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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) FINANCIAL SERVICES REFORM BILL THROUGH SENATE

On 23 August 2001 the Financial Services Reform Bill was passed by the Senate.

The Bill proposes three key reforms:

(1) A harmonised licensing, disclosure and conduct framework for all financial service providers.

(2) A consistent and comparable framework for financial product disclosure.

(3) A streamlined regulatory regime for financial markets and clearing and settlement facilities.

The commencement is proposed to be 1 October 2001.

The Government has established an Implementation Consultative Committee to review the regulations relating to the Bill and provide advice to the Government relating to implementation. Further information about the Committee is available at <http://www.treasurer.gov.au/fsr/pressreleases/2001/058.asp>.

The regulations which have been released by Treasury are available at <http://www.treasury.gov.au> and click on "What's New".

(B) CENTRE FOR CORPORATE LAW 6 MONTH REPORT

The Centre for Corporate Law and Securities Regulation has published its report of activities for the first 6 months of this year. The report provides details of the current research activities of Centre members, the conferences and seminars the Centre has held or been involved in organising, and other matters. The report is available on the Centre's website at:

<http://cclsr.law.unimelb.edu.au/annual-report/index.html>.

(C) BUSINESS GUIDE TO WINNING GREEN INVESTORS

On 13 August 2001 the Federal Environment Minister, Senator the Honourable Robert Hill, announced the release of a new business guide to socially responsible investment.

The guide is titled "A Capital Idea - Realising Value from Environmental and Social Performance". It discusses ways to profit from socially responsible investment at the same time as saving money from sustainable practices, improving community standing and shareholder returns, and attracting new customers. "The amount invested in superannuation funds is now exceeding $497 billion and growing at nine per cent a year. Right across the board, Australia is experiencing rising share ownership. At the same time, investors are increasingly demanding information about the social and environmental performance of the companies they are supporting," Senator Hill said. "This rising interest in socially responsible investment reflects a trend world wide - this kind of investment already accounts for around $US2.16 trillion dollars in the United States and $A7.2 billion in the United Kingdom. As time goes by, the importance of environmental issues and the opportunities and risks associated with them means that all funds will take account of them."

The guide explains measures companies can take to improve their-environmental and social performance, such as environmental management systems, public environmental reporting, codes of practice, greater accountability and better consultation with stakeholders and the community. Copies of the guide are available at:

<http://www.ea.gov.au/industry/sustainable/finance/publications.html> or by calling Environment Australia's Community Information Unit on 1800 803 772.

(D) REVIEW OF MANAGED INVESTMENTS LEGISLATION

On 6 August 2001 the Minister for Financial Services & Regulation, the Hon Joe Hockey, announced the Terms of Reference for the review of the Managed Investments Act 1998, which is to be conducted by Mr Malcolm Turnbull.

Section 3 of the Managed Investments Act 1998 (the Act) requires that a review of the Act be undertaken as soon as possible after the third anniversary of its commencement.  
  
Mr Turnbull will review the effectiveness of the arrangements for the regulation of managed investments introduced by the Act, contained in Chapter 5C of the Corporations Act 2001, to determine whether:

(1) the arrangements have delivered benefits in terms of:

- better protection of investors' investments;  
- greater certainty as to the responsibilities, obligations and liability of scheme operators (known as `responsible entities' under the legislation);  
- the rights of investors in managed investment schemes; and  
- reducing the costs of investing in managed investment schemes.

(2) the arrangements have strengthened compliance practices, procedures and awareness amongst responsible entities and others involved in the managed investments industry;

(3) the arrangements cater for the diversity of managed investments, including consideration of the way in which the legislation is administered by the Australian Securities and Investments Commission; and

(4) refinements could be made (whether requiring legislative amendment or not) to enable the arrangements to operate more efficiently and effectively, while not unnecessarily detracting from the protection afforded to investors.

Mr Turnbull is expected to complete a written report by 3 December 2001. Submissions should be addressed to:

Managed Investments Act Review  
C/- Financial Markets Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Submissions may also be faxed to the Review on (02) 6263 2882, or submitted by email to miareview@treasury.gov.au.

(E) FOREIGN INVESTMENT APPROVAL OF BRAMBLES INDUSTRIES LIMITED-GKN PLC MERGER

The Treasurer, the Hon Peter Costello MP, under the Foreign Acquisitions and Takeovers Act 1975 (the Act), has approved arrangements for Brambles Industries Limited (Brambles) and GKN plc (GKN) to merge their support services businesses into a Dual Listed Company structure (DLC).

The merger will create a leading global support services group to be known as Brambles Industries.

The approval is conditional upon the observance of a number of undertakings that have been provided by Brambles.

Brambles and GKN are already joint venturers in a number of industrial services businesses around the world. Each also conducts separate industrial services businesses. GKN also conducts a number of unrelated automotive, engineering and aerospace businesses.

Before establishing the DLC, GKN will, via a new holding company, undertake a de-merger of its support services activities into Brambles Industries Plc (Brambles UK), to be listed on the London Stock Exchange.

Following the de-merger, Brambles (UK) will combine with Brambles through the creation of the DLC. Under the DLC structure, Brambles and Brambles UK will operate as if they are a single economic enterprise (with a single management and Board of Directors) while remaining separate legal entities.

This decision will ensure the Brambles Group continues a strong Australian focus with its headquarters located in Australia.

Brambles' undertakings, observance of which is a condition under Section 25(1A) of the Foreign Acquisitions and Takeovers Act 1975, are:

(1) That Brambles Industries Limited remains an Australian resident company, incorporated under the Corporations Act and listed on the Australian Stock Exchange under the name "Brambles Industries Limited";

(2) The headquarters of Brambles Industries Limited and the global headquarters of the Dual Listed Group are to be in Australia and publicly acknowledged as being in Australia in significant public announcements and in all public documents (as that term is defined in section 88A(l)(s) of the Corporations Act). The "global headquarters" of the Dual Listed Group will be taken to be in Australia if, and only if, both the Chief Executive Officer and the Chief Financial Officer of the Dual Listed Group (ie Brambles Industries Limited and Brambles Industries plc) are based in Australia and have their principal offices and key supporting functions in Australia. In addition, the centre of administrative and practical management of Brambles Industries Limited must be in Australia and Brambles Industries Limited's corporate head office activities, of the kind presently carried on in Australia, must continue to be carried on in Australia;

(3) That both the Chief Executive Officer and Chief Financial Officer of the Dual Listed Group have their principal place of residence in Australia;

(4) The Board of Directors of Brambles Industries Limited is elected in accordance with the procedures in the proposal or in accordance with procedures approved by the Treasurer; and

(5) That if Brambles Industries Limited wishes to act differently to these conditions, it seeks and obtains the prior approval of the Treasurer.

(F) SENATE SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES RELEASES ITS FIRST REPORT

On 20 August 2001 the Senate Select Committee on Superannuation and Financial Services released its Report on Prudential Supervision and Consumer Protection for Superannuation, Banking and Financial Services. The Committee's recommendations are:

(1) Regulatory framework

Recommendation 1

The Committee recommends that the regulators, especially the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission, work together to develop a coordinated strategy to improve awareness in the community about their respective roles and responsibilities.

Recommendation 2

The Committee recommends that an Office of Regulatory and Consumer Affairs be established within APRA to act as a first point of call for consumers and others unsure of which regulator to approach regarding a particular issue.

Recommendation 3

The Committee recommends that ASIC and APRA establish an employee industry secondment scheme to provide opportunities for staff to gain practical experience in the financial services industry.

(2) Prudential supervision - trustees of superannuation funds

Recommendation 4

The Committee recommends that APRA take steps to improve its performance in its oversight of trustees - whether they are trustees of small, medium or large funds - in particular by ensuring that trustees abide by the standards required to protect the best interests of fund members.

Recommendation 5

The Committee recommends that:

- APRA act more quickly when matters come to its attention, and that APRA deals with those matters within its jurisdiction rather than passing them on to another regulator; and  
- APRA and ASIC work more closely together to ensure a timely and effective response when matters come to their attention.

Recommendation 6

The Committee recommends that APRA work more closely with superannuation funds, the Australian Institute of Superannuation Trustees and others to ensure that an appropriate level of education and training is provided to trustees, including a mandatory minimum level of training prior to service.

Recommendation 7

The Committee recommends that APRA work more closely with the Australian Institute of Criminology to examine the best methods of crime prevention in superannuation funds administration.

Recommendation 8

The Committee recommends that, in relation to annual reports to fund members, the minimum information requirement be expanded to include identification of:

- any payments to trustees from the fund, broken down into directors' fees and other payments; and  
- all significant administration fees, charges and commissions paid to both fund and investment managers.

Recommendation 9

The Committee recommends that:

- a trustee, fund manager or administrator who has been convicted of fraud should not practice again in the business of superannuation until certain conditions are met. These conditions might include not practicing for a period of at least 15 years, and then proving to APRA's satisfaction that they are a fit and proper person; and  
- APRA maintain a listing of trustees, fund managers and administrators of superannuation funds which have been defrauded, regardless of whether they are regulated or not.

Recommendation 10

The Committee recommends that:

- the Minister act expediently and efficiently in making a decision under the SIS Act to grant financial assistance to a fund that has suffered as a result of fraud or theft, to minimise the hardship that superannuation fund members could otherwise potentially suffer; and  
- the provisions for financial assistance to funds under Part 23 of the SIS Act be extended to include an appropriate range of pension and retirement annuity  
products.

(3) Prudential supervision - operational effectiveness of APRA

Recommendation 11

The Committee recommends that APRA review its approach to risk management to ensure that it has transparent procedures in place to detect early warning signals of impending institutional or fund failure or loss.

