

**MINORITY SHAREHOLDERS: DO THE OPPRESSIVE CONDUCT
PROVISIONS OF THE *CORPORATIONS ACT 2001* (CTH) PROVIDE
ADEQUATE PROTECTION?**

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Abstract

The relationship between majority and minority shareholders has emerged as a critical aspect of corporate law and governance. The increasing focus on this relationship began in the mid to late 1970s, when rising corporate activity, such as mergers, acquisitions, and hostile takeovers, served as a catalyst for bringing shareholders' rights into sharper focus. Although minority shareholder rights, including access to records, participation in annual meetings, voting, and dividends, gained greater attention, varying across jurisdictions, their enforcement largely depended on court decision, where minorities faced significant challenges.

More importantly, for a long time, corporations have allocated shares to shareholders as either majority or minority holdings. Notably, majority shareholders, with a larger shareholding, are afforded extensive control in a company, whereas minority shareholders, with little influence in decision making, remain vulnerable and frequently encounter restrictions in exercising their rights. A key concern is that this imbalance can diminish the value of shareholding and harm not only minority shareholders and the company itself, but also investor confidence and national overall corporate governance.

Accordingly, oppressive conduct in companies occurs when the actions of a company's controllers harm the interests of one or more shareholders or the company itself. In response, minority shareholders may initiate an oppression claim. Although this provides a legal avenue for seeking relief under statutory provisions, minority shareholders still face considerable difficulties when pursuing such claims. Various jurisdictions, however, have distinct laws for addressing minority oppression, each reflecting its unique approach to shareholder protection.

This thesis examines the question of whether the oppression remedies under ss 232-235 of Part 2F.1 of the Australian Corporations Act 2001 (Cth) offer adequate protection to oppressed minority shareholders in Australian companies. The thesis argues that, currently, Australian laws fall short of meeting this purpose, as they fail to comprehensively address the challenges faced by oppressed minority shareholders. Therefore, in order to protect minority shareholders from oppressive conduct in companies, it is essential to identify and highlight the shortcomings of the relevant existing oppression laws and to offer recommendations for legislative reforms that would best protect minority shareholders in Australian companies. This thesis examines the positions taken by the United Kingdom, United States (specifically Delaware), Australia, Canada, Germany, Singapore and India, regarding oppression remedies available to minority shareholders facing oppressive conduct within companies. Through comparative legal research, the thesis identifies key similarities and differences in the laws on oppression in those countries, aimed to address the common issues and find relevant solutions for overcoming those issues in Australia. This thesis contributes to the evolving body of knowledge, as no prior research has examined the issue on the basis proposed.

The thesis confirms that, while the scope of oppression remedies in Australia has broadened over time, they still do not adequately protect minority shareholders from the abuse of power by controlling shareholders. Based on the comparative analysis of Australian oppression remedies and those in the selected jurisdictions, this thesis concludes with a number of recommendations to best protect minority shareholders and promote a more effective regulatory regime.

Declaration of Authenticity

I, Elizabeta Strumenikova Todorova, declare that the PhD thesis titled ‘Minority shareholders: Do the oppressive conduct provisions of the *Corporations Act 2001* (Cth) provide adequate protection?’ is no more than 80,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

I have conducted my research in alignment with the Australian Code for the Responsible Conduct of Research and Victoria University’s Higher Degree by Research Policy and Procedures.

The contents of the thesis were not generated by AI. The final proofreading and editing of said contents were conducted by a professional proofreader to ensure clarity and accuracy of expression.

Signature:



Date: 29/07/2025

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DEDICATIONS

**This thesis is dedicated to my fabulous son,
Matej,
whose love and presence have been the greatest inspiration in my life.
And to my late colleague, Vladimir Rakocevik,
whose memory and inspiration will always be cherished.**

List of Abbreviations

AktG	German Stock Corporations Act 1965
Canada BCPA	Canada Business Corporations Act (RSC, 1985, c C-44) (Can)
Co	Company
Co Ltd	Company Limited
Co Pte	Company Private
Corp	Corporation
CPA	Corporations Act 2001 (Cth)
DGCL	Delaware General Corporations Law (Title 8, Chapter 1 of the Delaware Code)
GmbHG	German Limited Liability Companies Act 2008
In liq	In Liquidation
Inc	Incorporated
India CMA	Companies Act 2013 (India)
Insolvency Act 1986	Insolvency Act 1986 (UK)
LLC	Limited Liability Company
Ltd	Limited
MBCPA	Model Business Corporation Act (2016 Revision)
NCL Tribunal	National Company Law Tribunal
NL	No Liability
Ontario BCPA	Business Corporations Act 1990 (Ontario)
plc	Public Limited Company
Pte Ltd	Private Limited
Pty Ltd	Proprietary Limited
Pvt Ltd	Private Limited
Retained EU Law	Retained EU Law (Revocation and Reform Act) 2023 (UK)
Singapore CMA	Companies Act 2006 (Cap 50) (Singapore)
United Kingdom CMA	Companies Act 2006 (UK)

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Chapter 1

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1.1 Introduction

When dealing with the management of a corporation, the board of directors may 'inadvertently or purposefully ostracise, oppress or exclude the views of minority shareholders'.¹ As minority shareholders often suffer oppression from the dominant majority shareholders, the 'oppression remedies are becoming increasingly important'.² While effective company governance relies on transparency regarding rules and controls, aligning the interests of shareholders, this thesis will compare the existing remedies for oppressive conduct towards minority shareholders in Australia, the United Kingdom and United States (specifically Delaware). These provisions appear in Part 2F.1, specifically in ss 232-235 of the *Corporations Act 2001* (Cth)³ ('CPA'), s 994 of the *Companies Act 2006* (UK)⁴ ('United Kingdom CMA'), and s 14.30 of the revised *Model Business Corporation Act (2016 Revision)*⁵ ('MBCPA'). Although minority shareholders'

¹ Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context – A Contemporary Review' (2012) 24(2) *Bond Law Review* 101, 101.

² Zain Sharar, 'Minority Shareholders' Remedies in Public Shareholding Companies: Comparing the State of Qatar and Australia' (2010) 9(3) *Corporate Governance eJournal* 1, 1.

³ *Corporations Act 2001* (Cth), Australian Government (Web Document, 2024) <<https://www.legislation.gov.au/C2004A00818/2019-07-01/text>>.

⁴ *Companies Act 2006* (UK), *The National Archives* (Web Document, 2024) <<https://www.legislation.gov.uk/ukpga/2006/46/contents>>.

⁵ *Model Business Corporation Act* (2016 Revision), *American Bar Association* (Web Document, 2024) <https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf>.

protection varies across the United States jurisdictions, Delaware remains an influential jurisdiction in shaping legal standards in matters concerning minority shareholders. This is due to its specialised Court of Chancery, extensive body of case law, and the large number of companies incorporated there, making it the focus of this analysis. While *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code)⁶ ('DGCL') does not contain specific provision for oppression, Delaware courts have addressed the abuse of power by directing shareholders through the imposition of fiduciary duties. Consequently, Delaware's legal system relies heavily on equity, with its Court of Chancery being responsible for resolving disputes based on fairness between litigants. This approach provides flexibility and judicial discretion, ensuring that controlling shareholders are held to a high standard of accountability in their dealings. Furthermore, in Delaware, the 'business judgement' rule prevents Delaware courts from second guessing the decisions that the company leaders determine to be in the best interests of the company.⁷ Under this rule, directors are presumed to act in good faith, on an informed basis, and in the best interest of the corporation when making business decisions. The 'business judgment' rule grants directors broad discretion to make business decisions, limiting the risk of shareholder interference and promoting independent decision-making, as discussed in further detail below. These aspects underscore Delaware's relevance as a comparator jurisdiction for this research.

Moreover, this thesis compares oppression remedies in Australia with the statutory oppression remedies of Canada, as set out in s 241 of the *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can)⁸ ('Canada BCPA'), in Germany, under the *German Stock Corporations Act 1965* (Ger)⁹ (Aktengesetz or 'AktG') and the *German Limited Liability Companies Act 2008* (Ger)¹⁰ (Gesetz betreffend die Gesellschaften mit beschränkter Haftung or 'GmbHG'), in

⁶ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code), *Delaware Code Online* (Web Document, 2024) <<https://delcode.delaware.gov/title8/c001/>>.

⁷ Lyman P Q Johnson, 'Unsettledness in Delaware Corporate Law: Business Judgement Rule, Corporate Purpose' (2013) 38 *Delaware Journal of Corporate Law* 405, 411.

⁸ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can), *Government of Canada* (Web Document, 2024) <<https://laws-lois.justice.gc.ca/eng/acts/c-44/index.html>>.

⁹ *German Stock Corporations Act 1965* (Ger), *Federal Ministry of Justice* (Web Document, 2024) <https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html>.

¹⁰ *German Limited Liability Companies Act 2008* (Ger), *Federal Ministry of Justice* (Web Document, 2024) <https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html>.

Singapore, where oppression remedies are found in s 216 of the *Companies Act 2006* (Cap 50) (Singapore)¹¹ ('*Singapore CMA*'), and in India, where the *Companies Act 2013* (India)¹² ('*India CMA*') includes ss 241-246 to prevent oppression and mismanagement in a corporation.

The United Kingdom, the United States (specifically Delaware) and Germany were chosen for comparison purposes as they are among the most developed countries in terms of good corporate governance.¹³ The other jurisdictions, i.e., Canada, Singapore and India, were selected for this comparison based on their well-established corporate legal frameworks and their considerable economic influence in the corporate world. By applying a comparative methodology, this thesis examines the key elements of oppression remedies and determines the extent to which the existing legal frameworks in the selected jurisdictions provide adequate protection for shareholders, particularly against oppressive conduct in corporate affairs. The comparison aims to further the knowledge and understanding of current remedies in order to achieve the objectives of this thesis. The examination of primary and secondary legal sources from the selected jurisdictions will support the development and analysis undertaken in this study. As this thesis argues, Australia's oppression laws fail to adequately protect minority shareholders or provide oppression remedies that effectively serve against shareholders' oppression. Accordingly, the thesis proposes amendments to the legislative framework on oppression, with the aim of ensuring better protection for minority shareholders in Australian companies. These proposed amendments draw on best practices and effective strategies from the jurisdictions examined to address minority shareholders' oppression in companies. Such reforms are crucial for the establishment and continued development of a strong governance framework in Australia. This approach will contribute to the evolving knowledge of ways to increase the efficacy of Australia's oppression remedies and establish more effective corporate laws. It presents original findings, since

¹¹ *Companies Act 2006* (Cap 50) (Singapore), *Singapore Statutes Online* (Web Document, 2024) <<https://sso.agc.gov.sg/Act-Rev/CoA1967/Published/20211231?DocDate=20061031>>.

¹² *Companies Act 2013* (India), *Ministry of Corporate Affairs* (Web Document, 2024) <<https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>>.

¹³ Steven M Mintz, 'A Comparison of Corporate Governance System in the US, UK and Germany' (2006) 3(4) *Corporate Ownership and Control* 24, 25.

no previous studies have considered the issue from the perspectives adopted in this thesis.

1.2 Thesis Structure

Chapter 1 introduces the thesis and outlines the thesis structure. This chapter presents the research question and the aims of this study, and details the research methodology and justification. The significance of the research and contribution to knowledge are also discussed in this chapter. This chapter concludes with a summary of the main issues being examined.

Chapter 2 provides an overview of the literature review on the selected topic. It considers the theories of corporate governance and shareholders' rights in Australia today, and in the United Kingdom, United States (specifically Delaware), Canada, Germany, Singapore, and India. This chapter also outlines the development of the oppression remedies and examines the literature and case law concerning minority shareholders' oppression in the chosen countries. It concludes by summarising lessons and recommendations for improving corporate governance practices in Australia.

In **Chapter 3**, the roles of directors in Australian companies are explored, and directors' duties and the consequences for breach of those duties are examined. The chapter defines a company under the Australian *CPA* and describes the process of becoming a company's member. It also studies shareholders, their rights, and duties in Australian companies. The chapter also considers the protection offered to minority shareholders in Australia under the *CPA*. It examines what constitutes oppression and the requirements that the court must consider when assessing oppression claims. Furthermore, the chapter explores relevant case law on the oppressive conduct of affairs in Australian companies and explains the conditions under which entities may bring an oppression claim. It also examines the oppression remedies that may be ordered by the courts for oppressive conduct.

This thesis also analyses the protection of minority shareholders in the United Kingdom. **Chapter 4** explores the foundation of United Kingdom companies, the roles and duties of their directors, and identifies the oppression remedies available to protect minority shareholders. The chapter also reviews early case law on minority oppression in the United Kingdom, as well as recent developments in the United Kingdom's case law on minority oppression.

Chapter 5 explores the United States' position concerning the protection of minority shareholders in companies and the oppression remedies available under the *MBCPA*. It analyses statutory oppression remedies in several states, including California, New York, Michigan, Louisiana and Pennsylvania, and Delaware in particular, under the *DGCL*. Chapter 5 addresses the provision related to directors and their duties and the foundation of minority shareholder claims in Delaware. It discusses the protection of minority shareholders in merger situations and recent developments in Delaware case law on minority oppression.

Chapter 6 explores Canada's position on minority shareholder oppression, with a particular focus on directors and directors' duties. It also examines the scope of oppressive conduct, the statutory oppression remedies available under the *Canada BCPA*, and significant rulings in this area.

Germany's stance is explored in **Chapter 7**. It explores German stock corporations and limited liability companies, focusing on the roles and responsibilities of directors, as well as the rights and voting powers of company members. The chapter also examines remedies for shareholder oppression under German corporate law, and studies the concepts of shareholder 'withdrawal' (*Austritt*) and 'expulsion' (*Ausschlissung*), as interpreted in German case law.

Chapter 8 examines the position taken by Singapore and India regarding statutory remedies of oppression under their corporate laws.¹⁴ The chapter explores the roles and duties of company directors in both jurisdictions, as well

¹⁴ That is: *Companies Act 2006* (Cap 50) (Singapore) (n 11) and *Companies Act 2013* (India) (n 12).

as the members' rights at general meetings. The chapter also analyses the statutory oppression remedies available for oppression, and reviews each country's significant case law concerning minority shareholder oppression.

Chapter 9 presents a comparative analysis of statutory oppression remedies in the chosen jurisdictions outlined in. This analysis considers the protection of minority shareholders in each country and examines the extent to which the oppression remedies in these comparator countries could serve as a model for reforming the oppression laws in Australia. This chapter concludes with recommendations for amendments to oppression laws in Australia to ensure the best protection for oppressed shareholders in companies.

Chapter 10 provides the overall conclusion and summarises the key research findings. One of the central issues identified is the lack of clarity in the language of the Australian *CPA*, particularly in phrases such as 'the affairs of a body corporate' in section 53(a) of the *CPA*, 'conduct of a company's affairs' in s 232 of the *CPA*, 'contrary to the interests of the members as a whole' in s 232(d) of the *CPA*, and 'a member of the company' in s 234(a) of the *CPA*. The thesis also highlights the lack of clear statutory definition for unlawful or oppressive conduct within the *CPA*, and the failure to recognise compensation as a specific remedy for shareholder oppression, further limiting the effectiveness of current oppression remedies. The thesis proposes the adoption of Delaware's 'entire fairness' doctrine to ensure stronger minority shareholders' protection. Under this doctrine, defendant must demonstrate that the transaction was not only fair to the company, but also resulted in a fair price for the shareholders. Further, it recommends introducing the concepts of 'withdrawal' and 'expulsion' as exit rights for minority shareholders without requiring court intervention. The thesis emphasises the importance of alternative dispute resolutions to ensure fairness in shareholders' disputes. The thesis also supports the establishments of specialised courts to provide expedited, expert and cost-effective relief.

