University of Houston Law Center

Doing Business Down Under

(Transnational Legal Practice)

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Class times: TBA

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LECTURE NOTES

ADMINISTRATIVE MATTERS AND SYLLABUS

Icebreaker: On the first day of class, tell me a little about yourself. I want to know about your first degree and aspirations. Tell me, for example if:

- you have taken a class in corporations,
- you have taken a class in finance,
- you are a foreign LLM student.

This will help me understand the outcomes you are looking for and better tailor the class to your needs.

Course Description: This is a class on transnational legal practice. The take-home exam deals with a transaction in which a Texas domiciled company forms one company in Australia and one in New Zealand and then embarks upon land purchases and construction projects. Ultimately, the Texas company exits the transaction by way of a trade sale or an initial public offering. You are an associate in the law firm that acts for the Texas company. You are tasked with writing a set of internal memos on aspects of the transaction.

A key focus is on the company and securities laws of Australia and New Zealand. Each of these jurisdictions copied United Kingdom company law and later modified that law. We look at the statutory law of these jurisdictions from the point of view of a North American lawyer structuring transactions in Australia and New Zealand. To an extent, therefore, we are entering the realm of cross-border commercial transactions, a topic usually dealt with in USA law schools in a class on International Business Transactions: see, for example, Folsom, Gordon, Spanogle and Fitzgerald, *International Business Transactions*, 9th ed. (2006).

In our transaction, however, there are a set of common issues that need to be addressed. These can be broken down into three large themes. The first theme is legal history or comparative legal traditions (we need to know about the type of law we are dealing with in the subject jurisdiction as well as salient aspects of the jurisdiction that may affect the way we do business); the second is the statutory company and securities law of Australia and New Zealand and the third is transaction planning.

Theme One: We are looking at some of the issues involved in doing business in the Southern Hemisphere. When we look at jurisdictions in this region, we prefer (from a legal risk point of view) to operate in common law jurisdictions: see generally, Glendon, Gordon and Osakwe, *Comparative Legal Traditions* (1985). The reason is simple: the common law jurisdictions are "rule of law" jurisdictions with an independent judiciary, defined property rights and privately enforceable contract law. The non-common law jurisdictions (for example, Thailand and Indonesia) carry greater legal risks (and country risks).

Most of the major commercial jurisdictions in the region – Hong Kong, Singapore, Malaysia, Australia and New Zealand - have a British/United Kingdom legal heritage. They are common law countries. There will be a brief discussion of the company laws of the five main former British enclaves in the Southern Hemisphere in the first day of class. All of these jurisdictions adopted the UK Company Act of 1948 and later modified that law. *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 in Singapore or Hong Kong. Note also that most South Pacific jurisdictions have similar company laws (because they follow British, Australian or New Zealand models). These countries include: Papua New Guinea, the Solomon Islands, Vanuatu, Tonga, Samoa, Fiji and Niue.

We will briefly examine the operating environments in Australia and New Zealand. The point of this exercise is to alert you to the need to do some extra-legal research when you contemplate dealing in a new jurisdiction. You need to get some basic understanding of the economy, demographics and so on.

There is one overarching point you need to be aware of in the Southern Hemisphere: the overseas Chinese diaspora in the Southern Hemisphere is large (about 32 million plus; cf., approximately 8 million in the Northern Hemisphere): see Wikipedia and Dudley Posten and Mei-Yu Yu, "The Distribution of the Overseas Chinese in the Contemporary World (1990) 24 (3) International Migration Review 450-508. The overseas Chinese are active in business in the Southern Hemisphere: see Department of Foreign Affairs and Trade, East Asia Analytical Unit, *Overseas Chinese Business Networks in Asia* (1995). Typically, Chinese business is family controlled and this has commercial implications. As of 2014, there is continuing evidence of mainland Chinese investment in Australian real estate. What are the drivers? See press reports in your materials.

Theme Two: We will look at the statutory company and securities law of Australia and New Zealand in some detail. Here, the focus is not on the case law but on the statutory law and the choices available to the commercial actor. A key *second learning* here is that, from a transaction planning perspective, the statutory choices are more important than the case law.

Third theme: One focus of the class is on the types of transaction planning issues that confront a practising lawyer. So *the third 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 (in the context of these jurisdictions) 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).

