

COMPANY LAW

FINAL IMPLEMENTATION OF ACT

The piecemeal implementation of the **Companies Act 2006** (the Act) draws to a close in October 2009. The final parts deal mainly with incorporation formalities, constitutional documents, share capital issues and the registration and submission of forms to the Registrar of Companies.

There are several important new provisions in the Act, which include the following:

- Any type of company, including a public limited company, can now be formed by a single person. Simply, a statement of share capital and initial shareholders can be submitted to Companies House together with a statement of compliance, replacing the current Form 12.
- The memorandum of association need only contain details of the initial subscribers for shares and the articles of association will be the main constitutional document for companies formed after 1 October 2009. A company will be required to submit a set of the articles to Companies House together with any resolutions or agreements that affect the constitution.
- A company's objects will be unrestricted unless the articles specifically restrict them. Any existing company looking to amend its objects to make them unrestricted will be able to do so by amending its articles and removing the restrictions on its objects.

Please circulate to:	
<i>name</i>	<i>date</i>

- While a private company will no longer commit an offence if it offers securities to the public it may be compelled to reregister as a PLC.
- In addition to the statutory procedure of changing the name by special resolution a company name may be changed by whatever means as provided in the company's articles. Additionally where a change of name by special resolution is conditional on the occurrence of an event, for example a merger, the notice given

to the Registrar of the change must specify that the change is conditional and state whether the event has occurred.

- An authorised share capital will no longer be required unless a company wishes to restrict the amount of shares to be issued. An existing company with an authorised share capital must amend or revoke such provision by ordinary resolution. Each time there is a change of share capital a statement of capital should be filed at Companies House.
- A private company with only one class of shares will not need the authority to allot shares unless required to do so in its articles.
- Allotments must be registered within two months and the return of allotment must be filed together with a statement of capital.
- The requirement for a specific authorisation in a company's articles for companies to be able to reduce, buy-back, consolidate or sub-divide its shares is being removed.

The *Companies (Disclosure of Address)*

Regulations 2009 also come into force on 1 October 2009 and set out the circumstances in which the Registrar of Companies will be able to disclose an individual director's residential address to specific public authorities and credit reference agencies, in cases where a service address is on the public record. The Regulations also contain details of the procedure under which directors can apply to make an address on the Register unavailable for public inspection.

Model articles are being introduced with effect from the same date for both private and public companies limited by shares and private companies limited by guarantee and will constitute the default provisions for companies incorporated on or after implementation date. The model articles for private companies have been optimised for small owner-managed businesses and do not deal with matters otherwise addressed in the Act such as conduct of meetings and resolutions. As a result the new model articles contain virtually no repetition of the Act.

COMPANY LAW

This means that any company incorporated with the model articles seeking to find out what the quorum for holding a shareholders' meeting would have to refer to the Act.

It is expected therefore that many companies will look at making changes to the model articles to include certain administrative and management processes.

SHARE CAPITAL REGULATIONS

The *Companies (Share Capital and Acquisition by a Company of its Own Shares) Regulations 2009* (the Regulations) are due for implementation on 1 October 2009 and are intended to implement measures aimed at improving the competitiveness of companies by making it easier for them to react more efficiently to market developments. The Regulations amend provisions in Part 17 and Part 18 of the **Companies Act 2006** and reduce the minimum subscription period for a pre-emption rights issue set out in Section 562(5) of the 2006 Act, from 21 days to 14 days. They introduce a new requirement in Section 646 of the Act so that, when creditors object to a reduction in a company's capital, they should demonstrate that their claim is at risk and that the company has not provided adequate safeguards. They also remove the 10% cap on companies holding shares in Treasury and extend the period for which authorisation may be given for the purchase of shares from 18 months to five years. The consultation can be viewed on the BERR website and the Regulations can be found on the OPSI website www.opsi.gov.uk

CORPORATE GOVERNANCE ISSUES

A selection of recent corporate governance initiatives should be noted. Significantly, although it is hard to prove a direct link, there is a widespread consensus that remuneration practices may have played a contributing factor to the present crisis.

- * On 26 February 2009 the FSA published a draft Code of Practice on Remuneration Policy and on 18 March it published a consultation document which includes a revised version of the Code and consults on its application to large banks, building societies and broker dealers and on its incorporation into the FSA handbook. The Code consists of one general requirement and ten principles relating to FSA regulated firms, remuneration policy and arrangements.

The aim of the Code is to ensure that all firms have remuneration policies that are consistent with sound risk management and which do not expose them to excessive risk. The principles deal with matters including governance, measurement of performance for the calculation of bonuses and long-term incentive plans and composition of remuneration. The FSA plans to publish the final version of the Code in late July 2009 and

expects the Code to come into force in November 2009. A copy of the consultation document CP09/10 *Reforming Remuneration Practices in Financial Services* can be found on the FSA website www.fsa.gov.uk

- * In March 2009 the European Corporate Governance Forum published a statement on the main principles that should govern the remuneration of executive directors and issued a statement on cross-border corporate governance codes.

The Forum considers that executive remuneration is a corporate governance issue and should be distinguished from remuneration issues in financial institutions. It notes that remuneration of executive directors is an important element of the governance regime of companies and proposes that the disclosure of the remuneration policy of listed companies and of the individual remuneration of directors and any material change to it should be mandatory in the form of a directive for all listed companies in the European Union.

Currently only about 60% of Member States require disclosure of remuneration policy and about two thirds of Member States including the UK, require disclosure of individual directors' pay.

The Forum believes that executive directors should have no involvement in setting their own remuneration which should be left to non-executive directors and shareholders who should still be required to approve share option schemes for directors. Copies of their Statement are available on the Europa website at <http://ec.europa.eu>

- * Shadow Chancellor, George Osborne, speaking recently to the Financial Services Authority, stated that every suggestion of director wrongdoing should be thoroughly investigated and indicated that a Conservative Government would propose that the FSA hand its prosecution powers to a group such as the Serious Fraud Office.
- * The City Minister, Lord Myners, recently attacked shareholders for acting like "absentee landlords" and urged them to get more involved with companies they own. Speaking at an Association of Investment Companies conference, the former fund manager revealed that the Government had extended Sir David Walker's review of banks' governance to cover other financial institutions such as hedge funds, asset managers and insurers. Lord Myners also repeated calls for a more radical review of the UK's corporate governance code and encouraged companies to establish 'independent secretariats' serving non-executive directors, to reduce dependence on information provided by company executives and auditors.

Companies House

INCREASE IN LATE FILING

Figures recently published by Companies House show that late filing of accounts with the Registrar has increased by 25% over the last four years to March 2008, and in particular the last two years, each of which saw this increase by 10%. The total number of late filers in 2007 was nearly 240,000.

Penalties for late filing have increased substantially as from 1 February 2009. Private companies' accounts not more than one month late will incur a £150 fine which increases to £1,500 for accounts filed more than six months late. In addition where there is a failure to comply with the filing requirements in relation to the previous financial year (and that previous financial year began on or after 6 April 2008) the penalty imposed will be doubled. Details of the new increased penalty charges can be found on the Companies House website at www.companieshouse.gov.uk

NEW FORMS

The latest draft of the full list of proposed Companies House forms was published in February 2009. Final versions of all forms should be available on the website from 1 July.

The new numbering system will supersede the current and other form numbering systems used within Companies House. Although all forms will still show the legislative references to the specific section of the 2006 Act, forms that are frequently submitted will have the lower document number contained within

the code. For example, the Appointment of Director form will be AP01, similarly the return of allotment shares form will be SH01. For more details see www.companieshouse.gov.uk

SHARE CAPITAL STATEMENT

The success of the trial same-day service to process a reduction of share capital using a solvency statement introduced in December 2008, means that it will continue to operate. The Registrar is currently calculating the level of fees to be charged and there may be a short period when the service will have to be suspended while these final arrangements are made. For more details see the website.

NEW TELEPHONE NUMBER

Companies House have a new telephone number for their contact centre; 0303 1234 500. In addition, all letterheads and correspondence forms are currently being updated although the old 0870 number will continue to be operational until the change is complete.

CODE OF COMPLIANCE

The overall objective of Companies House is to provide a high quality, economic and readily accessible service which satisfies the need of all customers, space users and providers of information. Its Code of Compliance has now been issued as a brochure, designed to give clear information about the standard of service clients can expect. A copy of the Code can be downloaded from the website.

* A survey recently carried out by Hay Group Consultants has found that top senior managers at the UK's 350 largest companies are pessimistic about their chief executive's ability to lead them through the current downturn. 100 managers just below board level were surveyed, with 88% believing that their company would not meet its strategic goals.

Disturbingly, nearly half believe their chief executive has made promises to the stock market that cannot be kept. The survey also found that 28% of senior managers disagreed with some or all of their

chief executive's promises to the markets and 7% plan to sabotage or resist the company's plans behind the scenes.

* The Serious Fraud Office is investigating a subsidiary of the American insurance giant AIG for fraud. AIG Financial Products was hit hard by the credit crisis and is currently being wound up by its parent company with a view to being dissolved altogether. It has been reported that the investigation is limited to the actions of the subsidiary and the business of the parent company AIG is not under suspicion

COMPANY LAW

- * The Financial Services and Markets Tribunal recently reported that a company can be prosecuted for market abuse even if its actions are not the result of a decision to deliberately mislead. This decision comes in the ruling on a market abuse case brought by the FSA against the market-making company Winterflood. The FSA alleged that Winterflood facilitated an illegal share ramping scheme in 2003 by executing orders given by a Mr Eagle. By virtue of these actions Mr Eagle was able to inflate the share price of his AIM listed company from 2.5p in May 2003 to 11.75p in July 2004. Although it was accepted that an intent to mislead can form a large part of market abuse, the FSA argued in its ruling that the code does not purport to specify all types of behaviour that constitute market abuse. In addition, in not reporting suspicions regarding Mr Eagle's trading, Winterflood failed to observe the standards of behaviour reasonably expected of market makers in their position. Winterflood has been fined £4m for its part in the deal.
- * The FSA has obtained a court order requiring two individuals to return money to UK investors who were victims of unauthorised share dealing operations run by overseas entities. Investors were cold-called by unauthorised share sellers, Gatemore Securities and Enterprise Analytics Incorporated, and encouraged to buy worthless shares. Bayshore Nominees Limited, the company which held the shares, sent out confirmation notes requiring payment from the investors and arranged the transfer of shares to them. Bayshore then sent the money received, first to other bank accounts and then offshore. The High Court held that Bayshore had acted illegally without FSA authorisation and that Bayshore's owners and sole director had been knowingly concerned in this.
- * The FSA is launching an anti-scam campaign with Age Concern and Help the Aged after a survey found that more than one third of equity investment swindles preyed on the over-65 age group. Based on almost 2,000 face to face home interviews carried out by TNS, a major research company, the survey found that 35% of people targeted by share fraudsters over the past year were in this demographic where half of those surveyed felt they did not have sufficient information to protect themselves against the fraud and almost a quarter were worried that they could fall victim to a scam this year.
- * The head of the Financial Reporting Council, Paul Boyle, is arguing that the current challenges over how best to bring about improvements in the performance of boards is not about ripping up the comply and explain model. Mr Boyle stated, "The corporate governance challenge is about making boards more effective. As

boards are made up of a collection of individuals with different experiences, skills and perspectives, they have to come together to make decisions on a collective basis".

