

Week 6: Keeping of accounts (Companies Act 1993)
Why: S 194(1) accounting records are kept (meets purpose)
>Maloc Construction v Chadwick (1986) 3 NZCLC 99,794 [purpose not met]
Requirement: financial position to be determined at any time
Consequence: CRIMINAL: s 194(4) and CIVIL: liquidation and failure contributed then director liable (s 300) - defence under (s 300(2))
>Central Tyres Waipukurau Ltd v Pallesen [2016] NZHC 146 [untrained staff]
End of year financial statements (Companies Act 1993 and Financial Reporting Act 1993)
Reporting entities: S 200-207 5 categories of companies comply under financial material conduct act 2013 (GAAP) [large company— (asset>60m or rev>30m)] [Public entity][Oversea company (asset>20m or rev>10m)] [Company with 10 or more shareholder] [Company with less than 10 shareholder if required by shareholder]
Consequence: Penalties s 374(3) and civil liability (s 300) - defence under s 376(2) >Prain v FMA [2016] NZCA 298 - [failed to comply, charged under FRA 1993, s 38(b) defence of reliance under s 40(a) FRA and s138(1)]
Outside RE: Tax Administration (Financial Statements) Order 2014 (TAO) cl 8 sets out minimum requirements for financial statements (balance sheet, income statement, audit)
Audit and Disclosure (Financial Reporting Act 1993)
Role: s 16 certify truth and accuracy of the financial statements
Rule: auditing and assurance standards in audit and prep (ss 207A and 207B), s 207C accuracy reported to Registrar and XRB
User: 5 RE appoint, others register with registrar of companies
Liability: misstatement [Duty of care, Breach of duty, Causation and remoteness]
>Caparo Industries plc v Dickman [1990] 1 All ER 568 (HL) [third party cannot prove duty of care - not intended for investor]
>Boyd Knight v Purdue [1999] 2 NZLR 278 (CA) [third party cannot prove causation and remoteness- could not prove audit caused loss]
Requirement: All companies must - required to comply with **Part 12** requirements for preparation of Annual Report, Annual report must include financial statements and audit report (s. 211 CA), sent to shareholder in not less than 20 day of AGM. SH can opt out (s 212 CA) or vote to not hold AGM
Week 7: Shareholders' role in management Companies Act 1993
Directors: [Manage the business of the company s128][Bind the company s18, s180][Can delegate some power s130][Can rely on information s138]
Shareholders: [Appoint directors s153][Approve major transactions s129][May review management: s109][May adopt or change a constitution][Vote at GM s36]pre-emptive rights to new shares s45] [right to sell share s84][buy outs s110]
Rules: **CA 1993** (basic rules, default constitution s28 s26, [default and mandatory]), **Constitution** ([optional, default/alternative, mandatory]), binding ss27 ss31; current and future, change s32, public), **Shareholder's agreement** (binding; current - future requires deeds of accession, change by unanimous, private)
Constitution purpose: Create pre-emptive rights (first chance to buy): s39, Restrict issue of new shares: s42, Allow company to buy back shares: s59, Have supermajority special resolution: s2(1), Indemnify and insure directors: s162, Subject distributions to shareholder approval: s52. >Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34 (CA) [D didn't follow order of SH - breach C]
Shareholders' general meeting: Legal requirement to have AGM - can be waived by resolutions in lieu of meetings (s122), Possible to call special meetings (by board or shareholders with approval of 5%)
Requirement: [50% appoint/remove D][75%+ alter constitution, approve major transaction, amalgamation, liquidation s106][100% dividends s107, shares, D wages s161, company transaction with D]
Outvoted s106: if S outvoted on changes to adopt constitution, approve major transaction or amalgamation - S have right to have company buy their shares s110. This is subject to solvency test as buyout is distribution - if C is insolvent S must look for another buyer or apply to court for an exemption

Week 8: Enforcement and remedies (Companies Act 1993)
Director breach duty S may ratify: Personal action against directors: s169; take action for directors' breach of duty owed to a shareholder •Order directors to do something: s170 •Personal action against the company: s171 •Order the company (through the board) to do something: s172 •Representative actions: s173; Shareholders with similar grievance •Derivative actions: s165 •Prejudiced shareholders: s174
Derivative actions: s165: Majority of shareholder may ratify D actions, Possibility of fraud against the minority - in these cases court may grant S or D permission to act as C >Vrij v Boyle [1995] 3 NZLR 763 [majority diverting opportunity from minority] >Thorrington v McCann (1998) 8 NZCLC 261,564 [started own business after original was successful] >Presley v CallPlus Ltd [2008] NZCCLR 37 [majority diverting opportunity from minority] >McKay v PHC Holdings Ltd (1998) 8 NZCLC 261,603 [ultimate beneficiary was S - not fit for derivative action]
Concerns: Trivial actions, Effectively shifting burdensome costs to small shareholders, Exposing directors to so many claims it becomes a deterrent to directorship , 'Double dipping' (shareholder remedy and derivative action)