1.3 Research Question/s and Thesis Aims

1.3.1 Research Question/s

Australian companies can be either private (proprietary) or public with the main difference based on ownership and governance. Private companies are typically owned by individuals, whereas public companies are listed on stock exchanges, allowing shareholders to hold a portion of the company's assets and profits and generally structured to attract external investment. While the principles of good governance are important for both types of companies, the less formal governance structure in private companies can make shareholder oppression more likely and harder to detect. In most public companies, the two fundamental components are the board of directors and the shareholders in the general meeting.¹⁵ The board of directors, as 'the highest decision-making body in the company',¹⁶ manage the company according to their powers and fulfil the directors' duties required by statute and common law. Although the directors' duties are intended to protect the company and its shareholders from the risk of directors causing harm to the company,¹⁷ it is not uncommon for these directors to knowingly carry out actions that breach their fiduciary, common law and statutory duties. This raises important questions about the effectiveness of the current Australian corporate laws.

Research Questions are:

1. Does the regulatory framework of the *CPA* on existing oppression remedies provide adequate protection for minority shareholders against oppressive and unfair conduct within a company?
2. If not, what legislative reforms could be implemented to address these shortcomings?

¹⁵ Susan Woodward, Helen Bird and Sally Sievers, *Corporations Law: In Principle* (Lawbook, 5th ed, 2001) 83.

¹⁶ Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *UNSW Law Journal* 291, 291.

¹⁷ Jeswynn Yogaratnam, Lidia Xynas and Ann O'Connell, *Corporations Law: In Principle* (Lawbook, 10th ed, 2017) 296.

In order to address the research questions, the following sub-questions have been formulated:

1. To what extent do the powers exercised by directors in companies and the rights afforded to shareholders contribute to disputes between them?
2. How do such internal conflicts give rise to oppression claims under corporate law in Australia, the United Kingdom, United States (specifically Delaware), Canada, Germany, Singapore, and India?

Apart from examining the historical developments of oppression laws in selected jurisdictions, this thesis examines whether Australia should reconsider its approach in light of the oppression laws in the United Kingdom and United States (particularly the state of Delaware) that deal with oppressive conduct, as well as the statutory oppression remedies and case law developments in Canada, Germany, Singapore, and India. To achieve this aim, it analyses the main terms related to shareholder oppression, as set out in the corporate statutes of these jurisdictions, to illustrate their key features within each legal framework. Such concepts include 'oppressive, unfairly prejudicial and discriminatory' conduct, as set out in s 232 of the Australian *CPA*, which refers to burdensome, harsh and wrongful conduct towards minority shareholders in companies; 'unfair prejudice', a concept originating primarily from the United Kingdom company law (s 994 of the United Kingdom *CMA*), which covers actions that are unfair or inequitable and detrimental to the minority shareholder interests; and the doctrine of 'entire fairness' in Delaware corporate law, under which controlling shareholders in shareholder oppression cases must demonstrate that the transaction meets the standards of both 'fair dealing' and 'fair price'. Additionally, in India, under s 241(1) of the *India CMA*, when addressing shareholder oppression cases, the court applies the concept of 'mismanagement', relating to conduct by controlling shareholders that is 'prejudicial', i.e., detrimental and harmful to the interests of the company or its stakeholders. Other related terms addressed in this thesis include 'lack of fair dealing' or 'unfair dealing', 'fair and accountable conduct', as

well as 'fair process' and 'fair treatment', all of which are grounded in principles of equity in the selected jurisdictions. These terms describe situations in which directors or controlling shareholders in companies act in ways that breach their duties of good faith towards the company and its shareholders. They provide protections for minority shareholders, allowing them to petition the court when faced with abuse of power by majority shareholders, as defined by the relevant term. These concepts are explored in greater detail in the subsequent chapters to provide precision and clarity in the comparative analysis presented in this thesis.

1.3.2 Thesis Aims

The aim of the research is:

- to determine and address the shortcomings in Australia's oppression laws;
- to examine the position of the United Kingdom and United States (specifically Delaware), and also the position in Canada, Germany, Singapore, and India on oppression remedies (as countries with some of the most progressive corporate governance frameworks);¹⁸
- to provide a number of recommendations for amendments to the existing statutory oppression provisions in the Australian *CPA*;
- to support legislative reforms for adopting more effective oppression remedies that will benefit all stakeholders in Australian companies;
- to promote better minority shareholders protection; and
- to improve overall corporate governance.

Oppressive conduct in Australian companies often leads to breaches of directors' statutory and fiduciary duties, significantly impacting 'public perception and market confidence'¹⁹ regarding the effectiveness of the Australian corporate laws. Accordingly, a comparative analysis of oppression remedies in Australia and selected jurisdictions helps to identify the gaps and limitations in Australia's

¹⁸ Mintz (n 13) 25.

¹⁹ Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance Facilitating Innovations and Protecting Investors* (Consultation Paper No 3, 1997) 8.

current framework. This analysis forms the basis for recommending amendments to the oppression provisions under the *CPA*, in order to improve protection for minority shareholders in Australian companies and strengthen the broader corporate governance framework.

1.4 Research Methodology and Justification

1.4.1 Research Methods

To answer the research questions, this study will compare the current Australian corporate laws on statutory oppression remedies with those of the United Kingdom and United States (specifically Delaware), together with Canada, Germany, Singapore, and India, and their effectiveness in offering shareholders protection against oppressive conduct in companies. This study will adopt the comparative legal research method to compare similarities and differences in corporate laws on oppression in these countries, in order to identify common issues, and propose solutions to those issues in Australia. This will be achieved by comparing the shareholder oppression provision in corporate statutes across the selected jurisdiction, alongside relevant academic literature and case law. The comparison will focus on the main elements of shareholder oppression laws, the remedies available to oppressed shareholders, the standards of proof required to establish an oppression claim, and the courts' evaluation of majority shareholder conduct and its impact on minority shareholders. This highlights the similarities and differences in oppression laws and facilitates a comparative analysis across jurisdictions. Through this comparison, the thesis will determine which country's oppressive conduct rules best protect minority shareholders from oppressive conduct of affairs in companies, and the extent to which such protection is achieved. The thesis will draw on these insights to propose recommendations for reforming oppression remedies in Australia, as discussed below. This will result in finding the most suitable model for legislative reforms of Australia's current oppression laws so as to afford better protection to minority shareholders.

The doctrinal research methodology will be used in this research to examine the law and legal concepts pertaining to oppression remedies in the countries of interest. In this study, the doctrinal research approach will facilitate the examination of both the common law and corporations legislation in Australia, the United Kingdom, and United States (specifically Delaware), as well as Canada, Germany, Singapore, and India, particularly in regard to the oppression laws in these countries, along with related common law cases, and applicable academic writings. To conduct doctrinal research, this thesis first defines the research question, then identifies and collects relevant legal sources, systematically organises the materials, analyses their content, and finally draws reasoned conclusions. The research focuses on primary and secondary sources concerning shareholder oppression across selected jurisdictions, examining their similarities and differences to highlight their advantages and disadvantages, and to contribute new insights to the existing body of law. This thesis adopts a doctrinal research approach similar to that employed by Ian Ramsay,²⁰ who systematically analysed reported and unreported judgements to examine the types of orders sought and remedies granted in shareholder oppression cases. It is anticipated that this will offer a greater understanding of the existing oppression remedies available in the compared jurisdictions, and their effectiveness in protecting minority shareholders, thereby answering the research questions.

1.4.2 Theoretical Framework

This research adopts the approach of scholars such as Tetley, as discussed below, to examine different jurisdictions and legal systems, distinguishing between civil law and common law traditions, and to argue for the necessity to reform minority shareholders' oppression law in Australia, taking into account the regulatory frameworks of selected jurisdictions. For comparison of different legal systems, the methodology of comparative legal research is a generally accepted method in legal studies, used as an instrument for comparing domestic law with the legal systems of two or more different countries. As Konrad Zweigert and Hans Puttfarcken note, 'the beginning of Comparative Law is not some grand

²⁰ Ian M Ramsay and Benjamin B Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action' (Research Report, The University of Melbourne, 2006).

theoretical quest, but simple curiosity' about the way that others are performing the tasks that were assigned to them.²¹ A comparative study can be described as a theoretical study of two or more legal systems, and 'the solutions which different legal systems have adopted for identical legal problems' may offer resolutions for conflicting interests in another law system.²² Although the comparative study is dependent on the availability of the requisite sources for comparative research, it is a valuable tool for developing an understanding and awareness of other legal systems.

In his study, Peter De Cruz examined different approaches for the effective comparison of two or more legal systems.²³ De Cruz, in particular, considered 'linguistic and terminological problems,' 'cultural differences' and the tendency to impose one's own expectations on the legal systems being compared.²⁴ According to De Cruz, even in English speaking jurisdictions such as the United States and United Kingdom, 'different terms may be utilised so as to create an impression of divergence'.²⁵ De Cruz stated that every legal system has its history and mixture of social, economic and cultural events which influence the laws, culture and society.²⁶ He observed that when studying other legal systems, one must not approach these systems from his or her own viewpoint.²⁷ To overcome this, De Cruz proposed gathering and assembling relevant materials and giving 'equal weight to historical influence and socio-economic factors'²⁸ in order to identify the main sources of law and cases in the systems under comparison.²⁹ This approach,³⁰ as explained by De Cruz, involves critical analysis of the legal principles based on their fundamental meaning, rather than viewing them through a 'Western' or other lens.

²¹ Konrad Zweigert and Hans Jurgen Puttfarcken, 'Critical Evaluation in Comparative Law' *Adelaide Law Review* (1976) 5(4) 343, 343.

²² *Ibid* 344.

²³ Peter De Cruz, *Comparative Law in a Changing World* (Cavendish Publishing, 1991) 213.

²⁴ *Ibid*.

²⁵ *Ibid* 214.

²⁶ *Ibid* 217.

²⁷ *Ibid* 223.

²⁸ *Ibid* 236.

²⁹ *Ibid* 237.

³⁰ *Ibid* 238.

Taking a different perspective, William Tetley examined various jurisdictions and legal systems, distinguishing civil law from common law in terms of their approach, interpretation, style and substance.³¹ He identified fourteen differences in sources, concepts, and styles between civil law and common law, categorised under one legal family, i.e., 'the *Western* law family'.³² For instance, the 'doctrine of stare decisis,' under common law, requires the lower courts to follow the higher courts' decisions; whereas, in civil law jurisdictions, this doctrine provides guidance for the interpretation of codes and statutes, with judges applying the law.³³ Moreover, Tetley examined differences in legislative drafting and noted that civil law statutes 'need to be stated concisely if the code is to be exhaustive'.³⁴ On the other hand, Tetley observed that common law statutes must be precise but not concise, as the courts tend to 'restrict rules to the specific facts'.³⁵ In this study,³⁶ Tetley also argued that 'common law jurisprudence sets out a new specific rule to a new specific set of facts', whereas civil law jurisprudence applies only the general principles.

Moreover, to locate the law, the doctrinal research approach, as a systematic study of laws, cases, and academic writings, is the predominant methodology adopted for legal research. Legal scholars have been using doctrinal legal research to research 'black letter' law.³⁷ The doctrinal approach is a two-part process: firstly, the law is located; secondly, the text is analysed and interpreted.³⁸ Commonly used in legal research by lawyers, judges and other jurists 'as a systematic means of legal reasoning', the doctrinal research 'deals with studying existing laws, related cases and authoritative materials analytically on some specific matter'.³⁹ As one of the fundamental methodologies in legal research, the doctrinal approach, which involves analysing statutes, case law and legal

³¹ William Tetley, 'Mixed Jurisdiction: Common Law vs Civil Law (Codified and Uncodified)' (2000) 60 *Louisiana Law Review* 677, 680-1.

³² *Ibid* 701-7.

³³ *Ibid* 702.

³⁴ *Ibid* 704.

³⁵ *Ibid*.

³⁶ *Ibid* 702.

³⁷ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 105.

³⁸ *Ibid* 110.

³⁹ Amrit Kharel, 'Doctrinal Legal Research, (2018) SSRN 10.2139/ssrn.3130525: 1-16, 1.

principles, will serve as the foundation for examining the sources of law in common law countries, and in Germany, a civil law country.

1.4.3 Sources Collection and Analysis

This study examines both primary and secondary sources of laws pertaining to minority shareholders' oppression, in Australia and the selected jurisdictions of the United Kingdom and United States (specifically Delaware), and also Canada, Germany, Singapore, and India. The primary sources of law for this study will be obtained through systematic and organised research of legal texts from the selected countries, such as statutes, codes, treaties, directives and regulations. Since court decisions alone offer a broad perspective on the law, the collection and analysis of court rulings will be particularly useful to this research. On the other hand, when examining the regulations on oppressive conduct under the Australian *CPA*, reference will be made to the legislation from the United Kingdom and United States (specifically Delaware), including the *United Kingdom CMA*, European Union Law, the *MBCPA*, and the *DGCL*. Moreover, to conduct a comparative analysis prior to proposing potential law reforms to Australia's oppression laws, this research will consider the corporate laws addressing minority oppression in Canada, Germany, Singapore, and India, namely, the *Canada BCPA*, the German *AktG* and *GmbHG*, the *Singapore CMA*, and the *India CMA*. In this regard, countries such as Germany predominantly rely on codified statutes, while common law jurisdictions, including Australia, the United Kingdom, United States, Canada, Singapore and India prioritise judicial precedent and case law.

Some scholars, such as Rene David and John Brierley noted that 'the use of comparative law as a means of improving one's national law is open to courts and legal commentators as well as legislators'.⁴⁰ Moreover, the practice of borrowing was described by Alan Watson, 'as the most fruitful source of legal change'.⁴¹ Watson, referring to Ugo Mattei, noted that borrowing of law 'is simply

⁴⁰ Rene David and John EC Brierley, *Major Legal Systems in the World today: An Introduction to Comparative Study of Law* (Free Press, 2nd ed, 1978) 7.

⁴¹ Alan Watson, 'Aspects of Reception of Law' (1996) 44 *The American Journal of Comparative Law* 335, 335.

economically efficient'.⁴² Also, Pierre Legrand, drawing on Weber, argued that a comparative legal study should focus on identifying individuality and defining the characteristics 'which made the one conclude in a manner so different from that of the other'.⁴³ Similarly, Heideki Kanda and Curtis Milhaupt mentioned that the transplantation of legal rules from one jurisdiction to another is a global practice.⁴⁴ In their study,⁴⁵ they noted that it may range from the replication of a single rule to the adoption of entire systems of law.

In this thesis, secondary sources of law are collected by conducting a systematic examination of the corporate law literature of the selected countries. This includes textbooks, published articles, journals, newspapers and encyclopaedic work, using a qualitative research methodology. According to Denzin Norman and Yvonna Lincoln, a generic definition of qualitative research is 'a situated activity that locates the observer in the world' and comprises 'interpretive, naturalistic approach to the world'.⁴⁶ In their study,⁴⁷ Norman and Lincoln further noted that qualitative research involves gathering and analysing empirical materials including cases, personal experiences, life stories, introspections, interviews, artifacts, and cultural, observational and historic texts.

