

Corporate Governance in China and in Australia

-----A comparative approach

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Preface

Corporate law is one of the most important laws in regulating business activities of companies or corporations and advancing the development of economy, and almost all countries attach much importance to it.

Furthermore, international societies have recognized sound corporate governance is a key factor to keep institutional competition in recent years. The first company law of China was born in 1993, just 15 years till now, and it is no more than 2 years since the new company law entered into force in January, 1, 2006.

The new company law of China was amended greatly, only 20 old provisions were kept. There are many new provisions about corporate governance in company law.

I have been practising in the area of corporate law and securities law for 7 years since I became a lawyer. During this time, I experienced almost all the important reforms in corporate and securities laws, regulations and bylaws in China which forms the current framework of Chinese corporate governance. During my work on a masters' degree at Renmin University of China, with the help of my tutor who is one of the experts legislation member of Chinese company law, I tried to combine my working experience with the theory and practice in Chinese corporate law in order to solve many controversial problems in reality.

It is very lucky for me to get this great opportunity to participate in the China and Australia Governance Program, this program is organized by Attorney-General's department in Australia, with the help of Attorney-General's department, Australian Law Council, ILSAC (International Legal Service Advisory Council) and Minter Ellison law firm, I experienced

the real exciting legal issues and the real legal culture in Australia.

During the process of my study and placement in Australia, what impressed me most in the corporate area is the powerful regulatory body, unified and abundant corporations laws and regulations, preciseness and flexible legal tradition and a society of rule of law.

I am very grateful that so many Australian experts gave me great introductions about corporate law and also gave me very good suggestions about my paper.

This paper is made up of four parts. In part I, I will give a brief introduction of the relevant background of corporate law both in Australia and China. In Part II, I will discuss corporate governance in Australia and in China, Part III is about directors' duties in both countries. Part IV is the summary.

At the end of my paper, based on my observations in Australia, I will explain my conclusion as to how to reform corporate governance and directors' duties in China.

Part I A Brief Introduction to

Australian Corporate Law

1 A brief introduction to the background and the history of Australian corporate law

Number	Period	Characteristics
1	1788 - 1850s	Small beginning
2	1850s - 1890s	Boom and depression
3	1890s - 1930s	Early moves towards uniformity
4	1960s - 1980	The first uniform legislation
5	1980 - 1990	THE CO-OPERATIVE SCHEME
6	1991 - 2001	THE NATIONAL SCHEME

2 The Current legal system of Australia corporate law

2.1 The principal enactments in the national scheme

At present , the principal enactments in the national scheme are the Corporations Act2001(Cth)(Corp Act),and the Australian Securities and Investments Commission Act2001(Cth) (ASIC Act),These Acts commenced operation on 15 July,2001.

These Act were introduced in response to the High Court's decisions in the cases of Re Wakim; Ex p McNally and R v Hughes. These two acts are commonwealth laws which originated from states and territories, we can find the relevant provisions in s51,s122.

2.2 The main characteristics of Australian corporate law

2.2.1 The coexistence of statutory law and common Law

Unlike most civil law systems, common law systems follow the doctrine of stare decisis in which lower courts usually make decisions consistent with previous decisions of higher courts.

2.2.2 Detailed Provisions in Corp Act and basically cover most aspect of corporation s and securities

Note: For example, Ch2A Registering a Company, in China, SAIC(State Administration for industry and commerce will in charge of similar things, it will be discussed in the following part of this paper), Ch6CA Continuous Disclosure, can be found in Chinese securities law.

Corp Act include 8 Chapter(there is no Ch3 or 4 in the Corp Act), and Corp Act cover company law and securities law

Ch1 Introductory,

Ch2A Registering a Company,

Ch2B Basic Features of a Company,

Ch2C Registers, Ch2D Officers and Employees,

2E Related Party Transactions, 2F Members' Rights and Remedies,

2G Meetings, 2H Shares,

2J Transactions Affecting Share Capital,

2K Charges,

2L Debentures,

2M Financial Reports and Audit,

2N Updating ASIC Information about Companies and Registered Schemes,

2P Lodgments with ASIC,

Ch5 External Administration,

Ch5A Deregistration, and Transfer of Registration, of Companies.