Further, this type of work is "team sport". So, for example, while you may be running the transaction from the corporate desk, you will involve the tax desk from an early point in the transaction. You are not expected to have tax expertise but you are expected to be alert to tax issues. Tax effects are a major consideration in cross-border transactions. Advisers seek to arrange tax effects so that the transaction is tax neutral, i.e. pay little or no tax. This is usually achieved by interposing one or more entities into the transaction and such entities will be in other jurisdictions (i.e., not A to B but A to B to C where B is a tax neutral jurisdiction).

Here, it also helps to know something about the economic context in which you are operating. So, for example, you might want to look at reports by the *Economist Intelligence Unit* to get a feel for the general economic settings in Australia and New Zealand. You might also want to look at a chart of the historical cross-rates of the USD, AUD and NZD. As you will see, the AUD has been very strong against the USD in recent times. The AUD was as high as $1.10 against the USD but is now (October 2014) about AUD0.88 against the USD. Note here that the strength AUD is largely dependent on conditions in China. Why? What might this mean for the acquisition of assets by a USA company? How do you mange currency risk?

An important consideration is "sequencing". You will see that I place a great deal of emphasis on the "front end of the transaction". I will explain this point further in class but (simply put), it means getting the structure of the transaction right on Day One. So one way of conceptualising the take-home exam for this class is to say that it deals with:

- Start-up issues (planning the transaction)
- Operational issues (the middle part of the transaction). It is here that we think about corporate governance issues; directors' duties and so on and
- Closing out the transaction (making a profit in a tax effective manner).

In this regard, pay close attention to the power point number 4 accompanying this outline.

A note about companies and transaction planning:

The following notes touch on some core issues that we will revisit throughout these lectures. Make sure you have a good grasp of the basics of companies, trust and tax issues in this regard.

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. To elaborate:

- Companies: When setting up a transaction offshore, we will use a company in the subject jurisdiction. Sometimes we call such companies, "special purpose vehicles" (SPVs). There is no magic in this term. It is simply a short-hand term for a company set up to fulfil one particular task. We do not use public listed companies for such transactions. Usually, we will use a company with one or two shareholders. So the companies we set up in Australia and NZ can be described as SPVs as they will be formed simply to hold real estate assets.
- Another type of SPV is a company set up in a tax neutral jurisdiction. Such companies are usually interposed to achieve a tax effect. Sometimes, such SPV companies have nominee directors and nominee shareholders. Why? Because all jurisdictions have a company's registry and these registries can be searched. So if one wishes to conceal ownership, nominees are used. Service providers will provide nominee directors and shareholders for fee. The nominee shareholders may hold shares on trust for another legal person. The trust could be a bare trust or a discretionary trust. As a result, if you search the register of company x, there is nothing to tell you that the directors and the shareholders are nominees.
- Trusts: Recall that legal and equitable interests can be split. Again, we sometimes use trusts as SPVs or to hold shares in SPVs. For example, trusts are often used to hold shares in companies for tax and protective purposes. Here, trustees (usually natural persons) legally hold assets in their names in trust for another legal person (this person has equitable ownership or beneficial ownership). *Unlike companies, trusts are not registered.* There is no register to search and so, prima facie, there is nothing to tell the world that A holds on trust for B. However, tax information sharing agreements (TIEAs) may be used to get behind legal ownership to discover beneficial ownership.
- There are various types of trusts. Typically, for our purposes, an inter vivos discretionary trust is used: see *Re Manisty's Settlement* [1974] Ch. 17 reproduced in your materials. Three certainties are required for trusts: intention; subject matter and objects. The intention certainty is usually met by the terms of the trust deed. Where the subject matter is shares in a company, subject matter certainty is met. The key issue is certainty of objects (the beneficiary principle). A trust will not fail merely because the actual persons who will benefit from the trust are not known at the time of its creation. It is sufficient for a discretionary trust if the terms of the trust set out sufficiently clear criteria to identify a potential class of beneficiaries. Thus, a discretionary trust will arise where the trustee has a discretion vested in him or her to choose who the potential beneficiaries might be from a particular class. A named beneficiary under a discretionary trust only has a right to have the trust administered bona fide and in accordance with the trustee's fiduciary duties. A discretionary trust arises where the settlor confers discretion upon the trustee to select who, out of the designated class of beneficiaries, is to receive a benefit and how much that benefit will be. So the essence of the discretionary trust lies in the fact that the interests of the beneficiaries have not been fixed. The settlor sets up a trust and confers upon the trustee control – via a trust power - in the determination of who should benefit under

