a liquidation, particularly where former directors and officers were unwilling to assist the liquidator in their investigations. Debelle J suggested that it would be appropriate for the court to inspect the documents in question in these circumstances.

(E) WHEN IS NOTICE VALID FOR THE EXERCISE OF AN OPTION?
(Naomi Munz, [Mallesons Stephen Jaques](http://www.msj.com.au))

Parras v FAI General Insurance Company Ltd (Prov Liq apptd) [2001] NSWSC 1077, New South Wales Supreme Court, Santow J, 28 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/november/2001nswsc1077.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

For corporate lawyers, the most important aspect of this case is the court's discussion on how a document can be effectively served on a company at common law, as opposed to the statutory manner of service under section 109X of the Corporations Act 2001 (Cth).

(1) Background

The lease (under which the defendant was the lessor) as assigned to the Plaintiffs (4 individuals) included an option to renew the lease for a further term of 5 years and a second option to renew the lease for a further period of 10 years. The lease required the lessor to grant a renewed lease if the lessee "gives to the Lessor not less than 3 nor more than 6 months' notice in writing of that intention" where other conditions have been satisfied. The lease expired on 16 July 2001.

The lease also provided, in clause 31(14), that:

"Any notice required to be served on the Lessor under this Lease shall be served personally or by sending the same by pre-paid registered post to the Lessor's registered officer (if a company) or (if a natural person) to the address of the Lessor set forth in this Lease or at such other address as the Lessor shall from time to time by notice in writing to the Lessee nominate and any notice required to be served on the Lessee or any Guarantor shall be sufficiently served if served personally or in the case of the Lessee if left addressed to the Lessee on the premises or in the case of either the Lessee or the Guarantor if forwarded by pre-paid post to the last known place of business or abode of the Lessee or the Guarantor (as the case may be) and any notice sent by post shall be deemed to be given at the time when it ought to be delivered in due course of post."

The Plaintiff submitted that its solicitor sent a Notice of Exercise of Option dated 10 April 2001 to "FAI General Insurance Limited C/- FAI Property Services, 8th Floor, 77 Pacific Highway, North Sydney NSW 2000" and that it was posted before 5pm on 11 April 2001 (Wednesday) in a mail box in the city of Sydney. The Defendant contended that it never received the notice. The address to which the Notice was sent was never the registered office of the Defendant, however FAI Property Services managed and administered the leasehold property owned by the Defendant.

(2) Nature of an option and its exercise

Santow J provided a brief introduction to the law relating to notice of the exercise of an option. He describes a recent relaxation of the approach requiring strict compliance with the requirements (for example, time and form) set out for the exercise of an option. Santow J refers to the "commercial approach" in Mannai Limited v Eagle Star Association Company Ltd [1997] 2 WLR 945 in which the House of Lords asked how the recipient would, as a reasonable commercial person, be taken to have understood the intent of the notice. Santow J states that he would adopt a commercial construction of notice, however proper compliance with a notice clause remains a condition precedent to the valid exercise of an option in a case such as this one.

Santow J discussed the two distinct characterisations of the nature of an option in Australian case law. One characterisation of an option is "as a conditional contract of sale, conditional upon the exercise of the option in accordance with its terms within the period prescribed". The alternative characterisation is "as an irrevocable promise to grant a lease open for the designated period".

Santow J found both charaterisations artificial (in this case the parties are already contracted to the existing lease) and draws on the analysis of Hoffman J in Spiro v Glencrown Properties Limited [1991] Ch 537 that the two charaterisations of an option operate only by analogy. Hoffman J explained that an option does not have all the elements of the standard form of either of these concepts but resembles each of them in some way.

His Honour noted that strict compliance is necessary for fulfillment of a condition precedent whereas the requirements for acceptance of an offer are more flexible.

(3) Was the option properly exercised under the terms of the lease?

Santow J draws a distinction between the stringent requirements in clause 31(14) and the clause setting out the requirements for the exercise of the option under the lease. He states that clause 31(14) provides the requirements for service of a notice while the clause conferring the option refers to giving a notice of intention. Santow J found that the exercise of the option did not require formal service, although this would satisfy the requirement for notice of exercise of the option. Santow J cited various cases which found that there was no distinction between serving and giving notice however he found that on a proper construction of the relevant clauses in this case, they draw a deliberate distinction between 'serving' and 'giving' notice under the lease.