- * The Institute of Chartered Secretaries and Administrators (ICSA) has responded to the Government's review of banking governance by carrying out a special study. The ICSA believes that company secretaries are uniquely placed to comment on any changes needed and is carrying out an analysis of board values and behaviours to assist the HM Treasury review of governance in the banking sector, currently being carried out by Sir David Walker. The initiative will be 'action-oriented' with suggestions for securing changes in boardroom practice where necessary.
- * In a move to help achieve successful prosecutions in market abuse cases, the FSA has welcomed the Government's proposals to grant it new statutory powers. Previously allowed under common law, the new proposals will allow the FSA to grant immunity to witnesses when investigating criminal cases such as insider dealing. This is expected to enhance the FSA's enforcement processes, helping it to secure increased criminal convictions.
- * The 20th issue of the UK Listing Authority's newsletter, List! concerns the disclosure of major shareholdings where directors of listed companies have granted security over a significant proportion of their shareholdings in order to secure personal loans. The FSA undertook informally not to take enforcement action for a breach of DTR5 (notification obligations) for a transitional period. However this amnesty has now come to an end and the FSA will, in future, consider taking public disciplinary action where this is warranted. This has particular relevance in 2009 when the scope of DTR5 is widened to require disclosure of certain financial instruments that give rise to a similar economic effect to a qualifying financial instrument.

The same issue includes a reminder that listed companies that want to be able to hold general meetings on 14 days' notice after 3 August 2009, when the Shareholder Rights Directive is implemented in the UK, will need to pass an enabling resolution at the next annual general meeting. A copy of the publication can be found at www.fsa.gov.uk/pubs/ukla/list_jan09.pdf

NOTES FOR 2009 AGMs

With the imminent final implementation of the **Companies Act 2006** there are a number of technical issues which directors may wish to address at forthcoming AGMs. For traded companies in particular (ie: companies listed on the

COMPANY LAW

main market), the implementation of the *Shareholders' Rights Directive* increases the notice period for general meetings, other than AGMs, to 21 days from the current 14. The Directive is being implemented in the UK on 3 August 2009 and after this date if a company wishes to take advantage of the shorter notice period, a resolution is required to be passed to allow the company to continue to do so.

While some companies may want to take advantage of the changes being implemented to the articles of association, for example, the abolition of the memorandum of association, the alternative methods by which a company can change its name, the removal of authorised share capital limit and other such matters at this year's AGM, the implementation of the EU Directive may necessitate further amendment to articles as the final implementation regulations may not be available by the time companies are required to send out their 2009 AGM notice. In this case, further amendments may need to be made at the 2010 AGM.

BP SHAREHOLDER ANGER

At the recent BP AGM, shareholders registered an angry protest over senior directors' pay and their connections to Royal Bank of Scotland, by only narrowly passing the Group's remuneration report. The main concern was over the 15% discretionary bonus awarded to directors despite the Company's performance not meeting the requirements of its bonus plan.

BP's chairman, Sir Peter Sutherland, tried to reassure those investors concerned about a future cut in the Company's dividend by confirming the intention to continue pay-outs and maintain investment to ensure future growth. However, he also stated that with oil prices below \$60 a barrel, this did not generate enough cash to pay dividends and invest for growth. Some observers believe the BP vote reflects investor irritation with standards of governance and performance across corporate Britain.

Despite the fact that the chairman was also criticised for his role as a non-executive director of Royal Bank of Scotland, he was re-elected with 95.9% of votes in favour.

ICSA GUIDANCE

The Institute of Chartered Secretaries and Administrators (ICSA) has updated its original guidance on Access to the Register of Members: The *Proper Purpose Test 2009*. Sections 116 to 119 of the **Companies Act 2006** (inspection of register of members) provide that those seeking access to a company's register must state the purpose for which the information is going to be used although 'proper purpose' is not defined either in the Act or in the explanatory notes.

The ICSA guidance seeks to assist companies to ascertain what constitutes a proper or improper purpose and acknowledges that an individual company's response to a request would depend on particular circumstances of the case.

Examples of proper purpose include seeking access in order to contact shareholders about matters relating to a company; checking a register entry by a stockbroker to confirm ownership of shares before processing a transaction relating to those shares; a request from a credit reference agency for the purposes of performing credit or identity checks for the purposes of the money laundering regulations and persons seeking shareholder information with a view to enforcing a judgement whether by charging order, stock order, stock notice, third party debt order or otherwise.

Improper purposes include anything which may be unlawful, and any representation or communication to members that the company considers would threaten, harass or intimidate members or any offers relating to securities. The updated guidance can be found on the website www.icsa.org.uk

EU SHAREHOLDER RIGHTS DIRECTIVE

In October 2008 the Department of Business, Enterprise and Regulatory Reform (BERR) commenced a consultation exercise on the implementation of the *EU Shareholder Rights Directive 2007/36* (the Directive). Implementation of the Directive into UK law will involve amendments to certain provisions on shareholders' rights in the **Companies Act 2006**.

Under the Directive, companies listed on the London Stock Exchange must give 21 days' notice of any general meeting. Companies can however resolve to opt out of this obligation and retain the 14 days' notice period that became available under the 2006 Act if they meet the following conditions:

- * The shareholders have approved the holding of general meetings on 14 days' notice by passing an appropriate resolution at an AGM; and
- * the company offers 'the facility for shareholders to vote by electronic means accessible to all shareholders'.

Although there is ongoing consultation in respect of the definition of 'electronic means', BERR has confirmed that this does not prevent companies passing the enabling resolution prior to the implementation date of 3 August 2009. However, once the regulations have been finalised companies must ensure they meet the 'electronic means' requirements.

BERR has indicated that there will be no transitional relief on the number of days' notice for general meetings once the Directive is implemented and therefore a company which

COMPANY LAW

does not pass an enabling resolution at its 2009 AGM will be obliged to hold future meetings after 3 August 2009 at 21 days' notice until an appropriate resolution is passed at either the 2010 AGM or at a specially convened general meeting.

Other provisions may also require changes to UK company law:

- * The abolition of share blocking. This is the practice of preventing trading in shares after a specified date before a company meeting and once ownership of the shares and notification that they are to be voted at the meeting have been established. Although this is not a practice that occurs in the UK the law may have to be changed to prevent its possible use as there are currently no preventative measures in place.
- * Shareholders will have the right to ask questions at company meetings. Under UK law the chairman is responsible for orderly meetings and there is no requirement for questions to be answered so the law may need to be changed to allow this.
- * Members must be able to vote directly by correspondence without appointing a proxy. This also will necessitate changes to UK law as the right only exists now via a shareholders' ability/right to appoint proxies electronically or by correspondence.

COMPANY NAMES TRIBUNAL

Following the introduction in October 2008 of the new provisions concerning the objection of company names and the establishment of the Company Names Tribunal, (**sections 69-74 of the Companies Act 2006**), it has been reported that seven objection applications have been processed, all of which went undefended. The Company Names Adjudicator issued its first decision on 3 December 2008 ordering the company Coke Cola Limited to change its name and pay £700 of costs to the Coca Cola company. Other famous names that have submitted objections to company names include Harrods Limited (who objected to the name Harrods Limousine Limited) and Zurich Insurance Company (Zurich Risk Transfer Ltd). For more details see www.ito.gov.uk

UNFAIR PREJUDICE OF SHAREHOLDERS

Part 30 of the **Companies Act 2006** (CA 2006) enables a shareholder in a company who is being treated in an unfairly prejudicial way to seek relief from the court. Typically these cases involve companies with relatively small numbers of shareholders.

In **Oak Investment Partners XII Ltd Partnership v Boughtwood & Others [2009] EWHC 176 (CH)** the relationship between the two shareholders completely broke down when one of them attempted to assert control over the

company. The petitioner was a venture capital fund that had invested in the private company founded by an entrepreneur. As is generally the case, falling out is often the result of an exclusion of one shareholder director by another from the affairs of the company. The court usually orders that one shareholder/director purchases the shares of another at a value determined by the court to be fair in the circumstances. In this case when relations broke down and the entrepreneur sought to take control of the company at board level, the venture capital fund brought a petition under section 994 CA 2006 alleging that the conduct of the entrepreneur amounted to unfair prejudice.

The court reiterated that where a quasi partnership relationship, as was the case here, irrevocably breaks down as a result of the conduct of a party to a partnership that can amount to unfair prejudicial conduct.

In the event of a successful petition of unfair prejudice the court will usually order that the wrongdoer purchase the petitioner's shareholding. However in this case the court ordered the entrepreneur to sell his shares to the petitioner. This is a favourable remedy, particularly in situations where the wrongdoer is unlikely to be able to afford to buy the shares.

St John's Chambers in Bristol has recently published a useful guidance on Part 30 of the Companies Act 2006 entitled *Shareholder Protection from Unfairly Prejudicial Conduct, Case and Statute Citor* which can be found at www.stjohnschambers.co.uk

DISQUALIFIED DIRECTOR CHANGED NAME

A foreign exchange trader fooled the FSA by changing his name. Director of GFX Capital Markets, Terry Freeman, was detained by police in February suspected of laundering £44m in a pyramid fraud scheme.

He had been authorised to act as a director by the FSA more than two years ago despite being the subject of a fifteen-year director disqualification. Since changing his name from Sparks, Mr Freeman had registered as a director of three companies including the Foreign Currency Trading Fund at the centre of the money laundering probe. The disqualification was discovered during a private investigation of Mr Freeman in 2008, by Jeff Katz, chief executive of a corporate intelligence firm.

Although the FSA application process had been toughened in 2007 and now requires that people who seek authorisation must give details of previous names, criminal convictions and company directorships as well as any other relevant information, Mr Katz stated that the case revealed, "gaps in the system of regulation", especially when people change their name after rule breaking.

COMPANY LAW

EXECUTION OF DEEDS

Although the case **R (on the application of Mercury Tax Group and Another) v HM Revenue & Customs [2008] EWHC 2721 (Admin), [2008] All ER [D] 129 (November)** concerns the legality and validity of search warrants, it serves as a useful reminder about the correct manner of executing deeds and documents. It was held that a deed signed by an individual was not effectively executed because the signed signature pages had been attached originally to an early, incomplete, draft of the deed, then detached from the draft and transferred to a later, complete and amended version of the deed. The substitution of the signature pages affected the validity of the deed. The case confirms that for effective execution of a deed the signature (and attestation if relevant) must form part of the same physical document constituting the execution copy.

Mr Justice Underhill considered whether execution and delivery of the documentation had taken place in accordance with section 1(3) of the **Law of Property (Miscellaneous Provisions) Act 1989**. It was found that the formalities for a deed do not permit the insertion of pre-signed signature pages into final form documentation. It was concluded therefore that the recycling of signature pages had rendered the agreements ineffective and that the formalities for a deed had not been followed.