the trust. The right of a named beneficiary under a discretionary trust is a mere expectancy. It constitutes a right to be considered as a potential beneficiary and in this respect amounts to a chose in action and therefore constitutes personal property. But this proposition only applies to a named beneficiary. It does not apply to beneficiaries (subsequently) appointed pursuant to a hybrid or intermediate power granted to the trustee. A trustee holding a hybrid or intermediate power has the right to appoint anyone except for a defined category or class of persons. So in this type of discretionary trust there is usually a defined class and an excluded class of beneficiary but the trustee is given power to add an "intermediate" or "hybrid" class. Because the intermediate class is (by definition) not named in the trust deed, it cannot be said that such persons have a mere expectancy or any kind of personal property: in this regard, see *Re Manisty's Settlement* [1974] Ch. 17; Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (`1996), Chapter 17. In turn, this means that the intermediate class is always bankruptcy or insolvency remote until named. For tax purposes, it means that a trustee can (ultimately) choose a beneficiary who is tax neutral. The relevance of this discussion is that – for some transactions – we might, e.g., use a Hong Kong domiciled company where the shareholding in the company is held on trust.

- Tax: We always consider tax rates and whether or not the jurisdiction operates a world wide tax net. When we talk about a world-wide tax net, we mean that a resident of country x is taxed on world-wide income regardless of where that citizen lives. So if you live in the USA or are a USA citizen but derive income from another country you will be taxed on that income. The USA operates a world-wide tax net. Natural persons are usually subject to progressive tax as opposed to a flat tax. What is the difference? Australia also operates a world wide tax net and taxes companies at 30% flat less allowable deductions. The flat tax rate on companies in New Zealand is 28%.
- Tax: some countries impose no direct tax. These jurisdictions are usually called tax havens. Often, however, other jurisdictions will "black list" such countries. However, HK is not so black listed by other OECD countries. What is the economic rationale for imposing no income tax on persons or companies? Is a VAT or GST or sales tax another way of achieving the same result?
- Tax: some countries only tax income earned in the country. Hong Kong taxes on a *territorial basis* (i.e., on income earned in Hong Kong) and taxes companies at 17.5% flat but there is no tax on non-Hong Kong sourced income. Nor is there CGT. A HK company deriving non-HK sourced income pays no tax in HK. Why does HK permit this practice? What is the upside for HK?
- Tax: A useful reference here is www.lowtax.net where you will find an overview of rates and directions to professional advisors. Tax rates, however, are not the end of the matter. At this point, we usually seek specialised tax advice on such matters as tax information exchange agreements (TIEAs), double taxation agreements, capital gains tax (CGT) and thin capitalisation rules.
- As for TIEAs: these agreements typically enable the tax authorities of your home jurisdiction to enquire as to the ownership of assets in another jurisdiction. There is no TIEA as between the USA and Hong Kong or Australia and Hong Kong. There is, for example, a TIEA agreement between Australia and the British Virgin Islands (BVI) and this enables inquiry as to legal and beneficial ownership in criminal or civil matters.
- As for double taxation: the DTA between the USA and Australia appears in your Handout. See Article 7 (business profits). There is a DTA between NZ and the USA. There is no DTA between the USA and Hong Kong. There is no DTA between Australia and Hong Kong. There is a DTA between NZ and Hong Kong. Thus, an HK

domiciled company with management and control in HK would (generally speaking) be immune from Australian tax.

- As for CGT: Australia will not tax capital gains made by subsidiaries of a USA resident company on the sale of shares: see *Virgin Holdings SA v Commissioner of Taxation* [2008] FCA 1503 and the *Undershaft* litigation (see Handout and Art.7 of the DTA) but they will be taxable in the USA when and if realised. Note that this area is contentious as far as the ATO is concerned.
- As to thin capitalisation: it might appear that 100% debt finance is the ideal way for a parent company to capitalise a wholly owned Australian subsidiary. Why? Answer: so the subsidiary can claim a tax deduction on borrowings. There are tax rules that strike at this practice. So, e.g., if a USA company has a fully owned subsidiary in Australia, then the general "safe harbour" rule under Australian tax law is that debt (monies loaned in by the parent) cannot exceed 60% of total capitalisation. So, e.g., we might capitalise the Australian entity at AUD40 million equity capital and 60 million debt capital: see Division 820 Income Tax Assessment Act 1997, section 820-185 (in Handout). There will be nil capital gains tax (CGT) in Australia for the USA parent company if we sell the shares in the Australian entity but there will be a tax consequence in the USA. If the Australian entity owned land and sold same then normal tax consequences follow (i.e., tax at 30% flat less allowable deductions). Note that the thin capitalisation safe harbour in NZ is also 60/40.

