Doing Business Down Under

Company Law in Australia and New Zealand

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SYLLABUS

Administrative Matters

Icebreaker: **In the first class (Day One), I want you to tell me a little about yourself. I want to know about your first degree and aspirations. This will help me understand the outcomes you are looking for and to better tailor the class to your needs.**

Course Description: **This class focuses on the company laws of Australia and New Zealand. Each of these jurisdictions copied United Kingdom company law and later modified that law. There will be a brief discussion of the company laws of the former British enclaves in the Southern Hemisphere in the first day of class. The purpose of that discussion is to highlight the similarities between those jurisdictions which share the same legal heritage. *Key insight:* once you understand the company law in one of these jurisdictions, it is relatively easy to pick up the company law of a cognate jurisdiction. So *the first learning* from this class is that there are five major Southern Hemisphere jurisdictions that have cognate laws. This is good news if, for example, you are asked to join White & Case is Singapore or Hong Kong. Note also that most South Pacific jurisdictions have similar laws (because they follow British, Australian or New Zealand models).**

Main focus of this class: **While this class has some academic and theoretical interest, the main focus of the class is on the types of transaction planning issues that confront a practising lawyer. So *the second learning* from this class is to try and understand transaction planning issues in Australia and New Zealand from the point of view of a U.S. commercial actor. Note that these issues tend to blend commercial and legal considerations and, with regard to the latter, we are not much interested in "needlepoint" issues (i.e., what are the rules on the derivative action). Rather, we will focus on the legal choices available to us when setting up and running the transaction with a possible exit point in mind. Transaction lawyers are "pie expanders", i.e., unlike litigators (usually zero sum game**

players), transaction lawyers seek to expand the quantum under consideration by adding another slice to the pie (e.g., via a float).

Thus, here is a short note about companies and transaction planning. Companies are often used in complex transaction planning. You may be confronted in practice with issues involving the use of companies in the subject jurisdictions. Lawyers usually consider three broad matters in this regard: companies, trusts and tax effects. So, e.g., we consider tax rates and whether or not the jurisdiction operates a world wide tax net. Thus, for example, Australia operates a world wide tax net and taxes companies at 30% flat. By contrast, Hong Kong taxes companies at 17.5% flat but there is no tax on non-Hong Kong sourced income. A useful reference here is www.lowtax.net where you will find an overview of rates and directions to professional advisors.

Note also that (because of time constraints) we cannot cover all topics. The topics we will focus on are those that have relevance to practising lawyers.

Texts: The two basic texts for this class are:

- **Hanrahan, Ramsay and Stapledon, *Commercial Applications of Company Law*, 9th ed. (CCH Australia, 2008). Hereafter, "CACL". ISBN 978-1-921332-05-1**
- **Walker, Reid et al, *Commercial Applications of Company Law in New Zealand*, 2d ed. (CCH New Zealand, 2005). Hereafter, "CACLNZ". ISBN 0-86475-655-0.**

For more advanced texts see:

- **Austin and Ramsay, *Ford's Principles of Corporations Law*, 13th ed. (LexisNexis Butterworths, 2007). ISBN 978-0409-323634.**
- **John Farrar, Gen., Ed., *Company and Securities Law in New Zealand* (Wellington: Thomson Brookers, 2008). ISBN978-0-86472-617-9.**

For the legislation see:

- ***Corporations Law 2001* (the Australian legislation). Use the 2008 editions from either CCH Australia or Lexis Nexis Butterworths Australia.**
- **CCH NZ Ltd., *New Zealand Company and Securities Legislation 2008* (Edition 26), Vols A, B and C. These two vols. include the Companies Act 1993, the Securities Act 1978 and the Securities Markets Act 1988. The ISBN is 978-0-86475-726-5 (set). Note that this legislation can be viewed online at various websites.**
- **Websites for legislation: www.worldlii.org; www.austlii.com.au; www.comlaw.gov.au; www.aph.gov.au; www.legislation.govt.nz**

Other useful websites:

- **www.asic.gov.au**
- **www.ato.gov.au**

- **www.asx.com.au**
- **www.companies.govt.nz**
- **www.med.govt.nz**
- **www.seccom.govt.nz**
- **www.ird.govt.nz**
- **www.nzx.com**

A Note about the Materials: **You can download the legislation from the relevant websites. I have sent PDFs of the relevant legislation to your Law School and these PDFs will be posted. The Australia legislation is long and complex. You do not need to view all of this legislation. The set texts have statutory extracts which will suffice. You will need to look at the Listing Rules of each jurisdiction. You can view these online. I gather that your bookshop may be having difficulties getting the text. You can try ordering direct from support@cch.com.au or support @cch.co.nz If you having difficulties, email SWalker@cch.com.au**