After concluding that the giving of notice of an intention to exercise an option under the lease did not need to comply with the requirements for the service of notice under the lease, Santow J went on to examine whether the notice provided in this case was effective under section 170 of the Conveyancing Act 1919 (NSW) or at common law.

(4) Effective service on a company at common law

Santow J examined whether the principle that the acceptance of an offer (including the exercise of an option) must be communicated to the offeror applied where the offeror is a company. In this case the issue was whether the notice needed only to be delivered to the Defendant's premises without coming to the attention of an officer of that company.
Santow J cited a number of cases which considered the receipt of notice by a company where the notice was not received on time, or at all, for various reasons. The line of cases support the following principles:

(a) actual notice at the time of service on a company is not necessary and a document may be "served" although it is not personally served and requirements for service may be fulfilled by posting a document to the person required to be served (Capper v Thorpe (1998) 194 CLR 342);

(b) where modern forms of communication are used and equipment is kept available for the receipt of messages, then service by that medium is sufficient even though the document may arrive outside normal business hours (NV Stoom Maats de Maas v Nippon Yusen Kaisha (The Pendrecht) [1980] 2 Lloyd's Rep 56 and NM Superannuation Pty Limited v Hughes & Ors (1992) 10 ACLC 477); and

(c) if a notice arrives at the address of a person to be notified, at such a time and by such a means of communication that it would in the normal course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his employees to act in a normal businesslike manner in respect of becoming aware of the communication so as to postpone the effective time of the notice until it in fact comes to his attention (Megaw LJ in Tenax Steamship Co Limited v The Brimnes (Owners) [1975] 1 QB 929).

Santow J found that the Notice to Exercise the Option under the lease was effectively served on the lessor company as the authorities supported the proposition that:

(a) a document sent by post to a company which, it can be inferred, has been received by that company, or should have been if the ordinary course of business was followed, is therefore served for the purposes of the common law; and

(b) actual notice by the relevant officer is not necessary if it is accepted that the notice exercising the option was delivered to the office of the company and should ordinarily have come to the attention of the relevant officer.

His Honour distinguished a case in which the court refused to sanction constructive notice by service on the basis that the case examined only receipt as a reference point for determining service and did not take into account the expected time at which notice might in the ordinary course of business come to the attention of the company's officer.

Santow J cited the decision of Young J in Lollypops (Harbourside) Pty Limited v Werncog Pty Limited (1998) 9 BPR 16,361 which also involved the exercise of an option to renew a lease conveyed to the landlord. In that decision, Young J held that in the case of a company, communication of acceptance is satisfied when the relevant letter is opened "in the ordinary course of business or would have been so opened if the ordinary course were followed".

(F) REINSTATEMENT OF DEREGISTERED COMPANY TO ALLOW EMPLOYEE TO CLAIM FOR PERSONAL INJURIES - SECTIONS 601AH AND 601AG OF THE CORPORATIONS ACT 2001 CONSIDERED
(By James O'Connell, [Phillips Fox](http://www.phillipsfox.com))

Krstevska v ACN 010 505 012 Pty Ltd [2001] NSWSC 1093, Supreme Court of New South Wales, Campbell J, 21 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/november/2001nswsc1093.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The applicant commenced proceedings in the NSW District Court against Menzies Business Services Pty Ltd in relation to personal injuries she claims to have been suffered while working as a cleaner at Waterloo Public School between January 1994 and August 1999.

Subsequently, it was discovered two other companies, City Services Pty Ltd and ACN 010 505 102 Pty Ltd, had also employed the applicant during that period. The applicant named the two companies as respondents in a Notice of Motion in the District Court, seeking leave to join those companies as defendants and an extension of time in which to sue.

City Services Pty Ltd had been deregistered. On 18 October 2001 the Supreme Court had ordered that company's registration to be reinstated and granted leave to the applicant to commence and continue proceedings in the District Court against it.

(2) The application

This application was started on 19 November 2001. ACN 020 505 102 Pty Ltd was placed in members voluntary winding up on 13 June 2001 and was deregistered under section 509 of the Corporations Act on 29 September 2001.

The applicant applied for orders:

(a) reinstating ACN 010 505 102 Pty Ltd (formerly Berkley Challenge Australia Pty Limited) under section 601AH of the Corporations Act 2001, and

(b) if that was done, for leave to sue the company.