Moreover, Catherine Althaus, Peter Bridgman and Glyn Davis determined that policy analysis provides 'advice for decision makers' involving professional commitment for presenting information in an objective manner.⁴⁸ They suggested that the policy analysis phase requires the researcher to gather as much relevant information as possible.⁴⁹ In their study,⁵⁰ Althaus, Bridgman and Davis also noted that some sources may involve reviews of current policies or international

⁴² Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14(1) *International Review of Law and Economics* 3, cited in Watson (n 41) 335.

⁴³ Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 111.

⁴⁴ Hideki Kanda and Curtis J Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51(4) *The American Journal of Comparative Law* 887, 887.

⁴⁵ *Ibid.*

⁴⁶ Deniz Norman and Yvonna Lincoln, *The Landscape of Qualitative Research* (Sage Publications, 2nd ed, 2003) 4.

⁴⁷ *Ibid.*

⁴⁸ Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook: A Practical Guide to the Policy-Making Process* (Allen & Unwin, 6th ed, 2018) 74.

⁴⁹ *Ibid.* 80.

⁵⁰ *Ibid.*

findings in the field, reports on the issue, and discussions with experts in the field. For example, when assessing whether the oppression conduct provision of the CPA should be reformed, a policy analysis would consider comparative corporate law frameworks, examine case law on minority oppression, and evaluate which remedies most effectively protect minority shareholders.

Accordingly, this thesis will provide an analysis of previous research, other corporate law materials and the policy behind the law, such as speeches and explanatory memorandums. It will also consolidate published articles and relevant journal literature on the topic, so as to gather additional evidence to support the development of this thesis. This thesis will also examine discussions conducted by academic experts, legal institutions, and consulting professionals.

The analysis of sources will begin with the organisation and summarisation of the collected primary and secondary sources to identify relevant correlations. Once collected, these materials will be reviewed with a particular focus on the research questions to determine whether more materials need to be collected. After completing this review process, and conducting further research as necessary, the sources will be examined to determine relevant information, and interpreted prior to forming valid conclusions.

1.4.4 Justification

It has become increasingly important to ensure that Australia's current legal framework offers minority shareholders adequate protection against the oppressive conduct of affairs. This protection plays a crucial role in safeguarding minority shareholders from the abuse of majority shareholders or company directors, upholding minority shareholders' rights, promoting fairness in corporate governance, and preserving investor confidence. While a company's board of directors manages the company's affairs, shareholders may hold different views on management decisions.⁵¹ As a result, minority shareholders are often subject to oppression by dominant majority shareholders, making it 'crucial' to protect

⁵¹ Brockett (n 1) 101.

them from the 'abuse at the hands of the controllers', as noted by Richard Brockett.⁵² In this context, Brockett observed that, in minority shareholder oppression cases, courts often focus on what is 'fair in the circumstances', yet overlook the compensatory nature of the buy-out remedy.⁵³ In his work,⁵⁴ Brockett also pointed out the difficulties minority shareholders face when selling their shares in small proprietary companies when there is no ready market for these shares.

Moreover, without proper protection, minority shareholders are vulnerable to various other forms of unfair treatment in companies, including exclusion from decision-making, inequitable dividend policies, and forced buy-outs at undervalued prices. In this regard, Amelia Schultz found that the oppression remedies available to minority shareholders, especially in closely-held corporations, 'are limited and do not result in equitable and efficient solutions'.⁵⁵ For example, Schultz observed that when the buy-out remedy was applied to a hypothetical situation, it offered inadequate protection if the share valuation failed to account for the actual, rather than estimated, future profit.⁵⁶ These shortcomings require well-defined solutions that will offer minority shareholders adequate protection against the oppressive conduct of affairs in Australian companies, as identified in this research.

Moreover, minority shareholder protection within a corporate governance regime 'directly influences continued investment and capital market development', as highlighted by Elizabeth Woo.⁵⁷ Similarly, the 'law matters' advocates argue 'that the existence of strong investor protection results in observed economic growth and development of capital markets'.⁵⁸ In this regard, the 'law' is defined as 'a rule [(or body of rules)], enacted or customary in a community and recognised as enjoining or prohibiting certain actions and enforced by the impositions of

⁵² Ibid.

⁵³ Ibid 54.

⁵⁴ Ibid 104.

⁵⁵ Amelia Schultz, 'Finding the Right Remedy in Minority Shareholder Oppression Law: A Traditional Analysis of Solutions in Closely Held Corporations' (2017) 26(2) *Traditional Law & Contemporary Problems* 499, 521.

⁵⁶ Ibid 519.

⁵⁷ Elizabeth Li-Anne Woo, 'The Importance of the Law Matters Thesis' (2006) 3(4) *Corporate Ownership and Control* 219, 1.

⁵⁸ Ibid.

penalties'.⁵⁹ Additionally, in their study,⁶⁰ Richard Mitchell, Anthony O'Donnell, Ian Ramsay and Michelle Welsh argued that research on comparative corporate governance reveals that countries differ in 'the extent to which they privilege shareholders' in corporate governance structure. This highlights the importance of examining different governance models and their approaches to minority shareholder oppression under statutory and case law frameworks.

Given the research questions that will be addressed in this study, a comparative analysis of Australia's oppression laws in relation to minority shareholders' protection in companies, alongside those of selected jurisdictions, will serve to identify the strengths and shortcomings of the statutory oppression remedies provided under the Australian *Corporation Act* of 2011. This analysis will provide a basis for offering recommendations for developing more effective statutory oppression remedies in Australia. Such improvements could, in turn, increase trust in Australian companies, boost investor confidence, and ultimately contribute to the country's economic development. Therefore, the selected method of comparative legal research is considered an appropriate method for answering the research questions and achieving the aims of this study.

Moreover, the use of the doctrinal legal research method will enable an analysis of the current laws on oppression in the chosen countries and an examination of other relevant legal resources so as to establish a theoretical framework for this study. Similarly, recommendations for legislative amendments can be offered after examining sources collected through the qualitative research method.

1.5 Statement of Significance and Contribution to Knowledge

By comparing the current legal protections afforded to minority shareholders in companies, and the statutory remedies for oppressive conduct available under the Australian *CPA*, the *United Kingdom CMA*, United States *MBCPA* and Delaware *DGCL*, as well as the *Canada BCPA*, the German *AktG* and *GmbHG*,

⁵⁹ Ibid.

⁶⁰ Richard Mitchell et al, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(68) *Melbourne University Law Review* 68, 69.

the *Singapore CMA*, and the *India CMA*, this study evaluates whether these laws provide effective protection for minority shareholders in companies. Based on this analysis and the argument that current Australian oppression laws cannot adequately address the issue, this study identifies the gaps and offers recommendations to strengthen the legislative framework on minority oppression in Australia, making it a significant contribution.

Since the comparative analysis of oppression laws in the chosen jurisdictions presented in this thesis is a new research area, this study will add to the evolving body of knowledge by bringing original findings on the chosen topic. By comparing and contrasting the oppression remedies of the selected countries, a deeper knowledge of the research context will be acquired together with different insights on the minority oppression issues in Australia. The methodology adopted and the jurisdictions compared make this research unique, and contribute significantly to the body of knowledge regarding the best ways to protect minority shareholders in Australian companies, and insights on comparative judicial frameworks.

This study acknowledges that law reform is a complex and uncertain process, particularly in terms of its practical implementations. It recognises that such reform can be challenging, and its success cannot be easily evaluated. Consequently, even when new legislation is introduced following the law reforms, it may take considerable time before any outcomes emerge. As Laura Barnett noted, 'law reform is not a monolithic business', and having more law reform mechanisms available is the best way to solve each problem.⁶¹ Accordingly, the findings of this study will be of great importance to lawmakers, judges, and legal practitioners in Australia, as it will raise awareness of the effectiveness of current statutory oppression remedies and the need for legislative reform in this area, thereby informing and supporting further law reforms of Australian oppression remedies. These findings will also be significant to other researchers and scholars as a foundation for further research that contributes to the body of knowledge in this field.

⁶¹ Laura Barnett, 'The Process of Law Reform: Conditions for Success' (2011) 39 *Federal Law Review* 161, 193.

1.6 Conclusion

This chapter introduced the research topic and outlined the thesis structure. It presented the research question and aims of the research, as well as the chosen research methodology and its justification. The chapter also highlighted the significance of the research and its intended contribution to knowledge.

Importantly, the chapter explained the primary purpose of this research: to examine and compare the current statutory remedies for shareholder oppression in Australia, the United Kingdom and United States (specifically Delaware), as well as Canada, Germany, Singapore, and India, in order to identify key parallels and contrasts, address potential challenges, and inform solutions for Australia. To achieve this purpose, this study adopts the methods of comparative and doctrinal legal research.

Moreover, this chapter discussed the study's examination of primary and secondary sources of law of the chosen jurisdictions to gather and consolidate corporate law materials of previous research in support of the development of this thesis. The chapter further clarified the justification and significance of the research, emphasising that, given the research questions and objectives, the selected methodologies are appropriate considering the aims of this study. The chapter confirmed that this thesis presents original findings, contributing to this area of research. Hence, the chapter has established that this research contributes a distinctive study to the field, advancing new knowledge on this topic, given that, to the best of this researcher's knowledge, no previous studies have addressed the same research questions.

The Literature Review chapter that follows provides an overview of previous work in this research domain.

Chapter 2

Literature Review

2.1 Overview

2.2 Theories of Corporate Governance

2.2.1 Shareholder Theory

2.2.2 Stakeholder Theory

2.2.3 Managerialist and Contractual Theories

2.2.4 Stewardship Theory

2.2.5 Agency Theory

2.3 Corporate Governance and Shareholders Rights

2.3.1 Corporate Governance and Shareholders Rights in Australia Today

2.3.2 Corporate Governance and Shareholders Rights the United Kingdom

2.3.3 Corporate Governance and Shareholders Rights the United States (specifically Delaware)

2.3.4 Corporate Governance and Shareholders Rights in Canada

2.3.5 Corporate Governance and Shareholders Rights in Germany

2.3.6 Corporate Governance and Shareholders Rights in Singapore

2.3.7 Corporate Governance and Shareholders Rights in India

2.4 Lessons and Recommendations for Australia

2.1 Overview

This chapter presents a review of relevant literature related to corporate governance and shareholders rights, focusing in particular on scholarly perspectives on the protection of minority shareholders and the regulation of oppressive conduct in companies. This chapter demonstrates the multilayered approach that has been taken by scholars when addressing issues related to minority shareholders' oppression within companies. Acknowledging the multiple perspectives and interconnection between different governance theories contributes to the development of effective governance practices in Australia. This thesis follows the approach of scholars such as Mark Rix, Sandra Miller, George Young, Vincent Cirelli, Kelli Walters, and Brian Cheffins in arguing for the reform of Australia's minority shareholder oppression provisions. In particular, these scholars emphasise the need for a clearer statutory definition of oppressive

conduct and support drawing on comparative models such as those in Delaware and Canada for improving the Australian oppression laws.

The literature review in this chapter comprises three parts. The first part provides an overview of the theories of corporate governance. It demonstrates that, despite their differing approaches to resolving conflicts among shareholders, all corporate governance theories share a common notion regarding the way that companies should be managed and controlled. Hence, these theories are interconnected, with each offering different perspectives on preventing the abuse of power in corporate structure. Accordingly, this chapter explores the literature on these theories, underlining their importance in promoting good corporate practices. The second part examines the literature on corporate governance and shareholders rights in Australia, as well as selected jurisdictions, namely the United Kingdom, United States (specifically Delaware), Canada, Germany, Singapore, and India. It also outlines the developments of legal remedies for oppression, and reviews the literature and related cases on minority shareholders' oppression in the selected countries. This chapter emphasises the need to improve Australia's oppression laws after comparing them with the oppression laws of the examined countries. This chapter argues that this area of law has led legal scholars to adopt a multilayered approach in their analysis, often grounded in one predominant corporate governance theory. By integrating insights from multiple theories, corporations can be structured more effectively and directed to balance the interests of all stakeholders, thereby promoting good governance standards, as discussed below. This chapter begins by examining various corporate governance theories.

2.2 Theories of Corporate Governance

Corporate governance serves as a mechanism whereby the owners of companies, primarily shareholders, can oversee company operations.⁶² It is a

⁶² Runhui Lin and Jean Jinghan Chen, *The Theory and Application of Multinational Corporate Governance* (Springer Nature, 2022) 26.

system by which the company is governed and controlled.⁶³ Corporate governance involves 'defining and allocating the rights and obligations of the owners' as well as the company's controllers 'to ensure the realisation of the maximum interests of shareholders and prevent operators from acting against the owners' interests'.⁶⁴ Effective corporate governance is characterised by the 'separation of ownership and control'.⁶⁵ Therefore, in companies that have good corporate governance structures, management control is separate from that of shareholders. This thesis draws upon scholarly works on the jurisdictions being compared, in order to examine the efficiency of their corporate governance structures and the minority shareholders' protection; these will inform the recommendations for reforms to Australia's statutory oppression remedies.

The literature review draws upon the works of key scholars, such as Milton Friedman,⁶⁶ Robert Edward Freeman,⁶⁷ William Wilson Bratton,⁶⁸ Andrea Corfield,⁶⁹ Martin Calkins,⁷⁰ Jonathan B Wight,⁷¹ Ian Ramsay,⁷² Shelley Marshall,⁷³ Wan Fauziah Wan Yusoff,⁷⁴ Idris Ademi Alhaji,⁷⁵ Lynda Bourne,⁷⁶

⁶³ Priyanka Aggarwal, 'Impact of Corporate Governance on Corporate Financial Performance' (2013) 13(3) *IOSR Journal for Business and Management* 1, cited in Beka Khitiri, 'Theories of Corporate Governance: A Legal Analysis' (2017) 2 *Journal of Law (TSU)* 118.

⁶⁴ Lin and Chen (n 62) 26.

⁶⁵ Pavel Kral et al, 'Corporate Governance Against Recommendations: The Cases of the Strong Executive and the Strong Ownership' (2012) 4(3) *Journal of Competitiveness* 46, 46.

⁶⁶ Milton Friedman, 'A Friedman Doctrine - The Social Responsibility of Business Is to Increase Its Profits', *The New York Times* (New York, 13 September 1970)

<<https://graphics8.nytimes.com/packages/pdf/business/miltonfriedman1970.pdf>>.

⁶⁷ Robert Edward Freeman, *Strategic Management, A Shareholder Approach* (Pitman, 1984) 24.

⁶⁸ William Wilson Bratton, 'Public Values and Corporate Fiduciary Law' (1992) 44 *Rutgers Law Review* 675.

⁶⁹ Andrea Corfield, 'The Stakeholder Theory and Its Future in Australian Corporate Governance: A Preliminary Analysis' (1998) 10(2) *Bond Law Review* 213.

⁷⁰ Martin Calkins and Jonathan B Wight, 'The Ethical Lacunae in Friedman's Concept of the Manager' (2008) 11(2) *Journal of Markets and Morality* 221.

⁷¹ *Ibid.*

⁷² Ian M Ramsay, 'Corporate Theory and Corporate Law Reform in Australia' (2009) 1(2) *A Journal of Policy Analysis and Reform* 179.

⁷³ Marshall and Ramsay (n 16).

⁷⁴ Wan Fauziah Wan Yusoff and Idris Adamu Alhaji, 'Insight of Corporate Governance Theories' (2012) 1(1) *Journal of Business and Management* 52.