Class participation: **This class will be taught using a mixture of lecture and discussion. Class participation is voluntary, but I reserve the right to reward exemplary class participation by raising your grade one step.**

Examination: **The examination will be administered on a take home basis. The examination is based on the course work. However, you are encouraged to undertake further research. The maximum total limit on answers (excluding footnotes) is 4000 words. You have two weeks to complete the take home from the day after the last day of class. The take home examination question appears below.**

Take Home Examination Question:

You are an associate in a Houston law firm. Your firm acts for a number of experienced property developers in Texas. One of these firms is called, "Pacrim Properties" (PP). PP has undertaken market research on the property market in Australia and New Zealand. It has discovered that a number of wealthy USA citizens are investing in residential property in the South Island of New Zealand near the summer and winter resort of Queenstown. It has also discovered that there is USA demand for residential properties in Queensland, Australia, where prices for beachfront property are much lower than in the USA. PP has decided to enter these markets by buying land and building residential properties for sale or lease.

PP wants to incorporate one company in Australia and one company in New Zealand to hold its property acquisitions. PP seeks your advice and specifically requests that you blend "commercial" advice with your legal advice. Advise PP including (1) the preferred type of company to use; (2) the incorporation process; (3) the internal governance rules of each company; (4) the appointment of directors, and, (5) the initial capitalisation of each company.

Time passes. You are now a senior associate in the same Houston law firm. PP's property acquisitions have proved a success. The directors of PP decide that it is now a good time to list their companies and raise further capital while retaining control of the newly listed entities. PP now contemplates listing two companies in Australia and New Zealand. Advise PP.

Class Schedule and Synopsis

This synopsis (short form lecture notes) is intended as a guide to the contents and direction of this lecture series. It is not intended as a substitute for the set texts. Note that the sequence of planned lectures may slip – this schedule is an estimate only.

Lecture One (Day One): RECEPTION OF ENGLISH LAW

A note on terminology: the laws we are examining all flow from England. England later became part of Great Britain and, subsequently, the United Kingdom of Great Britain and Northern Ireland ("the UK"). The UK presently comprises England, Northern Ireland, Scotland and Wales.

From the C9 until 1707, England and Scotland were separate sovereign states. We call the law developed in England, "English law" or "common law".

Under the Acts of Union 1707, England, Wales and Scotland entered into political union in the form of the Kingdom of Great Britain. So after 1707, we talk of "British law".

The Act of Union 1800, united the Kingdom of Great Britain with the Kingdom if Ireland to form the United Kingdom of Great Britain and Ireland in 1801. So after 1801, we talk of "UK law".

After the partition of Ireland, the name of the United Kingdom changed to the United Kingdom of Great Britain and Northern Ireland in 1927.

In these lectures, I often use the term "English law" in a broad sense to describe the legal system originating in England. Strictly speaking, we should use the term "British law" for the period 1707 to 1801 and the term "UK law" for the period 1801 to the present. I use these terms more or less interchangeably. You will see all these terms used in the literature.

Section One: The Reception of English Law.

This part of the lecture is background. It is a topic in itself and has great interest for comparative law scholars. As stated, it has a direct link with the first key

proposition I am advancing in these lectures: i.e., once you understand the history of the reception of English law, you will quickly see that an understanding of one of the main jurisdictional offshoots of English company and securities law (such as New Zealand or Australia), enables you to come to terms with the cognate law in jurisdictions that share the same heritage (such as Hong Kong, Malaysia and Singapore). As we move through these lectures, keep looking for such connections.

Useful References: Baker, *An Introduction to Legal History*, 4th ed. (2002) and McPherson, *The Reception of English Law Abroad* (2007); Dupont, *The Common Law Abroad* (2001).

English law was first received in Virginia in 1607. Then in 1997, we observe Hong Kong's retrocession from English law (though modified UK law still dominates there). There are about four centuries in between. In those four centuries, English/British/UK law spread to countries under British rule and came to regulate the lives of about one third of the people on earth.

Thus, English law went into North America and Canada, Eastern Australia (then the rest of Australia) and New Zealand. New Zealand played a major role in the establishment of the Cook Islands, Niue, Tokelau, and Western Samoa and these jurisdictions all follow UK law via New Zealand. Fiji and the British Solomon Islands were administered by the British. As independent sovereign states, they now look to New Zealand to update their laws. New Guinea was administered by the British then the Australians. Vanuatu (formerly the New Hebrides) had elements of French and English law (via the Anglo-French Condominium) and is now predominantly derived from UK law.