TRANSPARENCY RULES

The Walker Guidelines Monitoring Group was established to oversee disclosure issues relating to 'portfolio companies' that qualify for enhanced reporting and those private equity firms that own them. A portfolio company is a company in which a venture capital firm or buyout firm invests. *The Guidelines for Disclosure and Transparency in Private Equity* which were drawn up at the end of 2007 state that private equity firms should make audited accounts available, disclose their owners and board members, and publish a business review and details of its risk management policy.

According to the Guidelines Monitoring Group (GMG) several private equity firms have still not opened themselves up to more scrutiny. The first report issued by GMG in January this year showed that half of the private equity firms which have signed up to the Code have not fully met the disclosure requirements, although many have agreed to address the deficiencies, which in some cases include failing to name all of their board members.

The Code is voluntary but it gives GMG the power to 'name and shame' offenders although this sanction has not yet been deployed. Trade Unions have demanded the Government implement statutory regulations, arguing

that an industry which uses debt to buy companies needs closer supervision.

The GMG Private Equity Monitoring Group on Transparency and Disclosure, First Report can be downloaded from <http://walker-gmg.co.uk>

LIMITED LIABILITY PARTNERSHIPS

Following a consultation exercise, the *Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009* have recently been published in draft form by BERR.

It was agreed that, where it could be achieved, there were many advantages to making rules applicable to LLPs similar to those for a company under the new Companies Act regime. The following changes to the LLP regime include the following:

- * An LLP must have at least two members. Under existing legislation the only option available to enforce the two members' rule is for the partnership to be struck off the register. The new rule imitates company law on the consequences of breaching the two member rule by making a single member jointly and severally liable for debts contracted in any period in excess of six months. Also **s156, CA 2006** will be applied to LLPs. This permits the Secretary of State to require the LLP to add a member, to comply with the minimum requirement and to make it take other steps to rectify the position.
- * The Regulations modify **s44, CA 2006** which relates to the execution of agreements and deeds. This enables an LLP to execute a document by either affixing its common seal, signing by two members or signing by one member in the presence of a witness.
- * The Regulations have modified **ss162-165, CA 2006** which deal with directors of companies and provide that an LLP must keep a register of members. The register must give an address of service for a member and specify the designated members. The place where the register is kept must be notified to the Registrar of Companies if not kept at the LLP's registered office.
- * **Sections 1143-1148 CA 2006** which set out the provisions relating to sending or supplying documents will also apply to LLPs. These sections preserve the right to insist on hard copies, deal with the authentication of hard and soft copies of documents, and set out the provisions for deemed delivery for both documents received by post and in electronic format.

A copy of the draft Regulations can be found at www.opsi.gov.uk

COMPANY LAW

COMBINED CODE REVIEW

A review of the Combined Code on Corporate Governance has been announced by The Financial Reporting Council (FRC) who consider that the time is right to review the content and impact of the Code in light of the current financial crisis.

The FRC will liaise with the Walker review on the governance of banks and share relevant research and information. Sir Christopher Hogg, chairman of the FRC, commented that, “reappraisal at this time is so important that every corporate board subject to the Code should carry out its own thorough individual governance appraisal”.

CORPORATE GOVERNANCE STATEMENT

The Department of Business Enterprise and Regulatory Reform (BERR) has issued draft regulations, the *Companies Act 2006 (Accounts Reports and Audit) Regulations 2009*, which will complete the implementation of the EU Company Reporting Directive. Under the Directive, companies on the Official List are required to include a corporate governance statement in their annual directors’ report.

This statement can either be included in the report or published as a separate document at the same time and in the same manner as the directors’ report. Where the corporate governance statement is a separate statement, it must be filed with the Registrar of Companies and the auditor must give an opinion as to whether the information required to be shown in the statement relating to internal control and risk management systems in relation to the financial reporting process and certain disclosures required by the Takeovers Directive, is consistent with the annual accounts for the year in question.

The requirements set out in the Regulations will apply in relation to financial years beginning on or after 29 June 2008 which had not ended before 6 April 2009.

SHAREHOLDER PROTECTION

The *Protection of Shareholders Bill 2008/2009* was presented as a private members’ bill to Parliament on 17 March 2009. Its aim is to make provision for every public company to establish a shareholders’ committee to facilitate consultation and communication between the board and shareholders. The Bill was presented to the House of Commons by William Cash MP and the second reading debate is scheduled for 26 June 2009.

UNCLAIMED ASSETS

In recent years several countries have successfully set up schemes to enable unclaimed assets, such as small deposits of money in bank and building society accounts, to be reinvested in society. In November 2008 the Government introduced the **Dormant Bank**

and Building Society Accounts Act 2008 which forms the legal framework to enable both to transfer money in dormant accounts to a central reclaim fund for distribution for the benefit of the community. The money would then be distributed via the Big Lottery Fund back into society. The Act provides a minimum definition of dormant status; namely that an account must have been open for at least 15 years and that for the last 15 years there must have been no consumer initiated transactions on that account.

A key feature of the legislation is that it preserves the right of customers with dormant accounts to reclaim their money at any point in time – even after it has been transferred to the Scheme.

The Act also allows an alternative scheme for building societies (and banks) whose assets are less than £7 billion. Under this definition 50 of the 59 building societies would be able to use the alternative scheme. These societies will be able to choose to distribute funds directly to a charity of their choice, instead of via the Big Lottery Fund.

COMMUNITY INTEREST COMPANIES

In February 2009, BERR commenced a consultation exercise seeking comments and proposed amendments to the *Community Interest Company Regulations 2005 (SI2005/1788)*. CICs were formed as a new type of legal entity with the advantages of the corporate form but with the sole purpose of the assets being used for the purpose of community benefit. To date over 2,400 CICs have been registered, with the number steadily rising.

BERR now wishes to make some amendments to the Regulations to reflect the experience to date of CICs and the Regulator of Community Interest Companies in complying with existing legislation. In addition, in order to give full effect to the 2006 Companies Act’s provisions, amendments will need to be made to both the **Companies (Audit, Investigations and Community Enterprise) Act 2004** and the 2005 Regulations.

The consultation document contains draft *Community Interest Company (Amendment) Regulations 2009* with a proposed date of implementation of 1 October 2009.

NAPF GUIDELINES

The National Association of Pension Funds (NAPF) has updated its corporate governance policy and voting guidelines ahead of the 2009 AGM season. Although no changes have been made to remuneration policy, the NAPF urges investors to take a stronger stance on companies’ application of the Combined Code, ensuring that executive pay policy is clearly aligned with the pay policies of the company as a whole.

COMPANY LAW

New guidelines include a proposal for a non-audit fee cap of 100% of audit fees unless there is an explanation of any exceptional circumstances that might apply for fees to be higher. In addition where the role of chairman and CEO is combined for more than a year the NAPF recommends investors to consider an actively withheld vote or vote against the board chairman.

The Corporate Governance Policy and Voting Guidelines can be found at www.napf.co.uk

CHANGES TO PROSPECTUS DIRECTIVE

The European Commission has proposed changes to the *Prospectus Directive* that could facilitate capital-raising by listed companies and SMEs. The proposals reflect feedback from market participants received since the Directive was implemented in EU member states in 2005. With the number of prospectuses passported into other member states increasing by approximately six times, there are concerns about the amount of disclosure requirements which cause the prospectuses to be extremely lengthy.

To address these concerns the Commission is reviewing three particular areas:

- * Whether changes could be made to the structure and length of the prospectus to make it more useful;
- * Whether the threshold for the exemption from producing a prospectus should be increased from €2.5million to €10million and reduce the amount of information required for a prospectus published by an SME, and;
- * Whether companies doing rights issues or open offers should be exempt from the obligation to produce a full prospectus.

The Commission is also currently seeking a reaction from market participants and, if positive, they will publish concrete proposals for changes in these areas. Although any amendments to the Directive will not take place until at least the end of 2009/beginning of 2010 and will not have to be implemented for another year after that.

TAKEOVER CODE UPDATE

A new edition of the *Takeover Code* was published at the end of March which included the adoption of a number of amendments which recognize the increasing use of electronic forms of communication between companies and their shareholders and which now permit companies involved in offers to make use of this technology.

From that date, and only if the shareholder has consented to receive documents this way, then the information

from the offeree company can be posted on its website for access. The code sets out in the new Rule 19.11 a number of requirements relating to the information to be published and maintained on the website during the course of the offer. There is no equivalent requirement under the 2006 Act.

The new provisions, introduced by the **2006 Companies Act**, allow a registered shareholder in a quoted company to nominate another person to receive certain information in respect of the company. These nominated individuals will enjoy 'information rights' under the Companies Act 2006 in the same way as shareholders.

More information about the amendments to the Code can be found at www.thetakeoverpanel.org.uk

GAAP

The European Commission adopted measures in February this year, granting equivalence to the Generally Accepted Accounting Principles (GAAP) in relation to certain third countries. The measures amend the Prospectus Directive Regulation and the Commission Decision relating to the Transparency Directive.

Both of these determine that the GAAPs of the United States, Japan, China, Canada, South Korea and India are found to be equivalent to the International Financial Reporting Standards as adopted by the EU. These measures mean that non EEA companies listed or seeking listing on EU regulated markets will not need to restate historical financial information to IFRS or to include in a prospectus a narrative explaining the differences between these GAAPs and IFRS and may continue to prepare financial statements in accordance with these GAAPs.

The Commission will continue to regularly review the ongoing status of equivalence and report to Member States and Parliament where necessary.

AUDITOR LIABILITY LIMITATION

UK companies registered with the US Securities and Exchange Commission (SEC) have been effectively blocked from striking deals that would limit the liability of their auditors as it would 'impair auditor independence'. The SEC said the proposed rules would not apply to UK companies that have registered with it either because they have a US stock market listing or have a substantial number of US investors.

Under the **Companies Act 2006** UK companies have the power to agree liability limitation with their auditors as long as shareholders approve the deal. However the SEC's move could have significant consequences for

COMPANY LAW

the audit market. Most companies would be unable to make such agreements with their auditors if they operate in the US. The Association of British Insurers which has voiced its opinion to the agreements in the past said that it was not aware of any proposals for companies to sign up to Liability Limitation agreements in the current round of AGMs.

The GC100 (The Association for the General Counsel and Company Secretaries of FTSE 100 companies) has published a note on auditor liability limitation agreements. This sets out issues that directors should consider before entering into an agreement in the context of guidance issued by the FRC and the Institutional Shareholders' Committee.

EMPLOYMENT

KEY CHANGES

A number of key employment law changes took effect in April 2009.

- * Repeal of the statutory dispute resolution procedures. In most cases, where an employee sends a step one grievance letter or submits a tribunal claim before 4 July 2009 the old statutory rules will apply. For certain claims, such as those concerning redundancy payments and equal pay claims, however, the old rules continue to apply until 4 October 2009.
- * Statutory minimum holiday entitlement rose to 5.6 weeks from 4.8 weeks. This equates to 28 days for employees working a five day week. Employees affected must be informed in writing of their increased holiday entitlement.
- * Increases in the weekly rates of SSP, maternity allowance and maternity and paternity pay took effect from 5 April. SSP rose to £79.15 whilst MA, SMP, SPP and SAP all increased to £123.06 per week.
- * The right to request flexible working was extended to parents of children up to the age of 16.
- * The Employment Agency Standards inspectorate was given greater enforcement powers to tackle employment agencies and employment businesses who persistently fail to observe set standards.