Recommendation 12

The Committee recommends that APRA increase the attention it gives to the prudential supervision of superannuation entities, especially those in the small to medium sized fund environment.

Recommendation 13

The Committee recommends that the Government review the resources allocated to APRA, to ensure that it is provided with the resources necessary to match its level of supervisory responsibilities.

(4) Consumer protection

Recommendation 14

The Committee recommends that the Government review the resources allocated to ASIC to ensure that it is provided with the resources necessary to enable it to perform effectively its broad and increasing range of regulatory functions.

(5) Regulatory issues - levies and standards of auditing

Recommendation 15

The Committee recommends that APRA review the rationale for determining the quantum of supervisory levies, in order to remove inequities and ensure that levy payments more closely match the level of supervision.

Recommendation 16

The Committee recommends that APRA work more closely with the Institute of Chartered Accountants in Australia to identify ways to improve adherence by auditors to professional and ethical standards and ensure genuine auditor independence.

(6) Superannuation regime

Recommendation 17

The Committee recommends that the Government review those aspects of the Superannuation Industry (Supervision) Act 1993 (the SIS Act) referred to in its report.

The report is available on the website of the Senate Select Committee on Superannuation and Financial Services at <http://www.aph.gov.au/senate/committee/superfinan_ctte/index.htm>.

(G) THE COMPANY LAW REVIEW STEERING GROUP RELEASES ITS FINAL REPORT ON MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY

The UK Company Law Review Steering Group has published its final report titled "Modern Company Law for a Competitive Economy".

The topics dealt with in the report are:

- small and private companies  
- improving governance: directors and shareholders  
- company reporting and audit  
- sanctions

The report is available at <http://www.dti.gov.uk/cld/final_report/prelims.pdf>.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC CLARIFIES ITS POLICY ON JOINT BIDS

On 20 August 2001 ASIC) clarified its policy on joint bids by parties who together have a holding of over 20 per cent of the voting power in a company.

The policy has been clarified as a result of discussions with representatives of three of the four joint bidders for Tourism Asset Holdings Limited ahead of their announcement of a joint bid for that company on 17 August 2001.

Chapter 6 of the Corporations Act 2001 limits the opportunities for two or more parties to agree to make a bid for a company in circumstances where they would collectively exceed the 20 per cent takeovers limit. ASIC will generally not take action or will provide modifications to facilitate joint bids where they comply with the following three major conditions.

(1) The bid must contain a non-waivable minimum acceptance condition of 50.1 per cent of target company shareholders who are not associated with the joint bidders. This is designed to ensure the bid proceeds only at a price that a majority of the target shareholders consider acceptable and will stop the joint bidders being able use a joint bid to take control at a lower than fair price.

(2) Where the joint bid is a cash bid, the bidders must agree to accept a rival higher bid, unless they match the rival bidder's price. Where the joint bid is a scrip bid, the bidders must agree to accept a rival scrip bid if it is higher and offers listed securities, unless they match the rival bidder's price. If a rival bid offers scrip or a combination of cash and scrip, ASIC will consider whether to require acceptance by joint bidders on a case-by-case basis, taking into account factors such as limited liquidity of particular scrip. These conditions are designed to ensure that joint bidders do not unnecessarily deter a potential rival bid and any ensuing auction for the target company.

(3) The bidders use their best endeavours to have the target engage an independent expert to prepare a report on the bid.

The joint bid for Tourism Asset Holdings Limited announced on 17 August 2001 is a cash bid and three of the four joint bidders have agreed to enter into an enforceable undertaking with ASIC giving effect to their agreement to accept a better rival cash bid.

For the purposes of the undertaking, a better bid is one that offers five per cent more than the announced bid. If a rival cash/scrip, or scrip only bid emerges, ASIC will consider the terms of the rival bid and may take action designed to ensure an auction for the target company is not deterred. "ASIC does not oppose joint bids as such, but does seek to ensure that they do not disadvantage target company shareholders by allowing the joint bidders to take advantage of the significant voting block that they create", said Richard Cockburn, ASIC's Director Corporate Finance. "We encourage parties to discuss such bids with us before announcing them to ensure that there are no regulatory issues which need to be resolved before the bid can proceed. Bids that do not comply with ASIC's policy may be referred to the Takeovers Panel, ASIC may take court action (such as in the case of the Yandal Gold bid for Great Central Mines Ltd), or ASIC may require an enforceable undertaking to be entered into by the parties", he said.

For further information contact:

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Director Corporate Finance  
ASIC  
Tel: (03) 9280 3201  
Mobile: 0411 549 034

(B) CONTINUOUS DISCLOSURE

On 13 August 2001 ASIC announced that in the last three months it had examined 18 new economy companies over their compliance with continuous disclosure provisions.

ASIC's actions led to nine companies releasing additional information to the ASX and another company, ISP Limited, appointing an administrator.

Of the nine companies that released additional information, seven did so after discussions with ASIC. They were CBD Online Ltd, ComOps Ltd, E-Com Multi Ltd, Insurance My Way Ltd, Iocom Ltd, MinTech 8 Ltd, and Techniche Ltd.

ASIC identified the 18 new economy companies from an analysis of quarterly cash flow statements to the ASX and other intelligence.

ASIC and ASX have agreed that the quarterly cash flow reporting requirements imposed by ASX should be continued until a company has demonstrated a positive cash flow for four quarters, given the continuing lack of compliance by many high tech companies with the continuous disclosure requirements.

ASIC has also undertaken surveillance activity to ensure compliance with continuous disclosure obligations by listed companies that are not new technology ones. One example was the announcement on 19 July 2001 by PMP Ltd, following discussions with ASIC, of a probable write down of between $400 and $420 million for its Australian and New Zealand publishing rights and titles.

(C) SOLICITORS' MORTGAGE SCHEME INVESTIGATION UPDATE

On 8 August 2001 ASIC provided an update on its national investigation into solicitors' mortgage schemes.

ASIC launched its investigation on 25 February 2001 because it was concerned about the high levels of default being reported by solicitors' mortgage schemes.

ASIC's investigation is focusing specifically on those solicitors' mortgage schemes that are in 'run-out' mode and are currently required to be brought to an end by 31 October 2001. The investigation has confirmed that over $370 million of 'run-out' loans are in default across Australia.

Solicitors' mortgage schemes that are in run-out mode are those that have not moved to the more stringent requirements of the Managed Investments Act. They are currently regulated by State law societies in New South Wales, Victoria, Queensland and Tasmania and the Finance Brokers Institute Inc in South Australian.

Since February ASIC has taken a number of actions, including:

- instigating a criminal action;  
- applying to wind up a number of mortgage schemes;  
- negotiating compensation for some investors;  
- requiring additional licence conditions for responsible entities; and  
- removing responsible entities from operating schemes.

Based on ASIC's initial findings, many of the solicitors' mortgage schemes have lacked the controls and disciplines that one would expect from prudent and professional lending institutions, Examples of this include:

- the acceptance of security valuations provided or commissioned by borrowers rather than lenders;  
- inadequate analysis of borrowers' repayment capacity (and in some cases the recurring financing of borrowers with poor credit histories); and  
- insufficient skills or resources available to the operator to properly manage defaulting loans.

ASIC is also reviewing the policy and regulatory settings for mortgage schemes in general. The initiatives will:

- focus on the need for truly independent valuations to underpin mortgage security values;  
- impose more specific lender conduct guidelines, particularly in respect of borrower's credit assessment;  
- introduce more specific disclosure and reporting requirements; and  
- query the public policy merits of permitting mortgage braking businesses to operate under the guise of a legal practice. There have been some cases where the firm has no external clients of substance and could not legitimately claim to be engaged in legal practice.

ASIC expects this review will be concluded in six months.

(D) 2000-2001 SURVEILLANCE OUTCOMES FOR RESPONSIBLE ENTITIES

On 1 August 2001 ASIC released the results of the surveillance undertaken of Responsible Entities (REs) between July 2000 and June 2001.

REs are licensed under the Managed Investment Act to look after investors' funds and manage the assets of the managed investment scheme.

The ASIC inspections revealed breaches or compliance failures in 69 of the 83 Res inspected. ASIC's subsequent remedial action included revoking dealers' licences, imposing additional licence conditions and modifying scheme compliance plans.

The 83 surveillances represent 19 per cent of the Managed Investment industry operating as at 30 June 2001 and, while generalised conclusions about the whole industry cannot be drawn from these findings, they were reasonably consistent across both industry sector and size.

ASIC found that some REs had inadequate compliance monitoring and reporting systems that, in some cases, led to breaches of the law by the RE.

For further information contact:

Darren McShane  
Director  
Managed Investments National Team  
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3. RECENT ASX DEVELOPMENTS

(A) ASX TO END QUARTER TRADING CHANGES

The Australian Stock Exchange Limited (ASX) and SFE Corporation Limited (SFE) have acted to reduce the risk of a recurrence of the events surrounding end of quarter trading on ASX and its effects on trading in index futures contracts on SFE on 29 June 2001.

On 29 June 2001 the Standard & Poors ASX 200 index increased 45.4 points between 4.00 pm and 4.15 pm to close at 3490.3, following trading during the Closing Single Price Auction (CSPA) on ASX. Due to the linkage between the final settlement price of the SFE SPI Index 200 Contract and the closing prices on ASX at quarter end, this trading also had consequential effects on the pricing of SFE's index futures contracts expiring on that day.

ASX and SFE have now agreed with ASIC on a range of interim measures to limit the recurrence of an undesirable situation at the end of the September 2001 quarter. On 28 September 2001, ASX will temporarily suspend the Closing Single Price Auction and close the market on a random basis.