Ch5B Bodies Corporate Registered as Companies, and Registrable Bodies

Ch5C Managed Investment Schemes

Ch6 Takeovers

Ch6A Compulsory Acquisitions and Buy-outs

Ch6B Rights and Liabilities in Relation to Chapter 6 and 6A Matters

Ch6C Information about Ownership of Listed Companies and Managed Investment Scheme

Ch6CA Continuous Disclosure

Ch6D Fundraising

Ch7 Financial Services and Markets

Ch8 The Futures Industry [Repealed]

Ch9 Miscellaneous

Ch10 Transitional Provisions

Schedules

2.3 A comparison of main statutory company laws and regulations

	Australia	China
	<p>CorpAct2001</p> <p>ASIC Act 2001</p>	<p>the Company Law of PRC(Revised 2006) (中华人民共和国公司法)</p> <p>the Securities Law of PRC(Revised 2006) (中华人民共和国证券法)</p> <p>Regulation of the PRC on the Administration of Company Registration (Revised 2005) (中华人民共和国公司登记管理条例)</p> <p>Regulation of the People's Republic of China on the registration of enterprises as legal persons (中华人民共和国企业法人登记管理条例)</p>

Note: From the above analysis, we found two characteristics of Australian corporate law compared with Chinese corporate law, first, different legal tradition result in different legal style, for Australia, the legal style is the mixture of statutory law and case law; second, Australia has an uniformed code of corporate law.

3. A comparison of main regulatory bodies of companies and the relevant functions between two countries

	Australia	Function	China	Function
1	ASIC	Enforces and regulates company and financial services laws	CSRC (中国证券监督管理委员会)	supervision over securities and futures business, stock and futures exchange markets, the listed companies, others.....involved in the securities and futures business

			SAIC(国家工商行政 管理局)	Registering a company
2	ASX	ASX (Australian Securities Exchange) provides markets with trading securities, helping listed companies raise capital, enabling buyers and sellers to transact with confidence	SSE (上海证券交易 所、深圳证券交易 所)	a non-profit-making membership institution directly governed by the China Securities Regulatory Commission(CSRC)
3	Takeovers Panel	The Takeovers Panel is the primary forum for resolving disputes about a takeover bid 1) unlisted trust; 2)unlisted public company; 3) listed company	Takeover Committee	a special internal committee. It is composed of professionals and relevant experts in the takeover area, whose function is, upon the request of a functional department of the CSRC, to provide opinions about takeover regulation, to assist in dealing with complicated issues regarding takeovers. 1) listed company
4	ACCC	Responsible for administering the Trade Practice Act, especially in the	state administration for industry and commerce Ministry of Commerce	Exercise the similar power and perform the similar function in the area of consumer

		area of consumer protection (but not for financial service---ASIC) and competition.	National Development and Reform Commission	protection, competition and anti-monopoly.
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4. A Comparison of types of companies and basic organizational structure between two countries

		Australia	China
1.types of companies 公司类型	Public Company (Unlimited number of members, may be listed on the ASX)	Limited by shares	Joint Stock Limited Company 股份有限公司
		Unlimited with share capital	
	Private Company (proprietary company)	Limited by shares	Limited liability company 有限责任公司 [including one-person company] 包括一人公司
		Limited by guarantee	
Unlimited with share capital			
No liability company			
2.Numbers of Directors 董事人数	Public Company	at least 3 directors (not counting alternate directors) 201A(2)	5—19 members
	Proprietary	at least 1 director 201A(1)	3—13members (one executive

	Company		director can exist in some small company)
3. Numbers of Shareholders 股东人数	Public company	At least one	2 - 200 initiators
	Proprietary company	No more than 50 non-employee shareholders (at least one)	1 - 50 members

Note : From the following chart, we compare some basic but important factors between two countries, including types of companies, number of directors and number of shareholders.

For example, six types of companies can be registered in Corp Act, Part 2A.1 Article 112, but in China, only two types of companies can be registered in company law.

Part II Corporate Governance

1. A brief introduction to corporate governance

1.1 The definition or concept

1.1.1 The concept of corporate governance has a wide range of meaning. "At its broadest, it can be used to refer to the formal and informal control and regulation of companies by outsiders.

1.1.2 More commonly, it refers to intra-corporate processes and structures."

It is no doubt that a sound corporate governance structure can improve the efficiency of decision-making, accelerate the corporation development and attract more investors.

1.2 the importance of Corporate Governance

A good corporate governance will improve the operating efficiency and management in modern companies, attract more investors and make tremendous contributions to national economy. It is self-evident that corporate governance is so important that international society attach much importance to it.