PENSION FUNDS

The Pensions Regulator has reinforced earlier statements to the effect that the current scheme funding regime is flexible enough to cope with the economic downturn. Stressing the importance of long-term thinking by trustees and employers working openly together, the

EMPLOYMENT

statement also notes that 'there is no reason why a pension deficit should push an otherwise viable employer into insolvency'.

Companies with under-funded schemes can take up to ten years to complete a 'recovery plan' although those that take longer will attract special scrutiny. More importantly, companies will not be allowed to cut cash contributions to under-funded pension schemes if they are still paying dividends to shareholders.

The Pension Protection Fund (PPF), set up to protect the individual whose employer goes bust and whose Defined Benefit scheme can no longer afford to pay the promised pension, has announced a cap of £31,936.32 for people aged 65 in this situation. The figure represents a 3.5% increase from 2008/2009 and has been ratified in an order laid before Parliament.

Figures from the Pension Protection Fund recently published show the total shortfall of UK under-funded company schemes – which account for 86% of all final salary plans – rose to a record £155bn at the end of November 2008. This represented a rise in shortfall of £30bn which is nearly three times bigger than it was at the end of November 2007.

The Pension Regulator's website is www.thepensionsregulator.gov.uk

EMPLOYERS TO BE NAMED AND SHAMED

In an attempt to clamp down on those who disregard tribunal rulings, the Government has implemented amendments to the *Register of Judgments, Orders and Fines Regulations (2005)* to bring Employment and Employment Appeals Tribunal awards within the scope of the Register.

From 1 April 2009 anyone who fails to pay awards made by employment tribunals will be publicly named and shamed on the Register, which can be searched by members of the public and credit reference agencies.

A study in May 2009, designed and undertaken by IFF Research on the enforcement of awards made by employment tribunals, looked at the overall proportion that were honoured, and the factors that were likely to affect a claimant being paid by the employer.

A total of 1,002 interviews were conducted with claimants who had been awarded a monetary payment between January 2007 and April 2008.

By the time of interview, 39% of claimants had not received their award at all. If this percentage is applied to the total number of claimants in the sample framework, this amounts to 2,127 claimants not receiving their awards over a 16 month period.

EMPLOYMENT

Just over half (53%) had been paid in full and a further 8% had been paid in part. Of those who had received payment in part, 27% were being paid in instalments. In all other cases, it appeared unlikely that claimants would receive further payment.

Claims that have an element of working time directive, wages or redundancy pay and consultation are more likely to have been paid in full than claims without these elements and those in lower level job roles were significantly more likely to be paid in full than those at higher levels (58% of operatives compared to 47% of managerial claimants).

In some cases payment had been secured by recourse to the county court. While 61% of claimants had received full or part payment of their award, only 51% had achieved this without the involvement of the county courts.

Reasons given by claimants for non-payment of their award tended to be either the status of the employer had changed or a simple refusal to pay. Bankruptcy was the most mentioned reason for non-payment (39%) and it was more likely to affect those in mid-size organisations.

A refusal to pay was the second most mentioned reason for non-payment (29%). This issue was more likely to affect those with lower award values (under £5,000), so while members of this group may have been the most likely to be paid their award generally, when they were not it is apparent that it is the organisation that is driving the non-payment rather than a procedural issue associated with the claim. See the full Report at www.justice.gov.uk/publications/employment-tribunal-awards.htm

STOPPING SERIAL LITIGANTS

Disgruntled employees could be put off filing false claims after an Employment Appeal Tribunal in May 2009 ruled staff who fabricate allegations against their employers should be ordered to pay the legal costs.

Solicitor Gordon Turner has also focused attention to the issue of serial litigants making money from nuisance claims against multiple organisations after he discovered that a single claimant had made almost 50 claims of alleged age discrimination in relation to job advertisements in fields as diverse as architecture, translation and 'dance examination'.

Mr Turner has urged HR professionals to share information about suspicious claims as a way of stopping litigants. He has also called for a change in the tribunal system to address perceived weaknesses that allow such serial litigants to go largely unnoticed. Further, since

each party is generally responsible for paying their own costs, there has been up to now, little to deter people from bringing claims.

Providing a centralised register of claims online would be one way of helping employers identify serial litigants but the Tribunal Service has indicated that it has no plans to do this.

RECRUITMENT PROBLEMS

With an estimate of more than 3 million people searching for employment in the UK at present, it would seem that employers would have little difficulty recruiting the right people. However, two recent surveys illustrate the problems currently facing recruiters.

According to a CBI survey carried out at the end of last year, 40% of employers reported 'problems' with employee literacy and numeracy.

Research carried out more recently by the talent assessment specialist SHL gives less comfort for employers as it reveals that an increasing number of job seekers are prepared to bend the truth about their skills and qualifications in order to secure a post, with almost a quarter of those surveyed citing tough economic times as a reason.

For recruiters inundated with applications for each post it can be difficult to spot potential job cheats. SHL recommends psychometric testing as a more reliable and cost-effective method of ensuring employers recruit candidates with the right competencies, behaviours and values for a given role.

EQUALITY BILL AND GENDER PAY GAP

Published in April 2009, the *Equality Bill* includes a power to make further regulations to require private sector employers with at least 250 employees to publish information about the pay differentials between male and female employees.

The Government is keen that employers do this on a voluntary basis and will only use the power to make further regulations if adequate progress on reporting has not been made by April 2013. Failure to comply with any statutory publication requirements could attract a fine of up to £5,000.

The Bill, which is expected to come into force in autumn 2010, also includes a clause which means it will no longer be valid for employers to seek to prevent their employees from discussing their pay with colleagues and any action taken to dissuade this will be treated as victimisation.

EMPLOYMENT

LEGAL REPRESENTATION AND DISCIPLINARY HEARINGS

As outlined in the February edition of Update, employees may sometimes be entitled to have a lawyer present at a disciplinary meeting instead of being accompanied by a colleague or trade union official. The issue has arisen again in the courts and employers will need to consider carefully, requests for legal representation.

In **R (on the application of G) v The Governors of X School and Y City Council [2009] EWHC Admin** a 23 year old music assistant was dismissed for breach of trust as a result of him kissing a 15 year old pupil. The school refused the claimant's request for legal representation at internal disciplinary hearings and the claimant sought judicial review on the grounds that the refusal constituted a breach of Articles 6 of the European Convention of Human Rights (right to a fair trial).

A key element in this case was the school's obligation to make a report to the Secretary of State on the basis that the claimant might be unsuitable to work with children. The Secretary of State in turn had the power to prohibit the claimant from working with children in educational establishments. Therefore, given the seriousness of the allegations and the consequences that could arise from the disciplinary process, the High Court held that the claimant was entitled to legal representation at the disciplinary and appeal hearings.

While the court was at pains to stress its decision was limited to the particular circumstances before it, and the decision is most relevant to public sector employees, where the outcome of a disciplinary process could prevent an employee working in their chosen field, employers will need to be vigilant before refusing a request for legal representation.

The school has been given leave to appeal.

SHORT-TERM WORKING

The call from a number of employment groups for the Government to include a short-term working scheme in the Budget went unheeded. Under the proposals workers would, temporarily, work fewer hours per week, with the shortfall in wages being partially subsidised by the government. A similar scheme has been introduced in Germany.

Some organisations have already started to put in place flexible working schemes. Prominent among these is KPMG, which offered its staff the chance to either work a four-day week at a proportionately reduced salary, or to take a sabbatical of up to three months on reduced pay. Interest in the scheme was initially muted, forcing the accountancy firm to promise that staff volunteering for the

four-day week option would suffer only a 10% reduction in pay as long as at least 75% of staff signed up to the scheme and allowing staff to opt back out of the scheme in December 2009 instead of having to wait until September 2010 as originally planned.

In many cases, creative measures such as these can prove more cost-effective than redundancies.

RELIGION AND BELIEF DISCRIMINATION

In **Nicholson v Grainger Plc and Others ET 2203367/08** a tribunal has found that beliefs about the importance of climate change can amount to a 'belief' for the purposes of *The Employment Equality (Religion or Belief) Regulations 2003*, as amended (the Regulations).

After Mr Nicholson was made redundant by Grainger Plc, he brought several claims, including one for discrimination on the grounds of his 'strongly held philosophical belief about climate change and the environment'. The tribunal found that his beliefs were capable of being considered a 'belief' under the Regulations since they affected the way he lived his whole life.

The Regulations had originally referred to 'religious belief or similar philosophical belief', but in 2006 the word 'similar' was removed. Although the government indicated at the time that there was no intention to broaden the scope of the Regulations, this would appear to be the first case in which it has been successfully argued that a belief which is not similar to a religious belief falls within the scope of the Regulations.

The case will now proceed to a full hearing to consider the issue of whether Mr Nicholson was discriminated against because of his belief.

SWINE FLU RECOMMENDATIONS

The World Health Organisation's current high alert (end May) means that a swine flu pandemic is 'imminent', with over 17,410 laboratory confirmed cases as of 1 June 2009.

Britain's Department of Health confirmed 47 new cases of the virus were largely traced to an outbreak at a single school and although health officials said the cases have been mild, without evidence of widespread transmission in the community, the UK has over 229 cases currently registered with dozens of other cases still being investigated.

Various organisations have issued recommendations about the steps employers should take in connection with the current outbreak. The Health and Safety Executive (HSE) recommends employers to:

- Advise staff to stay at home if they are ill with flu-like symptoms; and
- Send home any employees who display flu-like symptoms.

EMPLOYMENT

The HSE also recommends that risk assessments should be carried out, paying particular attention to whether workers are likely to encounter others who are displaying symptoms and what measures can be taken to minimise contact. Although the use of face masks is not generally recommended, the HSE recognises that there are some circumstances in which wearing one will be advisable, depending of the nature of the work involved and where it is to be carried out.

From an HR perspective, the outbreak highlights the need for companies to continually update their business continuity plans which should include appraisals of the minimum number of staff needed to run each department. Travel policies will also need to be reviewed and appropriate restrictions on travel put in place if necessary.

In addition, policies on flexible working or consideration of the possibility of employees working from home to also cover for family requirements caused by the crisis.

Some employees may refuse to come to work because of fear of catching the virus and while there is no legal right for them to do this, employers should plan carefully about the appropriate way to deal with such absences.

TUPE

Several interesting cases concerning different aspects of Transfer of Undertaking legislation (TUPE) have arisen in recent months.

A recent decision of Liverpool Employment Tribunal in **Royden & Others v. Barnett Solicitors** has serious adverse implications for outsource providers and their clients.

When the Britannia Building Society awarded a £1m contract for its conveyancing work to Barnetts, affected employees of its previous law firm were offered employment with the new firm. Accepting the offer would have resulted in them relocating from Birkenhead to Barnetts' offices in Southport, or to the Bradford or Manchester offices of another law firm who were to assist Barnetts with the Britannia work.