SFE will use the powers available to its Board to deal with anticipated undesirable situations by directing that the settlement price of its contracts will be determined using an average of prices of the underlying index every 30 seconds over the last 30 minutes of ASX trading. ASIC, ASX and SFE will continue to work together to conduct a full review of these measures and to ensure that longer-term mechanisms are put in place for the December and succeeding quarters.

ASIC's specific enquiries into the trading activity that took place on 29 June 2001 are continuing.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL SIGNS MOU WITH ASIC

On 20 August 2001 the Takeovers Panel announced that it had entered into a Memorandum of Understanding with the Australian Securities and Investments Commission (ASIC). The MOU is intended to continue the positive and cooperative working relationship that the Panel already has with ASIC, and to ensure that the market sees a smooth and seamless relationship between the two regulators.

The President of the Panel, Mr Simon McKeon, said that he was very pleased that the two regulators had formalised their already good working relationships. He said that the two regulators' complementary activities in the takeovers area made it essential, for market certainty and efficiency, that they work together harmoniously.

The MOU addresses such matters as the exchange of information between ASIC and the Panel where either of the agencies becomes aware of matters relevant to the other's operations, as well as the role ASIC plays in hearings before the Panel.

(B) PANEL RELEASES POLICY ON LOCK-UP DEVICES FOR COMMENT

On 2 August 2001 the Takeovers Panel advised that it had released its draft policy on Lock-Up devices for public comment. Comments are due by 14 September. Lock-up devices include Break Fees, No-Shop and No-Talk Agreements, and Pre-Emptive Rights.

The Panel's policy 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 will not 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 has said that its role is not to consider the legality or enforceability of break fees, but it won't intentionally facilitate a lock-up device that appears clearly invalid.

The Panel has taken account of a range of factors, including overseas experience and rules on break fees and other lock-up devices. It believes that it has developed a draft policy which suits the Australian market and jurisdiction.

The Panel has set a general limit of 1% of the bid value for break fees. It has said that 1% will be too high in the case of large bids and may be too low for some small bids. The elements that the Panel considers are acceptable in break fees are the reasonable third party costs paid out by a bidder (legal fees, funding costs); similar internal costs; and, in appropriate cases, opportunity costs of a bidder that are connected with the bid.

The Panel's policy on pre-emptive rights and on no-shop and no-talk agreements is also primarily based on the Panel's role as a market regulator concerned with fair and effective competition for control of companies in the interests of shareholders.

The Panel's President, Mr Simon McKeon, said that he was delighted with the excellent work that the Panel's subcommittee on the break fees policy had put into this project. He said "This policy is the first in a line of policies that the Panel will be publishing over time, that will provide forward guidance for the market. Break fees are an area where there is little or no specific guidance in Australian case law or policy. The Panel felt that the recent increase in the use of break fees in Australia meant the policy void needed filling quickly."

The policy is on the Panel's website at <http://www.takeovers.gov.au/Policy/policy.htm>.

(C) PANEL PUBLISHES REASONS FOR HOLDING OVER ALQ PROCEEDINGS

On 20 August 2001 the Takeovers Panel published its reasons for deciding to hold over its proceedings in relation to the application made by Liquorland on 12 July 2001, in relation to Liquorland's bid for Australian Liquor Group (ALQ).

Liquorland's bid for ALQ closed on 29 June 2001, and the first payments of the bid consideration were due to be made to ALQ shareholders on 18 July 2001.

In its application, Liquorland alleged that disclosure by ALQ of its financial performance had been inadequate during Liquorland's bid. Liquorland applied for an interim order restraining the payment by it of the bid consideration to all shareholders of ALQ. It also applied for a declaration of unacceptable circumstances and final orders. On 17 July, the Panel made interim orders directing Liquorland to pay into an interest bearing trust account the money owing to the ex-directors of ALQ and their associates for ALQ shares they sold into Liquorland's bid. The money, and accrued interest, was to be paid out in 14 days, unless otherwise ordered by a court. These orders were later modified and extended to apply for a period of 21 days. The Panel made no order concerning the payments to other ALQ shareholders.

In its reasons for making the interim orders, the Panel said that the court appeared to be a more appropriate forum to resolve Liquorland's allegations and to make orders for any compensation or damages. The Panel made it clear that it had made no decision on the merits of those allegations, which are yet to be tested. The Panel also invited the parties to make submissions on whether it would be in the public interest for the Panel to pursue its proceedings in this matter. Liquorland then initiated proceedings in the Supreme Court of Victoria, and the Court has since made consent orders further restraining payment of that money to the former ALQ directors and an associate. Following receipt of submissions from parties, the Panel has agreed to stand the matter over.

The Panel indicated to the parties that it would be prepared to accept further submissions if parties sought to revive the matter in the Panel (subject to the appropriate time limitations).

The reasons are available on the Panel's website at <http://www.takeovers.gov.au>.

(D) PANEL PUBLISHES REASONS IN RELATION TO ALPHA HEALTHCARE

On 1 August 2001 the Takeovers Panel published its reasons for its earlier decision to decline an application by Alpha Healthcare Ltd (Alpha) in relation to the takeover bid by Ramsay Centauri P/L (Ramsay) for all of the shares in Alpha.

The application was for a declaration of unacceptable circumstances and for orders unwinding a Pre-Bid Agreement dated 9 April 2001 (Pre-Bid Agreement) between Ramsay, Ramsay Healthcare Ltd (RHC), SHG Holdings Pty Limited (receiver and manager appointed) (SHG) and Sun Healthcare Group Australia P/L (receiver and manager appointed) (Sun Healthcare).

The Panel's reasons set out why it considered that:

- Ramsay's acquisition of the second parcel of 17% of Alpha shares did not take place other than under the takeover bid;  
- the Pre-Bid agreement did not adversely affect the market for control of Alpha; and  
- Ramsay's acquisitions from SHG and Sun Healthcare under the Pre-Bid Agreement (specifically of Alpha debts and the first 19.9% parcel of Alpha shares) did not show any transfer of value between the debt and equity components bought by Ramsay.

The reasons for its decision are available on its website at <http://www.takeovers.gov.au>.

5. RECENT CORPORATE LAW DECISIONS

(A) TAKEOVERS: FACTORS AFFECTING WHEN A DELAY IN GIVING NOTICE OF AN EXTENSION OF THE OFFER PERIOD TO OFFEREES UNDER CHAPTER 6 OF THE CORPORATIONS ACT WILL BE CURED OR EXCUSED  
(By Margery Clark, [Phillips Fox](http://www.phillipsfox.com))

Pinnacle VRB Ltd v Reliable Power Inc [2001] VSC 262, Supreme Court of Victoria, Mandie J, 30 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2001/july/2001vsc262.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) The facts

The plaintiff (Pinnacle) is a listed public company. The defendant (Reliable) is a company registered in Delaware in the United States of America.

On 22 January 2001, Reliable announced to the ASX that it intended to make an off market cash takeover bid for all ordinary shares in Pinnacle at no less than 55 cents per share conditional upon a minimum acceptance of 51 per cent.

On 5 March 2001, a Bidder's statement was lodged and on 20 March 2001 Reliable made a cash offer at 65 cents per share. Reliable's offer expired at 7.30pm on 22 May 2001. On or about 14 May 2001, Reliable extended the offer period until 7.30pm on 10 July 2001.

On 6 July 2001, Reliable lodged a notice of extension with ASIC purporting to extend the offer period a second time until 7.30 pm on 21 August 2001. Reliable gave a notice to Pinnacle on the same day however Reliable did not ensure that notices to all shareholders were dispatched before 10 July 2001. The notices to offerees were dispatched as follows:

- 400 notices were collected by Australia Post at 5pm on 10 July 2001 (before the deadline);  
- 1994 notices were collected by Australia Post at about 8pm on 10 July 2001 (after the deadline); and  
- 116 notices were posted on 11 July 2001.

(2) Orders sought

Pinnacle sought a declaration that Reliable's offer lapsed on 10 July 2001 and that Reliable failed to comply with sections 650C and 650D of the Corporations Law (now the Corporations Act).

Reliable denied its offer was invalid but, in the alternative, sought an extension of time or to have any invalidity cured or any contravention excused.

(3) The Corporations Law 2001 (the 'Law')- Sections 650A, 650C and 650D

Subsection 650A(1) of the Law provides that bidder "may only" vary the offers under an off-market bid in accordance with sections 650B, 650C or 650D.

Section 650C entitles a bidder making an off-market bid to extend the offer period at any time before the end of the offer period.

Subsection 650D(1)(c) requires that after the notice is lodged with ASIC a notice must be given to the target and to everyone to whom offers were made under the bid.

Subsection 650D(2) provides that notices which merely extend the offer period need not be sent to an offeree who has already accepted the offer if the bid is not subject to a defeating condition.

Mandie J held that these sections provide the sole method by which offers under an off-market bid may be varied, including extension of the offer period. Mandie J based this conclusion on the words "may only" in subsection 650A(1) and "the bidder must" in subsection 650D(1).

Pinnacle contended that the word 'give' in subsection 650D(1)(c) means 'serve' or 'place in the hands of the offerees'. However, Mandie J accepted the submission of ASIC (which appeared by its legal representative to argue this point only), that the construction to be preferred is that which promotes commercial certainty for participants in financial markets. Therefore, Mandie J held, dispatching or sending the notices before the offer lapsed was consistent with section 650D(1)(c); the time of receipt was not important.

Mandie J determined that Reliable had failed to validly extend the offer period because it had not sent (by prepaid post or by courier) notice to all offerees before the end of the offer period as required section 650C and section 650D(1).