When thinking about the above matters, consider also the relevant rules of professional conduct in your home jurisdiction. Those rules will say that you cannot opine on foreign law to client. So, for example, Rule 5.05 (a) of the Texas Disciplinary Rules of Professional Conduct prohibits, "the practice of law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction". Thus, if the other jurisdiction says that only persons admitted in that jurisdiction can practice law, the Texan lawyer cannot opine. As a result, you may write internal memos (or similar) for your law firm but formal advice on foreign law will have to come from the foreign lawyers. Query: where do you find the foreign law firm? Tip: see Martindale and Hubbell. What type of firm are you looking for? Tip: full service law firm? There is a question on this point in your take-home exam. It has practical significance.

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.

Tools: The Corporate Lawyer's Desk Books: How we use texts in practice. I recommend: current basic text; current advanced text; loose leafs (law plus Listing Rules).

Texts: The two basic texts for this class are:

- Hanrahan, Ramsay and Stapledon, *Commercial Applications of Company Law*, 15th ed. (CCH Australia, 2014). Hereafter, "CACL". ISBN 978-1-922215-65-9. Earlier editions of this text are OK if you can get them second-hand. These notes are keyed to the 12th edition of this text.
- Walker, Pekmezovic et al, *Commercial Applications of Company Law in New Zealand*, 4th ed. (CCH New Zealand, 2012). Hereafter, "CACLNZ". ISBN 978-0-86475-981-8. These notes are keyed to this edition of the text. A fifth edition of this text is in preparation. I will supply page proofs where required.
- Note: these texts are held in your law library on CLOSE RESERVE.

For the legislation see:

- *Corporations Law 2001* (the Australian legislation). Use the 2013 or 2014 edition from either CCH Australia or Lexis Nexis Butterworths Australia.
- CCH NZ Ltd., *New Zealand Companies and Securities Legislation for Students 2013.* See the *Companies Act* 1993 and the *Securities Act* 1978.
- However, there is no need to get hardcopies of the legislation.
- The legislation can be viewed online at various websites.
- Websites for legislation and other materials: 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 Materials: You can download the legislation from the relevant websites. 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. They appear on the websites of the ASX and the NZX. If you want to buy the texts and you are resident in the USA, contact Wolters Kluwer Business in the USA.

Book of Readings: I will arrange for a book of readings (Handout) to be distributed to you or posted on your subject website.

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.

Class Schedule and Synopsis

This schedule and 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. As I move through this sequence I will be relating each part to the take-home exam (“light and shade”).

RECEPTION OF ENGLISH LAW

Key point: 1607-1997: The common law covers one third of the world. We prefer to work in common law jurisdictions and we prefer to use SPVs in common law jurisdictions. This is because they are "rule of law" jurisdictions and have legal tools we can use.

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 of Ireland to form the United Kingdom of Great Britain and Ireland in 1801. So after 1801, we talk of "UK law". So, e.g., when we look at NZ, we say that it took UK law in its early history.

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.

Key point: we look at the maps to get a quick view of common law jurisdictions around the world.

Look at the maps in your materials (handouts) to follow this part of the lecture. *The maps are there for a reason. They are there to help you identify those jurisdictions that*

you might use to stage a part of the transaction (via an SPV) and those that are more deal friendly from a legal risk POV.

Useful References: Baker, *An Introduction to Legal History*, 4^{th} 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. Fiji is presently under the control of a military dictatorship.

New Guinea was administered by the British then the Australians. It is now an independent sovereign state. It is resource rich but has many problems (HIV Aids, law and order etc).

Vanuatu (formerly the New Hebrides) had elements of French and English law (via the Anglo-French Condominium) but its laws now predominantly derive from UK law. It is now the Republic of Vanuatu and is a tax haven and an international financial centre.

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. Burma (Myanmar) took British law via India.

In 1867, we see the Straits Settlements, then the Malay States in 1937 receiving UK law. Borneo (Sarawak, Brunei and North Borneo) all took UK law.

Hong Kong took UK law from the Treaty of Nanking in 1861. The HKSAR is now under the control of the PRC.