English law went into West and East Africa. It went into India from 1726 onwards and then down into SE Asia via Penang and Singapore. In 1867, we see the Straits Settlements, then the Malay States in 1937 receiving UK law. Burma took British law via India. Borneo (Sarawak, Brunei and North Borneo) all took UK law. Hong Kong took UK law from the Treaty of Nanking in 1861. Currently, we see a number of South Pacific states rewriting their laws following New Zealand precedents (a form of "rediffusion").

In the result, a number of the leading commercial jurisdictions in the Southern Hemisphere operate some form of English law. The so-called "TIP" jurisdictions (Thailand, Indonesia and the Philippines) have a different legal genealogy and are thought to be more difficult to do business in from the viewpoint of "Anglo-American" lawyers. See Michael Backman, *Asian Eclipse*, Rev. Ed. (2001).

Section Two: The British Enclaves in the Southern Hemisphere

The main focus of these lectures is the company and securities law of Australia and New Zealand. We will look briefly at the cognate law in Hong Kong, Singapore and Malaysia. These countries (all former British enclaves) are major

commercial players in the region which use versions of UK law modified for local circumstances.

References: Generally, for Hong Kong, Singapore and Malaysia, see Gutterman and Brown, *Commercial Laws of East Asia* (Hong Kong: Sweet & Maxwell, 1996). Another useful text is Roman Tomasic, *Company Law in East Asia* (Aldershot: Dartmouth, 1999).

Singapore and Malaysia: The countries that comprise these entities all received UK law in the C19. Matters changed after WW2. Under the Straits Settlements Repeal Act 1946, the Straits Settlements (Singapore, Malacca and Penang) were disbanded. Singapore became a separate Crown Colony. The remainder became the Malayan Union and, later, the Federation of Malaya. In 1959, Singapore became the State of Singapore. In 1963, Singapore merged with Sarawak, North Borneo and the Federation of Malaya to become the federation of Malaysia. In 1965, Singapore left the Federation and became an independent republic. So we now have the independent sovereign states of Singapore and Malaysia.

Generally speaking, these jurisdictions followed UK legislation and adopted a version of the 1948 UK Company Act. When change came, the change was modelled on Australian law. The Malaysian Companies Act 1965 was modelled on the Australian Uniform Companies Acts and the UK Act of 1948. The Singapore Companies Act of 1984 followed the Malaysian Companies Act of 1965.

Current legislation: for Malaysia, the key legislation is the Companies Act 1965 and the Securities Commission Act 1993. For Singapore, the key legislation is the Companies Act (Cap 50) and the Securities and Futures Act 2005.

References: Sulaiman et al, *Commercial Applications of Company Law in Malaysia,* 2nd ed. (Malaysia: CCH Asia, 2005); Yeo et al, *Commercial Applications of Company Law in Singapore,* 2nd ed. (Singapore: CCH Asia, 2006); Woon and Hicks, *The Companies Act of Singapore - An Annotation* (Singapore: LexisNexis, 1994 updated biannually); Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2004).

Hong Kong: the Companies Ordinance 1865 followed the English Companies Act 1862. In 1984, the revised Ordinance relied on the UK 1948 Act. Amendments in 1991 followed the UK 1985 Act. On 1 July 1997, the Basic Law of the SAR (after retrocession) was introduced. At present, the key legislation is the Companies Ordinance (Cap 32) run by the Companies Registrar and the Official Receiver (for insolvency matters) and the Securities and Futures Ordinance (Cap 571) effective as of 2003. The SFO is administered by the SFC.

References: Paul Kwan, *Hong Kong Corporate Law* (Hong Kong: Lexis Nexis, 2006); Berry Hsu, Douglas Arner et al, *Financial Markets in Hong Kong: Law and Practice* (Oxford: OUP, 2006)

Lecture Two (Day One): DEVELOPMENT OF COMPANY LAW

In this lecture, we look at the development of company law in the UK, Australia and New Zealand. We look first at the UK. We then consider Australia (settled before New Zealand), then New Zealand. We then look at some aspects of the Australia/New Zealand relationship.

Section One: United Kingdom
References: See *Commercial Applications of Company Law*, 9th ed. (hereafter, CACL), Chapter 1 or any standard treatment of the development of UK company law.