(4) Sections 1325D and 1322

Section 1322(4) provides that a Court may declare, on the application of an interested person, that any act purporting to have been done under the Law is not invalid by reason of any contravention of a provision of the Law.

Section 1325D states that a document is not invalid merely because a person has contravened a provision of Chapter 6 and that a document will have effect at all times as if there had been no contravention provided that the Court is satisfied that the contravention ought to be excused in all of the circumstances.

Pinnacle contended that Reliable's failure to validly extend the offer period could not be cured, validated or excused because the words 'may only' in section 650A(1) evinced an intention to exclude those provisions from the operation of section 1325 and 1322.

Mandie J held that no such intention was evinced. On the contrary, he held that subsections 1325D(1) and (3) expressly provided that the Court may declare an act to be valid because a person has contravened a provision of Chapter 6. This clearly showed that Chapter 6 is not a self-contained regulatory regime as submitted by Pinnacle.

Mandie J held that the failure to give all the relevant notices to offerees prior to 7.30pm on 10 July 2001 was principally caused by the failure of Reliable's solicitors to expressly instruct Computershare that all of the notices had to be posted by the 7.30pm deadline. Instead, the instruction was given to mail out the notices on that day. The solicitors assumed, without expressly enquiring, that this would ensure that the deadline was met. Mandie J considered Reliable's non-compliance was "minor and unintentional".

Pinnacle submitted that no relief should be granted on several grounds, including the time and trouble caused to Pinnacle by Reliable's bid, the costs involved in dealing with Reliable's bid (including the various applications to the Takeovers and Securities Panel); and the small number of acceptances of the bid (about four to five percent).

Mandie J took these factors into account but found that they were essentially historical and collateral to the present question and to some extent bought about by Pinnacle's own conduct. Mandie J held that the prime consideration was the right of shareholders to choose whether to accept the Reliable's offer.

(5) Decision

Mandie J ordered that the time for extending the offer period and giving the notices be extended to midnight on 11 July 2001 on condition that:

- Reliable undertakes to pay to Pinnacle and ASIC their costs of this proceeding to be taxed on a party-party basis including reserved costs; and  
- Reliable lodges with the Prothonatory the sum of $30,000 as security for the costs of Pinnacle and $2000 for the costs of ASIC.

If the conditions are not met Pinnacle is granted liberty to apply for the declarations it seeks and any consequential relief, and for an order dismissing Reliable's interlocutory process.

(B) SUBSTANTIAL SHAREHOLDER AND FAILURE TO DISCLOSE RELEVANT INTEREST IN SHARES  
(By Colleen Carey, [Phillips Fox](http://www.phillipsfox.com))

ASIC v Merkin Investments Pty Ltd [2001] VSC 211, Supreme Court of Victoria, Mandie J, 25 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2001/july/2001vsc211.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case involved a breach of the disclosure obligations of a substantial shareholder under section 671B of the Corporations Law ('the Law') - now the Corporations Act. It also concerned a failure to comply with a direction from ASIC to disclose all relevant interests in shares, contrary to section 672B of the Law. As a result, the court considered the application of section 1325A, and the power of the court to make orders where a person fails to comply with the disclosure requirements under sections 671B and 672B of the Law.

(1) The facts

Merkin Investments Pty Ltd ('Merkin') was an 'international company' registered in the Republic of Vanuatu. Merkin's nominee or trustee, Rubicon Nominees Pty Ltd ('Rubicon'), held 1,219,599 shares in Bligh Ventures Ltd ('Bligh'), a listed public company, for Merkin. On 15 September 2000, Techniche Ltd announced a takeover of Bligh.

In response to a notice from ASIC under section 672A(1)(b) of the Law, Rubicon identified Merrill Lynch Canada Ltd ('Merrill Lynch') as having a relevant interest in the 680,000 of the shares in Bligh held by Rubicon. In response to another such notice from ASIC, Merrill Lynch named Merkin as having a relevant interest in the same 680,000 shares.

On 18 October 2000, ASIC sent a further notice to Merkin directing the 'international company' to disclose in accordance with subsections 672B(1) and (2) of the Law:

- full details of its relevant interest in the shares and the circumstances that gave rise to it;   
- the name and address of each other person who had a relevant interest in the shares; and  
- the name and address of each person who had given Merkin instructions in relation to the acquisition of the shares and details of those instructions.

Merkin replied that it was unable to provide the information requested as Merrill Lynch 'are refusing to acknowledge we purchased any shares in Bligh'.

ASIC demanded that Merkin provide the information, stating that the 680,000 voting shares constituted 9.43% of the issued share capital in Bligh and that section 671B of the Law required a person with a relevant interest in 5% or more of the voting shares of the company to submit a substantial shareholder notice. No such notice was lodged in relation to the 680,000 shares.

On 2 November 2000, the Court enjoined the defendants from disposing of the Bligh shares and then, on 10 November 2000, ordered Merkin to disclose to ASIC the section 672B(1) information. Merkin's solicitors stated that Merkin believed that it was the beneficial owner of the 680,000 Bligh shares and that, to its knowledge, no others had a relevant interest in the shares.

It was subsequently disclosed in an affidavit that Merkin had, prior to the date of the solicitors' letter, been informed by its shareholders, Teak Ltd ('Teak') and Pine Ltd ('Pine'), that they did not own beneficial title to the Merkin shares, but were unable to identify the entity or entities for whom they held legal title to the shares.

Mandie J noted that the inconsistency between the solicitors' response and that of Merkin's shareholders may have been due to the fact that Merkin, at the time of the solicitors' response, did not appreciate the width of the definition of relevant interest and had not conveyed its shareholders' information to its legal advisers.

In a later letter, Merkin's solicitors confirmed that Merkin asserted that it was the beneficial owner of the 680,000 Bligh shares. The letter also stated that Merkin had two shareholders, Pine and Teak, each of whom held 50% of the shares in Merkin and had a relevant interest in the Bligh shares. Again, it appeared that Merkin's solicitors had not been informed by Merkin that its shareholders did not hold beneficial title to their shares.

ASIC's investigations revealed that Pacific International Trust Company Ltd ('PITCO') held shares in Oak, a director of Merkin, and in Teak and Pine, Merkin's shareholders. PITCO was a large trust company in Vanuatu which incorporated companies and provided administration services after incorporation, including the allocation of:

- nominee shareholders;  
- directors; and  
- company secretaries.

ASIC submitted that PITCO controlled Merkin and had a relevant interest in the Bligh shares under sections 608(3)(b), (4) and (5) of the Law. Furthermore, ASIC contended that as Pine, a 50% shareholder in Merkin, was virtually a wholly-owned subsidiary of PITCO, PITCO controlled Merkin and had a relevant interest in the Bligh shares under sections 608(3)(a) and 610 of the Law. ASIC submitted that Teak and Pine owned their own shares in Merkin on behalf of a client of PITCO and that, as a result, it was likely that a client of PITCO had a relevant interest in the Bligh shares under section 609 of the Law.

An authorised officer of Oak, Mr Karae, responsible for the administration of Merkin, deposed that he believed that Teak and Pine held their shares in Merkin on behalf of another entity or entities whom Teak and Pine were prevented by Vanuatu law from making the disclosure. However, Karae deposed that Teak and Pine held their shares in Merkin as nominees or bare trustees for an undisclosed beneficiary or beneficiaries, and therefore, Teak and Pine did not have a relevant interest in Merkin's shares under section 609(2) of the Law.

Merkin lodged a notice with the ASX under section 671B as a substantial holder and beneficial owner of the shares in Bligh, registered in the name of Rubicon. The notice confirmed that Teak and Pine held their shares in Merkin as nominees or trustees for a third party or parties.

(2) Failure to disclose substantial shareholding under section 671B

Mandie J found that Merkin, a substantial shareholder in Bligh, contravened section 671B of the Law (section 709 prior to 12 March 2000). Merkin failed to give a written notice to Bligh in the form required within 2 business days after the day on which Merkin became aware of the relevant interest rendering it a substantial shareholder. Mandie J held that the contravention occurred in March 1994 when Merkin acquired a beneficial interest in 300,000 Bligh shares it had previously purchased for another entity. According to Mandie J, it is the awareness of the relevant interest or interests which activates the disclosure obligation under section 671B. It is not necessary that there be an awareness of the fact of the substantial shareholding itself for the obligation under section 671B to arise.

(3) Failure to comply with ASIC direction to disclose relevant interests under section 672B

Merkin contravened section 672B, by failing to comply with the section 672A(1) direction from ASIC to disclose information regarding its own relevant interest, and the relevant interest of any others, in the Bligh shares within 2 days of receiving the direction from ASIC.

Section 672B provides that the person required to make the disclosure need only disclose information regarding the relevant interest of others to the extent to which that information is known to them.

Mandie J found that Merkin was managed by PITCO in the course of its business of supplying and managing offshore companies on behalf of others. The directors, secretary and shareholders of Merkin were all companies controlled, and supplied, by PITCO. Mandie J found that, on the balance of probabilities, an unidentified person or persons existed who provided instructions concerning Merkin, directly or indirectly, to PITCO or to PITCO's relevant nominee companies. Merkin J found that the client may or may not have been known to the corporate directors and shareholders of Merkin and may or may not have been known to PITCO.

Merkin J held that as the client probably had the power to dispose of, or control the exercise of power to dispose of, the shares in Merkin held by Teak and Pine, under section 608(1)(c), the client had, through Teak and Pine, a relevant interest in the Bligh shares under section 608(3)(a). His Honour also found that the client probably had the capacity to determine the outcome of decisions regarding Merkin's financial and operating policies, and therefore controlled Merkin under sections 608(3) and (4) of the Law. As such, the unidentified client or clients had a relevant interest in the Bligh shares.