Prejudice shareholders CA 1993 s174: if S former S or entitled person considers C affairs to be "oppressive, unfairly discriminatory, or unfairly prejudicial s175" can apply s174(2)
Remedies s174: buyout, regulate future conduct, liquidate >Re HR Harmer Ltd [1958] 3 All ER 689 [oppressive-majority excess power] >Thomas v HW Thomas Ltd [1984] 1 NZLR 686 [not prejudicial - reason for monetary policy and share sell restriction. Plaintiff did not attempt to sell share; cannot claim locked in] >MPML v Mike Pero [2016] NZHC 3185 [prejudiced as equal shareholder demand excess pay] >Szekely v Muse on Allen Ltd et al [2017] NZHC 703 [S excluded from shares however as company went into liquidation and worth nothing no compensation was awarded - if the shares had value compensation would have been awarded]
Just and equitable liquidations241(4)(d): Deadlock, Major part of the business lost, Lack of trust due to directors' dishonesty/incompetence, Oppressive conduct, Company formed for a fraudulent purpose, No reasonable hope of a profit >Vujnovich v Vujnovich [1988] 2 NZLR 129 [Both oppressive, lack of trust] >Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 (HL) [one partner removed -began as partnership]
Week 9: Corporate liability (Companies Act 1993)
Rules of attribution: which acts are to be attributed to the company (separate legal entity)
Primary (companies): CA, Constitution, Common law
General rule (legal actors): Law of agency
Special (rules when General cannot be applied): Statutes
Contract bound by: Directly s180 or by Agency
Defective contracts: Statutory indoor management rule CA 1993 s18 (normally assume internal rules have been complied with - with limit that third party knew or should have) - Capacity, powers and validity of actions s16-s19
>Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146 [Bank should have investigated when director of company mortgaged land of one company to finance own company (No benefit and high risk)- mortgage unenforceable] >Story v Advance Bank Australia Ltd (1993) 31 NSWLR 722 [Bank had to reason to investigate as entry into contract seemed reasonable(company benefited)- mortgage enforceable]
Company liability for torts (civil wrongs)
Attribution CL: Vicarious liability (An employer is liable for the torts of their employee committed during the course of employment), Directing will and mind doctrine (David (sales director) and Edward (compliance officer) of Zeta bank establish a system which leads Carla to give negligent advice; Zeta itself may have primary liability because David and Edward are its 'directing mind and will')
Attribution statutes: Legislation deems employees' and

directors' tortious acts to be the wrongful acts of the company > Fair Trading Act 1986 s45(2)
Crime: Criminal act + criminal intention (Actus reus +Mens rea) >Meridian Global Funds Asia Ltd v Securities Commission [1995] 3 NZLR 7 [rejects 'directing will and mind' and applies attribution]
Manslaughter Crimes Act 1961: s 171 manslaughter; homicide required for manslaughter, s 158: homicide; killing of a human being by another (must occur between two humans)
> R v Murray Wright [1970] NZLR 476 (Court of Appeal) [company is not a human it cannot be prosecuted for homicide]
Funding: Equity
What are the main sources of company funding: Share capital: (No agreed rate, return paid after profit, not fixed term, solvency test applies, default is commercial, participates in profits, isn't tax deductible) **Debt finance:** (agreed rate, return paid before profit, fixed term, solvency test does not apply, default is legal, no participation in profits, tax deductible), **financial leases** , **Trade finance**, **Retained earnings**
What is a share: personal property CA 1993 ss2, 35-36
Share type:
Risk return trade-off (high risk high return in order): ordinary share (full entrepreneurial risk), redeemable share (reduces risk by allowing for buy out/early escape), preference share (reduces risk by taking priority over other shareholders, e.g. 5% pa cumulative), redeemable preference shares
Compensating shareholders: Distribution – transfer of economic value to a person because they are a shareholder CA 1993 s2 [A dividend is a distribution CA 1993 s53(1) - this is authorised by board CA 1993 s52]
Authorisation only permitted if: immediately after distribution company passes the solvency test s4(Pay debts in the normal course of business and Assets exceed liabilities) - measured using financial statement, accounting record and asset value
Consequence: director liability and claw-back from shareholders Financial Markets Conduct Act 2013
Week 10: Funding: Debt
Debt: Fixed term contract for loan of funds, risk compensated by interest, No voice in the company (except on default), Priority over shareholders, Interest payment tax deductible
Types: Overdraft, Term loan, Trade finance, Debentures
Risk: (Unsecured debt = high risk high return), (Secured debt = low risk, low return), Guarantees, Securities, Retention of title (Romalpa clauses) , Negative pledge
Securities: real properties (Mortgages: Property Law Act 2007, Searchable register: Land Transfer Act 1952)- First registered mortgage takes priority (Personal Property Securities Act 1999)