OECD[Organization for Economic Cooperation and Development of United Union].: 《OECD principles of corporate governance》《关于公司治理原则》(Revised 2004) US: the Sarbanes-Oxley Act of 2002 ,etc

2. The formal legal model (Principles)

2.1 The division of power between the board and the general meeting

“In Australia, Corporate law recognises only two sites of decision-making power within the corporation: the general meeting of members and meetings of directors, usually constituted as a board.”¹

In Australia, The allocation of the managerial power stipulated in Corporate Act: (198A1)The business of a company is to be managed by or under the direction of the directors.(198A2)[Exception]The directors may exercise all the powers of the company except any powers that this Act or the company’s constitution(if any)requires the company to exercise in general meeting.²

2.2 The principle of non-interference

2.2.1 Case1 : Since the 1906 case of Automatic Self-Cleansing Filter

Syndicate Co Ltd v Cunninghame([1906]2 Ch 34) ,it has been accepted that where the board is granted exclusive powers of management then neither individual members nor the general meeting have any power to intervene in or dictate the exercise of that power.

2.2.2 Case2 : In NRMA v Parker, Mc Lelland J held that a general meeting can not exercise, or interfere with the exercise of, a power that is vested by the corporate constitution exclusively in the directors.

2.2.3 Three Exceptions:

2.2.3.1 if directors having certain powers are unable or unwilling to exercise them ,there must be some power in a company to do itself that which under other circumstances would otherwise be done

2.2.3.2 subject to certain limitations, the general meeting has the powers to consent to or ratify

2.3 The unanimous consent doctrine

It is also a further exception to the principle of non-interference, this doctrine, if applied, would override the division of management power between the general meeting and the board of directors.

3. The comparison of main stipulations on corporate governance between Australia and China

	Australia	China
1	Relevant provisions of Corp Act 2001	Relevant provisions of Company law (Revised 2006)
2	the Listing Rules	Guidelines for Corporate Governance of Listed Companies

		上市公司治理准则(2001)
3	Principles of Good Corporate Governance and Best Practice Recommendations (March 2003)	Guidelines for the Articles of Association of Listed Companies 上市公司章程指引 2006
4	Corporate governance Guidelines [Australian Council of Superannuation Investors (ASCI)(March,2003)](new one will be released in 2007)	Guidelines for independent director of listed company (2001) 关于在上市公司建立独立董事制度的指导意见
5	Corporate Governance: A guide for fund managers and corporations (Oct 2004),known as" Blue book"	Provisions on Strengthening the Protection of the Rights and Interests of the Public Individual Shareholders (2004) 关于加强社会公众股股东权益保护的若干规定

Note:

1. The Listing Rules will also affect the manner in which decision-making power is allocated.(see LR7.1,LR 10.1,LR10.17,LR 11.2)]
2. The ASX Corporate Governance Council released its in March 2003. This represents the most comprehensive statement of best practice in Australia. Listed companies must adopt its recommendations or explain why not.
3. In 2001,CSRC released Guidelines of Corporate Governance for Listed

Companies, the Guidelines for independent director of listed company.

In 2006, in order to meet the need of new company law, CSRC released new Guidelines of articles of association for Listed Companies in place of the old one in 1997.

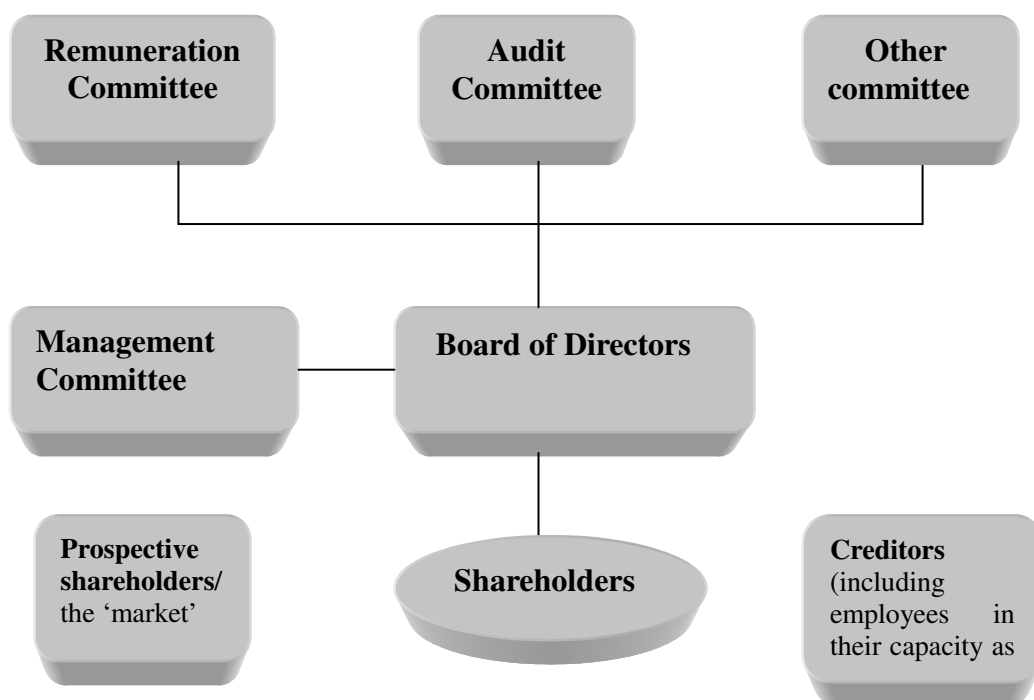
4. A comparison of official agencies between Australia and China (microcosmic)