Here are the key events:

- **Corporations aggregate (chartered companies) and joint stock companies**
- **The South Sea Bubble (retards corporate development). Bubble Act repealed in 1825.**
- **Deed of Settlement companies.**
- **The 1844 Act – companies now formed by a process of registration**
- **The Limited Liability Act 1855 which led to the Companies Act 1862 (UK).**
- ***Salomon's Case* (1897). A decision on the Companies Act, 1862. House of Lords held that benefits of incorporation extend to one person companies.**

Section Two: Australia
See Chapter 2 of CACL. Here are the key events:

- **Separate company law legislation in each Australian state based on the UK Companies Act of 1862.**
- **Proprietary companies introduced in Victoria pursuant to legislation in 1896. A world first. See CACL at p. 18. Such entities called "private" companies in New Zealand.**
- **The Uniform Companies Acts of 1961. The Victorian version of this Act was later the model for Malaysia and Singapore.**
- **Security Industry Acts in the late 1960s. A response to the mining boom of the 1960s.**
- **The Co-operative Scheme 1981-1991.**
- **The Corporations Law 1991.**
- **The Corporations Act 2001. A Commonwealth or federal law applying to the states via a referral of power to the Commonwealth (currently effective to 2011). The Corporations Act is administered by the Australian Securities and Investments Commission (ASIC). Note that ASIC operates the companies registry and acts as enforcer. As for the contents of the Corporations Act, administrative setup and other sources of law, see CACL Chapter 2.**

Section Three: New Zealand
See p 27-30 of Commercial Applications of Company Law in New Zealand, 2nd Ed. ("CACLNZ"). New Zealand (like Australia) followed UK company legislation. In 1993, New Zealand radically overhauled its company law in the

Companies Act 1993. That Act was modelled on a Canadian model which in turn was modelled on the New York statue. The New Zealand securities regulation regime is contained in two distinct statutes – the Securities Act 1978 and the Securities Markets Act 1988. Major amendments to New Zealand securities regulation occurred in late February 2008. (In Australia, the securities regulation regime is contained within the Corporations Act 2001.) Note that in New Zealand, Acts take the date on which they were first passed, notwithstanding major overhaul subsequently. Read Chapters 1 and 2 of CACLNZ.

Section Four: The Australia/New Zealand Relationship
Reading: G. Walker, "The CER Agreement and Trans-Tasman Securities Regulation: Part I" [2004] 19 (10) JIBLR 390-397 (PDF posted). The first part of this article discusses the historical context of the relationship. I will talk to this section of the article. As a result of the CER Agreement (and especially the MOU on Business Law Co-ordination) there are consequences for, e.g., the securities regulation regime in each country.

Australia has a federal system; New Zealand has Westminster (unicameral) system. The NZ population is 4m plus and Australia is 21 m plus. Australia is NZ's largest trading partner. Australia is important to NZ but the reverse is not the case. There is a substantial NZ diaspora in Australia and Australia continues to attract NZers, especially in the recent economic context in Australia (mining boom in WA and QLD; the "China story"). NZ is now in economic recession and it is an open question as to whether Australia will follow in 2009. Consider how economic conditions might influence the decision to invest in these jurisdictions. This is a key issue for commercial actors.

Lecture Three (Day Two): OPERATING ENVIRONMENTS

Section One: Government, Legal System and Economic Context

New Zealand is a sovereign independent unitary State with a constitutional monarchy, responsible government and a unicameral legislature. Like the United Kingdom, New Zealand does not have a written constitution - there is no one document which embodies a national constitution. The sources of the constitution include Imperial legislation (principally the Imperial Laws Application Act 1988); New Zealand legislation (principally the Constitution Act 1986); the common law (customary common law, judicial precedent and statutory interpretation); customary international law; Letters Patent; the law and custom of Parliament and convention. The Constitution Act 1986 specifies the principal entities of the New Zealand Constitution, namely: the Sovereign (represented by the Governor-General); the Executive; the Legislature and the Judiciary. In recent years, The Treaty of Waitangi, 1840 made between indigenous Maori and the Crown has assumed increased constitutional importance. In November 1993, New Zealand adopted a proportional representation voting system. Following a General Election in October 200), New

Zealand was governed by a minority coalition of the New Zealand Labour Party and the one-man Progressive Party holding 51 votes in a 121-seat parliament. Prime Minister Helen Clark from the Labour Party was Prime Minister for a three year term from October 19 2005. To ensure a working majority, the Prime Minister entered into agreements with two other minor parties – New Zealand First and United Future. A General Election occurred in November 2008. The National Party now governs with the support of the ACT party.

New Zealand is a common law country. The legal system derives from UK origins (like Australia, Hong Kong, Singapore and Malaysia). The court hierarchy comprises the District Court, the High Court, the Court of Appeal, and, the Supreme Court. The Supreme Court Act 2003 (NZ) established the Supreme Court of New Zealand. This Act established within New Zealand a new court of final appeal comprising New Zealand judges in order to recognize that New Zealand is an independent nation with its own history and traditions; to enable important legal matters including legal matters relating to the Treaty of Waitangi Treaty (a treaty with the indigenous Maori people) to be resolved with an understanding of New Zealand conditions, history and traditions, and, to improve access to justice. For appeals from New Zealand, the Supreme Court of New Zealand replaces the Judicial Committee of the Privy Council located in London. It came into being on 1 January 2004 and hearings commenced on 1 July 2004: see [2006] NZLJ 17-20 for a review of the operation of the Supreme Court.