Why Purchase money security interests (PMSI): Banks' SIs (right of secured lender) over all present & after-acquired property
Types of PMSI:Close connection (hire purchase, Romalpa clauses), Deemed SIs (leases for >1 year)
Process:Personal property used to secure a debt, Debtor grants SI in collateral, SI must attach to collateral, SI should be perfected (registered on PPSR), Duty registered PMSI has a super priority
Competing security interests: Attached (the collateral linking to the debt) beats unattached SI, Perfected (completion, e.g. due registration) beats attached SI, First perfected beats later perfected SI, PMSI beats non-PMSI >Graham & Gibson v Portacom NZ Ltd (2004) 2 NZLR 528 [creditor leased property but did not register SI on PPSR - debtor borrowed from bank who registered general SI resulting in property of creditor being seized by bank]
PPSA 1999 and insolvency Under liquidation rules: PMSIs are excluded from distributable assets (not distributed in liquidation (taken out of total asset), General SIs have some priority over unsecured debts
Debt default and insolvency Receiverships Act 1993 & CA

Compromise (ss227-234): Binding agreement between company and creditors, General freedom to agree terms,75% approval required, Creditors may prefer company to continue trading in the hope of receiving more money >no catastrophic failure, debtors have interested in C success or there is opportunities for future growth
Receivership (Receiverships Act 1993): secured creditor able to appoint a receiver (powers: RA s14, General duties: s18) to take control of C assets to release adequate funds to pay debt, A debenture normally includes the power to appoint a receiver
>Secured assets, assets to hive down (liquidate loss, new from profit)
Receiver's liability: liable for contract entered into RA s 32, Right to indemnity from company assets
Statutory management: Corporations (Investigation and Management) Act 1989, Permits government to intervene in exceptional circumstances (prevent fraud or group of companies fail) >when wide scale fraud is suspected, group collapse, or there is national/regional significance e.g south Canterbury finance
Requirements of corporate rescue: Moratorium (breathing space), Compulsion (on creditors to accept less), Ability to trade
Voluntary administration(CA 1993, Part 15A (ss 239A-239AEF)): Safe haven for the company to trade out of trouble (admin can perform/exercise any function/power s 239U) > has Support (acceptance) of major creditors, the Benefits of continuing to trade outweigh costs of other options, Company not hopelessly insolvent
Effects of admin CA: s239X, s239Y, s239Z, s 239AB, s239AC
Watershed: CA 1993, s 239ABA (DOCA, VA terminated, Liquidator)
VA process: Moratorium, watershed, 3 outcome
Week 11: Liquidation CA Part 16 (ss240-316B)
Who start liquidation:director,shareholder,creditor(watershed), court
Liquidator power and duties: All powers necessary to carry out functions, good faith, collect and distribute s253
Liquidation distribution principles:CA 1993 ss311-313 and sch 7- SIs (charges) generally excluded - after all shareholder get remains
Key preferential creditors: Liquidator, employees, IRD
Distribution order: 1 Preferential claims(1.1 Liquidation fees etc 1.2 Employees' pay and PAYE etc 1.3 Layby sales creditors 1.4 Costs of creditors' meeting to consider a compromise 1.5 IRD)2 SIs over inventory etc 3 Unsecured debts (Interest can be paid)4 Subordinated debts 5 Preference shares 6 Ordinary shares
Pari passu and unfair benefit:insolvent companies may limp on for years - requires all unsecured to be treated equally-clawback
Shared requirement for below: Was the transaction within the specified period (2 years), * insolvent in the 6 month period before liquidation, #Was the company insolvent at the time of the transaction OR Did the transaction cause insolvency
Transactions undervalue s297: # Was the transaction undervalue
Insolvent transaction s 292: * Allows a creditor to receive more than they would from liquidation - Continuing relationship test (burden of proof): s292(4B) >Shephard v Steel Building Products Ltd [2013] NZHC 189 [insolvent trans]
Voidable charge s293(3): *Immediately after the charge was given, the company was insolvent - Good faith defence: s296(3) >Shephard v Steel Building Products Ltd [2013] NZHC 189 [court accepted claim of good faith and that SBP did not suspect however they had no proof that they changed their position]> Grant v Shears and Mac Ltd [2012] NZHC 1772[no Change in position] >Allied Concrete Ltd v Meltzer [2015] NZSC 7 [1off change]
Transactions undervalue s297: #Was the transaction undervalue
Transactions with inappropriate consideration (related persons) s298: Made within 3 years of liquidation (specified period), No requirement for insolvency at time of transaction
Charges (related persons) s299:Court may set aside any charge granted to a director (or relatives) -if just and equitable, no insolvency required >Madsen v Cooper[2020] NZSC 100 [charge for lending reversed]
Liability if proper accounting records not kept s300: - defence available
Negligence, breach of duty etc: s301 - usually breach director duties