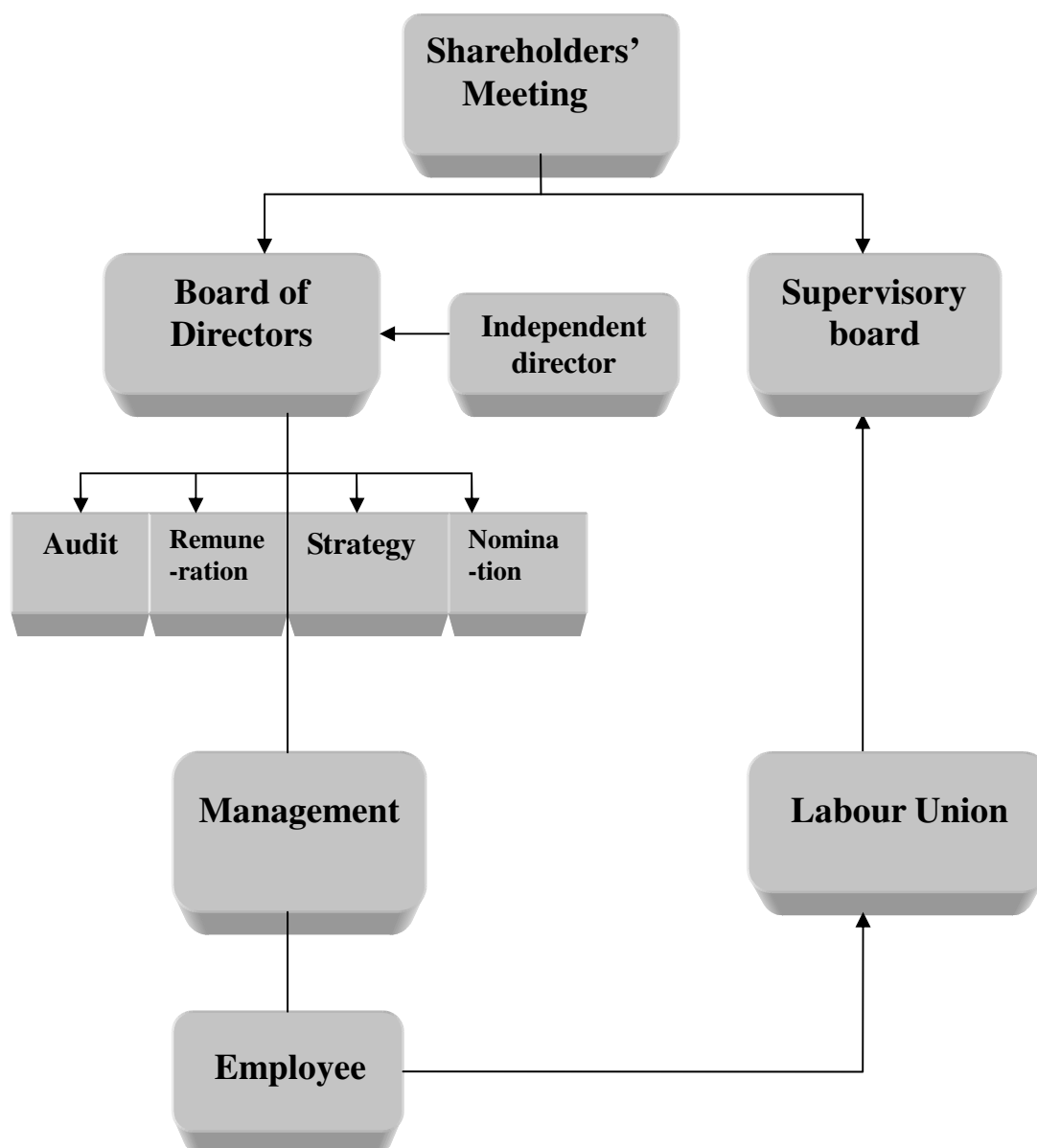
		Australia	China
1	Chairperson 董事长	Independent directors are advised to act as Chairperson	Generally speaking, directors nominated by controlling shareholder act as chairperson
2	The board of directors 董事会	Specialized Committees 专业委员会	Audit (审计) Nomination (提名) Remuneration and appraisal (薪酬与考核) corporate strategy committee(公司战略)
		Independent Director 独立董事	Independent director should take up 1/3, and one of independent director should be qualified accountant 上市公司独立董事应占
		Independent director should account for the majority of board of directors; independent director should act as chairperson. 上市公司	