⁷⁵ *Ibid.*

⁷⁶ Lynda Bourne, 'Series on Effective Stakeholder Engagement: Stakeholder Theory' (2015) 4(2) *PM World Journal* 1.

Beka Khitiri,⁷⁷ Jeffrey Pfeffer,⁷⁸ as well as Oliver Hart,⁷⁹ Luigi Zingales,⁸⁰ Meltem Karatepe Kaya,⁸¹ Runhui Lin,⁸² and Jean Jinghan Chen,⁸³ discussed below.

This thesis adopts the approach taken by scholars such as Mark Rix, Sandra Miller, George Young, Vincent Cirelli, Kelli Walters, and Brian Cheffins to argue for the need to reform Australia's minority shareholder oppression laws as there is a growing need for clearer standards and stronger protection for minority shareholders in companies. These scholars stress the urgency of governance reform in Australia, as stated by Rix, and support amending corporate statutes to provide clearer definitions of terms such as 'unfairly prejudicial', 'oppressive' and 'unfairly discriminatory', which are currently left to judicial interpretation, as argued by Miller. Clearer statutory definitions would improve legislative efficiency by allowing courts to interpret and apply law more effectively, ultimately contributing to improved corporate governance.

Moreover, Young, Cirelli, and Walters argued that jurisdictions, including Australia, could benefit from aspects of Delaware's approach to minority shareholders' protection. This is because Delaware's corporate law is widely recognised for its well-developed judicial standards, particularly the 'entire fairness' doctrine; therefore, the adoption of certain aspects of Delaware's approach would lead to greater fairness when resolving shareholder disputes. This thesis also builds on Cheffin's work and identifies the Canadian model as a valuable comparative reference for potential amendments aimed at advancing Australia's oppression remedies. The Canadian approach offers broad and flexible legal mechanisms, allowing courts to focus on whether the oppressive conduct violates the reasonable expectations of minority shareholders.

⁷⁷ Beka Khitiri, 'Theories of Corporate Governance: A Legal Analysis' (2017) 2 *Journal of Law (TSU)* 117.

⁷⁸ Jeffrey Pfeffer, *Power in Organisations* (Pittman Publishing, 1981), cited in Khitiri (n 76) 124.

⁷⁹ Oliver Hart and Luigi Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' (2017) 2 *Journal of Law, Finance, and Accounting* 247.

⁸⁰ Ibid.

⁸¹ Meltem Karatepe Kaya, 'Notion of Protection of Minority Shareholders; Theoretical Framework' (2020) 5(9) *Istanbul Medeniyet Universitesi Hukuk Fakultesi Dergisi* 195.

⁸² Lin and Chen (n 62) 28.

⁸³ Ibid.

Against the backdrop above, these legal scholars are arguable regarded as leading contributors to the field of corporate governance, offering analyses on different governance theories and emphasising their importance in providing different perspectives on the promotion of good corporate structures. The following discussion will be structured according to specific theoretical categories:

- Shareholder Theory (introduced by Milton Friedman);⁸⁴
- Stakeholder Theory (introduced by Robert Edward Freeman);⁸⁵
- Managerialist and Contractual Theories (explored by Ian Ramsay);⁸⁶
- Stewardship Theory (analysed by Wan Fauziah Yusoff and Idriz Alhaji);⁸⁷
- Agency Theory (examined by Beka Khitiri).⁸⁸

Examining the multilayered approach proposed by scholars is crucial for understanding corporate governance theories and for developing effective frameworks for protection of minority shareholders in companies. This perspective offers a better understanding of the governance principles that support the protection of minority shareholders' rights, as outlined below.

2.2.1 Shareholder Theory

In 1970, the Nobel Prize-winning economist Milton Friedman introduced the 'shareholder theory'. Friedman argued that a corporate executive is an employee of the business owners and is directly responsible to company's shareholders.⁸⁹ In his seminal article,⁹⁰ Friedman stated that this responsibility includes managing the business according to the owner's wishes and increasing their wealth as much as possible 'while conforming to the basic rules of the society, both those embodied in law', and ethical norms.

⁸⁴ Friedman (n 66).

⁸⁵ Freeman (n 67).

⁸⁶ Ramsay (n 72).

⁸⁷ Wan Yusoff and Alhaji (n 74).

⁸⁸ Khitiri (n 77).

⁸⁹ Friedman (n 66) 12.

⁹⁰ Ibid.

However, in 1992, William Bratton questioned the notion of wealth maximisation, arguing that its framework appeared to be defined by economics, 'the discipline that tells us how to maximize'.⁹¹ He proposed the concept of dialogue as an alternative to profit maximisation, stating that 'when people talk about how corporations should be governed and what the duties of corporate actors should be, they take part in the ongoing endorsement of corporate power'.⁹² Similarly, in 2008, Martin Calkins and Jonathan Wight also challenged Friedman's doctrine. In their study,⁹³ they observed that it 'fails to recognise the genuine relationships of managers as well as the authentic sympathy and passion' which inspires them, and that it fails to take into consideration the 'moral imagination - a construct that cannot be conjured up along narrowly rational' and self-serving grounds.

Moreover, Oliver Hart and Luigi Zingales, in their analysis of Friedman's article, determined that it has had a significant influence and that Friedman's general position - that companies should increase profit or market value - is widely accepted by both economists and lawyers today.⁹⁴ However, in their work,⁹⁵ they concluded that Friedman is correct only 'if the profit-making and damage-generating activities of companies are separable or if government perfectly internalizes externalities' through legislation and regulations.

Meltem Kaya also opined that according to 'shareholder theory', a business's only social responsibility is to increase profits.⁹⁶ Therefore, according to the 'shareholder theory', the company's only duty is to satisfy its shareholders by increasing their incomes.⁹⁷ Kaya observed that this theory gained greater importance in the 20th century.⁹⁸ Nevertheless, in her findings,⁹⁹ Kaya emphasized that 'all shareholders, including minority shareholders, should have equal access to the remedies provided in company law' when they are unfairly treated in their shareholding.

⁹¹ Bratton (n 68).

⁹² Ibid 689.

⁹³ Calkins and Wight (n 70) 234.

⁹⁴ Hart and Zingales (n 79) 248.

⁹⁵ Ibid 270.

⁹⁶ Kaya (n 81) 205.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid 205-206.

However, even though ‘shareholder theory’ asserts that maximising shareholder value is essential for successful corporate performance, this approach often results in short-term gains, as the long-term success of a company cannot be achieved without promoting strong interpersonal relationships. Hence, prioritizing shareholder interests and wealth creation may occur at the expense of the company itself. Therefore, this theory must be aligned with good corporate practices to ensure the company’s lasting growth and stability. To broaden the focus beyond shareholders’ profit, Robert Edward Freeman introduced the concept known as *stakeholder theory*,¹⁰⁰ discussed below.

2.2.2 Stakeholder Theory

Robert Edward Freeman first introduced the stakeholder concept in 1984 in his book *Strategic Management: A Stakeholder Approach*.¹⁰¹ According to Freeman, by exploring how a company can succeed in both, ‘the current and future business environment’, it can be better managed ‘in turbulent times’.¹⁰² As the stakeholder approach emphasises that the business should strive to create value for all stakeholders, not just shareholders, in his later work,¹⁰³ Freeman clarified that this theory ‘becomes a genre that is quite rich’ as it integrates core business concepts with ethical consideration.

In 1998, Andrea Corfield analysed the ‘stakeholder theory’ in relation to the corporate governance framework developed by Freeman.¹⁰⁴ In her work,¹⁰⁵ she determined that the ethical treatment of stakeholder theory does not mean that the interests of stakeholders with those of shareholders will be equated; rather, stakeholders should be treated ‘fairly and justly’, and even though there are no obligations imposed by law to follow the ethical principles, company leaders are required to consider them as any member of society would.

¹⁰⁰ Freeman (n 67) 24.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Robert Edwards Freeman, ‘The Politics of Stakeholder Theory: Some Future Directions’ (1994) 4(4) *Business Ethic Quarterly* 409, 409.

¹⁰⁴ Corfield (n 69).

¹⁰⁵ Ibid 218.

Moreover, Lynda Bourne posed an important question raised by this theory: 'Can business leaders make decisions about the conduct of the business without concerning the impact of these decisions on (all) those who will be affected by the decisions?'¹⁰⁶ Accordingly, 'stakeholder theory' suggests that the objectives of directors, and the company as a whole, is not to increase their own value, but to consider the well-being of all parties with a stake in the company, as observed by Beka Khitiri.¹⁰⁷ Further, according to this theory, managers should take into account the interests of all stakeholders in companies, even if it is against short-term maximisation of shareholders' value, as stated by Meltem Kaya.¹⁰⁸ Consequently, this theory asserts that by considering the interests of all stakeholders, conflicts in companies can be effectively reduced, promoting good corporate governance.

2.2.3 Managerialist and Contractual Theories

In 2009, Ian Ramsay explored two theories related to corporations, both of which were concerned with corporate governance. Under the first 'managerialist theory' of the corporation, 'accountability is secured by the imposition of mandatory legal duties upon directors and other officers',¹⁰⁹ whereas the 'contractual theory' of the corporation 'emphasises the role of market forces, rather than legal rules alone, in aligning the interests of corporate managers and shareholders'.¹¹⁰ Ramsay contended that both theories seek to establish ways to ensure that companies' managers act in the shareholders' best interest.¹¹¹ However, Ramsay suggested that both theories have distinct implications for corporate law and corporate law reform.¹¹² Ramsay concluded that a substantial part of corporate reform is best understood through the 'managerialist theory of the corporation', which emphasises the significance of legal duties and obligations enforced on corporate managers.¹¹³ Hence, even though 'managerialist' and 'contractual'

¹⁰⁶ Bourne (n 76) 1.

¹⁰⁷ Khitiri (n 77) 132.

¹⁰⁸ Kaya (n 81) 206.

¹⁰⁹ Ramsay (n 72) 180.

¹¹⁰ Ibid.

¹¹¹ Ibid 179.

¹¹² Ibid.

¹¹³ Ibid 186.

theories require directors to act in the best interest of shareholders, it may be argued that these theories prioritise the role of managers and their position within companies rather than promoting good corporate practices.

2.2.4 Stewardship Theory

In 2012, Wan Fauziah Yusoff and Idriz Alhaji, analysed 'stewardship theory' noting that it highlights the relationship between a company's success and its managers who are seen as good stewards who act in the best interests of the owners.¹¹⁴ Beka Khitiri also examined this theory and pointed out that it emphasises the relationship between directors and shareholders.¹¹⁵ Khitiri, referring to Edwin Quinn, stated that the 'stewardship theory' considers directors to be the individuals 'who sees the well-being of the company as their personal mission'.¹¹⁶ Therefore, based on this theory, the directors serve the company and its own interests, and are not just shareholders' representatives, Khitiri observed.¹¹⁷ Khitiri concluded that directors always work for the company and will not take 'unwarranted risks'.¹¹⁸ Therefore, it is considered unacceptable to burden directors with the consequences of these risks, as it would limit their 'much-needed freedom', as Khitiri further concluded.¹¹⁹ Consequently, as this theory suggests that directors act in the company's best interest, focusing on their ethical decisions as well as their interests, it plays a relevant role in corporate governance practices.

However, Runhui Lin and Jean Chen posit that 'stewardship theory' 'ignores the fact that operators are also self-interested economics actors'.¹²⁰ According to their study,¹²¹ this theory has received little attention, 'as corporate democracy prevails, institutional investors dominate, and insider control' along with agency issues retain a central role.

¹¹⁴ Wan Yusoff and Alhaji (n 74) 57.

¹¹⁵ Khitiri (n 77) 126.

¹¹⁶ Edwin Quinn, 'The Complex Relationship between Corporate Management, Stakeholders and Accounting (2014) 4(3) *International Journal of Academic Research in Accounting, Finance and management Sciences* 80-8, cited in Khitiri (n 76) 128.

¹¹⁷ Khitiri (n 77) 129.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Lin and Chen (n 62) 28.

¹²¹ Ibid.

2.2.5 Agency Theory

Beka Khitiri also critically assessed both the positive and negative aspects of the 'agency theory' and the conflict of interest.¹²² According to Khitiri, 'agency theory' is based on the assumption that company directors are 'self-serving and self-interested', and that, without an 'effective supervision mechanism', directors may engage in actions that are selfish and detrimental to the shareholders.¹²³ Khitiri also observed that if directors' salaries are linked to the shareholders' income, the company will be governed in a manner that is most desirable to its owners, although they have a limited role in the company's governance.¹²⁴ Moreover, as observed by Jeffrey Pfeffer, 'agency theory' suggests that, when making decisions, managers are likely to prioritise their own interests over the interests of the shareholders.¹²⁵ As such, the concept of 'agency theory' explains the relationship between agents and principals, and aims to prevent conflicts between them in order to protect the interests of the company's owners.

Moreover, Runhui Lin and Jean Chen suggested that researchers have also found limitation in this theory, particularly because 'a company has a diverse group of stakeholders.'¹²⁶ As concluded in their study,¹²⁷ 'agency theory' fails to take into account the risk faced by stakeholders other than owners and operators.

2.3 Corporate Governance and Shareholders Rights

As stated above, company control may be held by a single shareholder or controlling shareholders who elect directors and pass resolutions at general meetings. These companies are governed by a board of directors who manage their affairs. Various legal rules form the framework for corporate governance.¹²⁸ The main corporate governance regulations in Australia include the duties and

¹²² Khitiri (n 77) 123.

¹²³ Ibid 124.

¹²⁴ Ibid 125.

¹²⁵ Jeffrey Pfeffer, *Power in Organisations* (Pittman Publication, 1981), cited in Khitiri (n 76) 124.

¹²⁶ Lin and Chen (n 62) 27.

¹²⁷ Ibid.

¹²⁸ Anil Hargovan, Michael Adams and Catherine Brown, *Australian Corporate Law* (LexisNexis Butterworths, 2023) 405.

obligations placed on company directors and officers under ss 180-184 and 588G of the *CPA*, and under the general law.¹²⁹ Also, where shareholders do not participate in company's operation, remedies for shareholder's oppressive conduct are enforced under ss 232-235 of the *CPA*.

Several researchers have focused on the shareholders' and directors' rights. In their study,¹³⁰ Ian Marshall and Shelly Ramsay found that 'the board of directors is the highest decision-making body' within the corporate structure. They also examined stakeholders' and directors' duties under the Australian corporate law.¹³¹ Marshall and Ramsay observed that a brief examination of corporate law in Australia has shown that directors, in executing their directors' duties, are in a position to exercise significant discretion, which may be 'consistent with a limited stakeholder approach to corporate governance'.¹³² Marshall and Ramsay further also found that the traditional view of a company's stakeholders 'is limited to those concerned with the inputs (investors, employees, suppliers) and output (customers) involved in maximising value to the company and returning profits to shareholders'.¹³³ They determined that this approach increases value maximisation by recognising 'that the value is not only created by 'inputs' and 'outputs' but also by the relationships between a company and its stakeholders'.¹³⁴ In this context, the directors' conduct is closely linked to the company's performance and has a role in shaping shareholders' trust.

The following review presents an analysis of the literature on corporate governance and shareholder rights in the jurisdictions selected for examination. It also explores statutory and case law developments in oppression laws and the protection of minority shareholders in these countries.

This analysis begins with Australia.

¹²⁹ Ibid.

¹³⁰ Marshall and Ramsay (n 16) 291.

¹³¹ Ibid 299.

¹³² Ibid.