The Notice of Motion to join ACN 020 505 102 Pty Ltd and City Services Pty Ltd to the District Court proceeding was to be heard on 22 or 23 November 2001. Further, the applicant's solicitors submitted evidence that imminent legislative changes regarding workers' compensation would affect the rights of employees in the applicant's position. Consequently, the Court allowed the applicant to serve short notice of this application and heard it as a matter of urgency.

Under section 601AH the Court has to be satisfied that the applicant is a 'person aggrieved by the deregistration' and that 'it is just that the company's registration be reinstated.'
In relation to standing, the Court held that the test is satisfied 'if an applicant's legal rights have been affected by the deregistration and if it has a genuine grievance that the dissolution has affected its interests'. The Court held this test was satisfied as the entity the applicant wished to sue had gone out of existence.

In relation to whether it is just that the company's registration be reinstated, the Court determined that it was required to consider 'what will happen if the company stays deregistered, and what… will happen if it comes out of deregistration'.

The Court held that as the company was in liquidation immediately before deregistration, reinstating it would place it in liquidation again. Consequently, the directors would retake their offices, but have no power under section 601AHH(5). The liquidator was identified and could resume the position. The liquidator was unlikely to be required to carry out any functions as a result of the re-appointment, although he may have to complete the formal steps of concluding the company's affairs again depending on the result of the litigation. There was no risk that reinstatement could lead to the company trading while insolvent. Further, refusal to reinstate the company would prevent the applicant from litigating 'in circumstances where any liability of the company is covered by a policy of insurance.' The Court held that 'if there are any considerations which make it unfair for insurers to have to litigate an old claim those considerations are more properly ones to be taken into account in the District Court …not in this application'.

The Court held that it was not necessary for it to determine whether the application should have been brought under section 601AG of the Corporations Act 2001, which allows action against the insurer of a deregistered company. The Court remarked that that section may be more appropriate where, among other things, deregistration would result in a company being revived 'for all purposes, not just for the purposes of bringing the litigation'.

Campbell J therefore ordered, subject to an undertaking by the applicant's solicitor to advise ASIC when the plaintiff's litigation against the company was finished:

(a) the Australian Securities and Investment Commission reinstate the registration of company ACN 101 505 012 Pty Ltd, and

(b) that leave be granted to the applicant to commence and continue nunc pro tunc proceedings against ACN 101 505 012 for damages in relation to injuries alleged to have occurred in the course of her employment at the company.

(G) MANAGED INVESTMENT SCHEMES, CHANGE OF 'RESPONSIBLE ENTITY', REGISTRATION OF CHARGES
(By Sean Tully, [Phillips Fox](http://www.phillipsfox.com))

Investa Properties [2001] NSWSC 1089, Supreme Court of New South Wales, Barrett J, 28 November 2001

This full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/november/2001nswsc1089.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

In 1977, the Investa Property Trust ('the Trust') was formed as a property trust according to the traditional unit trust model.

In 1994, Permanent granted a charge over all the present and future assets of the Trust to Perpetual Trustees Australia Ltd ('Perpetual'). Permanent registered the charge in accordance with Chapter 2K of the Corporations Law as then in force.

On 1 July 1998, changes to the Corporations Law effected by the Managed Investments Act 1998 (Cth) commenced.

On 16 August 1999, the Trust obtained registration as a registered managed investment scheme. As part of that process, the then management company, Westpac Property Funds Management Limited ('Westpac'), became the 'responsible entity' of the Trust and the former trustee, Permanent Nominees (Aust) Limited ('Permanent'), ceased to play any role.

No steps were taken under Chapter 2K in relation to the charge until more than a year later when Westpac lodged a Form 309 'Notification of Details of a Charge'.

Form 309 is a form designed to be used either where a company creates a charge (lodgement required under Section 263) or where a company acquires a property which is already subject to a charge (lodgement required under Section 264). It contains, as alternatives, a space for the date of the creation of the charge and a space for the date the property was acquired. The Form 309 lodged by Westpac contained the date '16/08/1999' in the space for 'Date charge was created'. The form represented that the charge to which the form related was a newly created charge (ie a charge other than the one created in 1994) and failed to show that it related to the acquisition of property subject to a charge.

On 30 November 2000, Investa Properties Ltd ('Investa') replaced Westpac as responsible entity of the Trust. Investa came, by operation of Section 601FC(2), to hold scheme property on trust. On this occasion, no action at all was taken to make any lodgement under Section 264 of the Corporations Law.