			独立董事占董事会多数，董事长应由独立董事担任	董事会三分之一，独立董事中应当有一名 <u>为注册会计师</u>
		Employee Director 职工董事	NO	State-owned company (2or more shareholders are State-owned companies or enterprises)
3	Supervisory Board 监事会		No	YES (At least one employee supervisor 至少一名职工监事)

5. A comparison of the structure of corporate governance between Australia and China

(Australia)





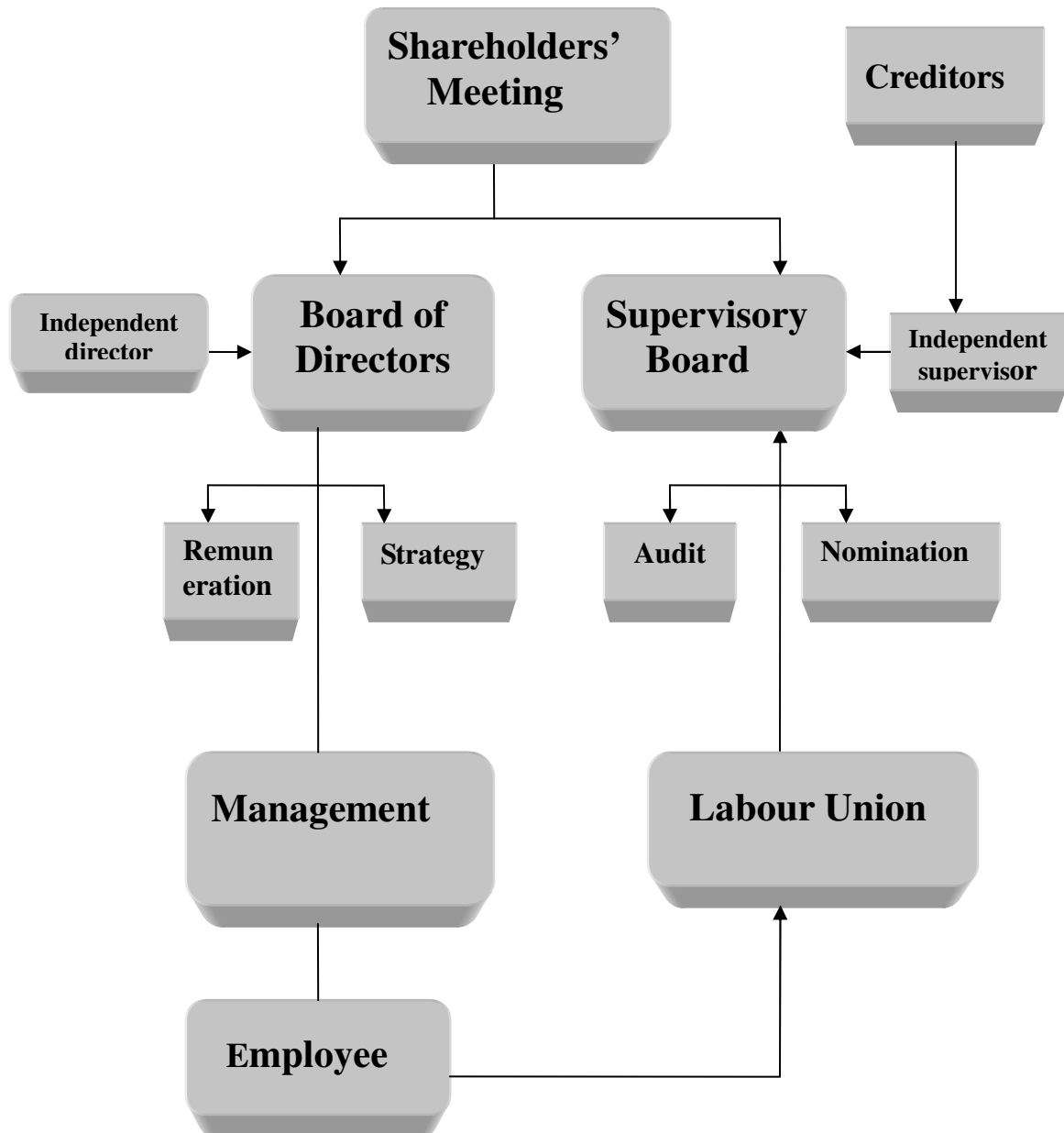
Note: From the chart, we found the most distinct difference about the structure of corporate governance between Australia and China is : Chinese companies have supervisory board and the supervisory function, Australia model just has independent director, the function of supervisor and independent director is a little overlapped.

