Every year, usually in late January when any distraction from another cricket test starts to look welcome, an M&A sage will be quoted in the financial press predicting another record year for takeovers and mergers. On the basis of the first quarter of 2001, the sage will be proven correct. Activity levels have increased and the dollars involved have become much larger. BHP/Billiton, Bramble/GKN, and SingTel/Optus have all set new benchmarks.

They follow a series of milestone transactions in 2000: Hanson/Pioneer, CBA/Colonial, NAB/MLC and Rio Tinto’s superbly executed trilogy of consecutive bids which the market has applauded including Comalco (the first scrip bid post CERP), the hostile bid for North and the successful underbid for Ashton. Just as large and significant were several transforming deals which did not make it to the announcement stage. Takeover activity in an industry tends to breed more of the same, as well as a rash of takeover response planning by potential targets.

Globalisation has been a significant element in this increase of M&A activity and with it comes the desire of Australian companies to be a driver and not a victim of the process. Merger restrictions under the Trade Practices Act taken together with mature domestic markets of limited size have meant that Australian companies have had to look offshore for growth through acquisition. Inefficiencies in the tax system have meant that many Australian companies with significant foreign earnings are thinking about restructuring and relocating offshore. The benefit of access to foreign capital markets and the importance of inclusion in foreign market indices mean that, in cross-border mergers, Australian companies are frequently targets rather than acquirers. The forces are vicious ones for Australia. Concerns that many long-established Australian companies risk disappearing from the All Ordinaries index and the apparent relegation of Australia to ‘branch office’ economy status have been accompanied by calls for regulatory overhaul.

Australian companies therefore need to find a way to perform on the world stage while ensuring the maintenance of an Australian identity and culture and the facility for Australian shareholders to invest.

That means renewed focus upon innovative structures for cross-border mergers of which the Dual Listed Companies (DLC) structure is the best current example. This structure provides the benefits of scale, merger synergies, access to foreign capital markets and continuity of franking. Merger accounting may be available depending on the circumstances (although that will become less of an issue if other countries adopt the new US approach to goodwill amortisation). Because the shareholders of both merging entities continue to hold their shares, there is...
no capital gains tax or stamp duty on disposal of shares and Australian listing is maintained. Importantly, there is no loss of Australian identity for the corporate entity (or, at least, for part of it) and the structure avoids the problem of flowback endemic in other cross-border merger forms: shareholders selling foreign scrip (by reason of portfolio investment restrictions, the desire for franking or simple discomfort with foreign stock) with consequent pressure on price and change in national ownership profile.

The DLC is well-known in Australia, thanks to Rio Tinto, and the further significant examples which BHP/Billiton and Brambles/GKN will provide. A number of other significant potential mergers in the last couple of years have looked at the DLC as a possible structure. Apart from Rio, BHP and Brambles, we have substantially documented another three in the past two years which never happened; DLC’s are intensive from a documentary perspective and are often difficult to negotiate (between parties and with regulators). In addition to the advantages listed above, they are perceived as creating shareholder value better than some other merger forms.

Wider use of schemes to combine mergers with restructuring and other innovative forms should be expected. If 2001 continues at the pace of the first quarter, it will be a remarkable year indeed.

### Directors’ Fiduciary Duties to Shareholders

The recent decision of the English Court of Appeal in *Peskin v Anderson* continues a series of judgments that require the existence of special circumstances to justify the imposition of fiduciary duties on directors to individual shareholders. (See the New Zealand Court of Appeal in *Coleman v Myers* and the New South Wales Court of Appeal in *Brunnerhausen v. Glavanics*.) It is important for Australian directors to recognise that such a duty may arise where:

1. directors are brought into close contact with shareholders (through dealings, negotiations, communications and other contact directly between the directors and the shareholders); and
2. the relationship is capable of generating fiduciary obligations (such as an obligation to use confidential information acquired by the directors in that office, for the benefit of the shareholders).

The decision in *Peskin v Anderson* involved the de-mutualisation by scheme of arrangement of the Royal Automobile Club. Following the de-mutualisation, the motoring services business was sold and all members as at a certain cut-off date received a payment of $34,131 pounds for their interest in the business.

Three hundred and fifty-five former members of the Club, who retired their membership prior to the cut-off date, commenced proceedings against the directors seeking damages for breach of a fiduciary duty to disclose the plans relating to the de-mutualisation.

The Court held that, in this case, the general rule that the directors’ fiduciary duties are owed only to the company applied. In so doing, the Court confirmed that directors will only owe fiduciary duties to shareholders (as distinct to the company) if there is a special factual relationship between the directors and the shareholders which is capable of generating fiduciary obligations.

The claimants also argued that the directors had acted beyond their power by spending Club resources in preparing for the sale of the motoring services business and, more fundamentally, for the scheme of arrangement which was a necessary pre-condition of any payment to members. However, the Court considered that, as it is lawful for a company to change its objects and to amend its Memorandum by means of the appropriate procedures, so it must follow that it is lawful for directors to authorise the expenditure of the company’s money on those procedures.