(2) The application

Investa and Westpac sought:

(a) An order under Section 266(4) of the Corporations Act that the time for lodgement of the Form 309 in fact lodged on 11 September 2000 be extended to 12 September 2000;

(b) An order under Section 266(4) of the Corporations Act that the time for lodging of a notice in consequence of Investa having acquired property subject to a charge be extended to a suitable time after the order is made;

(c) An order under Section 274 of the Corporations Act that the Australian Register of Company Charges in relation to the relevant charge be rectified by changing 'Date Created' from '16 August 1999' to '21 September 1994' and by recording '16 August 1999' as the 'Date property was acquired'; and

(d) Orders pursuant to Section 85 of the Trustee Act 1925 relieving Westpac and Investa respectively from personal liability for any breach of trust arising from the failure to lodge the relevant notice under Section 264 of the Corporations Law within the time required by that section.

(3) The decision

(a) Did the incoming entity acquire a property subject to the charge as referred to in section 264(1) as a result of sections 601FS and 601FT when coupled with section 601FC(2)?

This issue had to be determined in relation to (a) Westpac when it became the responsible entity on 16 August 1998; and (b) Investa when it became the responsible entity on 30 November 2000.

The Court noted that sections 601FS(1) and 601FT(1) appear intended to cause the incoming responsible entity to 'step into the shoes' of its predecessor. However, they 'do not seem to effect a form of statutory vesting or assignment of property generally… except, perhaps, to the extent that the subject matter of the charge is a species of property which clearly involves no more than "rights".' Even then the Court considered the phrase 'in relation to the scheme' to raise some doubt about such a vesting or assignment being effected.

In this case, the Court considered the doubtful effect of sections 601FS(1) and 601FT(1) of vesting to be overshadowed by section 601FC(2) which declares unequivocally that the responsible entity 'holds scheme property on trust for scheme members'. The definition of 'scheme property' for this purpose is contained in Section 9. The Court held that it 'operates upon and in relation to pre-existing money and property at the point at which a particular scheme becomes a registered managed investment scheme'. Consequently, when Westpac and Investa respectively attained the status of responsible entity, the scheme property vested in each of them at the relevant time on trust. The Court held that as Westpac and Investa hold the property on trust on 16 August 1998 and 30 November 2000 respectively, they each acquired property.

(b) Was the property acquired 'subject to a charge'?

The Court held that as and when Westpac became the responsible entity Westpac commenced to hold as trustee all the then existing money and property Permanent had held and which fitted within the definition of 'scheme property'. That property was subject to the charge created in 1994 at the time Westpac came to hold it. Under section 601FT(1), references to Permanent as mortgagor in the charge became references to Westpac, while section 601FS(1) caused Westpac to assume all of Permanent's obligations and liabilities under the charge. 'It may be that these obligations and liabilities included those arising from or in relation to the charge, although again the words "in relation to the scheme" are the product of some doubt about this.' When Investa succeeded Westpac as responsible entity in 2000, sections 601FC(1), 601FC(2) and 601FT(1) had the same effect in relation to it.

Consequently, the Court held that each incoming responsible entity was required to comply with section 264(1) within 45 days after becoming the responsible entity and each of them failed to do so.

(c) Section 266(4) - relief for failure to register the charges within the time required by section 264(1)

Under section 266(4), if the Court is satisfied that the failure to lodge a notice in respect of a charge, or in respect of a variation in the terms of a charge…was accidental or due to inadvertence or some other sufficient cause [the Court]… may… by order extend the period for such further period as is specified in the order'.

The solicitor who acted for Westpac in relation to the Trust, Mr Robertson, advised Westpac in writing of the requirement to lodge a Form 309 with ASIC in respect of the charge. The Court inferred that Westpac relied on Mr Robertson to complete the lodgement. Mr Robertson deposed that lodgement of the Form 309 was overlooked by him at the time Westpac became the responsible entity. It was only when subsequent instructions were received from Westpac to review the stamp duty paid on all securities given by it that the omission was identified. The evidence was that the Form 309 was lodged in accordance with ASIC's view as to when the charge should have been registered.

Mr Robertson deposed that his firm was instructed by both Westpac and Investa to act generally on the change of responsible entity in 2000 and to take all necessary steps. He also deposed that the need to comply with Section 264 on that occasion was overlooked by him, as it had been on the earlier occasion.