However, Mandie J held that knowledge held by the unknown client or clients was not knowledge shared by Merkin. In the absence of evidence of knowledge of the identity of the entity or entities having relevant interests in the shares, Mandie J found that such knowledge should not be attributed to Merkin. Therefore, Mandie J held that Merkin had not contravened section 672B of the Law, other than by failing to comply with the requirement to respond to the direction from ASIC within 2 business days.

(4) Orders under section 1325A

As a result of Merkin's breach of sections 671B and 672B, Mandie J was entitled to make orders under section 1325A(1) of the Law. Merkin sought to have its conduct excused under sections 1325A(3) and (4). Mandie J, however, refused to excuse Merkin's conduct.

In relation to Merkin's breach of section 671B, Mandie J stated that it was Merkin's responsibility as a purchaser of shares in an Australian listed company to comply with the obligation to disclose its substantial shareholding, and that Merkin failed to provide any satisfactory explanation for its failure to do so.

In relation to the contravention of section 672B, Merkin argued that its failure to comply with ASIC's direction within the required time was due to the uncertainty of its entitlement to the Bligh shares. Mandie J did not agree. Mandie J held that there was insufficient evidence to show that Merkin did not know of its beneficial interest in the Bligh shares to provide grounds for an excuse under section 1325D(4) of the Law, or to explain its delay in responding to ASIC's direction.

Mandie J held that, in addition to the direct circumstances of the breaches of Merkin's disclosure obligations, the fact that Merkin did not know the names of the entity or entities for whom it held the Bligh shares, and who therefore had a relevant interest in the shares, required the making of appropriate remedial orders. Mandie J held that section 1325A(1)(c) clearly indicates that ignorance of such matters may provide a basis for the making of appropriate remedial orders. Otherwise, the legislation could be ignored, and the objective of maintaining an informed market frustrated.

Therefore, Mandie J ordered that:

- the Bligh shares be vested in ASIC;  
- the shares then be sold by tender;  
- ASIC retain, out of the proceeds of the sale, the costs of the sale and the proceeding on an indemnity basis; and  
- all money remaining, after the costs of the sale and the proceeding have been deducted, be paid to Rubicon on behalf of Merkin.

(C) SECTION 588FF AND PROCEDURAL FAIRNESS IN COMPANY LAW CASES  
(By Annika Forss, [Blake Dawson Waldron](http://www.bdw.com.au))

Martin Russel Brown v DML Resources Pty Limited (in liq) [2001] NSWSC 590, New South Wales Supreme Court, Austin J, 17 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/july/2001nswsc590.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case discusses the ambit of the courts power under section 588FF of the Corporations Law (now the Corporations Act), and the situations in which the principles of procedural fairness are applied in company law proceedings.

Mr Brown and Mr Cumings, the plaintiffs, were the liquidators of the DML Companies. They sought an order granting a proposed litigation funding agreement under section 477(4B) of the Corporations Law, and an order extending the time within which proceedings to challenge transactions of the DML Companies as unfair and voidable preferences under section 588FF(3)(b) of the Corporations Law could be brought. Both of those orders were granted on an ex parte basis. Five creditors of the DML Companies, including BP Holdings and BP Australia, the applicants, were granted liberty to file and serve an application to set aside the orders within 28 days. The applicants were creditors from which the liquidators were trying to recover payments on the basis that they were voidable transactions. The applicants brought an application to the Court that the order in relation to section 588FF be set aside on the grounds that the Court did not have the power to make the order, that they were not given an opportunity to be heard, failure to establish a prima facie case, and delay.

(1) Absence of power to make the order under section 588FF

The order made under section 588FF(3) was not limited to a particular transaction or a particular creditor but rather extended the time limit for all voidable transactions in relation to the DML Companies. The applicants argued that the court did not have the power to made such a broad order under that section. Austin J dismissed the applicants' argument on the ground that it was an unduly restrictive interpretation of section 588FF(3). He dismissed the argument for a number of reasons.

First of all, he said that although section 588FF(1) refers to "a transaction" and section 588FF(3) refers to the transaction mentioned in (1), in his opinion, that reference to "a transaction" is only to illustrate how (1) and (3) are linked, and not to limit the application of that section to a particular transaction.

In addition, Austin J thought that the applicants' construction of the section would unnecessarily hamper the work of liquidators for no good reason. He stated that in some cases, the liquidator has far from completed his/her investigations at the expiration of the time limit to recover voidable preferences and it is impossible for him/her to even identify a particular transaction for which an extension for time could be applied. If the court was limited to only granting extensions in relation to specified transactions the consequence would be to defeat the interests of creditors.

Finally, Austin J thought that the applicants' construction of the section was contrary to the purpose of its enactment. According to section 109H of the Corporations Law, the preferred construction is that which promotes the purpose or object underlying the Law. In his view, the purpose of section 588FF was to protect the interests of creditors by allowing liquidators to pursue recoveries in respect of voidable transactions, where the court considers that proceedings for that purpose after the expiration of the time period are warranted.

Austin J acknowledged that it is undesirable to leave creditors in a state of uncertainty in relation to the validity of their transactions for an extended period but stated that, in some circumstances, it was necessary.

As a result, Austin J held that the court did have the power to make the order to extend the period of time under section 588FF(3).

(2) Failure to provide the applicants with an opportunity to be heard

The applicants argued that because the plaintiffs knew that prior to commencing proceedings that the applicants' interests would be adversely affected by the order, as a matter of procedural fairness, they should have at least being notified of the proceedings. The question to be determined was, whether the principle of procedural fairness entitles a person, who is affected by an order not directed at him, to insist on notice of the application before it is made.

Austin J discussed the general principles of procedural fairness, and in particular, the application of the principle of procedural fairness to company law cases. He stated the general approach of the courts that the principle of procedural fairness should be applied in company law cases unless there is a special reason for not doing so. However, he also stated that it is not the normal practice of the Court to require notification of applications under the Corporations Law to all such affected persons on every occasion.

In his opinion, the approach of Bryson J in Dahozo Pty Ltd v Oz-US Film Productions Pty Ltd (1997) 24 ACSR 739, should be used to distinguish between Corporations Law cases where notification should be given to affected persons, and cases where the case can proceed on an ex parte basis. On one extreme there are cases where the application is seeking relief against a particular person, and therefore they should not only be notified but be made the respondent. At the other extreme, the Corporations Law gives the Court a discretion whether to require notification, but there is no need to notify all affected parties because, for example it is too difficult to identify all affected parties or the effect on them is relatively insignificant. However, even in situations where it is not feasible to notify all affected parties there may be a small number who have a legitimate interest in the application or a legitimate expectation that they will be notified before the application is made.

Applying that approach to this case, Austin J thought that as the applicants, being creditors of the company, were exposed to the examination process of the liquidators (plaintiffs) they had a legitimate expectation that they would be notified. This does not mean that everyone who has a dealing with the company should be notified, but if they are specifically identified, as the applicants were, then they would have a legitimate expectation of being notified before an application for an extension of time is made. In this case, in Austin J's view the applicants were in a special position compared to the other creditors as they had a claim against them by the plaintiffs for a large sum and had been strenuously contesting that claim. In addition, the plaintiffs would have been aware that an order extending the period in which they could pursue their claim for voidable transactions from creditors, such as the applicants, would be of concern to the applicants.

As a consequence, Austin J held that by not being notified of the application, the applicants had been denied procedural fairness and the order was set aside in relation to the applicants.

(3) Delay and prima facie case (and improper purpose)

As the order was set aside on the grounds of failing to provide the applicants with an opportunity to be heard, Austin J decided it was not necessary to discuss the questions of delay and prima facie case.

(4) Comment

Austin J's interpretation of the scope of the court's powers in relation to section 588FF is logical and ensures that the section is applicable to the reality of the processes involved in the liquidation of a company.

In relation to the application of the principle of procedural fairness in company law cases, this case illustrates that whether the principle is applied is highly dependent on the particular facts of the case. Simply having an interest in a Corporations Law application is not sufficient. There must be additional factors before notification will be required.

(D) EXPERT WITNESSES' SPECIALISED KNOWLEDGE  
(By Michael Paphazy, [Blake Dawson Waldron](http://www.bdw.com.au))

Australian Cement Holdings Pty Limited v Adelaide Brighton Cement Limited [2001] NSWSC 645, New South Wales Supreme Court, Barrett J, 27 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/july/2001nswsc645.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case centred on the admissibility of opinion evidence from an accountant. The defendant's solicitors tendered evidence in the form of an affidavit from Mr Anderson, a highly experienced chartered accountant. In the affidavit and its attached report, Mr Anderson gave his opinion on what an experienced and competent company director would do in circumstances equivalent to those in this case. Mr Anderson's affidavit also contained his opinion on the application and operation of accounting standards and accounting principles. The plaintiff objected to the admissibility of the affidavit.

First, the plaintiff argued that as the affidavit was tendered well into the trial proceedings, this would seriously prejudice its ability to respond properly to the document. Counsel for the plaintiff stated that the lack of time he had to peruse the affidavit would prejudice his client well beyond anything a costs order might later rectify.

The plaintiff also objected to the admissibility of the affidavit on the ground of relevance and on the ground based on section 79 of the Evidence Act 1995 (NSW) ("the Act").

(1) The meaning of specialised knowledge under section 79 of the Act

Section 79 of the Act creates an exception to the opinion rule in section 76, and states that:

"If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

Barrett J considered the issue of whether Mr Anderson's 40 years as a practising accountant, combined with his further training and study, constituted the source of specialised knowledge on which the affidavit was based.