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 are common law jurisdictions. 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 now 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 622) effective as of March 2014. 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).

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*, 14th ed. (hereafter, CACL), Chapter 1 or any standard treatment of the development of UK company law. Some of this material is in your Handout.

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
- 1720-1825: Industrial Revolution.
- 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. Such entities called "private" companies in New Zealand.
- 1901 federation.
- 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 *Commercial Applications of Company Law in New Zealand*, 4th ed. ("CACLNZ"), Chapter 2. 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 2011. There is a new market regulator (the FMA. The Financial Markets Conduct Act 2013 will repeal the 78 and 88 Acts by the end of 2014. (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 reproduced in your Handout. 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 – third version signed June 2010) there are consequences for, e.g., the securities regulation regime in each country. *In particular, there is now a treaty on mutual recognition of securities offers* (see Handout). A report by ASIC found that mutual recognition saves issuers between 55-95% in additional legal costs: See New Zealand Securities Commission, *Annual Report 2010*. This has relevance for your take home exam. Note also that the FMC Act 2013 is closely modelled on the Australian law.

Australia has a federal system; New Zealand has Westminster (unicameral) system. The NZ population is 4.4m plus and Australia is 22.8 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 (over 0. 5m) in Australia and Australia continues to attract NZers, especially in the recent economic context in Australia pre 2008 (mining boom in WA and QLD; the "China story"). NZ went into economic recession in 2008-9 then emerged from recession in 2011 but suffered the Christchurch earthquake in 2011. Australia (technically) avoided a recession partly because the federal government applied a large stimulus package. The so-called "China story" (demand for Australian commodities such as iron ore from the PRC) was strong again in 2010. As of 2014, the Australian economy is facing challenges as the mining boom tapers off.

Consider how economic conditions might influence the decision to invest in these jurisdictions. This is a key issue for commercial actors. Consider the relevance of the so-called "business cycle". Look at the historical currency cross-rate charts in your PPTs. Consider their impact of timing the transaction.

<u>OPERATING ENVIRONMENTS</u>
Government, Legal System and Economic Context.

When you go into a new jurisdiction, you need to pick up on the key data very quickly (demographics, average incomes etc). How do we do this? Discuss.

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. The National Party (centre-right) now governs in its own right (61 of 121 seats) as of September 2014.

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, as a result, Australia elected a Labor Party federal government headed by PM Kevin Rudd. Rudd was deposed in 2010 and the Labor Party, headed by Julia Gillard won the narrowest of victories in a subsequent election in 2011. There was a federal election in September 2013. The Labour Party was defeated and the Liberal Party lead by PM Tony Abbott is now in power. The Australian economy (technically) avoided a recession following the turmoil in financial markets flowing from the sub-prime crisis in 2007-8. Chinese demand for commodities (iron ore etc.) declined somewhat but has picked up again in 2010. In 2012, there was much talk of a two or three speed economy on account of the continued mining boom. As of 2013, the mining boom is winding down.

Generally speaking, however, transaction costs are higher in Australia than New Zealand. Question: what are transaction costs (think 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 exhibits 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.

COMPANIES

Types of Companies and the Incorporation Process

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 or the NZSX); 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. See section 45A of the Corporations Act reproduced in Handout. As to types of companies in Australia, see CACL at Ch. 3 and note that companies can convert from one type to another. Companies are incorporated via a registration process. See CACL Chapter 4.

New Zealand: see CACLNZ at Chapter 5. 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 non-listed company. As to types of companies, see CACLNZ at chapter 5. See also CACLNZ at Chapter 5 and note the different reporting requirements. This is illustrative of the way in which reporting requirements are enhanced by reference to size and the solicitation of funds from the public. Companies are formed via a process of registration: see CACLNZ at Chapter 5. Changing the type of company is easy in New Zealand: see Chapter 5 of CACLNZ. Note the absence of an ordinary residence test for a director in New Zealand: see Chapter 5. This is an important consideration in transaction planning. Note also that companies can be formed via the Internet. In 2014, some changes were made to the incorporation process.

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 (1) 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. 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 chapter 4.

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)

COMPANY MANAGEMENT

In this lecture we look at the management of companies and shareholder/member decision making. Note that this is not a significant issue for the transaction the subject of your take home exam. This is partly because the register of shareholders will not be fragmented. This is a corporate governance issue. See M. Fox, G. Walker and A. Pekmezovic "Corporate Governance Research on New Zealand Listed Companies" (2012) 29 (1) Arizona J of Int. & Comp. Law 1-48.