Following Rynmarc Pty Ltd v Classic Ergonomic Chairs Pty Ltd (1994) 12 ACLC 1038 and Hamilton v Property Investments Pty Ltd [1983] WAR 317, the Court found the failure to act resulted from forgetfulness or oversight and must be regarded as 'due to inadvertence'. His Honour stated that it was probably also 'accidental'.

(d) The court's discretion

His Honour followed the decision of Wheeler J in the Supreme Court of Western Australia in Morris v Woodings (1997) 25 ACSR 636 and held the discretion should be approached against the background of the statutory scheme in which it appears 'which is concerned with protection of those who deal with companies by, inter alia, the provision of adequate notice of charges'.

As there was 'no hint of any possibility of winding up or administration and it is shown that there exists no other chargee occupying a position actually or potentially adversely affected by the system of priorities under Part 2K.3,' the Court concluded that lodgement outside the 45 days here would not disturb or affect accrued or accruing rights.

(e) Rectification of the register

The Plaintiffs sought to obtain an order under Section 274 for rectification of the Australian Register of Company Charges. The Court held that as the Form 309 had been deliberately prepared in the form it was lodged on behalf of Westpac, the case was not one of 'accident or inadvertence', but was 'an error in understanding the operation of the statutory provisions'. This constituted 'some other sufficient cause' for the purposes of section 274. The Court found no prejudice would be suffered by correcting the register. Consequently, it made the desired order.

(f) Relief under the Trustee Act

Both Westpac and Investa sought relief from personal liability under Section 85 of the Trustee Act for any breach of trust arising from failure to lodge notice under Section 264 within the required time. Section 85(2) states that such relief may not be given unless it appears that the trustee has acted honestly and reasonably and ought fairly to be excused.

His Honour first considered whether the Trustee Act applied to responsible entities of registered managed investment schemes. He held that as scheme property is held on trust by the responsible entity, the entity is a 'trustee' for the purposes of the Trustee Act.

His Honour found that Westpac and Investa had each relied on guidance from solicitors and 'acted honestly reasonably and ought fairly be excused from any breach of trust'.

5. CORPORATE LAW TEACHERS CONFERENCE

The corporate law teachers annual conference will be held in Melbourne on 10-12 February 2002. The conference is jointly hosted by the Corporate Law Teachers Association and Monash University's Centre for Law in the Digital Economy. The theme for the conference is corporations and financial regulation in the digital economy. International speakers include Professor Donald Langevoort of Georgetown University Law School, Professor Caroline Bradley of the University of Miami Law School and Professor Mary Condon of Osgoode Hall Law School. The conference will be held at the Monash Conference Centre, Level 7, 30 Collins Street, Melbourne. The conference website is: <http://www.law.monash.edu.au/clyde/cltaconf/index.html>.

The conference website includes details of all speakers and their topics as well as a registration form.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

E Boros, 'Corporations Online' (2001) 19 Company and Securities Law Journal 492

This article examines the impact of the cyber revolution on the way corporations are communicating with investors. The first part of the article looks at whether the legal framework is accommodating the demands of electronic modes of communication in terms of providing companies with an optimal balance between flexibility and certainty, and investors with sufficient protection. It argues that an inflexible approach of medium and technology neutrality and a regulatory approach that relies solely on legislation may not achieve these aims. The second part looks at whether the promise of information equality for all investors is capable of being realised and includes a survey of the investor-relations information available on the websites of the top 100 issuers. It argues that although the Internet has made much more information accessible to retail investors than ever before, time, cost and skill levels still create barriers to information equality. It also suggests that while issuer websites have a valuable role to play in this process, they may not be the ideal vehicle through which to secure universal real-time free access to continuous disclosure information.

R Simmonds, 'Why Must We Meet? Thinking About Why Shareholders' Meetings Are Required' (2001) 19 Company and Securities Law Journal 506

This article explores issues raised by but not discussed in CASAC's Shareholder Participation in the Modern Listed Company, Final Report, June 2000. The Final Report is a valuable stocktake of issues in relation to the role of shareholder meetings in listed companies, but nowhere addresses explicitly the issues of why shareholder participation might be important, and, if it is, why the shareholder meeting is an appropriate form of such participation and why annual ones should be mandated. An analysis of those issues permits a better discussion of the issue of the welcome that corporate law should, or should not, accord to the possibility of virtual company meetings.