The part of the affidavit which dealt with Mr Anderson's view as to what company directors do to prepare accounts to conform with statutory requirements was held to be irrelevant. Barrett J did not believe that "the experience of watching practitioners do what they do, or even discussing with them why they do what they do, arms the observer with specialised knowledge of the particular field of practice". His Honour cited with approval Gaudron J's warning in HG v The Queen (1999) 197 CLR 414 that "experts who venture "opinions" (sometimes merely their own inference of fact) outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority".

(2) Is an expert's knowledge relevant to matters of law?

On the question of the affidavit's relevance to whether a particular accounting treatment in the books of a company's subsidiary adhered to the Corporations Law, Barrett J ruled that this was a matter of law. Consequently, Mr Anderson's evidence concerning the practice of company directors was irrelevant to the question of whether statutory accounting requirements had been fulfilled.

(3) When is an accountant's expert opinion relevant?

In contrast, Mr Anderson's evidence about accounting standards and accounting principles was held to be relevant at law and under s 79 of the Act.

(4) Does evidence tendered late constitute a serious prejudice to the opposing party?

As the affidavit and its annexed report dealing with the issue of appropriate accounting treatment in the subsidiary's books did not form part of the plaintiff's evidence-in-chief, but came out in cross-examination of the plaintiff's witnesses, Barrett J gave an interim ruling that the interests of justice required him to hold that that part of the affidavit was admissible.

(5) Comment

It is important to recognise that experts' opinions must lie within their specialised field in order to be admissible in court. In order for opinion evidence to be admissible it seems necessary for an expert to have stepped into the shoes of the person to whom they would claim to have specialised knowledge of their circumstances.

(E) FORGIVING A DEBT: AN UNCOMMERCIAL OR INSOLVENT TRANSACTION?  
(By Sharmila Soorian, [Blake Dawson Waldron](http://www.bdw.com.au))

Sparks v Berry [2001] QSC251, Supreme Court of Queensland, Chesterman J, 19 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/july/2001qsc251.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The applicant, Mr Sparks as liquidator, sought summary judgment pursuant to Rule 292 of the Uniform Civil Procedure Rules 1999 (Qld) claiming that a resolution made by the directors, Mr and Mrs Berry ("respondents") of Labjoy Pty Ltd ("Labjoy") was voidable under the Corporations Law. Labjoy's only substantial asset was shares in Sedgwick MacDermott Pty Ltd ("Sedgwick"). Labjoy sold its shares in Sedgwick for approximately $378,000 and $360,000 from the proceeds was lent to Mr Berry (the "Debt").

A resolution was made at a directors' meeting held on 15 January 1997 whereby Mr Berry was to be absolved from his obligation to pay the Debt. The resolution was evidenced in a minute of the meeting signed by Mrs Berry.

In 2000, a debt was owed to the Australian Tax Office by Labjoy for $113,494.28 and following an application brought by the Deputy Commissioner of Taxation, the Court ordered that Labjoy be wound up.

Mr Sparks sought this application seeking the repayment of the Debt owed to Labjoy by Mr Berry on the ground that the resolution forgiving the Debt was voidable under section 588FE of the Corporations Law. Counsel for the respondents submitted that the forgiveness of the Debt was neither an insolvent nor an uncommercial transaction since the release was an act of Labjoy on 15 January 1997 not supported by consideration and therefore not a "transaction" for the purpose of Corporations Law.

Chesterman J considered the following relevant provisions of the Corporations Law.  
Section 588FB provides:

"A transaction of a company is an uncommercial transaction ... if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

(a) the benefits (if any) to the company of entering into the transaction; and

(b) the detriment of the company of entering into the transaction; and

(c) the respective benefits to other parties to the transaction of entering into it; and

(d) any other relevant matter."

Section 588FC provides:

"A transaction of a company is an insolvent transaction ... if, and only if, it is ... an uncommercial transaction...and:

(a) ...

(b) the company becomes insolvent because of matters including:

(i) entering into the transaction."

Section 588FE provides:

"(1) Where a company is being wound up, a transaction... may be voidable because of any one or more of the following subsections.

(2) ...

(3) ...

(4) The transaction is voidable if:

(a) it is an insolvent transaction of the company; and

(b) a related entity of the company is a party to it; and

(c) it was entered into...during the four years ending on the relation-back day".

Chesterman J was satisfied that the transaction, the release of Mr Berry's Debt, was uncommercial for the purposes of section 588FB. Further, his Honour was satisfied that the transaction was an insolvent one for the purposes of section 588FC, that Labjoy's forgiveness to recover the Debt resulted in a significant deficit in its balance sheet.

Counsel for the respondents argued against a finding that the transaction was uncommercial and submitted that it was not unreasonable for Labjoy to write off Mr Berry's Debt as its value as an asset was worthless. The respondents' counsel argued that the deletion of the Debt from it accounts as an asset of value brought the accounts into line with reality. Chesterman J noted the problem with this submission was that Labjoy could have achieved that objective without forgiving the Debt. His Honour further noted that to indicate a debt as worthless value because of difficulties in recovery is different from releasing the debtor from the obligation to pay.

The Court ordered that the resolution of 15 January 1997 was void and that Mr Berry pay the sum of $332,814 to Labjoy.

(F) STATUTORY DEMANDS, GENUINE DISPUTES AND OFFSETTING CLAIMS  
(By Adam Brooks, Herbert Geer & Rundle)

Remuneration Planning Corporation Pty Ltd v Paidion Foundation Pty Ltd [2001] NSWSC 598, Supreme Court of New South Wales, Hamilton J, 12 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/july/2001nswsc598.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

Remuneration Planning Corporation Pty Ltd ("RPC") had been served with a statutory demand under section 459H of the Law by Paidion Foundation Pty Ltd ("Paidion"). In this matter, RPC the plaintiff sought to set aside the statutory demand.

The demand claims an indebtedness of approximately $300,000. The debt claimed was made up of various fees arising from the sale of employee share trusts and similar products which had been devised by RPC. The proceeds of sale were to be divided 60/40 between RPC and Paidion.

RPC denied the indebtedness of the amount set out in the demand ($300,000) but admitted indebtedness of approximately $100,000. This matter concerned the assertion by RPC that there was a genuine dispute as to the balance ($200,000) and the nature of its potential counterclaim for the $100,000 amount.

Hamilton J noted that the principles relating to the existence of a genuine dispute (and any offsetting claim) are set out in the judgment of McLelland CJ in Eq in Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785 at 787?788:

"…in my opinion that expression [general dispute] connotes a plausible contention requiring investigation, and raises much the same sort of consideration as the 'serious question to be tried' criterion … This does not mean that the Court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements … or inherently improbable in itself … or a patently feeble legal argument or an assertion of facts unsupported by evidence."

Hamilton J noted that there is authority for the proposition that "it is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it), the Court has no function."

Hamilton J noted that for a demand to be set aside on the basis of a genuine dispute, it must be established by the plaintiff that the dispute concerning its existence is bona fide and "not spurious, hypothetical, illusory or misconceived". As to an offsetting claim, Hamilton J referred to a different applicable test being whether "the offsetting claim can be shown to be not frivolous or vexatious."

In relation to the $200,000 amount (which RPC submitted was subject to a genuine dispute), Hamilton J held that a genuine dispute had been established. Hamilton J's conclusion was based on the fact that "the dealings out of which the claim arises were multifarious and complex on the evidence on both sides". Hamilton J was of the view that the remedy of an account of profits sought before service of the statutory demand (which is the subject of this matter) appeared to be the appropriate remedy and it was not for the Court on the demand to "enter into the material to see where the truth of the matter lies".

The offsetting claim (in relation to the $100,000 amount) was essentially based on the assertion that 20 plans had been sold and RPC was entitled to sale proceeds in respect of those sales. Hamilton J stated that RPC faced the difficulty that, despite asking to be informed of the monies which relate to the 20 plan sales, that information was not forthcoming. Accordingly, RPC estimated the share of sales revenue due to it based on what it estimated would have been the average sale price for the plans.

Hamilton J noted that claims and their quantum must in some way be rendered concrete for the purposes of establishing an offsetting claim which may be relied on by section 459H. Hamilton J held that the relevant establishment had occurred in the present case and that the quantification suggested by RPC arose "from the very necessity for the plaintiffs to demonstrate a single simple offsetting claim among the plethora of claims and cross claims that there appear to be between the various parties, to which some concrete form can be given."

Hamilton J was therefore satisfied that the estimate of the offset was stated clearly enough and was reasonably established. In therefore setting aside the demand in its entirety, Hamilton J further noted that:

"it lies ill in the mouth of a defendant which has declined to reveal the amount received under the 20 plans, although that information has been sought, to say that the plaintiff cannot exactly specify the amount of its claim. Furthermore, the defendant's own version of the facts is that it was a party to a joint venture for the sale of the plans. It has thereby in effect conceded that it regarded itself as under a fiduciary obligation to the plaintiff in respect of receipt of these monies, which, one would have thought, imported a liability to account to it for part of them and an obligation to reveal the quantum of the monies received."

Accordingly, this case illustrates how a Court may consider the conduct of parties, and allow a degree of flexibility in the appropriate circumstances to a party who needs to estimate the quantum of an offsetting claim.

(G) DIRECTORS' DUTIES  
(By Roger Byrne and Ben McEniery, [Clayton Utz](http://www.claytonutz.com))

Australian Securities and Investments Commission v Doyle [2001] WASC 187, Supreme Court of Western Australia, Roberts-Smith J, 20 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2001/july/2001wasc187.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This decision deals with the following issues:

- A director with a material personal interest voting at board meetings;  
- Improper use of position by a director;  
- Whether another director was knowingly concerned in a contravention; and  
- Failure of a director to exercise due care and diligence.