Prior to economic deregulation in 1984, NZ had all the hallmarks of a socialist economy. The economy was opened up in 1984. NZ now has a small, open economy and is affected by "globalization": see G. Walker and M. Fox, "Globalisation: Meaning and Implications" in G. Walker, Gen Ed., *Securities Regulation in Australia and New Zealand*, 2nd ed (1998), 3-32. To get a feel for the economy, look at the latest edition of *The Economist Country Reports*. (Wikipedia is also good.) Note the high degree of transfer payments for social welfare.

Australia has a federal system (like the USA). We have a federal govt. (based in Canberra) and State and Territory govts. The controlling legislation is the federal statute, the Commonwealth Constitution 1901. Section 51 (xx) gives the Commonwealth govt. power "… to make laws for the peace, order and good govt. of the Cth. with respect to: … foreign corporations and trading or financial corporations formed within the limits of the Cth." This placitum is known as the corporation's power. Because of legal uncertainty surrounding this placitum, referral of power from the States and Territories to the federal govt. via section 51 (xxxvii) of the Constitution has been the key means of ensuring nation-wide uniform company law. Note that the same problem did not arise with regard to securities regulation since here the interstate trade and commerce power could be used (cf., the USA).

In Australia, company law matters (depending on the nature of the dispute) may be heard in the State court system or the federal court system. For both State

and federal matters, the apex of the court hierarchy in the High Court of Australia: see CACL Chapter 2.

Australia is a medium sized, open economy. Before November 2007, the country was governed by a Liberal/National Party coalition headed by PM John Howard. There was a federal election on November 24 2007 and Australia now has a new Labor Party federal government headed by PM Kevin Rudd. The Australian economy is still quite strong despite the turmoil in financial markets flowing from the sub-prime crisis. Chinese demand for commodities (iron ore etc.) is one key reason although this demand may be declining (commodity prices are down). Generally speaking, however, transaction costs are higher in Australia than New Zealand. Question: what are transaction costs (see Coase)? Why might this be the case?

Note that the Corporations Act 2001 is a large, difficult and unduly complex statute. By contrast, the New Zealand statute, the Companies Act 1993 is a model of simplicity and clear drafting.

This ends the introductory part of these lectures. The intent was to give you a quick overview.

[Short class discussion aimed at ensuring that you have a general grasp of the nature of these two jurisdictions.]

Section Two: Types of Companies and the Incorporation Process

For Australia, see CACL Chapter 3. The types of company we will largely be concerned with are public listed companies (e.g. companies listed on the ASX); public unlisted and proprietary companies. Proprietary companies form the vast majority of all companies in Australia. If you are transaction planning, you will be using a proprietary company. Companies are incorporated via a registration process. See CACL Chapter 4.

For New Zealand, see CACLNZ at p. 18. In New Zealand, we deal with two types of company: listed companies (on the NZX) and companies. The public/private distinction was abolished in the 1993 Act. If you are transaction planning, you will be using a company simpliciter. See CACL at pp 118-120 and note the different reporting requirements. Companies are formed via a process of registration: see CACLNZ at pp 120-122. Note the absence of an ordinary residence test for a director in New Zealand. This is an important consideration in transaction planning. Note also that companies can be formed via the Internet.

Section Three: Internal Governance

Pre-1998 in Australia and pre-1994 in New Zealand, the internal governance rules of companies comprised two documents: the Memorandum of Association (MA) and the Articles of Association (AA). The MA was the document which incorporated the company together with the AA which comprised the internal governance rules (i.e., the machinery provisions dealing with the appointment of directors etc.).

Australia: The current position in Australia is contained in section 134 of the CA 2001. See the discussion in CACL at Chapter 4. Note that special arrangements apply for one person/one shareholder companies - section 135 (2) of the CA - and there are additional requirements for ASX listed companies. As to the replaceable rules: see 4-400ff of CACL. Note especially the second paragraph of heading 4.440.

Generally speaking, companies choose the replaceable rules (you may know such rules as default rules) or adopt a constitution that contains some of the replaceable rules. We use a constitution when we wish to customize the internal governance rules. The legal effect of the internal governance rules is to create a statutory contract: see section 140 CA and CACL at p 89. Who are the parties? They are: company and each member; company and each director and secretary, and, between members. No contract between member and officer and no contract with outsiders. See the discussion of how the rules and enforced and the consequences of non-observance at CACL pp 85-89.