The employees refused to transfer on the grounds of a substantial change in working conditions, which was 'to their material detriment.' This meant that they could treat their contract as having been terminated unfairly. The ET held that the new outsource provider was not able to rely on the ETO (Economic, Technical or Organisational) reason defence under TUPE, when it relocated the work to its own offices. The employees were therefore entitled to unfair dismissal compensation rather than just redundancy pay.

A remedy hearing has yet to take place.

Another case concerning service provision changes is that of **Clearsprings Management Ltd v Ankers and others**, which considered the issue of whether TUPE applies when a contract is divided among a number of businesses. Although the EAT found that a service provision had taken place, the activity after the transfer had taken place was so fragmented for TUPE to apply as it could not be ascertained which provider the employees should transfer to. Accordingly the employees were not protected on transfer.

In **Alemo Herron & Others v Parkwood Leisure Ltd** the EAT has held that a transferee is bound by collective agreements which apply to the contracts of transferring employees even where the agreement in question has since come to an end or been re-negotiated. The decision is a controversial one and permission to appeal has been granted.

Finally, the EAT has held that neither the *Acquired Rights Directive* nor TUPE require a transferee employer to consult after the transfer has occurred on measures it plans to take in respect of transferred employees (**UCATT v Amicus and others EKEATS/0007/08**).

LANDMARK RULING FOR DISABLED TEENAGER

Seventeen years old David Allen, who has muscular dystrophy, launched legal action against The Royal Bank of Scotland after they failed to implement wheelchair access at the Church Street branch in Sheffield.

The teenager suffered a series of embarrassing incidents, including having to discuss his current account details in the street and being advised he should attend the nearest accessible RBS branch which would have involved a two and a half hour round trip by bus.

At Sheffield County Court, Judge John Dowse ruled the bank had breached the **Disability Discrimination Act** and in addition to paying £6,500 in damages has until the end of September to install a platform lift.

It is the first ruling of its kind and has set a legal precedent which could have implications for other service providers. The bank claimed that it had complied with the Disability Right's Commissions' Code of Practice and that it had arranged access to three other branches. A spokesperson said, 'RBS strongly disagrees with the Court's Judgment and will accordingly be pursuing its right of Appeal'.

Until now no company has been forced by injunction to make a physical adjustment to ensure that disabled people have equal access to their services. This ruling changes that. Bigger companies now know that it is up to them to anticipate the needs of all their customers; and it will be up to them to prove why they have not ensured equal access to their services for all their clients.

HEALTH AND SAFETY

REMOVAL OF REGISTRATION REQUIREMENT

New rules have removed the requirements to register under the **Factories Act 1961** and the **Offices, Shops and Railway Premises Act 1963** which means that factory employers no longer have to register with the Health and Safety Executive (HSE) and office and shop employers do not need to register with their local authority.

However, some businesses will still have to register and submit forms under other regulations, depending on the type of business and the regulations that govern them. For example, food and catering businesses must continue to meet food standards registration and other requirements, which local authorities enforce.

Businesses producing, storing, using, and/or transporting substances defined under major hazard legislation, also must continue to meet major hazard requirements, which the HSE enforces.

The various requirements have been abolished because in terms of the premises notification requirement, this is now redundant as the HSE obtains information on factory premises using a range of more reliable and efficient information sources and strategies, as do many local authorities on offices and shops. It would also seem clear that the general register is obsolete as modern legislation has overtaken the original purpose of this requirement.

ROSPA CALLS FOR OVERHAUL

The Royal Society for the Prevention of Accidents (ROSPA) has called for a radical overhaul of the UK health and safety system, believing that ‘it is time for the HSE to develop a new dynamic between its work and the wider health and safety market’.

Launching a new initiative at its Occupational Safety and Health at Work Congress which took place in Birmingham in May, the safety charity is also seeking its members’ views on the best way to enhance the director-level leadership of health and safety within businesses and organisations. The results of the survey will be presented to the Health and Safety Executive, which is investigating the effectiveness of guidance currently issued to directors and senior managers about their health and safety responsibilities.

Central to discussions about directors’ duties is the question of whether further guidance or stronger regulatory intervention is required to enhance the leadership of accident and ill health prevention in the workplace.

ROSPA contends that business and people in the workplace, rather than the regulator, need to be placed at the heart of the system; that the substantial contribution of ‘tens of thousands’ of health and safety activists outside HSE is undervalued.

NIGHT SHIFTS AND CANCER

The Danish Government has begun paying compensation to women who developed breast cancer after working night shifts. These payments follow a finding by a United Nations Health Agency that working nights ‘probably increases the risk’ of cancer.

The International Agency for Research on Cancer (IARC) places shift work in the same category as anabolic steroids, ultra violet radiation and diesel engine exhaust fumes.

It is estimated that around 20% of the UK’s workforce is currently engaged in night work and Union leaders say the UK Government should be doing more to protect workers from its dangers.

As a result of the IARC’s findings, it is revealed that the HSE has again commissioned its own research, although they have been looking at the relationship between shift work and the disease since around 2002 when their first report followed anxieties in the USA. At the time, Professor Anthony Swerdlow, a leading epidemiologist at the Institute of Cancer Research concluded that, “Overall, the evidence for an association is appreciable, but not definitive” and that ‘further epidemiological research was needed to clarify the relationship’.

RECENT CASES

- A pet food manufacturer has been fined £157,500 over the death of an employee who was crushed after crawling into a machine to clear a jam.

Gross negligence manslaughter charges against the company’s chairman and another executive were dropped part-way through the trial after the HSE accepted a guilty plea on a Health and Safety at Work Act charge

The employee was working on a semi-automatic off-load machine, used to transfer finished dog food cartons onto a conveyor, when the machine jammed. He crawled into the machine’s entrance to try to clear the jam when the pneumatic pick-up unit came down and pinned him to a stack of trays. He died of asphyxiation as a result of pressure on his chest.

The HSE’s joint investigation with Surrey police uncovered ‘serious and deliberate deficiencies in the safeguarding of the machine’ as well as discovering that safety guards on other machines had also been disabled. The HSE served several Prohibition Notices during its investigation.

- A young apprentice at a joinery workshop died from serious head injuries, when a stack of MDF boards collapsed on him. The boards had been held by a badly designed bracket which had been in situ for only a week.

HEALTH AND SAFETY

The managing director was fined £7,500 and ordered to pay costs of £2,500 after pleading guilty to breaching regulation 4(1) of the Provision and Use of Work Equipment Regulations 1998.

- A student on work experience suffered burns from a fireball that melted the plastic print of his T-shirt onto his skin. The accident was caused by the ignition of brake fluid being sprayed onto a running engine by another worker.

The motor car workshop was fined £15,000 with £9,000 costs for failing to ensure the health and safety of their employees.

WORK-RELATED STRESS WEBSITE

The Health and Safety Executive's new website on Work Related Stress, www.hse.gov.uk/stress is achieving much success with a steadily increasing number of hits each week.

With a total of 13.5 million days lost each year in the UK to work-related stress, it is a major cause of occupational ill health resulting in sickness absence, high staff turnover and poor performance for organisations. According to the Confederation of British Industry, the annual cost of this is estimated to be around £12bn. The new site has been designed to help businesses prevent the causes and includes updated advice and guidance, a self-assessment questionnaire for line managers, case studies and good practical examples of things that have worked well for other organisations.

A particular focus is the section on Management Standards which has already been used successfully by many organisations to help manage the issue sensibly and minimise the impact on businesses by highlighting the components of good organisation, job design and management that keep stress levels in check and enhance productivity.

CONSTRUCTION COSTS

The House of Lords has delivered its long-awaited judgement in **R v Chargot (2008 2 All ER 1077)**. In this case the employee was fatally injured after he drove a dumper truck which tipped over onto its side, burying him under the load of soil it was transporting. There were no witnesses to the accident and the precise cause was never established. However the ensuing investigation did reveal various shortcomings in the health and safety organisation of the construction project and the HSE brought charges against the two companies involved in the project, along with the director of the group.

At first instance, all three defendants were found guilty and ordered to pay substantial fines and costs. The first appellant was fined £75,000 and ordered to pay £37,500 costs. The second appellant was fined £100,000 and ordered to pay

£75,000 costs. The third appellant was fined £75,000 and ordered to pay £103,500 costs.

At Court of Appeal, the defendants argued that the prosecution had not identified or proved particular acts or omissions consisting of the failure to comply with their duties as set out in the **Health and Safety at Work Act 1974** and that the prosecution had based its case on the proposition that it was sufficient for it to identify and prove a risk of injury arising from a state of affairs at work. The Court of Appeal agreed with the prosecution, holding that there was a positive burden on employers. The House of Lords affirmed this reasoning. It was firmly of the view that the prosecution need only prove the existence of a particular set of circumstances that can be described as 'exposure of employees or non-employees to a 'risk' and that this 'risk' can be evidenced by the fact that the accident happened in the first place.

MANAGEMENT OF IDENTIFIED RISKS

An employee working as an adviser for a firm of insurance brokers, developed a pain in her wrist after a bonus scheme was introduced which meant that her typing workload had increased. She informed her line manager and after taking annual leave the pain subsided but returned when she resumed work.

She was then signed off for two weeks by her GP who diagnosed tenosynovitis and after she returned to work, her workload was reduced. Despite this, the symptoms returned and she subsequently accepted her employer's offer of voluntary redundancy.

She then claimed for personal injury against her employer, citing the **Health and Safety (Displaced Screen Equipment) Regulations 1992** and basing her claim on the allegation that her employer had failed to take reasonable care to protect her from suffering wrist injury.

The claim was dismissed at first instance on the grounds that the breaches were not causative of her injury. On appeal, her claim was allowed in part. Firstly the amount of typing that the employee had undertaken was found not to be excessive and would not normally cause personal injury. However, taking all the circumstances into account, it ought to have been held that on the balance of probabilities, the pain suffered by the claimant was aggravated by her keyboard work. In addition, the employer had failed to plan adjusted provisions for the employee.

Although the employer had not been negligent until the employee returned to work, it became apparent that even moderate typing aggravated the employee's symptoms; it would then have been foreseeable that continuing such work could lead to personal injury (**Goodwin v Bennetts UK Limited (2008)**).

ENVIRONMENT

THE CARBON TRUST

In a move to help British business export specific technologies, the Carbon Trust at the beginning of May, signed a groundbreaking £10million agreement in Beijing with the China Energy Conservation Investment Corporation (CECIC) to develop and deploy low carbon technologies.

This new partnership will see a joint venture created to accelerate low carbon innovation and technology transfer in China, opening new markets for innovative, British clean technology companies and reducing global carbon emissions.

The Carbon Trust is an independent company set up in 2001 by the British Government in response to the threat of climate change, to accelerate the move to a low carbon economy by working with organisations to reduce carbon emissions and develop commercial low carbon technologies.

In 2008 alone the Carbon Trust supported half a million UK businesses, saving companies over £200 million from their annual energy bills and cutting up to 2.3 million tonnes of carbon dioxide from their annual emissions. Their website at www.carbontrust.co.uk contains advice, tools and new publications to help businesses monitor and reduce their carbon emissions and costs.