¹³³ Ibid 294.

¹³⁴ Ibid.

2.3.1 Corporate Governance and Shareholders Rights in Australia Today

The research and study of corporate governance in Australia and around the world continues at different stages, however, this thesis begins by focusing on Australia. Michael Adams refers to a number of reports and scholars that stress the importance of corporate control.¹³⁵ This section begins with Adam's analysis of the role and definition of corporate governance, followed by Mark Rix's study of the challenges it presents.

In his study,¹³⁶ Michael Adams observed that the term "corporate governance" has not been conclusively defined. Adams referenced the Final Report of the Royal Commission which describes corporate governance as 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations'.¹³⁷ Additionally, Adams referred to the study conducted by Stijn Claessens and Burcin Yutoglu, which provides 'clear evidence of a link between economic development and corporate governance'.¹³⁸ Further, Adams noted that corporate governance emerged as a global phenomenon during the 1990s, together with several developments including 'the implementation of market-building structural reforms' in post-Soviet states, the 1997 Asian financial crisis, and the European Union's ongoing efforts to integrate capital markets.¹³⁹ In concluding his study,¹⁴⁰ Adams observed that 'there is a wide spectrum of possible regulatory approaches' and that it remain to be seen which one will prove to be more effective.

Also, in Australia, Mark Rix investigated 'the changing duties and responsibilities of boards and directors of Australian public companies'.¹⁴¹ He noted that in Australia, the corporate governance environment is undergoing significant

¹³⁵ Michael Adams, 'Board Diversity: More Than a Gender Issue?' 2015 20(1) *Deakin Law Review* 123.

¹³⁶ *Ibid* 125.

¹³⁷ HIH Royal Commission, Parliament of the Government of Australia, *The Failure of HIH Insurance: A Corporate Collapse and Its Lessons* (Parliamentary Paper No 98, April 2003), cited in Adams (n 135) 125-6.

¹³⁸ Stijn Claessens and Burcin Yutoglu, 'Corporate Governance and Development - An Update' (Global Corporate Governance Forum, 2012), cited in Adams (n 135) 129.

¹³⁹ Adams (n 135) 126.

¹⁴⁰ *Ibid* 151.

¹⁴¹ Mark Rix, 'The New Australian System of Corporate Governance: Board Governance and Company Performance in a Changing Corporate Governance Environment' 2019 1(2) *Corporate Law and Governance Review* 29, 29.

transformation, raising the question of whether company and board performance can still be primarily assessed based on short-term 'profit, share price and dividends generated'.¹⁴² Rix noted that this change was in response to many 'external environmental, political and social challenges' that are compelling company boards and executive managers to review corporate strategies, objectives, business practices and approaches to engaging with shareholders and other stakeholders.¹⁴³ Rix concluded that Australia needs 'to change governance principles, structures and practices to meet this challenge before it is too late'.¹⁴⁴ Accordingly, drawing from Rix's study, Australian corporate governance should develop a legal framework that more effectively directs companies and addresses minority shareholders' oppression, in order to promote better governance principles in the country.

By way of historical context, the principal statutory oppression remedy in Australia was introduced in s 186 of the Australian *Uniform Companies Act 1961* (Cth). Section 186 was modelled after s 210 of the *Companies Act 1948* (UK) and enacted in response to *Cohen Report*.¹⁴⁵ One of the earliest cases on minority shareholders oppression came from the United Kingdom, i.e., *Scottish Co-operative Wholesale Society Ltd v Meyer* ('*Scottish*'),¹⁴⁶ where Viscount Simonds defined 'oppressive' as 'burdensome, harsh and wrongful' conduct. This case,¹⁴⁷ is considered to be one of the most important decisions regarding minority oppression in companies since the passage of the *Companies Act 1948* (UK), elaborated upon later. Section 186 of the Australian *Uniform Companies Act 1961* (Cth) was the first statutory remedy for oppression and provided that the conduct needed to be 'oppressive' to one or more members to apply to the court for an order.¹⁴⁸ Under the *Companies Act 1981* (Cth), the oppression remedy is specified in s 320. By legislating s 320 in the *Companies Act 1981* (Cth), the oppression provision was extended so that the court may make an order if members of the company believed that the directors have acted in a manner

¹⁴² Ibid.

¹⁴³ Ibid 30.

¹⁴⁴ Ibid 39.

¹⁴⁵ *Company Law Amendment Committee, Report of the Company Law Amendment Committee* (Cmb 6659, 1947).

¹⁴⁶ *Wholesale Society Ltd v Meyer* [1959] AC 324.

¹⁴⁷ Ibid.

¹⁴⁸ *Uniform Companies Act 1961* (Cth) s 186.

which was 'unfair' or 'unjust' to the members,¹⁴⁹ that is, where the conduct placed shareholders at a disadvantage or was otherwise inequitable. The nature of the conduct described as 'prejudicial' and 'discriminatory', encompassing actions that cause unfair harm or unequal treatment, was expanded by the *Explanatory Memorandum, Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983* (Cth).¹⁵⁰ Later, in *Wayde v NSW Rugby League Ltd* ('*Wayde*'),¹⁵¹ Brennan J stated that the test to be used when the oppressive conduct relates to the decision of the board of directors would be what reasonable directors would not have thought as 'fair' to impose. The case is significant as it clarified the approach to oppression claims by focusing on whether the board's decisions fell within a reasonable scope of discretion.¹⁵² Section 320 of the *Companies Act 1981* (Cth) (as amended) was included in the *Corporations Act 1989* (Cth) in s 260, as 'a crucial weapon in the shareholders' armoury to correct perceived injustices carried out by the controllers of the company'.¹⁵³ As result of the amendments made by the *Company Law Review Act 1998* (Cth),¹⁵⁴ the oppression remedy become s 246AA, and then s 232 of the *CPA*. Thus, in Australia, the relevant legislative protection for oppressive conduct of affairs in companies, as stated above, is set out in Part 2F.1 of the *CPA* which comprises ss 232-235. Section 232 specifies when the order can be made by the court, s 233 sets out remedies available under this Part. Section 234 states who can apply under s 233, and s 235 sets out the requirements for lodging an order. These sections are explored in greater detail later.

The effect of the oppression remedies in Australia has been a matter of long-standing debate, discussed below. In 1985, Jeff Corkery observed that s 186 of the Australian *Uniform Companies Act 1961* (Cth) 'had glaring gaps'.¹⁵⁵ By examining s 320 of the *Companies Act 1981* (Cth) and its 'answers to the residual

¹⁴⁹ *Companies Act 1981* (Cth) s 320.

¹⁵⁰ Explanatory Memorandum, *Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983* (Cth), *Parliament of Australia* (Web Document, 2024) <https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/Browse_by_Topic/law/explanmem/1983>.

¹⁵¹ *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459.

¹⁵² *Ibid.*

¹⁵³ Lynden Griggs, 'Specific Problems with the Oppression Section' (1993) 9 *Queensland University of Technology Law Journal* 101, 101.

¹⁵⁴ *Company Law Review Act 1998* (Cth).

¹⁵⁵ Jeff F Corkery, 'Oppression or Unfairness by Controllers – What Can a Shareholder Do About It – An Analysis of S 320 of the Companies Code' (1985) 9(4) *Adelaide Law Review* 437, 437.

problems in the previous version' in the Companies Code, Corkery compared overseas experiences of the United Kingdom and Canada and commented on the importance of the oppression provision in the statute.¹⁵⁶ The 'oppression', as put forward by Corkery, 'connotes wilful or careless imposition of pressure, or unfair dealing or tactic of a reasonably serious kind'.¹⁵⁷ Corkery examined what the courts considered to constitute oppression and observed that in *Elder v Elder & Watson Ltd*,¹⁵⁸ Lord Keith stated that the test of 'oppression' is 'lack of probability or fair dealing' rephrasing it to 'lack of probability and also fair dealing',¹⁵⁹ referring to conduct that is both dishonest (lacking probity) and inequitable or prejudicial (failing fair dealing). Corkery also found that 'unfair prejudice' and 'unfair discrimination' overlap in meaning.¹⁶⁰ He observed that in *Re WH Thomas*,¹⁶¹ prejudicial or discriminatory conduct considered a wider category than 'oppressive' conduct, and also that in *Re Dalkeith Investments Pty Ltd*,¹⁶² as agreed in *Re G Jeffery (Mens Store) Pty Ltd*,¹⁶³ it was confirmed that 'unfairly prejudicial' and 'unfairly discriminatory' consider behaviour beyond what is consider 'oppressive'.¹⁶⁴ Corkery stated that minority shareholders 'when faced with corporate misdeeds' should keep in mind s 320 and have a powerful remedy in s 574 as in s 320.¹⁶⁵ Corkery concluded that s 320 'may have a profound influence on the development and of duties between majority and minority shareholders', and that 'if the judiciary is receptive' the minority shareholder will have 'an important monitoring role in corporate affairs in Australia'.¹⁶⁶ Corkery's analysis illustrates that s 320 significantly influences the relationships between shareholders in companies and that the judiciary's openness to this remedy has further empowered the company's minority shareholders.

Moreover, in 1993, Lynden Griggs examined the oppression remedy under s 260 of the *Corporations Act 1989* (Cth), focusing on the difficulties created by this

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 444.

¹⁵⁸ *Elder v Elder & Watson Ltd* [1952] SC 49, cited in Corkery (n 155) 445.

¹⁵⁹ Corkery (n 155) 445.

¹⁶⁰ Ibid 446.

¹⁶¹ *Re WH Thomas* (1983) 1 ACLC 1256, cited in Corkery (n 155) 446.

¹⁶² *Re Dalkeith Investments Pty Ltd* (1985) 3 ACLC 74, cited in Corkery (n 155) 446.

¹⁶³ *Re G Jeffery (Mens Store) Pty Ltd* (1984) 2 ACLC 421, cited in Corkery (n 155) 446.

¹⁶⁴ Corkery (n 155) 446.

¹⁶⁵ Ibid 464.

¹⁶⁶ Ibid.

section such as the definition of 'affairs of the company', or 'whether the conduct can be said to be 'unfairly prejudicial' or 'unfairly discriminatory' and if it affects all members the same'.¹⁶⁷ Griggs observed that in *Re Carrington Vijella*,¹⁶⁸ it was held that even though a breach affected all shareholders equally, for a successful case, the complainant must show that the conduct was 'unfairly prejudicial' to part of the company's members.¹⁶⁹ Griggs concluded that the oppression remedy under s 260 has overcome many challenges for minority shareholders 'seeking to redress a wrong done to the corporation'.¹⁷⁰ Further, Griggs opined that, with a broad interpretation of s 260 by the courts, many of the difficulties that arise from the interpretation of this section 'can be defeated'.¹⁷¹ Consequently, it appears that s 260 can effectively address the challenges encountered by minority shareholders; furthermore, the courts expanded its impact through a broad interpretation of this remedy.

The first empirical study in Australia 'of both reported and unreported judgments resulting from oppression action' was undertaken by Ian Ramsay in 1999.¹⁷² Ramsay presented several key conclusions, and observed that 'there has been a significant increase in the use of oppression remedy', generally by minority shareholders in private companies with fewer than ten shareholders, and that the courts are 'slightly more prepared to find that oppression has not been established'.¹⁷³ Ramsay also concluded that most shareholders in oppression matters are involved in the management of the company and that there is a 'disparity between the relief sought by plaintiffs and the relief granted by courts' as they granted the winding up of the company only in a small number of cases compared to what the plaintiffs sought.¹⁷⁴ Therefore, as a form of dissolving a corporate entity, this remedy is considered to be the remedy of last resort.

¹⁶⁷ Griggs (n 153) 101.

¹⁶⁸ *Re Carrington Vijella* [1983] 1 BCC 98, cited in Griggs (n 153) 104.

¹⁶⁹ Griggs (n 153) 104.

¹⁷⁰ *Ibid* 110.

¹⁷¹ *Ibid*.

¹⁷² Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 24.

¹⁷³ *Ibid* 29.

¹⁷⁴ *Ibid*.

Two years later, in 2001, in their study, John Farrar and Laurence Boulle, identified many forms of ‘oppressive’, ‘prejudicial’ and ‘discriminatory’ conduct of minority shareholders, such as exclusion from management, withholding dividends, and self-interested dealings that disadvantage minority shareholders.¹⁷⁵ Moreover, Farrar and Boulle stated that minority shareholders in companies may be affected by mergers, dissolutions, improper use of company assets, the diversion of profits, insufficient access to information, removal as directors, general mismanagement and ‘lack of fair play’.¹⁷⁶ They expanded their observation by stating that oppression remedies were ‘conceived within two dominant paradigms’, the first, based on ‘rights’, derived from the rule in *Foss v Harbottle*,¹⁷⁷ and the second, reflected in the decision in *Ebrahimi v Westbourne Galleries*,¹⁷⁸ that was based on ‘interests’.¹⁷⁹ Within this study,¹⁸⁰ Ferrar and Boulle proposed a need for a third paradigm that, while maintaining the interest-based approach, would develop oppression remedies by changing approaches to civil procedures and potentially incorporating alternative dispute resolution processes.

Part 2F.1A of the *CPA* has been criticised for not improving the shareholders’ position in companies. Richard Brockett, for example, in 2012, examined the issues faced ‘by the parties and practitioners alike in cases of buy-out remedies for minority oppression’.¹⁸¹ Brockett indicated that minority shareholders have no power to influence ‘the development, management and direction’ of companies.¹⁸² As stated by Brockett, oppressed minority shareholders seeking remedies for oppression may petition the court under s 233 of the *CPA* ‘for the company to compulsorily acquire or buy-out the affected shareholder’s shares’.¹⁸³ Brockett focused on ‘the way in which the courts determine the value of shares when making a compulsory buy-out order’.¹⁸⁴ He concluded that in these

¹⁷⁵ John H Farrar and Laurence J Boulle, ‘Minority Shareholder Remedies – Shifting Dispute Resolution Paradigms’ (2001) 13(2) *Bond Law Review* 1, 1.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Foss v Harbottle* [1843] 2 Hare 461, cited in Farrar and Boulle (n 175) 2.

¹⁷⁸ *Ebrahimi v Westbourne Galleries* [1972] 2 All ER 492, cited in Farrar and Boulle (n 175) 2.

¹⁷⁹ Farrar and Boulle (n 175) 2.

¹⁸⁰ *Ibid.*

¹⁸¹ Brockett (n 1).

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

circumstances, the ‘majority cases have focused on doing ‘what is fair in the circumstances’ without at least acknowledging the ‘compensatory nature of the remedy’.¹⁸⁵ For instance, in the High Court decision of *Gambotto v WCP Ltd* (*Gambotto*),¹⁸⁶ the majority (Mason CJ, Brennan, Deane and Dawson JJ) supported the ‘fair in all circumstances’ approach. In this case,¹⁸⁷ the appeal was related to the ‘validity of an amendment to the articles of association of a company’ to enable majority shareholders to acquire compulsorily shares of the minority shareholder. The High Court rejected the test ‘for the benefit of the company as a whole’ and established that such amendment must be fair and made for a proper purpose.¹⁸⁸ The High Court took this position because, as Mason CJ, Brennan, Deane and Dawson JJ affirmed, this approach is intended to ‘to secure the company from significant detriment of harm’.¹⁸⁹ Therefore, the impact of *Gambotto*¹⁹⁰ on efficient corporate governance will depend on future court decisions and the extent to which it inspires the efforts to rebalance the interests of majority and minority shareholders.