Conclusion:

Some rules should be revised in order to make the supervising function of the independent director and the supervisory board work in harmony. The supervising function of independent director should lie on impartial

and scientific supervision of key decision made by the board of directors, the supervisory board should be mainly engaged in financial supervision, and supervise illegal actions of directors and managers.

6. Corporate governance—a new framework



This is a restructuring of Chinese corporate governance , it is not an ideal one, the special characteristic of Chinese legal system and Chinese corporate law decide the difficulty of restructuring about Chinese corporate

governance, it should be improved with other reform together.

Part III Directors' duties

1.The core part of the board of directors

The decision-making power is the most important power in the structure of corporate governance.

It is evident that the board of directors play a vital part in the process of decision-making except that those powers should be exercised by general meeting of members. Those include:³

- changing to a company of a different type(s162)
- alterations to the memorandum or articles(s 136(2))
- appointment and removal of the company's external auditor(ss 327,329)
- removal of directors of a public company(s203D)
- alterations and reductions of the share capital (ss 254H, 256C)

2.The importance of directors and directors' duties

The shareholders or members own the company, but it is the directors who control the way in which the company operates. The board of directors play the most important part in the structure of corporate governance.

Directors' duties is the core of the corporate structure

3. Categories of directors and the complexity of judging the directors' duties

—Chairperson

—the Managing director ; the Governing Director

—Executive Director ; Non- Executive Director

—Nominee Directors

—Alternative Directors

—De facto, shadow, puppet ,passive and sleeping

—Other corporate executive officers

Note: The nature and the position of a director in a corporation will affect the judgement of directors' legal duties and liabilities.

4. A comparison of directors' duties between Australia and China

4.1 The directors' duties in Australia legal system

1	Traditional common law concepts	Directors owe fiduciary duties to the company. Fiduciary concept invokes duties of loyalty and to avoid conflicts of interest but does not mean that directors' are trustees.
2	Traditional common law and equitable duties	<ul style="list-style-type: none"> —act in good faith for the benefit of the company as a whole —exercise powers for proper purpose —not fetter discretion —confidentiality —duty of care
3	the Corporations Act has codified	The Corporations Act requires a director or officer (including company secretaries and other senior management) to act in accordance with four key

	directors' common law duties	principles: —Care and Diligence(s180(1)) —Good Faith(s181(1)) —not to Use the Position Improperly(s182(1)) —not to Use the Information Improperly(s182(1))
4	Others	Insolvent trading (s588G Director's duty to prevent insolvent trading by company) Duties in respect of related-party transactions

4.2 The directors' duties in Chinese legal system

1	Doctrine	Duty of Loyalty 董事忠实义务	not to appropriate the property of company 不得侵占公司财产 Not to let out the secret of company 不得泄露公司秘密 Corporate Opportunity Doctrine 不得篡夺公司机会 Not to accept bribery or other illegal payment 不得收受贿赂或接受其他非法利益 Conflicts of Interest 不得违规自我交易 Not to compete with company in the same business area 不得与公司竞业(等)
		Duty of Care 董事注意义务	Duty of Diligence 董事应当勤勉的义务
2	Company	—Art.148 : director should have duty of loyalty and duty	

	law of PRC	of diligence for company ——Art.149(1)-(8)give details about duty of loyalty
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4.3 Conclusion:

On the basis of the comparison between the corporate law of Australia and China, I find that there is no more provisions in Chinese company law about the directors' duty of care except Art.148 (director should have Duty of loyalty and Duty of diligence for company),and as a result ,
 -----no direct provisions are stipulated in Chinese company law about what is the liabilities of directors if they breach the duty of care;
 ----- no direct provisions are stipulated in Chinese company law about how directors can indemnify from liabilities if they breach the duty of care but they exercise their power for the best interest of company.(business judgement rule)

