

Company Law Update

INTRODUCTION	1
1. REMEDIES FOR BREACHES OF DIRECTORS' DUTIES	2
Introduction	2
<i>Bank of New Zealand v New Zealand Guardian Trust Co Limited</i>	2
<i>Background</i>	2
<i>Reasoning of the Court</i>	3
Implications of NZGT for directors' duties	4
<i>Good faith – s 131</i>	5
<i>Proper purpose – s 133</i>	5
<i>Skill and Care – s 137</i>	6
<i>"Reckless trading" - ss 135 and 136</i>	7
<i>Use of company information – s 145</i>	8
<i>Compliance with Act and constitution – s 134</i>	10
<i>"Interested" transactions – ss 139 to 144</i>	10
2. CONSTITUTIONS	12
A recap - Why have a constitution?	12
Prevalence of precedents	13
Entrenching the constitution	13
Pre-emptive rights, drag-along and tag-along rights	14
<i>Pre-emptive rights</i>	14
<i>Drag-along and tag-along rights</i>	14
Shareholders' Agreements	15
<i>Is the company bound by a shareholders' agreement?</i>	16
<i>Shareholders' Agreement or constitution - which prevails?</i>	16
3. MAJOR TRANSACTIONS	18
Introduction	18
What is a "Major Transaction?"	18
<i>Series of Transactions</i>	18
<i>Transactions by Subsidiaries</i>	19
<i>Share Issues</i>	19
<i>Dividends</i>	20
<i>Debentures</i>	20
Value of Assets	21
Value of Liabilities	21
<i>Contingent Liabilities</i>	21
<i>Refinancing</i>	23
<i>Transactions which "become" Major Transactions</i>	24
<i>Long Term Obligations</i>	24
Consequences of Failure to Comply with s 129	25

<i>Consequences for Company and Directors</i>	25
<i>Ratification?</i>	25
<i>Invalidation of Transactions as Against Third Parties?</i>	26
<i>Some Advice ...</i>	27
4. DEADLOCK RESOLUTION MECHANISMS	29
Introduction	29
<i>What are deadlocks?</i>	29
<i>Is a deadlock resolution mechanism required?</i>	29
<i>Choice of Deadlock Mechanism</i>	30
Inter-party Resolution	32
<i>Re-submittal</i>	32
<i>Escalation</i>	32
<i>Mediation</i>	33
<i>Casting vote</i>	33
Third party resolution	34
<i>Arbitration</i>	34
<i>Independent expert</i>	35
<i>"Swinger"</i>	35
Interest adjustment mechanisms	36
<i>Put options</i>	37
<i>Call options</i>	38
<i>"Russian roulette"</i>	38
<i>"Total Interest" v "Vote Only"</i>	41
<i>Dilution</i>	42
Compulsory exit mechanisms	42
<i>Liquidation / termination</i>	43
<i>Joint sale</i>	43
5. INSOLVENT TRADING	44
Directors' statutory duties	44
<i>Section 135</i>	44
<i>Section 136</i>	45
<i>Australian provisions</i>	45
Common law duty to creditors?	46
Shifting assets	47
Third party liability	50
6. LIQUIDATION DEVELOPMENTS	51
Voidable transactions	51
<i>"Ordinary course of business" test</i>	51
<i>"Transactions"</i>	54
<i>Procedure</i>	55
<i>"Running account" cases</i>	55

<i>"Change of position" defence</i>	56
<i>Law reform</i>	57
<i>Statutory demands</i>	57
7. NEW CAPITAL MARKET	59
Introduction	59
Objectives of the NCM	59
How will it work?	60
<i>Company formation</i>	60
<i>Organising broker</i>	61
<i>Application for listing on NCM</i>	61
<i>Initial Public Offering</i>	61
<i>Securities Act (NZSE New Capital Market) Exemption Notice 2000</i>	62
<i>Restrictions while listed</i>	63
<i>Key Transaction</i>	63
<i>Full listing</i>	64
The NCM in practice - some thoughts	64
Conclusion	65
APPENDIX - CASE STUDIES	66
Case Study 1	66
<i>Issues for discussion</i>	67
Case Study 2	68
<i>Issues</i>	69