(1) The facts

Chile Minera NL ("Chile Minera") issued shares in breach of ASX Listing Rule 7.1, which prohibited a company from issuing more than 10 per cent of its capital in one class in any 12 month period without the approval of the holders of ordinary securities.

At all relevant times, Doyle acted as a director or alternate director of Chile Minera and a director of another company, Doyle Capital Partners ("DCP"). Doyle also owned and was beneficially entitled to 50 per cent of the issued shares in DCP.

DCP was engaged as a consultant to Chile Minera to assist in respect of capital raisings. An agreement was entered into by Doyle on behalf of DCP under which DCP would arrange for its clients to take up an issue of shares in Chile Minera.

As a result of the infringement of ASX Listing Rule 7.1, voting rights on the shares issued to the allottees represented by DCP were suspended. Doyle then sought a return of the placement money to the allottees on the ground that they did not get what they bargained for, namely shares with voting rights.

He used his position on the board of Chile Minera to vote at board meetings on 21 and 22 November 1996 for resolutions in favour of a return of the money to DCP for the benefit of the allottees. He also signed a circulating resolution on 22 November 1996 authorising that a cheque be drawn for the return of the money. Another director, Satterthwaite, attended the meetings and signed the circulating resolution with Doyle.

(2) Doyle's involvement

The applicant sought to prove that Doyle contravened section 232(6) of the Corporations Law - now the Corporations Act. However the issue of whether Doyle contravened section 232A(1) is discussed in the context of whether his use of position was improper.

Section 232A(1) provides that a director of a company who has a material personal interest in a matter that is being considered at a meeting of the board of directors must not vote on the matter and must not be present while the matter is being considered at the meeting.

Under Chile Minera's Articles of Association, a quorum at a meeting of the board required the presence of two directors who were entitled to vote at the meeting. As Doyle was not entitled to vote as a result of the operation of section 232A(1), there was no quorum and any resolution of the meeting would be invalid.

In his defence, Doyle argued that any resolutions made at the meetings on 21 November 1996 were invalid, as there was no quorum of directors present and that in any event, he did not vote. Similarly, he pleaded that the circular resolution was invalid as it had not been resolved by a sufficient number of directors. He further pleaded that he did not vote at the meeting held on 22 November 1996.

Doyle argued that as the meetings were inquorate, they were not meetings for the purposes of section 232A(1) and that as there was no meeting his actions were not improper.

The court dismissed this argument. It said that even though no resolutions could have been validly passed, what took place was still a meeting (albeit an inquorate one) for the purposes of section 232A(1). Doyle had breached section 232A(1) by being present while the relevant discussion took place.

According to the Court, a resolution made at a board meeting is simply an agreement of a particular kind which binds the company and may be proved in the same way as any other agreement. It does not require any formal voting procedure. It follows that a vote is an indication of a person present by whatever means, and understood by the others present, that they join or do not join in the making of the agreement.

As such, there were board meetings and Doyle was taken to have voted at those meetings regardless of his conflict of interest, which was improper.

(3) Contravention of section 232(6)

The effect of this provision is that an officer or employee of a corporation must not make improper use of his or her position to gain an advantage for himself, herself or any other person or to cause detriment to the corporation.

Doyle contravened section 232(6) by making improper use of his position as a director to gain directly an advantage for the allottees. The conduct by which he did so was his presence and voting at board meetings on 21 and 22 November 1996 and signing a circular resolution dated 22 November 1996.

As a director or alternate director, Doyle was an officer of the company. By attending and voting on resolutions at meetings on 21 and 22 November 1996 and signing the circular resolution, Doyle was using his position as a director.

The applicant claimed the following as alternatives:

- that Doyle improperly used his position as a director of the company to cause detriment to the company; and  
- that Doyle sought to gain an advantage for the allottees and DPC.

To establish a breach of the provision, it is not necessary to prove the accrual of an advantage or the suffering of a detriment. What has to be shown is that the use of the position by the officer was improper and it was done for the purpose of gaining an advantage or causing a detriment at the time the conduct occurred.

Doyle believed he was acting for the good of the company. He had a reasonable but mistaken belief that the return of the placement money to DCP was for the benefit of the company as it would protect the company from claims by the allottees.

The detriment claimed was that the return of the placement money reduced the company's share capital in a manner not permitted by the Corporations Law and it was a contributing factor to the insolvency of the company. However, the court held that it was not Doyle's intention to cause detriment to the company.

The court found that Doyle's intention was to benefit the allottees. His motivation was to return their money on the basis that they did not get what they bargained for, being shares with voting rights attached. In doing so, he put the interests of the allottees and DCP ahead of the interests of the company.

The Court was also satisfied that putting the interests of the allottees and DCP ahead of the interests of the company was improper in the circumstances.

Doyle's breach was a serious breach of section 232(6).

(4) Satterthwaite's involvement

Satterthwaite was a director of Chile Minera at the relevant time. Satterthwaite contravened section 232(6) by having been knowingly involved in Doyle's contravention.

Section 79 provides that a person is involved in a contravention if he or she is knowingly concerned in a contravention. A person who is involved in a contravention of a provision of the Corporations Law is taken to have contravened that provision.

To prove that Satterthwaite was knowingly concerned in the contravention of section 232(6), it was necessary to show that he had knowledge of the essential elements of the offence. That is, it had to be shown that Satterthwaite knew:

- Doyle used his position as a director of the company;  
- for the purpose of gaining an advantage for the allottees; and  
- that it was an improper use of Doyle's position.

It was further necessary to show that Satterthwaite was actively involved in Doyle's contravention.

Satterthwaite knew that Doyle was acting as a director or an alternate director at the relevant times. He knew that Doyle's purpose was to return the placement money to DCP for the benefit of the allottees. He acknowledged that Doyle's actions were improper by repeatedly acknowledging Doyle's conflict of interest.

Satterthwaite's active involvement took the form of arranging for Doyle to attend board meetings and involving Doyle in the decision to repay the placement moneys. Satterthwaite also appointed Doyle as a director and allowed Doyle to chair board meetings.

This was held to be a serious breach of section 232(6).

In the alternative it was argued that Satterthwaite contravened section 232(4) by failing to exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the circumstances of the company at the time. This pleading lapsed as a result of the finding that Satterthwaite had contravened section 232(6). It is, however, dealt with by way of obiter dicta.

Section 232(4) stipulates that an officer of a corporation must exercise the degree of care and diligence in the discharge of his or her duties that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.

The placement money had become part of the capital of the company. In the circumstances in which Satterthwaite found himself, there was a real possibility that the return of the placement money would constitute a reduction of capital and that when the money was paid it would move out of the company's control. He also should have realised that its return would threaten the company's solvency.

It was held that Satterthwaite failed to exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the circumstances of the company at the time by not maintaining control of the placement money when he was uncertain as to whether the return would constitute a reduction of capital and where the company was close to insolvency.

(5) Authorised reduction of capital?

The Court held that, once the shares had been issued and allotted, the subscription money became part of the company's capital. The ASX's subsequent restrictions on their voting rights may have given the allottees rights against the company or its directors, but did not vitiate the placement.

The directors also argued that sending the money to DCP had not been an unauthorised reduction of capital. This argument turned on the contention that it was in fact a bona fide compromise of a legitimate claim.

This failed on the grounds that there had been no compromise. The money had been paid over pending counsel's opinion as to the effect of the allotment and the method of returning the money to the subscribers. At that point, there had not been a definite compromise of the subscribers' claims.

(H) BOARDROOM SURPRISE  
(By Stephen Magee)

Aqua-Max v MT Associates [2001] VSCA 104, Supreme Court of Victoria (Court of Appeal), Brooking, Charles and Chernov JJA, 19 July 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2001/july/2001vsca104.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

In this judgment, the Court considered whether a board meeting that was valid in law could still be set aside by a court on equitable grounds.

This was an oppression case. As is common with such cases, the bulk of the decision is taken up with matters of fact, rather than issues of law.

However, it does contain an interesting obiter about the role of equity in directors' meetings.

The company's constitution set a quorum of two for board meetings. A director, Trihey, was invited into a room. There he found another director (apparently the Chairman) and some people who were not directors. He was told, for the first time, that this was a board meeting. A motion was moved to appoint a new director. The Chairman voted for the motion and Mr Trihey voted against it. The Chairman used his casting vote to pass the motion. The meeting ended. Mr Trihey left the room. All of this took about one minute and thirty seconds.

At first instance, it was held, among other things, that this was a valid meeting. By staying in the room, Mr Trihey had indicated his agreement that the meeting should take place: if Mr Trihey had simply walked out of the room once it was announced that the encounter was a board meeting, no meeting would have been held. However, by staying in the room and voting (albeit against the resolution), Mr Trihey had given rise to the inference that he had agreed to the holding of the meeting.

The Victorian Court of Appeal agreed that the meeting was good at law. However, it also said that this did not mean that the meeting would necessarily hold up in equity. As things panned out, the Court of Appeal did not have to decide the point. Nevertheless, its obiter strongly indicates that, if the issue had been argued, it would have ruled the meeting invalid on the grounds that Mr Trihey's consent had been obtained by unconscionable conduct.

It noted that most cases of unconscionable conduct concern contracts or dispositions of property. However, in the Court's view, there was no reason for confining equitable principles to such cases. It said that there were several ways in which the case might be analysed from the standpoint of a dealing or transaction.

For example, one might enquire whether the consent or agreement - good at law - which the first instance judge found Mr Trihey to have given to the holding of a directors' meeting was not to be recognised in equity in all the circumstances. If it was not to be recognised, then the meeting would fall.