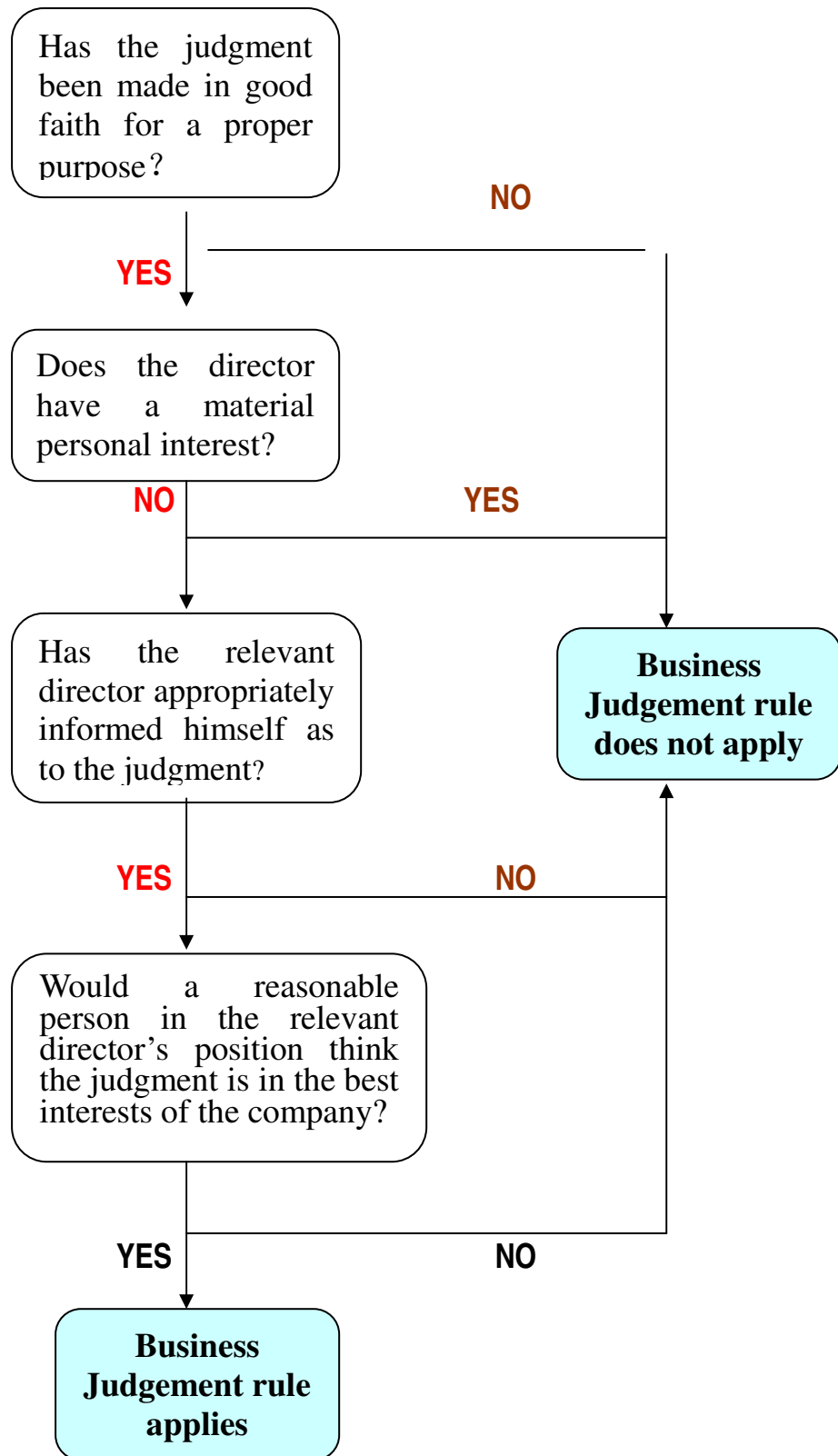
5. Business Judgement Rule

[Corp Act S180(2)]

5.1 *business judgment* means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Directors rely on the Business Judgement Rule which provides a statutory safe harbour. How is it applied to? (*chart*)