GOVERNMENT CHANGES CARBON AUCTIONS RULES

In line with the government's commitment to support a robust and stable carbon market, HM Treasury recently published the *Community Emission Trading Scheme (Auctioning of Allowances) Scheme 2009* which sets out how the UK will conduct auctions of carbon allowances and the terms governing participation in auctions during Phase II of the EU Emissions Trading Scheme.

This replaces the Community Emission Trading Scheme (Allocation of Allowances for Payment) Scheme 2008 and improves upon the UK auctioning model on two significant grounds.

Firstly, it implements a previous Government commitment to establish a non-competitive bidding facility specially designed for smaller emitters. Secondly, provision is made for the Government to compensate primary participants (auction intermediaries) for the services they provide at auctions.

WATER POLLUTION FINE

Thames Water, Britain's largest water company, was recently fined £125,000 for causing polluting matter to enter controlled waters. In September 2008 the company

had allowed a large quantity of industrial strength chlorine to spill into the River Wandle resulting in the pollution of a 5km stretch of the river, killing and damaging aquatic life and vegetation.

The Environment Agency estimates it will take ten years for the river to return to its former state. It is understood that the fine is the largest ever levied against a water company for a single water pollution offence but represents less than 0.1% of Thames Water's annual turnover. The Environment Agency has called for the sentencing guidelines for pollution offences to be reviewed (www.environment-agency.gov.uk/news).

ENVIRONMENTAL PERMITTING

DEFRA, DECC, The Welsh Assembly Government and the Environment Agency have issued a consultation document outlining proposals to widen the environmental permitting regime. This programme is presented as 'a better regulation initiative', designed to reduce costs for industries by cutting red tape while continuing to protect the environment and human health.

The consultation seeks to extend the 2007 regulations to incorporate the permitting and compliance aspects of a number of other regimes including discharge consents, groundwater authorisations and radioactive substances authorisations.

www.defra.gov.uk/corporate/consult/env-Permitting/consultation-document

WASTE ELECTRICAL AND ELECTRONIC EQUIPMENT

BERR has issued a consultation paper inviting views on the European Commission's proposals to amend WEEE and the Restriction of the use of certain Hazardous Substances in the electrical and electronic equipment (RoHS) Directives. Views are invited on various matters including a proposal to increase the amounts of electric and electronic waste that are separately collected and recycled, while the proposals on RoHS aim for a higher level of environmental protection by revising the scope of the restrictions and the substances to which they apply. The consultation document is available at www.berr.gov.uk/whatwedo/sectors/sustainability/weee/page30269.html

MANAGING HAZARDOUS WASTE

The qualifying exemption for notifying the Environment Agency when hazardous waste is produced on premises has been raised from 200kg to 500kg with effect from 6 April 2009. This means that all premises producing less than 500kg of hazardous waste in any twelve

ENVIRONMENT

month period will no longer need to notify under the *Environment Agency (Hazardous Waste (England and Wales) (Amendment) Regulations 2009 SI2009/507)*.

PRE-PACKAGED GOODS

Deregulatory measures have been introduced which allow, as from 11 April 2009, pre packaged goods (except for wines and spirits) to be freely packed in any size. Until now regulations have set down prescribed quantities for the packaging of various products such as staple and common foodstuffs. Manufacturers now have the freedom to pack products, from milk to cement and barley to ballast in any size of packaging (*Weights and Measures (Specified Quantities)(Pre-packaged Products) Regulations 2009 SI 2009/663*).

REACH

The *Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation (1907/2006/EC)* (REACH) has the aim of protecting human health and the environment from the use of chemicals, while at the same time facilitating the free movement of chemicals within the EU market. It imposes onerous requirements on manufacturers and importers of chemical substances into the UK and 1 December 2010 has been set as a deadline for full registration for substances manufactured or imported in quantities of 1,000 tonnes or more, or manufactured in smaller quantities but considered to be particularly harmful.

The European Commission has now produced draft guidance on registration and in particular the exemptions that are available. The guidance is available at www.ec.europa.eu/enterprise/reach/docs/reach/_com_rev_anx_V_guidance_081010_en.pdf.

The REACH *Enforcement Regulations (SI1008/2852)* came into force on 1 December 2008 providing for the division of enforcement responsibilities between several different UK regulators including the Environment Agency, the Health and Safety Executive and local authorities. The Regulations can be downloaded at www.opsi.gov.uk/si/si2008/uksi_20082852_en_1

Finally, the Department for Environment, Food and Rural Affairs (DEFRA) has published guidance seeking to clarify the REACH Regulations in relation to recovered waste substances and in particular guidance as to when a business in the waste industry may be deemed to be a 'manufacturer' under REACH and what obligations and exemptions are available. The guidance can be sourced at www.defra.gov.uk/environment/chemicals/reach/pdf/reach-recovered-waste-guidance.pdf

ENVIRONMENTAL DAMAGE

Operators of economic activities that cause serious damage to the environment now have to pay for that damage under *EC Directive 2004/35*. The new Regulations, which are in addition to existing ones to protect the environment, apply to serious environmental damage to species and habitats, damage to the water environment and contamination of soil. If there is an imminent threat of damage, actual damage under the Regulations or reasonable grounds for believing that there might be, the business must without delay take steps to prevent the damage or further damage and to notify the relevant authority (*Environmental Damage) (Prevention and Remediation) Regulations 2009 (SI2009/153)*).

DATA PROTECTION

GOVERNMENT DATABASES BREACH LAW

A report written by the Foundation for Information Policy Research for the Joseph Rowntree Reform Trust, claims that on an assessment of 46 databases across various Government departments, at least a quarter of them are 'almost certainly illegal under human rights or data protection law'.

In recent years, the Government has built or extended many central databases that hold information on every aspect of our lives, from health and education to welfare, law-enforcement and tax. Claimed to make public services better or cheaper, they have been repeatedly challenged by controversies over effectiveness, privacy, legality and cost.

The Trust believes that more than half of nearly 50 state databases have 'significant problems' in protecting privacy. Only one in seven was 'effective, proportionate or necessary'.

MODEL PUBLICATION SCHEME

The Information Commissioner's Office (ICO) has introduced a model publication scheme which all public sector organisations should have adopted from the beginning of this year. The scheme which is part of the **Freedom of Information Act**, requires all public authorities to make clear what kinds of public information they hold and how the general public can access this information. Most public authorities will include an item on their website listing the kinds of information they hold, although a leaflet is also available. Details can be found at www.ico.gov.uk.

DATA PROTECTION

EU THREATENS ACTION

The European Commission has threatened the United Kingdom with legal action over its handling of behavioural targeting and also its interpretation of European internet privacy laws.

Behavioural targeting is simply the process of using online data to build up a comprehensive picture of web-users' behaviour and then mould premium-rated advertising around it to personalise a marketing message to customers. That unique data has to be gleaned from monitoring each individual's viewing, listening, purchasing habits in order to shape the message, the offer or the service

BT and Phorm, a small AIM-listed advertising company, carried out trials on BT internet users in 2006 and 2007 without informing customers. However, official trials, carried out in 2008, did comply with EU Rules.

The EU's Telecommunications Commissioner has spoken of structural problems in the way the UK has implemented European Union Rules ensuring the confidentiality of communications. Though targeted advertising is not illegal, these rules make it clear that consumers must be informed that they are being monitored.

The Commission is particularly concerned with existing UK rules which allow data interception and has decried the lack of an independent supervisory authority to deal with the problem.

Senior figures in the advertising industry have been vocal in their criticism, some saying that while behavioural targeting is the way of the future for advertising, this recent problem has 'potentially spoiled the party for anyone else interested in exploiting it, under Ofcom's current regime of benign regulatory neglect'.

CONFIDENTIAL DATA

The Information Commissioner has raided and shut down a company which allegedly sold workers' confidential data to building firms. The Consulting Association in Droitwich, Worcestershire, are guilty of a serious breach of the Data Protection Act, according to the Commissioner. His office alleges that a secret system was run for over 15 years enabling employers to unlawfully vet job applicants. Action is also being considered against more than 40 firms who used the service which had not been registered and whose existence had been repeatedly denied. Data held by the company included information on personal relationships, trade union activity and employment history.

INTELLECTUAL PROPERTY

eBAY CLEARED

In March 2009, L'Oréal the French perfumer, launched a trade mark infringement case in London, accusing the online auction house eBay of selling goods, ranging from perfume to mascara, that were either counterfeit or sourced from outside the EU. The company argued that by failing to stop third parties selling 'fakes', eBay was in effect acting in concert with the sellers of those goods.

However, this month a French judge ruled that eBay is not liable for the sale of any counterfeit L'Oréal products through its website and it was fulfilling its "obligation" to try and prevent the sale of fake goods.

This dispute is the latest in a series of actions involving the two companies which has spanned five European jurisdictions and involved broadly similar claims. European courts have so far differed in their conclusions and have increased pressure on the EU to produce definitive rules.

eBay has lost similar cases in France brought by Hermes and Louis Vuitton.

NASDAQ WIN APPEAL

Under Article 8(5) of the Trade Marks Directive, the owners of trade marks with a reputation may oppose the registration of similar marks in relation to goods or services which are even dissimilar to those from which the owners' marks are registered, if the use of the later marks would take unfair advantage of or 'dilute' the distinctive character or reputation of the relevant mark.

The European Court of Justice (ECJ) has held that the Office for Harmonisation of the Internal Market was wrong to reject the NASDAQ's opposition to an application by an Italian company to register the same name as a community trade mark in relation to sports equipment. The ECJ ruled that, having regard to the 'omnipresent' NASDAQ mark in both the specialist and general press, and the interest of a large part of the general public in developments in financial markets, the reputation of the mark reached further than the professional public specialising in financial information (**Antarctica Srl v OHIN, Case C - 320/07, 12 March 2009**).

PICASSO PAINTS

Northampton-based, Manders Paints, has won a six year battle with the family of Pablo Picasso to name one of its ranges after the artist. Manders Paints has been granted the right to use the name for its 'Picasso Tint to Taste' range after it argued that other famous artists' names such as Matisse and Renoir, had been registered as trade marks. The Picasso estate had argued that Manders wanted to exploit the world-famous Picasso name.

A spokesman for the Intellectual Property Office (IPO) said that 'The key issue is the distinction the IPO drew

INTELLECTUAL PROPERTY

between, on the one hand, the notoriety of an individual, and the commercial reputation that exists in the name. In the case of Picasso, he enjoys notoriety as an artist, but the evidence only showed a commercial reputation in respect of vehicles (a reference to Citroen's use of the name in respect of its Xsara car). Such a commercial reputation was not sufficient to prevent use by a third party to indicate the trade origin of paints.

EASTER BUNNIES AND BAD FAITH

The Advocate General has provided her Opinion to the ECJ in a case requiring interpretation of bad faith in respect of Community trade mark applications.

Lindt, the Swiss chocolate makers, made and sold chocolate Easter bunnies and in June 2000 applied to register a 3-dimensional trade mark featuring a picture of its 'bunny'. Hauswirth have made and sold its own chocolate bunnies since 1962. These feature a similar motif which was unregistered.