Furthermore, Brockett gave an example of how winding up a company due to a dispute between shareholders would be considered an ‘extreme step’ that requires a ‘strong case’.¹⁹¹ He observed that in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd*,¹⁹² Spigelman CJ held that even though ‘irreconcilable differences may establish a basis for winding up, they do not of themselves constitute oppression or unfairly prejudice’.¹⁹³ Brockett further indicated that if the company was wound up, the value of the shares that the shareholders could receive may not be their true value.¹⁹⁴ In his study,¹⁹⁵ Brockett specified that selling shares in a small

¹⁸⁵ Ibid 124.

¹⁸⁶ *Gambotto v WCP Ltd* (1995) 182 CLR 432. The majority (Mason CJ, Brennan, Deane and Dawson JJ) started their analysis setting up the question ‘whether, and if so in what circumstances, the taking of a power by majority shareholders by amendment to the articles to acquire compulsorily the shares of the minority shareholders will be held invalid on the basis that it is oppressive’. For amendments to the company constitution to be lawful, they established two-way test, i.e., for a proper purpose and not oppressive towards minority shareholders, holding that the amendment was not made for a proper purpose.

¹⁸⁷ *Gambotto v WCP Ltd* (1995) 182 CLR 432.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Brockett (n 1) 103.

¹⁹² *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672, cited in Brockett (n 1) 105.

¹⁹³ Brockett (n 1) 105.

¹⁹⁴ Ibid 104.

¹⁹⁵ Ibid.

proprietary company could be difficult due to the absence of a market for such shares.

In a later study, conducted in 2014, Richard Mitchell, Anthony O'Donnell, Ian Ramsay, and Michelle Welsh analysed the strengths and effectiveness of shareholder protection in Australian corporate laws.¹⁹⁶ They measured the Australian system 'against the systems of some other similar economies',¹⁹⁷ such as 'Anglo-American', and European regimes. They found that Australia 'has a decidedly shareholder-centric model of corporate law' when compared to those of similar economies.¹⁹⁸ They determined that even though it appears that the Australian corporate law offers strong protection to shareholders, it fails to align with legal origins theories.¹⁹⁹ These scholars concluded that the strength of these laws compared to that of other jurisdictions may not fit within broad theories that classify countries based on factors 'such as types of capitalism, legal origins or political orientation'.²⁰⁰ Therefore, building on this research, this thesis argues that coherent legislative reforms to Australia's oppression laws, aligned with the relevant legal theories, are essential as a means of strengthening minority shareholder protection.

The authors mentioned above were specifically selected due to their strong relevance to the topic and research question, despite the possibility of other scholars having discussed this issue. The next section examines the United Kingdom's corporate governance framework and the rights of shareholders.

2.3.2 Corporate Governance and Shareholders Rights the United Kingdom

The United Kingdom is widely recognised for its efficient corporate governance mechanisms that have influenced other countries around the world. Forbes William and Lynn Hodgkinson stated that, in the United Kingdom, 'good corporate governance' is defined as the maximisation of 'long-term value of shareholder

¹⁹⁶ Mitchell et al (n 60).

¹⁹⁷ Ibid 69.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid 114.

²⁰⁰ Ibid 118.

interests in the company'.²⁰¹ They concluded that common law jurisdictions offer the greatest protection to shareholders and bondholders, whereas civil law offers the least protection.²⁰² Moreover, Marjan Parkinson discussed 'the Anglo-American corporate governance model (that) is based on a one-tier board of directors'.²⁰³ This model of corporate governance, according to Parkinson, relies on codes and regulations formulated by independent regulatory bodies.²⁰⁴ Parkinson found that the *UK Corporate Governance Code* 'is based on a set of prescriptions for effective governance',²⁰⁵ and that the importance of non-shareholding parties is reflected in s 172(1) of the *United Kingdom CMA* which connects director duties to stakeholder's interests.²⁰⁶ Therefore, in the United Kingdom, the main source of primary legislation applied to all companies in the country is the *United Kingdom CMA*, which provides fundamental governance requirements, whereas the *United Kingdom Corporate Governance Code 2018 (UK)*²⁰⁷ is the most significant code of practice, outlining the principles that the board of directors must apply to ensure the success of the company.

In the United Kingdom, shareholders, since 1948, within s 210 of the *Companies Act* of 1948 (UK), could bring direct action 'for relief related to oppression or unfair prejudice to which they have been subject', as observed by Andrew Keay, John Loughrey, Chuyi Wei, Jingchen Zhao and Ting Hu.²⁰⁸ Even though those provisions have changed over time, their aim has remained the same: 'to provide a remedy for shareholders who are being oppressed in some way by how the affairs of the company are being managed'.²⁰⁹ The previously mentioned case, *Ebrahimi Westbourne Galleries ('Ebrahimi')*,²¹⁰ reviewed the scope of the 'just and equitable' ground. According to Lord Wilberforce's reasoning, the 'just and

²⁰¹ Forbes William and Lynn Hodgkinson, *Corporate Governance in the United Kingdom: Past, Present and Future* (Palgrave Macmillan, 1st ed, 2015) 2.

²⁰² *Ibid* 4.

²⁰³ Marjan Marandi Parkinson, *Corporate Governance in Transition: Dealing with Financial Distress and Insolvency in UK Companies* (Palgrave Macmillan, 2018) 14.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid* 15.

²⁰⁷ *Corporate Governance Code 2018 (UK)*, *Financial Reporting Council* (Web Document, 2024) <<https://www.ecgi.global/sites/default/files/codes/documents/2018-uk-corporate-governance-code-final.pdf>>.

²⁰⁸ Andrew Keay et al, 'Protecting Chinese Investors Through Oppression Actions: An Examination in Light of the Position in the United Kingdom' (2020) 21(1)(5) *Australian Journal of Asian Law* 77, 79.

²⁰⁹ *Ibid*.

²¹⁰ *Ebrahimi Westbourne Galleries* [1972] 2 All ER 492.

equitable' provisions 'as equity always does, enable the court to subject the exercise of legal rights to equitable considerations'.²¹¹ The United Kingdom's *Companies Act* of 1985 was amended in order to eliminate the difficulties faced by the implementation of the Act of 1948, as observed by Anthony Nwafor.²¹² He pointed out that, in s 459, the *Companies Act* of 1985 replaced the word 'oppression' with 'unfair prejudice' so that the shareholder could complain 'for any act or proposed act of the director that could be injurious to him'.²¹³ Also, he stated that the courts were no longer required to provide proof of facts that 'would justify the winding up of the company as it were under the 1948 Act'.²¹⁴ Moreover, in the United Kingdom, the scope of 'unfair prejudice' was considered for the first time in *O'Neill v Phillips* ('*O'Neill*').²¹⁵ In this respect, Lord Hoffman observed the following: 'the parallel I have drawn... does not mean that the conduct will not be unfair unless it would have justified an order to wind up the company'.²¹⁶ The provisions of the *Companies Act* of 1985 were re-enacted as s 994 of the United Kingdom *Companies Act* of 2006, as observed by Nwafor,²¹⁷ providing statutory protection for today's oppressed shareholders in companies.

Several scholars conducted comparative studies of the oppression of minority shareholders. They include Sandra Miller,²¹⁸ Lindsay Heger,²¹⁹ and Amelia Schultz.²²⁰ In 1997, Miller conducted comparative studies on minority shareholder oppression in private companies in Germany, the United Kingdom, and France.²²¹ He also examined the corporate structure of both public and private corporations in these jurisdictions, along with the remedies available for minority shareholders disputes in the private companies, and suggested that the

²¹¹ Ibid.

²¹² Anthony O Nwafor, 'The Unfair Prejudice Remedy – A Relief for the Minority Shareholders' (2011) 13 *University of Botswana Law Journal* 37, 39.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ *O'Neill v Phillips* [1999] UKHL 24.

²¹⁶ Ibid.

²¹⁷ Nwafor (n 212) 39.

²¹⁸ Sandra K Miller, 'Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French "Close Corporation Problem"' (1997) 30 *Cornell International Law Journal* 381.

²¹⁹ Lindsey M Heger, 'Help from Across the Pond: Applying the U.K. Law Commission's Presumption That Exclusion from Management in a Private Company is Unfairly Prejudicial as a Guide to Assessing Claims of Minority Shareholder Oppression in U.S. Closely Held Corporations' (2009) 6(1) *South Carolina Journal of International Law and Business* 128.

²²⁰ Schultz (n 55) 500.

²²¹ Miller (n 218) 381.

modification of company statutes should be considered by each country to 'encourage shareholders to contractually address shareholder disputes in advance of their occurrence'.²²² Miller's analysis revealed that all three countries had developed equitable remedies with regards to shareholders' conduct. Nevertheless, she noted that equitable remedies under the United Kingdom law focus on the conduct rather than the personal characteristics of the shareholders, and that the definition of 'unfair prejudice' in the United Kingdom is decided on a case-by-case basis, which contributes to uncertainty.²²³ However, Miller's analysis revealed that in Germany, shareholders may seek an expulsion upon showing 'substantial causes'.²²⁴ Miller observed that France, on the other hand, 'provides for anticipatory dissolution of a company for 'valid reasons' including non-performance of one's obligations or discord among members'.²²⁵ Miller concluded that in each country there are 'vague standards of shareholder conduct and highly discretionary remedies' for resolving shareholder disputes in private companies which may increase 'the international shareholder's confusion regarding the scope of acceptable conduct'.²²⁶ Miller suggested that the existing laws be revised to comprise explanations of the factors 'which will be applied in determining the entitlement to a remedy'.²²⁷ Based on this research, such revisions will ensure fairness and effective relief for oppressed minority shareholders in companies.

In 2009, Lindsay Heger examined the causes of action and oppression remedies available to minority shareholders in the United Kingdom and United States.²²⁸ Heger studied the statutory cause of action for 'unfair prejudice'²²⁹ under the *United Kingdom CMA* and the statutory cause of action for judicial dissolution under the *MBCPA*.²³⁰ Heger provided an overview of the several recommendations by the United Kingdom Law Commission for reforming minority shareholder oppression remedies.²³¹ Heger's analysis revealed that the United

²²² Ibid 382.

²²³ Ibid 406.

²²⁴ Ibid 393.

²²⁵ Ibid.

²²⁶ Ibid 427.

²²⁷ Ibid.

²²⁸ Heger (n 219).

²²⁹ Ibid 136.

²³⁰ Ibid 137.

²³¹ Ibid 142.

Kingdom Law Commission's proposed codification of the presumption of 'unfair prejudice' was not adopted in the *United Kingdom CMA*.²³² Heger concluded that 'a presumption of oppression upon the minority shareholder's exclusion from management' might provide United States courts with an effective alternative in managing shareholders' oppression claims.²³³ Heger analysis indicated that by operating within a framework that includes the approaches to defining oppression, the oppression doctrine in the United States would be improved by the presumption.²³⁴

In 2017, Amelia Schultz examined statutory oppression remedies in closely held corporations 'in common law countries with sophisticated legal systems',²³⁵ such as the United Kingdom, Canada, the United States and Australia. Schultz first outlined the development of shareholder oppression law,²³⁶ and argued that the goal of shareholder oppression laws should be to find economically efficient and equitable solutions to shareholder disputes.²³⁷ Schultz examined three oppression remedies available under the laws of the four countries: judicial dissolution, forced buy-out, and judicial supervision.²³⁸ Schultz concluded that the available remedies are inadequate and do not effectively protect oppressed minority shareholders, as they do not result in 'equitable' and 'efficient' solutions.²³⁹ Expanding upon Schultz study, in disputes between shareholders and directors, it is fundamental to prioritise efficiency and fairness, which ultimately promote good corporate governance practices.

The corporate governance landscape in the United Kingdom is undergoing significant changes, especially concerning the implications of Brexit for this country's companies and their corporate governance. Companies must remain vigilant and closely monitor these developments in order to respond effectively to the post-Brexit corporate environment.

²³² Ibid 163.

²³³ Ibid 166.

²³⁴ Ibid 166.

²³⁵ Schultz (n 55) 500.

²³⁶ Ibid 501.

²³⁷ Ibid 505.

²³⁸ Ibid 511.

²³⁹ Ibid 521.

2.3.3 Corporate Governance and Shareholders Rights the United States (specifically Delaware)

The United States' corporate governance comprises a company structure consisting of a board of directors and a management team. Heidi Hylton and Natalie Meier argued that the United States' model for corporate governance 'follows the "Anglo-American" model which emphasizes the interests of shareholders, management and directors'.²⁴⁰ According to Hylton and Meier, the essential elements defining good corporate governance focus on 'ethics, aligning business goals, strategic management, organization, and reporting'.²⁴¹ Hylton and Meier highlighted that these concepts 'have resulted in requirements which encompass the rights and equitable treatment of shareholders, the interest of other stakeholders, the role and responsibilities of the board, integrity and ethical behaviour, and disclosure and transparency'.²⁴² Therefore, as indicated, corporate governance in the United States imposes binding obligations on the company's management and the board, and also promote equitable standards for shareholders.

Moreover, Karen Hogan and Gerard Olson found that, in the United States, 'most public companies have what is considered a two-tier system of corporate governance', where the first tier is the board of directors elected by the shareholders, while the second tier comprises the managers of the corporation who handle the day-to-day operations of the company.²⁴³ They noted that within the second tier, there is a management team that runs the company, but 'management can also be considered insiders on the board of directors'.²⁴⁴ Hogan and Olson concluded that in the United States, there is 'an attempt to thwart the potential agency theory behaviour of top management by increased oversight of boards of directors and increased regulations at the state and federal level of government'.²⁴⁵ Notwithstanding the above, today's corporate

²⁴⁰ Heidi Hylton Meier and Natalie C Meier, 'Corporate Governance: An Examination of U.S. and European Models' (2013) 9(2) *Corporate Board: Role, Duties and Composition* 6, 7.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ Karen M Hogan and Gerard T Olson, 'Governance and Corporate Control in the United States' (2021) 3(2) *Corporate Law and Governance Review* 41, 48-9.

²⁴⁴ *Ibid.* 49.

²⁴⁵ *Ibid.* 50.

governance system in the United States effectively aligns the roles and responsibilities of the company's management, shareholders, and board.

In the United States' *Model Business Corporation Act* of 1950, oppression provided grounds for involuntary dissolution, whereas the *Model Business Corporations Act* adopted in 1984 (fully revised in 2016) codified dissolution as a default remedy for shareholder oppression.²⁴⁶ Delaware, on the other hand, has been reluctant to adopt oppression provisions in the statute. Eschewing the statutory approach, in Delaware, the 1992 case of *Little v Waters* ('*Little*'),²⁴⁷ citing *Gampel v Bolstein*,²⁴⁸ applied two tests in defining oppression: (1) 'a violation of the 'reasonable expectations' of the minority' and (2) 'burdensome, harsh and wrong' conduct. *Little*²⁴⁹ considered claims for breach of fiduciary duties and shareholders' oppression as a refusal to declare dividends even though the company was profitable, imposing a tax burden on the applicant. The next year, in *Nixon v Blackwell* ('*Nixon*'),²⁵⁰ the Delaware Supreme Court held that shareholders should protect their rights by contract and not through judicial remedies. Some years later, the case of *Riblet Products Corp v Nagy* ('*Riblet*')²⁵¹ illustrated that the majority shareholders owe fiduciary duties to the minority shareholders in companies.