Alternatively, one might say that the enquiry was whether the meeting, or the resolution, ought to be allowed to stand in all the circumstances. The Court thought it strongly arguable that in all the circumstances of this case a court of equity would conclude that the meeting and resolution should not be allowed to stand, and would set the resolution aside. In this context, the Court cited Blomley v Ryan (1956) 99 CLR 362, Commercial Bank of Australia Ltd. v Amadio (1983) 151 CLR 447, Garcia v National Australia Bank Ltd (1998) 194 CLR 395, Legione v Hateley (1983) 152 CLR 406 and Clark v Malpas (1862) 54 ER 1067.

It was not, however, necessary, for the Court of Appeal to rule on the equity question. The holding of the meeting was one part of a larger picture of oppressive conduct, providing grounds for relief under section 260.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

M de Kluyver, 'Contractual Subordination in Schemes of Arrangement' (2001) 9 Insolvency Law Journal 60

The pari passu rule is not an insolvency principle unrestricted in application. Whereas, in the past, such a treatment of the rule has resulted in schemes of arrangement incorporating subordination arrangements to be struck down, it is arguable that the trends of analysis in the case law in fact recognise subordinated creditors as a separate class of unsecured creditor. This article argues that it is not the correct approach to consider whether a scheme of arrangement can be upheld based on the enforceability of the arrangement in a winding up. Rather, the correct approach is to put in place arrangements most likely to accomplish the aims of the administration on the basis that the parties' freedom to contract will be upheld should the company go into liquidation, provided it does not disadvantage the entitlements of creditors who were strangers to the contract.

R Mason, 'Choice of Law in Cross-border Insolvencies: Matters of Substance and Procedure' (2001) 9 Insolvency Law Journal 69

In a recent cross-border personal injuries case, the High Court, when choosing the relevant law to apply, departed from its previous distinction between laws of procedure and of substance based on remedies and rights. Instead it held that procedure refers to "rules which are directed to governing or regulating the mode or conduct of court proceedings". All other provisions or rules are to be classified as substantive. As such, this opens up the possibility of non-forum laws being chosen to apply to issues that may once have been considered procedural. This article explores the potential impact that this new distinction may have on cross-border insolvency practice in the international context.

M Dean, 'International Insolvencies: the Difficulties, the Traditional Solution and the Ideal' (2001) 9 Insolvency Law Journal 88

The problem of cross-border insolvencies (otherwise known as international insolvencies) has existed for centuries. The growth of international trade, international investment and multinational corporations in an increasingly global economy makes finding a solution to this problem even more pressing. Many common law countries adopt the universalist approach and the traditional solution of principal and ancillary liquidations. However, while this is a laudable theoretical ideal, in reality territorial notions remain as courts and legislatures use a variety of measures to protect local creditors. This reflects the fundamental fact that insolvency law is inherently linked to a nation's social, economic, political, and legal culture.

H Lowell Brown, 'The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era' (2001) 26 Delaware Journal of Corporate Law 1

A Licht, 'Toward a Cross-Cultural Theory of Corporate Governance Systems' (2001) 26 Delaware Journal of Corporate Law 147

D O'Rourke and D Haley, 'Creating Capital and Providing Shareholder Liquidity for De Novo Banks: The Super De Novo Bank Solution' (2001) 118 Banking Law Journal 412

M Hayashi, 'Japanese Insider Trading Law at the Advent of the Digital Age: New Challenges Raised by Internet and Communication Technology' (2000) Vol 23 No 1 Hastings Communications and Entertainment Law Journal

S Thompson, 'Change of Control Board: Federal Pre-emption of the Law Governing a Target's Directors' (2000) Vol 70 No 1 Mississippi Law Journal.

Note, 'Selective Disclosure: "A Fencing Match Conducted on a Tightrope" and Regulation FD - The SEC's Latest Attempt to "Electrify the Tightrope"' (2000) Vol 70 No 1 Mississippi Law Journal

A Chand, 'Corporate Governance and the Re-emergence of a Director's Duty in Negligence in Malaysia' (2000) 27 Journal of Malaysian and Comparative Law 147

C Meng, 'The Companies Act 1965: Some Recent Amendments' (2000) 27 Journal of Malaysian and Comparative Law 207

R Anderson, 'Valuing Minority Shareholdings for Court Ordered Buy-outs (When Accountants Meet Lawyers)' (2001) 69 Scottish Law Gazette 73

E Deards, 'Partnership Law in the 21st Century' (2001) Journal of Business Law 357

I Bolodeoku, 'A Critique of the Theories Underpinning Proxy Solicitation by the Board of Directors' (2001) Journal of Business Law 377

J Duke, 'Enforcement of Human Rights on Multinational Corporations: Global Climate, Strategies and Trends for Compliance' (2000) Vol 28 No 4 Denver Journal of International Law and Policy

K Bubna-Litic, L de Leeuw and I Williamson, 'Walking the Thin Green Line: The Australian Experience of Corporate Environmental Reporting' (2001) Vol 18 No 3 Environmental and Planning Law Journal

R Pardo, 'Bankruptcy, Court Jurisdiction and Agency Action: Resolving the Next Wave of Conflict' (2001) 76 New York University Law Review 945

K Medill, 'Stock Market Volatility and 401(k) Plans' (2001) Vol 34 No 3 University of Michigan Journal of Law Reform

Journal of Corporation Law, Vol 26 No 2, Winter 2001. Articles include:

- Privatization and Corporate Governance in a Unified Career  
- Presumptive Business Judgment, Substantive Good Faith, Litigation Control: Vindicating the Socio-Economic Meaning of Harhen v Brown  
- Directors' Negligence Liability to Creditors: A Comparative and Critical View  
- Private Equity Funds: What Counts and What Doesn't?  
- Gauging the Hurdle to Strike Suits: Reconciling the Circuit Split Over the Proper Interpretation of the Heightened Pleading Standard Under the Private Securities Litigation Reform Act of 1995

Columbia Business Law Review, 2001, No 2. Articles include:

- Clarifying the Imputation Doctrine: Charging Audit Clients with Responsibility for Unauthorized Audit Interference  
- Extending the Veil to Solo Entrepreneurs: A Limited Liability Sole Proprietorship Act  
- Gaining Perspective: Directors' Duties in the Context of 'No Shop' and 'No Talk' Provisions in Merger Agreements  
- The Venture Capitalist's Corporate Opportunity Problem

The Company Lawyer, Vol 22 No 7, July 2001. Articles include:

- Section 459, Public Policy and Freedom of Contract (Part 2)  
- Statutory Exceptions and Defences: What Protection is Available?  
- The Accountability of the Financial Services Authority Under the Financial Services and Markets Act 2000  
- Spain: Liability for Breaching Minimum Capital Requirements Under Spanish Law

The Business Lawyer: Vol 56 No 3, May 2001. Articles include:

- Report: Changes in the Model Business Corporation Act - Amendments Relating to Directors  
- The Securities and Exchange Commission's Revised Auditor Independence Rules  
- Categorical Confusion: Deal Protection Measures in Stock for Stock Merger Agreements  
- Individual Civil Liability Under the Federal Securities Laws for Misstatements in Corporate SEC Filings  
- The Boundaries of the 'In Connection With' Requirement of Rule 10b-5: Should Advertising be Actionable as Securities Fraud?

Securities Regulation Law Journal, Vol 29 No 2, Summer 2001. Articles include:

- Standing to Sue Under Rule 10b-5: A Fresh Look at the New Investment Doctrine  
- The SEC's Enforcement Program and Section 10A  
- Some Comments on SEC Rule 10b5-1 and Rule 10b5-1 Trading Plans

A Keay, 'Balancing Interests in Bankruptcy Law' (2001) 30 Common Law World Review 206

M Rogge, 'Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in Re Union Carbide, Alfaro, Sequihua, and Aguinda' (2001) 36 Texas International Law Journal 299

A Connatser, 'Multidisciplinary Partnerships in the United States and the United Kingdom and Their Effect on International Business Litigation' (2001) 36 Texas International Law Journal 365

G Jenkins, 'The Powerful Possibilities of Non-Profit Mergers: Supporting Strategic Consolidation Through Law and Public Policy' (2001) Vol 74 No 4 Southern California Law Review

L Bebchuk and J Fried, 'A New Approach to Valuing Secured Claims in Bankruptcy' (2001) 114 Harvard Law Review 2386

C Johnson, 'Banking, Antitrust, and Derivatives: Untying the Antitying Restrictions' (2001) Vol 49 No 1 Buffalo Law Review

J Fanto, 'Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers' (2001) Vol 49 No 1 Buffalo Law Review

R Schmidt, 'Partnership Approaches in South African Company Law: Same Label, Different Meanings' (2001) 118 South African Law Journal 115

J McLennan, 'Company Dividends: The New Law' (2001) 118 South African Law Journal 126

H Wainer, 'The Companies Act Changes - Problems and Doubts' (2001) 118 South African Law Journal 133

International Company and Commercial Law Review, Vol 12 No 3, March 2001. Articles include:

- Partnership Reform: Legal and Practical Implications  
- The Criminal Liability of Company Managers in France  
- The Legal Framework of Limited Liability Quota Companies in Brazil: Overview of Current Regulation and Proposed Changes  
- New Takeover Code to Enhance Shareholder Protection in New Zealand

Comment, 'Belk of Spartanburg, SC v Thompson: An Overview and Analysis of the Techniques Employed to Value Minority Interests in Closely Held Corporations in Dissenters' Rights Cases' (2001) Vol 52 No 2 South Carolina Law Review

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