S180(2)Business judgment rule

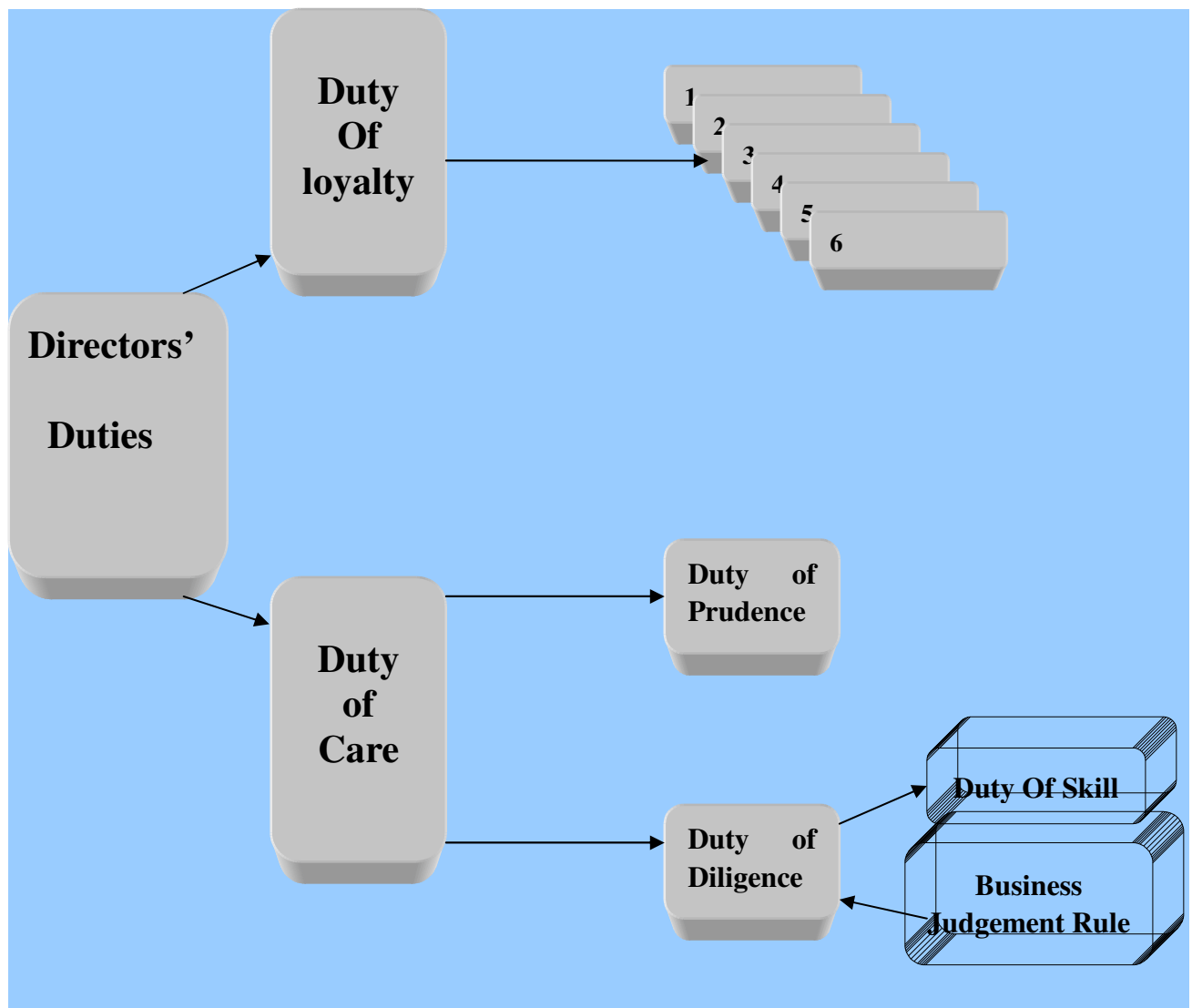


Note: From the chart, we found the business judgement rule are strictly restricted in some specific scenario.

6. Directors' duties—a new framework

In summary, in China, the relevant stipulation on directors' duties is extremely limited, how to define the directors' duties and how to judge whether directors exercise their powers and perform their functions properly is still a big problem and many works need to be done.

As for the core part of directors' duties and liabilities, it is vital to clarify directors' duties, which will improve the checks and balance system in the structure of corporate governance, protect the interests of corporations, shareholders and creditors, therefore perfect the corporate governance system.



Note:

1. Duty of loyalty include 6 types just as mention above.
2. Duty of prudence should be used in the area of the basic oversight corporate affairs.
3. Duty of diligence should be used in the area of the decisional corporate affairs .
4. Duty of skill will be applied to whether different directors exercise the duty of diligence properly.
5. Business judgement rule can be used to provides a statutory safe harbour for directors when they exercise duty of diligence properly for the best interest of the corporation.

Part IV Summary

The legal system of a country always roots deeply in the soil of its history and culture, the legal system of Australia inherited much from that of Britain, but has its own characteristics and meets the need of the development of Australian economy. Compared with the legal system of Australia, the modern legal system of People's Republic of China has been restructured from 1978 and hitherto no more than 30 years.

The reform of Chinese politics and economy has a trait of gradualism, new legal system need to be geared to the reality of society, economy and culture in China. In the past decades, Both of Australian and Chinese national economy grow rapidly, the communication between two countries also in a benign orbit, in addition, China is close to Australia in geography, as a developed country, Australia has a sound legal system, China will benefit much from Australia.

I believe, with the development of Chinese economy, the improvement and perfection of Chinese legal system, the idea of rule of law will embed in the heart of Chinese people. During the course of the communication of Australia and China in the field of politics, economy and trade and legal

professions, China will continue to draw profitable experience from the legal system and legal culture of Australia.