Following registration, Lindt raised proceedings against Hauswirth for trade mark infringement on the basis of a likelihood of confusion as to the origin of Hauswirth's product. Hauswirth counterclaimed that Lindt's application was made in bad faith and therefore their trade mark should be declared invalid under *Article 51(1)(b) of the Community Trade Mark Regulation*. The Advocate General stated that intention to prevent competitors from using unregistered signs which they had otherwise been entitled to use, particularly if that use was substantial and long-standing and enjoyed a degree of legal protection, was an indication of bad faith. However bad faith might not be found if the competitors had been deriving unjustified benefit from the applicant's mark (**Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH**).

COPYRIGHT LAWS

Consumers International, has placed the UK in last place in a survey of 16 countries' copyright laws. Consumer Focus, a group that campaigns for consumer rights in the UK, commented that UK copyright law is the oldest but also the most out of date and the least effective in balancing the interests of rights holders against those of consumers.

To reflect this, they report that over half of British consumers admit to 'ripping' CD's to a computer or iPod and, more worryingly' three in five think that it is perfectly legal.

MUSIC RECORDINGS TERM INCREASE

After a long, drawn out battle of both words and egos, the European Parliament has finally voted in favour of extending copyright term for music recordings to 70 years.

The Commission had originally proposed an extension

to 95 years, but the revised deal now paves the way for European countries to back the deal in the European Council, which also needs to approve the legislation.

The UK has now reversed its position despite originally, with 11 other countries, voting against the extension but the other states will need to change their view for a deal to be brokered in the Council.

The vote in the European Parliament is a victory for musicians across Europe. Member States' Governments now need to do the right thing and back the Parliament's vote. The Association of European Performers' Organisations AEPO-ARTIS also greeted the vote but stressed that, 'the proposal did not answer all needs of performing artists in Europe. In particular, their rights in the audiovisual sector and the recognition in the digital environment of their creative work and talent certainly need further work and proposals at European level.'

The vote contrasts with the recommendations of the UK's 2006 Gowers Review which was in favour of keeping the copyright term at 50 years.

THREE STRIKES LAW

France's controversial Creation and Internet law, which envisages cutting the internet connections of people who illegally download copyright material, has passed into law.

The bill was passed by the French Senate on May 13, 2009 after clearing the country's National Assembly on its second reading the day before.

Viviane Reding, member of the European Commission, responsible for Information Society and Media, announced that there was nothing in European law that contradicted the new legislation.

International Federation of the Phonographic Industry Chairman and CEO John Kennedy also welcomed the decision, saying, "Creative industries everywhere, including music, film, TV and books, are facing a fundamental challenge from the way online piracy is eroding the ability of creators to get rewarded for their work. The new French law takes the right approach and sets an example to the rest of the world. It will introduce sensible, proportionate measures that will have a real impact on piracy while respecting ordinary, legitimate internet users."

DR MARTIN LUTHER KING

Managers of Dr King's estate are seeking to protect the copyright of his stirring speeches for the benefit of the estate. They have sought help from EMI Group to track and charge when clips of his speeches appear on such sites as YouTube and also to promote and sell them more effectively on iTunes. Dr King himself copyrighted several

INTELLECTUAL PROPERTY

of his speeches before his assassination in 1968 and the process has been continued aggressively by his widow and his estate. The income already raised amounts to tens of millions of dollars each year and is used to fund the non-profit King Center in Atlanta.

TOYS ‘R’ US

It has been reported that the toy retailer, Toys ‘R’ Us, has paid US\$5.1m for the Toys.com domain name. Believed to be the biggest pay-out for a domain name this year, it has some way to go to beat the US\$14m paid for Sex.com in 2007.

Ron Jackson, editor of the Domain Name Journal, observes that the severe recession is forcing businesses to look for the most cost-effective, efficient way they can possibly operate and for many that means establishing or reinforcing a web presence. The Toy.com auction saw a series of bidders for the domain name but as the price rose to US\$3m only two bidders were left – Toys ‘R’ Us and National A-1 Advertising.

TRADE MARK FEES

The European Union has agreed to let the European Trade Mark Office (ETMO), formerly known as the Office of Harmonisation for the Internal Market – to cut its fees by 40%. This is expected to herald a ‘price war’ with the UK’s Intellectual Property Office (IPO) announcing a review of its fees and services by way of public consultation.

A range of options has been put forward aiming to help businesses register marks more easily and affordably in the UK, potentially saving them over £700k per annum. The IPO states that its review has been prompted by a decrease in demand for patent and trade mark applications in the UK (down 12% in 2008) in line with other trade mark offices such as ETMO.

EMPLOYEE COMPENSATION

The Patents Court has awarded £1.5m to two inventors of the radioactive cardiac imaging agent, Myoview (**Kelly v GE Healthcare (2009) EWHC 181 (PAT)**). Under section 40 of the **Patents Act 1977**, employees can claim compensation from their employers for patented inventions they have made where the patent is of outstanding benefit to the employer.

The claimants, Drs Kelly and Chiu, were employed by Amersham International and pioneered the development of Myoview in the 1980s. The Court found that the performance of Myoview which has achieved sales in excess of £1.3bn against comparatively low initial R&D costs of £2.4m, was far above that of Amersham’s other products. It had clearly been of outstanding benefit to

the company and had the patents not existed, generic competition following the expiry of regulatory data exclusivity would have created a ‘crisis’ for the defendant.

In a rare victory for employees seeking compensation under UK patent legislation, the Court considered that, even on a conservative view, Amersham’s income would have reduced by at least 10% in the face of generic competition, or £50m, and thus this constituted the value of the patents to Amersham. The Court awarded 2% of the £50m to Dr Kelly and 1% to Dr Chiu. It noted that this amounted to less than 0.1% of turnover or 3 days’ profits of Myoview which the Court considered to be just and fair. Whilst this case might awaken many employee inventors to their right to claim compensation for their inventions, it is clear that the success of such claims will depend on the claimant being able to demonstrate that the benefit to the employers was ‘outstanding’ or exceptional in light of the normal practice of the business.

TRADE MARK DILUTION

Under the *Trade Marks Directive (89/104/EEC)* a mark will not be registered or will be declared invalid if it is identical or similar to an earlier national trade mark and the use of the later trade mark, although registered for goods or services that are not similar to those for which the earlier trade mark is registered, would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

In **Intel Corp Inc v CPM UK Limited, Case C 252/07**, the European Court of Justice (ECJ) considered a claim from Intel that CPM’s mark, INTELMARK, registered for marketing and tele-marketing services, was invalid on the grounds that it took unfair advantage of, or was detrimental to Intel’s UK community trade marks consisting of, or including, the word ‘INTEL’ for computers and computer-linked goods and services. The ECJ considered that although an earlier mark may have a huge reputation for certain goods or services, this does not necessarily imply that there is a link between the earlier and later marks. However where the latter mark calls the earlier mark to mind for the average consumer, this will be tantamount to the existence of such a link. The owner of an earlier mark must show an effect on the economic behaviour of consumers to establish detriment to the distinctive character of his mark.

COMPUTER PROGRAMS NOT PATENTABLE

Following the decision in **Symbian Limited v Controller General of Patents**, the UK’s Intellectual Property Office (IPO) has issued a guidance notice to patent examiners assessing the patentability of computer-related inventions. In general, computer programs are not to be regarded as

INTELLECTUAL PROPERTY

inventions and so are not patentable (*Article 52(2), European Patent Convention*).

The Symbian decision adopted the approach that the test for patentability was whether the invention made a technical contribution to the state of the art. The IPO notice makes it clear that a program will be considered for registration as a patent if it results in a computer running faster or more reliably or generally improves the way a computer acts technically (**Patents Act 1977: Patentability of Computer Programs 8 December 2008 available at www.ipo.gov.uk**).

ADWORDS

Google's AdWords service allows advertisers to place sponsored links to their websites next to the search results on Google for any given search term. In May last year, Google controversially lifted the restriction on third parties bidding for trade mark terms. Previously, trade mark owners could notify Google of their rights and request that no other party be open to sponsor a particular term.

In December 2008, Interflora, the flower delivery firm, commenced legal proceedings against Marks & Spencer (M&S), for bidding on the word 'interflora' as a search engine key word. M&S were accused in the legal proceedings of bidding for the word as well as common misspellings such as 'intafloa' and 'inter-flora'. When those terms were searched for, adverts for M&S appear as Google 'sponsored links'. Interflora claims that the registration of such terms amounts to trade mark infringement. Marks & Spencer has not denied that it has registered interflora trade marks as sponsored links, but has stated this to be normal market practice. The case continues.

THE HAKA

The New Zealand Government has assigned intellectual property rights in the traditional Maori Haka to a North Island Maori tribal group. The move is an attempt to stop the Haka being ripped off by Hollywood directors and international advertising campaigns. Although the new agreement is largely symbolic it is considered immensely significant by Maori leaders. The Maori tribe has tried to trade mark the Haka several times over the past decade to limit commercial abuse but has failed, largely because of concerns that such registration would prevent the All Blacks team from performing it prior to international rugby games.

RECENT IP CASES

On a reference from the Austrian National Court, the European Court of Justice (ECJ) has found that it is not 'genuine use' of a trade mark for the purposes of the *Trade Marks Directive* where the mark is fixed to promotional items distributed as a reward for, and to encourage, the

purchase of other goods. This was because such items were not themselves distributed with the aim of creating or maintaining the market for goods in the same class (**Silberquelle GmbH v Maselli Strickmode GmbH, ECJ 15 January 2009**).

A recent decision has highlighted the need for prospective assignees of registered trade marks or patents to register the relevant assignments (**Thorn Security Ltd v Siemens Schweiz AG (2008) EWCA Civ 1161 2008**). One of the adverse effects of the failure to register an assignment within six months of a transaction is that the assignee is precluded from obtaining its costs and expenses arising out of a subsequent infringement action. In this case, the Court of Appeal concluded that Siemens' failure to register a previous transfer to it of the patent meant that under **Section 68 of the Patents Act 1977**, it would have been unable to recover damages for the period that the transfer remained unregistered.

The High Court has rejected Virgin Atlantic Airways' claims for infringement of unregistered design rights relating to a flat-bed airline seat. The Court rejected the claim of wholesale copying of Virgin's airline seat by the defendants, finding that each aspect of the defendants' design has been an independent design choice (**Virgin Atlantic Airways Ltd v Premium Aircraft Interiors Group Ltd (and Another) Patents Court 21 January 2009**).

COMMERCIAL

INTERNET PURCHASING ENFORCEMENT

Heralding a forthcoming White Paper, Consumer Affairs Minister Gareth Thomas has said it would include proposals for more effective enforcement to protect consumers using the internet to buy goods and services. With British consumers making almost double the amount of online transactions compared to the European average, they are twice as likely to be exposed to online fraudsters. In the UK in 2008, 37% of individuals ordered goods or services over the internet for private use.

REVENUE & CUSTOMS

The recent Budget included plans to enable HM Revenue & Customs (HMRC) to publish the names of both corporate and individual taxpayers who incur a penalty because they deliberately understate their tax liabilities by over £25,000. Furthermore, it is proposed that taxpayers who incur a similar penalty of £5,000 or more will be subjected to new reporting requirements; they will have to submit more detailed returns for up to five years to show that they have proper systems in place to be able to make a correct tax return.