Note that there is a distinct regime for single director/single shareholder companies. The replaceable rules do not apply: section 135 CA. See para 4-720 of CACL for an outline of the applicable provisions. Discuss.

ASX listed companies have special requirements for their constitutions. See the ASX Listing Rules. You can view these online.

New Zealand: Here the internal governance rules comprise mandatory rules plus the replaceable rules or a constitution. See generally, Chapter 6 of CACLNZ. Note that there are no special rules for single director/single shareholder companies. There are special rules for listed companies (see the NZX website)

Lecture Four (Day Three): COMPANY MANAGEMENT

In this lecture we look at the management of companies and shareholder/member decision making. We will focus on the way in which related party transactions and major or "significant" transactions are handled in each jurisdiction. We focus on these issues because they are a notorious source of difficulty in the SE Asian region. By this I mean, for example, the practice of selling in assets at an overvalue and selling out assets at an undervalue: see Backman, op. cit. Consider s. 160 CA (Singapore): approval by ordinary

resolution where disposal or whole or substantially the whole proposed. Consider also section 132C of the Companies Act (Malaysia): ordinary resolution required where material or adverse effect on financial position by reason of sale or purchase.

Australia: Chapter 5 of CACL contains a review of the well-known distinct functions of the board of directors and the members/shareholders in general meeting. The board manages (see section 198A of the CA) the business of the company and the members/shareholders in general meeting have limited decision making powers. Business decisions are reserved for the board: see *Cunninghame, Shaw* and *Howard Smith* cases discussed on para 5-340. Now go to Chapter 6. You will see in Chapter 6 of CACL at para 6-220 the various issues on which members have a vote. These include related party transactions and certain significant commercial undertakings (major transactions) by listed companies.

Chapter 2E of the CA imposes a requirement for member approval by ordinary resolution when a public company or an entity controlled by a public company gives a benefit to a related party. See section 207 CA. Chapter 2E applies to public companies only. See the flow chart on page 130 of CACL. It does not apply to proprietary companies. There is no major transaction approval rule in the CA. However, ASX LRs Chapter 11 (LRs 11.1 et seq) requires shareholder approval (by way of ordinary, i.e. 50%) resolution for a "significant" change to the nature or scale of activities in respect of listed companies.

New Zealand: See pages 176-77 of CACLNZ. NZ, unlike Australia, has a major transaction rule within its company legislation: see section 129 of the CA. If the acquisition or disposition involves 50% plus the company's assets, then a special resolution of shareholders is required (i.e. 75% vote). There are no related party transaction provisions in the CA itself. The NZX LRs have rules dealing with disposals and acquisitions and material transactions with related parties. Note that under NZX LR 9.1, a special resolution is required where s. 129 applies.

Lecture 5 (Day Three): DIRECTORS' DUTIES IN AUSTRALIA

This lecture provides an overview of directors' duties in Australia. This matter is discussed in Chapters 10-13 of CACL. Lecture Six will look at the position in New Zealand.

Note how this discussion illustrates the proposition that an understanding of the law in one jurisdiction helps you understand another jurisdiction. The Australian and New Zealand law is very similar.

Australia: Read Chapter 9 of CACL. Note the concept of de facto and shadow directors. A company can be the shadow director of another company: *Antico's*

Case. **Now go to Chapter 10 of CACL and look at the summary of duties on page 194. Note first the overlap between statutory and common law duties. However, statutory duties are enforced by ASIC and common law duties are enforced by the company. The duties break down into two general categories: (a) loyalty and good faith and (b) care, skill and diligence. These two categories break down further: see the flow chart on page 194. Next, who owes the duties? Common law duties are owed by directors and senior executive officers. They are also fiduciaries. The statutory duties apply to directors, de facto directors and shadow directors. Some also apply to "officers": see section 9 CA and p 197 CACL. The duties not to make improper use of position or information also apply to employees: ss. 182 and 183. Duties are owed to the company. Note that there is no difference between the statutory duty of care and the general duty of care – the differences go to remedies.**

Duty of care: the leading Australian case is *Daniels v AWA*, a decision of the NSWCA. Note the standards expected of ALL directors. See page 201 CACL.

Next note the four elements of the duty of care. Now go through the elements of (a) reasonable care (b) skill (c) diligence and (d) delegation and reliance. See the discussion at pages 201ff.

Section 182 (2) CA: the business judgment rule in Australia: see pp 210ff in CACL.