In the United States context, several scholars focused their work on squeeze-out techniques, involuntary dissolution, mergers, acquisitions, and fiduciary duties. They include Forest Hodge O'Neil,²⁵² Harry J Haynsworth,²⁵³ and Robert B Thompson,²⁵⁴ and specifically in Delaware, Kimble C Cannon²⁵⁵ and Patrick J

²⁴⁶ *Model Business Corporation Act 1950* (US); See also *Model Business Corporations Act 1984* (US).

²⁴⁷ *Little v Waters* 1992 WL 25758 (Del Ch, 1992).

²⁴⁸ *Gampel v Bolstein* 477 NYS 2d 1014 (NY Sup Ct, 1984).

²⁴⁹ *Little v Waters* 1992 WL 25758 (Del Ch, 1992) (n 247).

²⁵⁰ *Nixon v Blackwell* 626 A 2d 1366 (Del Ch, 1993).

²⁵¹ *Riblet Products Corp v Nagy* 683 A 2d 37 (Del Ch, 1996).

²⁵² Forest Hodge O'Neil, 'Oppression of Minority Shareholders: Protecting Minority Rights' (1987) 35(1) *Cleveland State Law Review* 121.

²⁵³ Harry J Haynsworth, 'The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension' (1987) 35(1) *Cleveland State Law Review* 25.

²⁵⁴ Robert B Thompson, 'The Shareholder's Cause of Action for Oppression' (1993) 48(2) *The Business Lawyer* 699.

²⁵⁵ Kimble C Cannon and Patrick J Tangney, 'Protection of Minority Rights under Delaware Law: Reinforcing Shareholders as Residual Claimants and Maximizing Long-Term Share Value by Restricting Directional Discretion' (1995) 3 *Columbia Business Law Review* 725.

Tangney,²⁵⁶ Peter V Letsou²⁵⁷ and Steven M Haas,²⁵⁸ George Parker Young,²⁵⁹ Vincent P Circelli²⁶⁰ and Kelli L Walter,²⁶¹ and Itai Fiegenbaum.²⁶² Their work is reviewed below.

In 1987, Forest O’Neil examined the causes of disputes among shareholders in closely-held corporations, such as basis conflicts of interests, the desire of minority shareholders for power and failure to keep proper records.²⁶³ He stated ‘the techniques used by controlling shareholders to eliminate minority shareholders from an enterprise or otherwise oppress them’.²⁶⁴ O’Neil also closely investigated the squeeze-out techniques that minority shareholders may use to protect their minority interests in companies. He stated that ‘a squeeze-out is often effected by a director or “inside” shareholder by purchasing the shares of a minority holder without disclosing information which bears on the value of the shares’.²⁶⁵ O’Neil also examined ‘advance planning and contractual arrangements that protect minority shareholders’.²⁶⁶ He found that statutory mergers were used ‘as an instrument for squeezing out minority shareholders or altering their rights’.²⁶⁷ In his study,²⁶⁸ O’Neil concluded that the most effective way to protect minority shareholders against squeeze-out ‘is to include in the charter or bylaws a provision requiring unanimity or a high vote’ by shareholders and directors.

The same year, Harry Haynsworth examined the effectiveness of involuntary dissolution suits as a remedy for close corporation dissension.²⁶⁹ He noted that, in a close corporation, dissention between shareholders can lead to ‘serious

²⁵⁶ Ibid.

²⁵⁷ Peter V Letsou and Steven M Haas, ‘The Dilemma That Should Never Have Been: Minority Freeze Out in Delaware’ (2005) 61(1) *The Business Lawyer* 25.

²⁵⁸ Ibid.

²⁵⁹ George Parker Young, Vincent P Circelli and Kelli L Walter, ‘Fiduciary Duties and Minority Shareholder Oppression from the Defence Perspective: Different Approaches in Texas, Delaware, and Nevada’ (2013) 45(3) *Texas Journal of Business Law* 257.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Itai Fiegenbaum, ‘The Controlling Shareholder Enforcement Gap’ (2019) 56(3) *American Law Journal* 583.

²⁶³ O’Neil (n 252).

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid 134.

²⁶⁷ Ibid.

²⁶⁹ Haynsworth (n 253).

deadlock, corporate paralysis and attempted squeeze-out or other oppressive action'.²⁷⁰ Haynsworth examined the remedies available for dealing with dissension, with a particular emphasis on involuntary dissolution suits. He concluded that the judges balanced the minority shareholders' interests and the management rights of majority shareholders by 'fashioning appropriate and innovative remedies to deal with oppression and other wrongful conduct'.²⁷¹ Haynsworth also found that dissolution suits are an 'effective method of resolving protracted close corporation dissension' and that the courts have done a 'highly credible job of fashioning remedies that are tailored to the specific factual situation presented'.²⁷² However, the courts in the United States are sometimes hesitant to order dissolution as they consider it an inadequate remedy.

In 1993, Robert Thomson examined the 'evolution of an involuntary dissolution action into a cause of action for oppression'.²⁷³ He found that the statutory grounds for judicial dissolution have been considerably broader and that most jurisdictions in the United States allow a shareholder to apply for dissolution on a variety of grounds such as 'illegality, fraud, misapplication of assets, and waste'.²⁷⁴ Thomson determined that 'the remedy has outgrown its dissolution origins and now is better described as a general remedy for shareholder dissension within a close corporation that rarely results in the dissolution of a corporation'.²⁷⁵ Furthermore, Thomson analysed an individual cause of action for breach of fiduciary duties in close corporations.²⁷⁶ In his analysis, Thomson concluded that 'both the shareholder's direct cause of action for a majority shareholder's breach of an enhanced fiduciary duty within a close corporation, and a statutory cause of action based on oppression or buyout or similar statutes, reflect the same concern for participants of close corporations'.²⁷⁷ Therefore, in the United States, dissolution is commonly used as an oppression remedy which rarely results in liquidation of the company. The courts apply this drastic remedy only as a last resort.

²⁷⁰ Ibid 25.

²⁷¹ Ibid 26.

²⁷² Ibid 61.

²⁷³ Thomson (n 254) 707.

²⁷⁴ Ibid 708.

²⁷⁵ Ibid 708.

²⁷⁶ Ibid 726.

²⁷⁷ Ibid 745.

In their 1995 study,²⁷⁸ Kimble Cannon and Patrick Tangney examined the protection of minority shareholder rights under Delaware law. They observed that the courts in Delaware have for a long time addressed the problem of how to protect company's shareholders when 'directorial decision-making is subject to self-interest at the expense of shareholders'.²⁷⁹ They noted that during mergers and acquisitions, directors are placed in situations where there are 'clearly defined risks to shareholders'.²⁸⁰ Cannon and Tangney argued that protecting the rights of minority shareholders accords with the courts' concern of increasing the share value, which 'informs the level of directorial discretion granted by Delaware law'.²⁸¹ Cannon and Tangney also reviewed common law tests relevant to minority shareholders' rights in the merger and equitable remedies.²⁸² They found that 'evident that the current structure for the protection of minority shareholders is incomplete, and therefore, inadequate as a vehicle for achieving effective protection of minority shareholder rights while preserving the integrity of directorial decision-making'.²⁸³ Cannon and Tangney concluded that further development and revision of the law is necessary for protection of minority shareholder rights.²⁸⁴ Therefore, as Delaware corporate law does not provide a statutory oppression remedy, protection for minority shareholders relies on fiduciary duty principles and judicially developed doctrines. As a result, claims for oppression must be carefully pleaded. In contrast, other states in the United States have adopted statutory protection for oppressed minority shareholders under the *MBCPA*, offering direct statutory claim for shareholders' oppression.

In 2005, Peter Letsou and Steven Haas examined the freeze-out strategy under Delaware law.²⁸⁵ They found that in Delaware, controlling shareholders who want to remove minority shareholders in companies 'have done so through freeze-out transactions negotiated with, and approved in advance by, the controlled

²⁷⁸ Cannon and Tangney (n 255).

²⁷⁹ Ibid 727.

²⁸⁰ Ibid.

²⁸¹ Ibid 729.

²⁸² Ibid 775.

²⁸³ Ibid 730.

²⁸⁴ Ibid 784.

²⁸⁵ Letsou and Haas (n 257).

subsidiary's board of directors'.²⁸⁶ They found that in 2001, a new form of freeze-out transaction had become very popular, taking the form of 'a tender offer by the controlling shareholder conditioned on the controlling shareholder's acquisition of at least 90% of the subsidiary's stock'.²⁸⁷ In their study,²⁸⁸ Letsou and Haas determined that 'these newer freeze-out transactions should be scrutinized under the same entire fairness test' as applied to traditional freeze-outs. However, if minority shareholders 'hold out', that is, refuse to sell their shares and resist a 'freeze-out', they risk liquidity and may ultimately be forced into a merger at a lower price for their shares. Moreover, they are generally not protected by oppression remedies, as merely refusing to sell does not constitute oppression, and their recourse is restricted to claims arising from breaches of fiduciary duties.

In 2013, George Young, Vincent Circelli, and Kelli Walter, examined fiduciary duties and minority shareholder oppression in Texas, Delaware, and Nevada.²⁸⁹ First, they investigated the fiduciary duty requirements in Texas and Delaware and stated that under the Delaware law, directors owe to the corporations fiduciary duties of care, loyalty and good faith.²⁹⁰ They pointed out that unlike Texas, Delaware has 'a case-specific approach designed to protect minority shareholders in limited circumstances, such as squeeze-out mergers and freeze-outs' which is done 'mostly through the way they interpret fiduciary and disclosure duties'.²⁹¹ They further provided an analysis of minority shareholder oppression in Nevada. In their findings,²⁹² Young, Circelli and Walter concluded that 'Texas would greatly benefit by modelling its development of this uncharted area of law' after the state of Delaware.

In 2019, Itai Fiegenbaum studied the enforcement gap in self-dealing transactions.²⁹³ While Australia offers legal measures to address self-dealing in companies and protect minority shareholders from such practices, the absence of clear procedural protections may lead to enforcement gaps similar to those

²⁸⁶ Ibid 30.

²⁸⁷ Ibid 26.

²⁸⁸ Ibid 28.

²⁸⁹ Young, Cirelli and Walter (n 259).

²⁹⁰ Ibid 266.

²⁹¹ Ibid 260.

²⁹² Ibid 322.

²⁹³ Fiegenbaum (n 262) 583.

identified by Fiegenbaum. He found that Delaware had an established framework for minimising the risk posed by this kind of controlling shareholder self-dealing.²⁹⁴ Fiegenbaum stated that the *DGCL* 'does not require such transactions to be subject to an intercorporate ratification mechanism'.²⁹⁵ Instead, he determined that litigation by private shareholders is the primary avenue that is used to enforce fiduciary obligations.²⁹⁶ Fiegenbaum also highlighted that freezeout transactions differ from non-freeze-out self-dealing in their impact on the minority's share ownership.²⁹⁷ He revealed that a successful freeze-out results 'in the elimination of the shareholder float and subsequent delisting of the corporation'.²⁹⁸ Whereas, according to Fiegenbaum, non-freeze-out transactions do not affect the composition of the shareholder base.²⁹⁹ Fiegenbaum concluded that self-dealing transactions permit controlling insiders 'to extract an outsized portion of the corporation's value, invariably at the expense of the minority shareholders'.³⁰⁰ In his study,³⁰¹ Fiegenbaum also concluded that the enforcement gap illustrated in the study leads to 'a more informed policy debate on the effective policing of managing shareholder non-freeze-out transactions' when there is self-dealing.

The corporate landscape in the United States is continually evolving, with corporations facing increasingly complex demands from both federal and state legislatures. Delaware corporation law governs many issues including, among other things, the corporate structures, the relationships between corporate managers and stockholders, and the company's mergers, all of which are considered internal affairs of Delaware companies. Its influence has resulted in significant changes to the broader corporate governance framework in the United States, with the state playing a central role in defining national governance practices.

²⁹⁴ Ibid 585.

²⁹⁵ Ibid 585.

²⁹⁶ Ibid 585.

²⁹⁷ Ibid 588.

²⁹⁸ Ibid 588.

²⁹⁹ Ibid 588.

³⁰⁰ Ibid 643.

³⁰¹ Ibid 644.

The next sections of this chapter review the literature on corporate governance and shareholder rights in Canada. This is followed by a review of the literature pertaining to Germany, Singapore and India.

2.3.4 Corporate Governance and Shareholders Rights in Canada

In their examination of corporate practices in Canada, presented in Chapter 4 of *The Corporate Governance Review*, a book by Willem J Calkoen,³⁰² Andrew MacDougall and John Valley found that Canadian corporate practices are situated between those of the United Kingdom and the United States, which are similar in many respects. They revealed that a company in Canada is more likely than a company in the United States to have a chair who is not the chief executive officer, and usually has fewer executives on the board than a corporation in the United Kingdom.³⁰³ MacDougall and Valley also pointed out that the legal rules in Canada are derived from 'provincial corporate statutes, securities laws and rules, stock exchange requirements and common law, as well as a wide variety of other regulatory statutes, regulations and policies'.³⁰⁴ In their findings,³⁰⁵ MacDougall and Valley concluded that issues such as board diversity or investors' interest 'will require companies to actively monitor' these changes. Following the view of MacDougall and Valley, Canadian corporate governance practices comprise a framework of rules designed to ensure fair and accountable conduct in companies, similar to the approaches adopted by the United Kingdom and the United States.

In Canada, oppression remedies are one of the areas where 'a significant amount of borrowing from other jurisdictions occurred'.³⁰⁶ They were adopted from the United Kingdom company law as introduced by the British Parliament in the *Companies Act of 1948* (UK). The Canadian oppression remedy was first introduced in 1960 in the *British Columbia Companies Act*. The 1962 Report of the Company Law Committee of the Board of Trade (the UK Jenkins committee)

³⁰² Willem JL Calkoen, *The Corporate Governance Review* (Law Business Research, 10th ed, 2019) 48, 48.

³⁰³ Ibid.

³⁰⁴ Ibid 48.

³⁰⁵ Ibid 50.

³⁰⁶ Brian Cheffins, 'The Oppression Remedy in Corporate Law: The Canadian Experience' (1988) 10(3) *University of Pennsylvania Journal of International Law* 305, 307.

identified various shortcomings in s 210 of the *Companies Act of 1948* (UK).³⁰⁷ Applicants under s 210 of the *Companies Act of 1948* (UK) had to provide justification for the winding-up of the corporation and to show that ‘under the circumstances of their case, a dissolution would be unfair or prejudicial to some of the shareholders’.³⁰⁸ A study on s 210 of the *Companies Act of 1948* (UK), completed by the Jenkins Committee, indicated that ‘it was unnecessary to tie the oppression remedies to the provisions for winding-up’.³⁰⁹ Thus, as noted by Brian Cheffins,³¹⁰ when the new *British Columbia Companies Act* was passed in 1973, the oppression remedies were modified in accordance with the 1962 recommendations by the Jenkins Committee in England.

Consequently, in Canada’s mid-1970s corporate laws, major reforms were undertaken which culminated in the enactment of the 1975 *Canada Business Corporations Act*.³¹¹ This resulted in today’s s 241 of *Canada BCPA*, enacting a statutory oppression remedy that granted the court ‘unprecedented discretionary power to award relief in cases where minority shareholders had suffered oppressive or prejudicial’ conduct.³¹² Robert Dickerson, John Howard and Leon Getz observed that the Dickerson Committee, drawing on the Jenkins Committee report, suggested a vast range of remedies for oppression by the controlling shareholders in companies.³¹³ The Dickerson Committee stated: ‘the stability of the corporate form as a legal device in a world of constant change reflects its flexibility and adaptability’.³¹⁴ Today’s s 241 of the *Canada BCPA* originated from and was reformed based on the recommendations in the Dickerson Report,³¹⁵ made by the Dickerson Committee in its 1971 report. Consequently, the oppression remedies found today in s 241 of the *Canada BCPA* were borrowed directly from s 210 of the *Companies Act of 1948* (UK).