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 (by contrast) they are a notorious source of difficulty elsewhere in the SE Asian region. By this I mean, for example, the practice of selling in assets at anovervalue 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 para 6.500 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) require 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 chapter 8 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.

DIRECTORS' DUTIES IN AUSTRALIA

This lecture provides an overview of directors' duties in Australia. This matter is discussed in Chapters 10-13 of CACL. 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 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 at para 10-120. 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 205. 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 207 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: A leading Australian case is *Daniels v AWA*, a decision of the NSWCA. Note the standards expected of ALL directors. See para. 10-220. We will also look at the *Centro* and *James Hardie* cases. See power points on recent trends in directors' duties.

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 para. 10-220.

Section 182 (2) CA: the business judgment rule in Australia: see para 10-240 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.

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 para 13-200.

Now consider statutory regulation of conflicts. First, look at section 191 and the exemptions thereto: para 13-300. Then see section 195 and the requirement that a director with a conflict must recuse himself: para 13-240.

Next look at section 182 and 183. These sections relate to improper use of position or information. See the case law discussed at para. 13-360.

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 259 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.

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 were 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. Australia has now passed the PPSA Act 2009 (Cth.)

Mortgages over land are not registered with ASIC. They are registered with the Registrar of Lands in the relevant State or Territory. Unregistered charges may be void as against a liquidator and priority of charges may be affected.

In New Zealand, 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 Chapter 20 of CACLNZ. Similar rules now apply in Australia.

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, 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 19.2 at para 19-200. 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. See para 19-300. 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 as of late 2011. However, the FMC Bill will bring the law here into alignment with Australia.

Next, go to para 19-600 and look at the rules re prohibited financial assistance. Prior to 1988, financial assistance was prohibited. Now such action is permitted under s. 260A.

Now go to chapter 19 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 para 1910 of CACLNZ. We shall look at this matter further later in these lectures. Note that the FMC Act 2013 aligns the NZ position with Australia.

Next, look again at the "solvency test" appearing at para 1912. This test has implications for share buy backs and financial assistance. See para 1914 for the NZ position on financial assistance.

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. See Chapter 20 at para 20-110. Now go through the exceptions 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 …. ". Note the requirement to provide information that ought reasonably be obtained by making inquiries. This requirement gives rise to the due diligence process: see para. 20-120. 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 432ff. Note especially the general ban on misleading or deceptive conduct in section 1041H.

Insider trading: see the discussion at para 20-220. Note the width of the prohibition in Australia.

SECURITIES REGULATION IN NEW ZEALAND

Reading: Chapter 27 of CACLNZ. In this lecture we look at securities regulation in New Zealand. Go to Chapter 27 of CACLNZ. Note that the law in this area changed in December 2014 via the Financial Markets Conduct Act 2013.

STRUCTURING THE DEAL

Students should read and be familiar with 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. reproduced in the Handout. This reading presents a model of an IPO. The structure elaborated in the reading is a useful way to think about the issues arising in the take home.

However, students should pay close attention to the PPTs in Slide Set Four.

So, in this class, we will consider how we might best structure a float of the Australian and New Zealand assets. This part of the lectures largely restates and reviews many of the issues we have examined thus far. Do not follow the sequence in the reading blindly. Rather, answer the questions in the take-home exam directly as asked.

Some key issues arising are:

Start-up phase: can you opine; choice of vehicle; directors; tax; SPV for shareholdings; fragmentation of the register; control of the board; offshore lawyers.

Choice of vehicle: corporate governance issues. Note here that if one controls the board and the shareholding, the internal governance rules are moot.

Trade Sale: desirability thereof; Chinese investors; private ordering of the deal; tax consequences and SPVs.

Prospectus phase: preliminary financial decisions; underwriting; rethinking the numbers with reference to PE ratios and retention of 30% control block. See power point slide set four. The Listing decision: which jurisdiction; ASX and NZSX LRs; accessing the mutual recognition regime. Consider matters that must be addressed to comply with the LRs (the "spread"; minimum parcels; constitution; takeovers etc).

Selling Phase: Underwriter or no underwriter? Road shows, dog and pony shows.

Closing the Issue: over and under subscription.

Continuous Disclosure and Insider Trading

See the two sets of power points on these topics. The topics are related.