Now go Chapter 11 of CACL. Look at section 588G of the CA, the duty to prevent insolvent trading. Object is the protection of creditors. Note that the duty is imposed only on directors. Now go through the ingredients of section 588G: see CACL at pp 214 et seq.

Now go to chapter 12 of CACL. Here, we look at the duty to act in good faith in the best interests of the company and the duty to act for a proper purpose.

Now go to Chapter 13 and consider the duty to avoid conflicts of interest. Here, the common law rules and the statutory rules are different. Consider first the common law conflict rule (director must not place self in position where there is an actual or substantial possibility of a conflict between a personal interest and duty to act in best interests of the company unless permission of company obtained). This is usually known as the rule in *Phipps v Boardman*. Typical example is sale of property to the company where director has an interest in the sale property: see *Aberdeen Railway Case*. The common law rule also extends to taking corporate property, information and opportunities: see *Cook v Deeks* and *Peso Silver Mines v Cropper*. What if the company cannot take up the opportunity? *See Regal Hastings v Gulliver*.

Note that it is possible to make provision in the constitution of a company that allows for conflict of interest provided there is disclosure. See CACL at p 249ff.

As for proprietary companies, see section 194, discussed at pp 250.

Now consider statutory regulation of conflicts. First, look at section 191 and the exemptions thereto. Then see section 195 and the requirement that a director with a conflict must recuse himself.

Next look at section 182 and 183. These sections relate to improper use of position or information. See the case law discussed at p 256ff.

Lecture Six (Day Four): DIRECTORS' DUTIES IN NEW ZEALAND

In this lecture we look at directors' duties in New Zealand. First, skim read Chapter 11 of CACLNZ. The substantive law appears in Chapters 12-15 of CACLNZ.

Chapter 12: See first the diagram on page 242 of CACLNZ. Note how this compares with the cognate diagram for Australia.

The statutory duty of care, diligence and skill appears in section 137 of the CA. Note first that the common law/statutory overlap (as applies in Australia) is not so clear cut in NZ. There is no decision directly on the point. Now go through the various heads of care, skill, diligence and delegation and reliance. Note similarity with Australia.

There is NO statutory business judgment rule in New Zealand.

Chapter 13: Duty to avoid reckless trading: ss. 135-6. Read section 135. The duty is owed by directors. The reckless trading test is an objective test. The leading cases are *Nippon Express, South Pacific Shipping* and *Mason v Lewis.* Now consider s. 136 (incurring performable obligations only): and see *Re Wait.*

Chapter 14 of CACLNZ: Here, we first look at section 131 (1) of the CA – the duty to act in good faith in the best interests of the company. Next we consider the duty to act for a proper purpose: section 133. Compare the Australian law – it is the same.

Chapter 15: Duty to avoid conflicts of interest. Note first how the common law conflict rules are the same as Australia (and you can generally extrapolate to the former British enclaves). Then there is a statutory obligation to disclose under

the CA: see ss. 140 and 141. Consider then: s. 140, then s. 139, then s. 140 (1), then s. 141.

As to use of information: see s. 145.

Lecture Seven (Day Four): COMPANY FINANCE

In this and the following lectures, we look at various aspects of company finance. First, we look at debt finance largely because there are significant differences between the way company charges are registered in Australia and New Zealand.

Go to CACL, Chapter 17 and distinguish debentures and charges. Debentures (called debt securities in New Zealand) may be issued by a company (a prospectus is required) and such debentures are secured. Finance companies typically issue series of debentures. Such debentures may be listed or unlisted. The rules relating to such issues are broadly similar in Australia and New Zealand.

Company charges (also called debentures) are a security given by a company over all or some of its assets. In Australia, such charges are known as fixed or floating charges. The law in New Zealand was the same prior to 1 May 2002 when the Personal Property Securities Act 1999 (PPSA) came into force.

Now read paras 17-320 and 17-340 of CACL on fixed and floating charges. What is the difference? What does crystallization mean? In Australia, registrable company charges must be registered with ASIC. Charges over land are not registered with ASIC. They are registered with the Registrar of Lands. Unregistered charges may be void as against a liquidator and priority of charges may be affected.

In New Zealand, the position is different. The same rules apply when land is charged. But where personal property is charged, the lender will register a security interest under the PPSA: see pp 409-11 of CACLNZ. It seems likely that Australia will move to a similar system in the future (draft legislation is in the pipeline)

We now look at Chapter 18 of CACL. This chapter is a simple introduction to shares and shareholding in Australia. Skim read the chapter. Note as follows: (1) the rule in section 250E of the CA means that we can vary voting rights in non-listed companies in Australia. This rule does not apply to ASX listed companies; (2) the distinction between ordinary and the various types of preference shares (consider here (a) capitalizing via debt rather than equity - though watch for "thin capitalization" tax rules where the debt is from offshore -

and securing debt via an "all monies" debenture and (b) using preferences shares rather than debt if problems emerge on the thin capitalization rules).