J Segal, 'Managing the Transition to the CyberWorld' (2001) 19 Company and Securities Law Journal 519

Regulators of financial services face many challenges in the online world. They must build a framework in which e-commerce can be used to its full potential, while consumers remain properly protected. They must also manage the transition from the paper mode of doing business to the electronic one. The regulator's role is to facilitate the transition successfully. Written by ASIC Commissioner Jillian Segal, this piece describes and analyses the policy responses of ASIC to the online provision of financial services.

Dimity Kingsford-Smith, 'Decentred Regulation in Online Investment' (2001) 19 Company and Securities Law Journal 532

The spread of the Internet has seen the dramatic extension of investment technology from the institutional to the retail investor markets. The Internet certainly provides access to cheap, easy investment services, but its extension to retail investors poses difficult policy and enforcement problems for regulators. Much financial services regulation operates through the obligations it places on market intermediaries, especially advisors. This piece argues that investment technology, by reducing the influence of intermediaries, makes traditional "command & control" regulation less effective for retail investment online. Instead regulators are looking to more "decentred" regulatory techniques: codes of conduct, self-regulatory techniques, voluntary disclosure, investor education and even standard setting by the market. These approaches are described in their application to online investment and analysed for their more enduring impact on the nature and effect of financial regulation.

Securities Regulation Law Journal, Vol 29 No 3, Fall 2001. Articles include:

- The Same Old Wine in a Brand New Bottle: Applying Traditional Market Manipulation Principles to Internet Stock Scams
- The Wharf (Holdings) Ltd v United International Holdings Inc: The Supreme Court Breaks New Ground
- The PSLRA and Obtaining Early Proof of Claims Information in Securities Class Actions
- The Fundamentals of Rule 10b5-1: A Practical Guide to Understanding the New SEC Rule that Permits Corporate Insiders to Buy and Sell Securities Pursuant to Prearranged Trading Plans
- The Commodity Futures Modernisation Act of 2000

M Vereecken, 'Electronic Money: EU Legislative Framework" (2000) 11 European Business Law Review 417

C Paulus, 'A Theoretical Approach to Cooperation in Transnational Insolvencies: A European Perspective' (2000) 11 European Business Law Review 435

V Ramraj, 'Disentangling Corporate Criminal Liability and Individual Rights' (2001) 45 Criminal Law Quarterly 29

D Nishimura, 'The Companies' Creditors Arrangement Act and the Petroleum Industry: The Blue Range Resource Corporation Proceedings' (2001) Vol 39 No 1 Alberta Law Review

C Parker, 'UK Capital Instruments' (2001) Vol 16 No 7 Journal of International Banking Law

Review of Central and East European Law, Vol 27 No 1 2001. Special Issue on Company Law Reform in Central and Eastern Europe. Articles include:

- Perspectives on Company Law Reform in Central and Eastern Europe: An Introduction
- Starting from Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transition Economies
- Macedonian Company Law in the Light of Comparative Law Experience
- Minority Shareholder Rights in the Current Macedonian Legislation
- Duties of Company Directors - The Developing Law in Macedonia
- The Theory and Practice of Corporate Governance in Russia
- Corporate Governance Revisited: Can the Stakeholder Paradigm Provide a Way Out of "Vulture" Capitalism in Eastern Europe?
- The Reality of Models: Reflections on the CIS Model Law on the Limited Liability Company
- Recommended Legislative Act of the Commonwealth of Independent States on Limited Liability Companies

R Mokal, 'The Authentic Consent Model: Contractarianism, Creditors' Bargain, and Corporate Liquidation' (2001) 21 Legal Studies 400

'How Rule 10b5-1 Can Help Stock Trading', International Financial Law Review, June 2001, 21

The Business Lawyer, Vol 56 No 4, August 2001. Articles include:

- Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law
- Second Generation Shareholder Bylaws: Post-Quickturn Alternatives
- The Fiduciary Duties of Institutional Investors in Securities Litigation
- Trying to Hear the Whistle Blowing: The Widely Misunderstood 'Illegal Act' Reporting Requirements of Exchange Act Section 10A
- Online Broker-Dealers: Conducting Compliance Reviews in Cyberspace
- Extra Jurisdictional Practice by Lawyers
- Changes in the Model Business Corporation Act - Proposed Amendments Relating to Domestications and Conversions

L Liu, 'Chinese Characteristics Compared: Corporate Finance and Governance in Taiwan and China' (2001) Vol 4 No 3 Corporate Governance International 4

G McDonough and R Frazier, 'Auditing Customer Value: The Emerging Governance Responsibility' (2001) Vol 4 No 3 Corporate Governance International 23

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