COMMERCIAL

Once the Finance Bill receives Royal Assent, large companies will be required to appoint a 'senior accounting officer' to certify to HMRC that the accounting systems in operation are adequate for the preparation of accurate tax returns, or explain any inadequacies in the system and confirm that they have been notified to the company's auditors.

From 1 April 2009 HMRC has had the power to enter residential homes without warning and gained new powers to fine taxpayers. Income and corporation tax inspectors now have the same powers of entry as those enjoyed by Customs officials investigating unpaid VAT.

LATE PAYMENT OF COMMERCIAL DEBTS

A recent case heard before the Court of Appeal has clarified the interpretation of **Section 4 of the Late Payment of Commercial Debts (Interest) (1998 Act)**.

Where parties to a contract for goods or services make no provision for payment of a rate of interest on overdue debts under that contract, statutory interest accrues under Section 4 of the 1998 Act.

The Section provides that statutory interest accrues from the last day of the period of 30 days from the day on which the obligation of the supplier to which the debt relates is performed or, if later, the day on which the purchaser has notice of the amount of the debt.

In this particular case, the terms of the contract made no provision for the payment of interest on overdue sums, the supplier submitting invoices for the work performed in a number of tranches, with the first invoice containing some errors. The supplier subsequently submitted a final account of all amounts due with the correct information. When the invoices were not paid, the supplier claimed interest on the overdue amounts under the 1998 Act, seeking to apply interest on the relevant amount from the date of the first invoice.

The purchaser maintained that interest should run from the date of the final account rather than the date of the first invoice which was incorrect. On appeal, it was held that Section 4 of the 1998 Act does not require an invoice to be perfect before interest accrues; otherwise any mistake in an invoice, no matter how trivial, would allow payment of an invoice to be delayed and the purpose of the 1998 Act would be frustrated (**Ruttle Plant Hire Limited v Secretary of State for Environment, Food and Rural Affairs (2009)(EWCA Civ 1997)**).

INSIDER TRADING CONVICTION

In the first criminal prosecution for an insider trading case brought by the Financial Services Authority a solicitor has become the first person to be imprisoned for the crime. Christopher McQuoid told his father-in-law, James

Melbourne, that his company, TTP Communications, was about to be taken over by Motorola.

Mr Melbourne spent more than £20,000 on shares in the company and when, just over a month later, the announcement of a buy-out by Motorola caused the share price to more than triple, this gave him a profit of close to £50,000. Mr McQuoid has been jailed for 8 months, while Mr Melbourne received an 8 month jail sentence, suspended for 12 months.

SPAM, SPAM, SPAM & SPAM

According to a recent Microsoft security report, more than 97% of all emails sent over the net are unsolicited and unwanted. The report states that the global average for infected machines is 8.6 for every 1,000 uninfected PCs. The UK's infection rate is 5.7. Hackers are increasingly using common file formats as the carrier of malicious exploits or programs and the report stresses the need to keep operating systems, web browsers and applications up to date with the latest software protection. Hackers are concentrating on named individuals in organisations and using 'social engineering' to appear legitimate and to convince a user to open an attachment.

CONSUMER CREDIT DIRECTIVE

The Department for Business, Enterprise & Regulatory Reform (BERR) is consulting on the implementation of the Consumer Credit Directive adopted by the European Commission. Its provisions are due to be adopted by Member States by June 2010. The Directive, which replaces that from 1986, is intended to harmonise key aspects of consumer credit legislation in Member States as part of the objective of creating a common credit market across the EU. '*Consultation on the Implementation of the Consumer Credit Directive (2008/48/EC)*' is available from the BERR website.

INCOME ENVY

According to new research presented at the annual conference at the Royal Economic Society, people who compare their earnings with others are damaging their health. Apparently they become less happy, more depressed and less satisfied with life overall. The research revealed that three quarters of people in the UK and the rest of Europe admit it is important to rank how much they earn against others; the typical comparison being with colleagues at work. The least damaging comparison is against colleagues, which may be because people hope one day to earn the same as their better-paid co-workers. Comparisons become more painful when the income is matched against family members and the most toxic of all it seems, is against friends, which produces twice the hurt.

COMMERCIAL

HARASSMENT VICTORY

A recent case heard by the Court of Appeal relating to alleged harassment of a customer by British Gas (BG), has alerted companies to the possibility of bearing both civil and criminal liability if they pursue the wrong person for payment of a bill or pursue an individual after a bill has been settled.

In **Lisa Maria Angela Ferguson v British Gas Trading Limited (2009) EWCA Civ 46**, the Court of Appeal refused to strike out a claim of harassment against British Gas after F had been on the receiving end of a wave of letters from BG threatening to cut off her gas supply; to start legal proceedings against her and to report her to credit rating agencies. This despite the bills having been paid or were for the period after her contract with them ended. BG claimed that its conduct was not grave enough to constitute harassment under the **Protection from Harassment Act 1997** but the Appeal Judge held that it was strongly arguable that it was.

COMMERCIAL ISSUES

INCOME TAX

A recent case has held that an additional income tax charge arose where, on the exercise of employee share options, employees failed to put their employer in funds to account for its PAYE liabilities before the expiry of the relevant deadline (**GE Chilcott (1); RI Griffiths (2); Evolution Group Services Ltd (3); the Revenue & Customs (2008) (UKSPC SPC00727)**).

THE BRIBERY BILL

The draft Bribery Bill published on 25 March 2009 replaces current regulations and makes it simpler to prosecute businesses, individuals and politicians for bribery. The maximum sentence has been increased from seven to ten years.

There is a new offence of 'negligent failure' that will catch 'any senior officer of the organisation' if it is deemed to have 'inadequate procedures to prevent bribery being committed on its behalf'. The Bill also provides clearer compliance with international obligations, simplifies legislation covering new

COMMERCIAL ISSUES

offences 'offering, promising or giving of an advantage or requesting, agreeing to receive or accepting an advantage'. It also creates a discrete offence of bribery of a foreign public official and supports high ethical standards in UK business. SFO director, Richard Alderman, hailed the Bill as an "excellent step forward" in tackling bribery.

In January the FSA fined Aon Limited £5.25m for serious failings in its anti-bribery and corruption systems and controls. Aon was fined for breach of principle 3 of the FSA's Principles for Businesses in relation to Aon's failure to take reasonable care to establish and maintain effective anti-bribery and corruption systems and controls between January 2005 and September 2007. Aon had failed to properly assess risks associated with making payments to non-FSA authorised overseas firms and individuals who helped it to win business from overseas clients and implement effective controls to mitigate these risks. The FSA has made it clear that UK authorised firms must put appropriate anti-bribery corruption systems and controls in place before they conduct overseas business.

MISCELLANEOUS

SAVINGS FOR CHARITIES

Thousands of small charities (company and non-company), will be saved time and money thanks to changing rules governing accounting. For financial years ending on or after 1 April 2009, the threshold above which charities are required to prepare accruals accounts has been raised from £100,000 to £250,000. The threshold above which accounts must undergo external scrutiny has also been raised from £10,000 to £25,000 and the threshold above which charities submit annual accounts and trustees' annual reports to the Charity Commission has been increased from £10,000 to £25,000.

Notes

Notes

Notes

We have been established as an independent firm of Chartered Secretaries since 1980 and act for companies ranging from small/medium size enterprises to several of the FTSE 250.

With our experience in Corporate Law and Practice, we are able to provide both a personal and professional service in:

- Acting as company secretary
- Company and LLP formations
- Registered office facilities
- Share issues
- Share transfers
- Listing Rules compliance
- Purchase of own shares
- Financial assistance for purchase of own shares
- Memorandum and Articles of Association
 - updating and drafting of special provisions
- Re-registration
- Sale and purchase of companies
- Share exchanges
- Administration of share option schemes
- Shareholder agreements
- Elective resolutions
- Dissolution
- Restorations
- Health & Safety
- Trade Mark registration
- Data Protection policies

For further information on any of the above, please call and speak directly to a partner:

**David Venus, Douglas Armour,
Martha Bruce or Susan Wallace.**

*For further copies of **Update** or to be placed on our mailing list, please e-mail, telephone or fax:*

Mickey Muntzer

DAVID VENUS & COMPANY LIMITED

Thames House, Portsmouth Road, Esher, Surrey KT10 9AD

Telephone: 01372 465330 Fax: 01372 463620

DX: 36318 ESHER

e-mail: info@davidvenus.com

web site: www.davidvenus.com

Update published by
Public Affairs & Marketing Ltd. Tel: 020 8398 0255



David Venus FCIS is a Chartered Secretary with over 30 years' experience of company secretarial work. Following a career in commerce and industry, gaining wide experience in several companies including subsidiaries of Nestle and ITT, he established the practice in 1980, having recognised a need, particularly among small and medium sized companies and other professional firms, for independent professional advice.

David is primarily concerned with the continuing development of the practice particularly in terms of technical expertise and in forging links with fellow professional advisers. He also acts as company secretary to several listed, private and public sector companies.

Over the years, he has written and contributed to a number of company law reference books and continues as author of Butterworths' *Company Secretarial Procedures and Precedents Manual* first published in 1993 and updated quarterly.



Douglas Armour FCIS joined the practice in 1985 having completed the ICSA professional examinations as a postgraduate student. He became a partner in 1992, since when he has gained considerable experience of companies of all sizes and types in particular start-ups and IPOs. He acts as company secretary to several public and private companies and heads our share registration division, SLC Registrars Limited, which specialises in smaller fully listed, AIM and OFEX companies.

Douglas is a specialist adviser to the ICSA and has written and contributed to a number of books, including two published by the Institute: *The ICSA Company Secretary's Checklists*, first published in 1992 now updated bi-annually and *The ICSA Company Secretary's Handbook*, first published in 1999 and now updated annually.



Martha Bruce FCIS has been with the firm since 1992 having previous experience with Chantrey Vellacott and Morgan Grenfell. She became a partner in 1997, since when she has built an extensive portfolio of clients in all areas of industry and commerce. She acts as company secretary to many listed and unlisted companies and heads our trade mark and health & safety consultancy services.

Martha has written two books *Rights and Duties of Directors* first published in 1998 by Tolleys and now in its 6th edition and more recently *The ICSA's Directors Guide* published in 2003. In addition, she has been a contributing editor to Butterworths *Corporate Law Service* since 1995 and as a specialist adviser to the ICSA, is also responsible for editing a monthly Q&A section in the Institute's monthly professional journal *Chartered Secretary*.



Susan Wallace FCIS joined the firm in 2001 initially on a temporary contract, but quickly became a valuable member of our permanent staff and was appointed partner in 2004.

She gained her initial experience within accountancy and legal practices including Eversheds and more recently KPMG in Hong Kong. Since joining the practice, she has rapidly established her own client portfolio; predominantly large, unlisted private groups. She also has a number of company secretarial appointments and specialises in the setting up of employee share schemes and the drafting of shareholder agreements.

Susan is a regular contributor to the Q&A section for the *Chartered Secretary* journal and has responsibility for in-house staff training.