As to partly paid shares: I am opposed to using partly paid shares as they create a liability in the event of liquidation.

As to restrictions on share transfers: note concept of pre-emptive rights and consequences thereof.

As to dividends: Note that under section 254T of the CA, dividends are only payable from profits and that directors have the power to decide if a dividend will be paid: s. 254U of the CA.

Look at para 18-540 and discuss position of guarantors. If guarantees required, consider the use of a trust to insulate key personal assets.

Now go to Chapter 19 of CACLNZ. You will see that the position in NZ is largely the same as in Australia. However, there are some matters that are different. First, (see p. 376), NZ business has often used puts and calls in structuring company financing transactions. This is a hazard for outsiders and others. Second, note that the rules re dividends differ. While directors decide on dividends (as in Australia), the old rule that dividends can only be paid out of profits has been abolished in NZ. Now the "solvency test" applies: see s. 4 of the CA.

Now go to Chapter 19 of CACL. Skim read the chapter. We will only focus on a few key issues. Note: (1) the process for issuing new shares; (2) the types of share issues; (3) underwriting (discuss types of underwriting agreements and "market out" clause and similar defeasance conditions).

See Figure 19.3 on page 372. Go through the flow chart. Note that proprietary companies cannot offer to the public, only public companies can, i.e. public unlisteds and public listeds. Next, does Chapter 6D of the CA apply? Chapter 6D applies to public offerings. Here, s. 707 says that disclosure must be made unless s 708 applies (this is a bright line rule with carve outs or safe harbors). Note the 7 listed carve outs in s. 708. Why would you wish to attract these safe harbors? Consider here, especially, the safe harbor rules for sophisticated investors. We will see that the NZ law in this area differs markedly.

Next, go to page 379 and look at the rules re prohibited financial assistance. Prior to 1988, financial assistance was prohibited. Now such action is permitted under s. 260A: see pp 379-383 of CACL.

Now go to chapter 20 of CACLNZ. The rules re share issues are largely the same except in regard to public offerings. Contrast s. 706 of the Australian CA with s. 33 of the Securities Act 1978 (NZ). See pp 394-395 of CACLNZ. We shall look at this matter further later in these lectures.

Next, look again at the "solvency test" appearing on p. 396. This test has implications for share buy backs and financial assistance. See pp 398-399 for the NZ position on financial assistance.

Lecture 8 (Day Five). SECURITIES REGULATION IN AUSTRALIA

In this lecture, we look more closely at the securities regulation regimes operating in Australia and New Zealand.

In Australia, Chapter 6 D of the CA regulates primary offers of securities. The regulation of secondary trading in securities appears in Chapter 7.

Chapter 6D requires that disclosure be made when shares are offered to the general public. There are policy exceptions to the general rule. One is where the purchaser is able to look after his or her interests. Another is where the costs of disclosure outweigh the benefits. So, s. 706 of the CA says disclosure is required unless s. 708 says that it is not. Now go through the exceptions appearing on pp. 493-394 carefully. What is the rationale for each exception and why might one seek to attract the exceptions?

How is disclosure made? Answer: a prospectus or OIS. Now see s. 710 for the general disclosure requirement," … must include all information that investors and their professional advisers would reasonably expect …. etc". Note the requirement to provide information that ought reasonably be obtained by making inquiries. This requirement gives rise to the due diligence process: see page 395. Note the more limited disclosure required for quoted securities and the ability to use an OIS where the raising is up to $5 million.

Sales practices are dealt with in Chapter 7 of the CA. Liability for defective disclosure is provided for in section 729.

Secondary trading: Generally speaking, securities markets intermediaries and secondary trading are dealt with in Chapter 7. The prohibited market practices are discussed at page 401ff. Note especially the general ban on misleading or deceptive conduct in section 1041H.

Insider Trading: see the discussion at pp 402ff. Note the width of the prohibition in Australia.

Lecture 9 (Day Six). SECURITIES REGULATION IN NEW ZEALAND

In this lecture we look at securities regulation in New Zealand. Go to Chapter 26 of CACLNZ. Read pages 483-510. I will supply a Handout that updates this chapter.

Lecture 10 (Day Seven). WRAP UP AND EXAM REVISION. Students should read G. Walker, "Case Study of an IPO in New Zealand" in G. Walker, Gen. Ed., ***Securities Regulation in Australia and New Zealand,*** **2nd ed. (1998), 421 ff.**