³⁰⁷ Board of Trade, *Report of the Company Law Committee* (Report, June 1962).

³⁰⁸ L M Schaef, ‘The oppression Remedy for Minority Shareholders’ (1985) 23(2) *Alberta Law Review*, 512, 513.

³⁰⁹ *Ibid.*

³¹⁰ Cheffins (n 306) 311.

³¹¹ Greta M Fung, ‘A Common Goal from Two Different Paths: Protection of Minority Shareholders in Delaware and Canada’ (1993) 57(1) *Albany Law Review* 41, 73.

³¹² *Ibid.*

³¹³ Robert WV Dickerson, John L Howars and Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Information Canada, 1971).

³¹⁴ *Ibid.* 2.

³¹⁵ The committee chaired by Robert WV Dickerson, commissioned to make recommendations for the reform of corporate law in Canada issued the *Proposal for a New Business Corporations Law for Canada*, Vol 1, Commentary (Information Canada, 1971), which led to enhancement of the *CBCPA*.

In 1988, Brian Cheffins examined the 'Canadian experience with oppression remedy'.³¹⁶ Cheffins explored the history of the oppression remedy and stated that the most influential jurisdictions for remedies for minority shareholders were the United States and England.³¹⁷ According to Cheffins, the Canadian oppression remedy is 'an open-ended remedy with few procedural obstacles'.³¹⁸ Cheffins observed that the case of *Diligenti v RWMD Operations Inc*,³¹⁹ was the most striking case illustrating judicial opposition to procedural obstacles, which held that when equitable rights and obligations exist between company's shareholders, they belong to the shareholders themselves, and if breached, the court may grant appropriate relief.³²⁰ Cheffins noted that the courts in Canada have been 'unreceptive to arguments which would impose procedural limitations on the availability of the remedy'.³²¹ He concluded that the 'open-ended' nature of the oppression remedy in Canada is associated with its success.³²² This is because this remedy was drafted to eliminate procedural barriers and, as result, the courts 'have generally resisted attempts to impose categorical bars on access to the remedy', as Cheffins further determined.³²³ He found that this flexibility has enabled the oppression remedy to be applied 'in a wide variety of circumstances'.³²⁴ This thesis will adopt this approach, which the researcher will explain later.

In Canada, the transaction will be presumed fair by the Canadian courts if it has been completed through a 'fair process', according to Greta Fung.³²⁵ In 1993, Fung examined two leading Ontario cases in this regard: *Brant Investments Ltd v KeepRite Inc*,³²⁶ and *Olympia & York Entertainment Ltd v Hiram Walker Resources Ltd*.³²⁷ Fung noted that the first decision is 'consistent with the

³¹⁶ Cheffins (n 306).

³¹⁷ Ibid 307.

³¹⁸ Ibid 314.

³¹⁹ *Diligenti v RWMD Operations Inc* [1976] 1 BCLR 36, cited in Cheffins (n 306) 315.

³²⁰ Cheffins (n 306) 315.

³²¹ Ibid 314.

³²² Ibid 338.

³²³ Ibid 338-9.

³²⁴ Ibid 339.

³²⁵ Fung (n 311) 78.

³²⁶ *Brant Investments Ltd v KeepRite Inc* [1987] 60 OR 2d 737, cited in Fung (n 311) 80.

³²⁷ *Olympia & York Entertainment Ltd v Hiram Walker Resources Ltd* [1996] 59 OR 2d 254, cited in Fung (n 311) 80.

Delaware court's philosophy that unless there is unfairness, then the statutory appraisal would be an adequate remedy'.³²⁸ Fung further observed that, according to the court in the second case, it would be unfair 'for all shareholders to be compelled to take less than proper value for their shares'.³²⁹ Fung also compared shareholders' protection in Delaware and Canada, and concluded that the courts in both countries use comparable norms and consider similar indicia when determining whether the reasonable expectations of the company's shareholders have been violated.³³⁰ Therefore, in both countries, the reasonable expectations of shareholders are the basis of oppression claims.

In 2016, Mohamed Khimji and Jon Viner evaluated 'the efficiency of the oppression action as a default contractual term between all corporate stakeholders'.³³¹ They highlighted that the Canadian oppression action has been praised as 'the broadest, most comprehensive and most open-ended shareholder remedy in the common law world'.³³² This action 'has been brought, not only by shareholders, but also by a variety of other corporate stakeholders including lenders, debenture holders, trade creditors, and employees'.³³³ Khimji and Viner determined that the judicial understanding of the oppression action has made it a default term in all corporate law relationships.³³⁴ They concluded that the litigation expenses could decrease with a default term that limits the oppression action to minority shareholders in private companies.³³⁵ They argued that this is because minority shareholders invest in the corporations, while other corporate stakeholders enter into contractual relationships with the company and can resolve disputes through contract law.³³⁶ In their study,³³⁷ they determined that 'a general "fair treatment" clause in all corporate relationships unnecessary reduces all of the corporate law to a muddy default', and that 'a default term in the form of

³²⁸ *Investments Ltd v KeepRite Inc* [1987] 60 OR 2d 737, cited in Fung (n 311) 80.

³²⁹ *Ibid.*

³³⁰ *Ibid.* 90.

³³¹ Mohamed F Khimji and Jon Viner, 'Oppression-Reducing Canadian Corporate Law to a Muddy Default' (2016) 47(1) *Ottawa Law Review* 123, 123.

³³² *Ibid.* 128.

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.* 176.

³³⁶ *Ibid.* 176.

³³⁷ *Ibid.* 177.

the oppression action is inefficient as the parties would prefer to have their rights' clearly defined.

It is evident that, Canada, as a constitutional monarchy and a parliamentary democracy, occupies a unique position between the United Kingdom's unitary broad structure and the influential system of the United States. Drawing from the United Kingdom's model and influenced by the United States developments, Canadian practice is shaped by relevant principles and concepts from both nations. As a result, Canadian corporate governance has become a strong and effective governance model that continues to evolve, gaining the trust of investors.

The corporate governance and oppression laws in Germany, as a civil law country, are outlined in the following section.

2.3.5 Corporate Governance and Shareholders Rights in Germany

In his study of corporate systems,³³⁸ Oliver Krackhardt observed that the United States and Germany have different corporate structures, and identified their main differences. He studied the rules from Germany and the United States that are suitable for New Zealand, taking its specific needs into account.³³⁹ Krackhardt noted that in the United States, the 'corporate system is characterised by a single-tier board (board of directors)'.³⁴⁰ He determined that there is a separation between ownership and control and that 'one of the major goals of the United States corporate legislation is to control the power of directors and protect minority shareholders' rights'.³⁴¹ Krackhardt revealed that 'German corporate law is characterised by a two-tier board system': the managing board and the supervisory board.³⁴² He noted that several main criticisms of German corporate governance include: 'a lack of transparency; a lack of focus on shareholder interest; the two-tier board structure; and a lack of independence on supervisory

³³⁸ Oliver Krackhardt, 'New Rules for Corporate Governance in the United States and Germany – A Model for New Zealand' (2005) 36(2) *Victoria University of Wellington Law Review* 319, 323.

³³⁹ Ibid 320.

³⁴⁰ Ibid 321.

³⁴¹ Ibid 321-2.

³⁴² Ibid 320.

boards and among auditors'.³⁴³ Krackhardt concluded that 'corporate governance cannot be regulated once and then forgotten about', but should instead be constantly reviewed to ensure that the principles are kept up to date and they are 'suitable for the current business environment'.³⁴⁴ According to Krackhardt, even though the company board in Germany is divided into a managing board and a supervisory board responsible for overseeing and controlling the management board of the corporation, the system is often criticised for its lack of transparency.

In a recent study,³⁴⁵ Jurgen Odenius found that in common law jurisdictions, corporate governance is focused on maximising shareholder value, whereas in other regions, including Europe and Asia, the emphasis remains on stakeholder value, despite major reforms that have more strongly taken the shareholder value into account. According to Odenius, these reforms were intended to achieve two main objectives: '(i) improving the functioning of the traditional insider-controlled corporate governance structure, while (ii) fostering capital market development'.³⁴⁶ These reforms have led to the emergence of a 'hybrid system' that integrates the traditional stakeholder-oriented system with key elements of the shareholder-oriented system.³⁴⁷ As a result, the influence of outsiders, particularly minority shareholders, has increased, and 'insider control has been reined in'.³⁴⁸ Due to the evident weaknesses in internal control, Odenius concluded that it is crucial to strengthen the effectiveness of external control in order to improve the efficiency of corporate and economy-wide allocation.³⁴⁹ In his analysis,³⁵⁰ Odenius suggested that 'striking defensive measures from the German takeover law and empowering markets' could be a significant step in this regard. Accordingly, Odenius' study emphasises that the German corporate governance system has many distinctive features that differ from the common law approach, with these differences continuing to evolve.

³⁴³ Ibid 325.

³⁴⁴ Ibid 357-8.

³⁴⁵ Jurgen Odenius, 'Germany's Corporate Governance Reforms: Has the System Become Flexible Enough?' (Working Paper No 179/2008, International Monetary Fund, July 2008) 3.

³⁴⁶ Ibid 7.

³⁴⁷ Ibid 15.

³⁴⁸ Ibid 15.

³⁴⁹ Ibid 15-6.

³⁵⁰ Ibid 15-6.

In 1993, Hugh Scogin examined the German experience with ‘close corporation problem’ and the doctrines of ‘withdrawal’ and ‘expulsion’.³⁵¹ Scogin explored the historical context of the German doctrines of ‘withdrawal’ and ‘expulsion’, which were initially suggested during the ‘Weimar period’ (recognised as between 1919-1933), when the courts were restricted to dissolution provided in *GmbH* law.³⁵² Scogin found that these doctrines were accepted during the Third Reich era from 1933 to 1945, and continued to be used in the post-war period.³⁵³ Scogin argued that the leading post-war case in this regard is the Judgement of 1 April 1953, BGHZ II ZR 235/52 (1953) (Ger),³⁵⁴ in which the court set the conditions under which the expulsion remedy may be granted, i.e., first, ‘the action must be confirmed by a court order’ and second, that ‘the court must provide a valuation of the expelled shareholder’s equity share’.³⁵⁵ Scogin concluded that ‘withdrawal’ and ‘expulsion’ remedies ‘place personal aspects of shareholder relationships at the centre of law’s attention’.³⁵⁶ Scogin further established that ‘in doing so, the normative basis for court action, has been shifted’ from contractual concerns so they can form clear rules formulated by statute.³⁵⁷ Drawing from Scogin’s study, ‘withdrawal’ and ‘expulsion’ remedies offer aggrieved shareholders a basis for judicial action before the German courts in order to protect their rights and interests.

In 2006, Udo Braendle stated that shareholder claims are a tool to control management in the company.³⁵⁸ He observed that, in Germany, an individual shareholder cannot file a lawsuit in the company’s name.³⁵⁹ Braendle also revealed that, under s 147 of the *AktG*, minority shareholders owning more than 10% of the share capital can pursue a claim for damages on behalf of the corporation.³⁶⁰ Personal and class actions are not recognised under German law;

³⁵¹ Hugh T Scogin Jr, ‘Withdrawal and Expulsion in Germany: A Comparative Perspective on the “Close Corporation Problem”’ (1993) 15(1) *Michigan Journal of International Law* 127, 131.

³⁵² *Ibid* 132.

³⁵³ *Ibid* 133.

³⁵⁴ Bundesgerichtshof [German Federal Court of Justice], II ZR 235/52, 1 April 1953 reported in (1953) 9 BGZH 157.

³⁵⁵ *Ibid*, cited in Scogin (n 351) 154.

³⁵⁶ Scogin (n 351) 183.

³⁵⁷ *Ibid*.

³⁵⁸ Udo C Braendle, ‘Shareholder Protection in the USA and Germany – “Law and Finance” Revisited’ (2006) 7(3) *German Law Journal* 257, 272.

³⁵⁹ *Ibid*.

³⁶⁰ *Ibid*.

however, Braendle noted that under s 117 of the *AktG*, a shareholder may bring direct claim.³⁶¹ Moreover, Braendle determined that, in the United States, shareholders may sell ownership of the company ‘when the corporation objects to certain fundamental changes such as mergers, asset dispositions and changes in the articles of incorporation’.³⁶² In relation to Delaware law, Braendle stated that it ‘does not grant this right for the sale of assets’ but shareholders may be entitled to it under certain circumstances such as demergers.³⁶³ Braendle concluded that in the United States, the board of directors and the executives hold significant power, whereas in Germany, larger shareholders have more influence, a distinction attributed to the mandatory nature of German company law.³⁶⁴ Building on Braendle’s study, it is evident that experiences in Germany and the United States with oppression remedies reflect two very different approaches to resolving corporate disputes.

Moreover, in 2022, Alan Koh examined Germany’s shareholder protection in close corporation law, introducing and defining the ‘withdrawal’ concept.³⁶⁵ Koh used the term ‘withdrawal’ as a term covering ‘unfair prejudice remedy (UK) and *Austritt aus wichtigem Grund* (Germany)’.³⁶⁶ However, in the United Kingdom, the ‘withdrawal’ concept, as defined by Koh, is contained in the ‘unfair prejudice’ remedy (now covered in ss 994-996 of the *United Kingdom CMA*), although they differ.³⁶⁷ Koh found that the ‘withdrawal’ concept refers to buy-out and the ‘unfair prejudice’ to one of many reliefs that may be granted by the court under statutory ‘unfair prejudice’ rule.³⁶⁸ Further, Koh noted that German law focuses on breaches of law, whereas the United Kingdom distinguishes between ‘unfairly prejudicial’ and merely ‘prejudicial’.³⁶⁹ Koh determined that closer analysis of the two regimes’ stance on the ‘withdrawal’ concept ‘reveals critical differences’ and reflects ‘two contrasting models of withdrawal’.³⁷⁰ Koh also concluded that

³⁶¹ Ibid.

³⁶² Ibid 273.

³⁶³ Ibid.

³⁶⁴ Ibid 275-276.

³⁶⁵ Alan K Koh, ‘Shareholder Withdrawal in Close Corporations: An Anglo-German Comparative Analysis’ (2022) 22(1) *Journal of Corporate Law Studies* 197, 199.

³⁶⁶ Ibid.

³⁶⁷ Ibid 203.

³⁶⁸ Ibid.

³⁶⁹ Ibid 207.

³⁷⁰ Ibid 227.

improving the law in the United Kingdom ‘regarding non-fault withdrawal would be a worthwhile endeavour’.³⁷¹

As a member of the European Union, Germany is significantly influenced by European Union directives, such as Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.³⁷² These directives stipulate the key shareholder rights in such companies. Accordingly, the European Union plays a crucial role in shaping German laws, as Germany often implements amendments to its legislation to comply with European Union directives.

2.3.6 Corporate Governance and Shareholders Rights in Singapore

In Singapore, Mak Yuen Teen and Philip Phan’s analysis of the country’s corporate governance system revealed that it is ‘loosely based on the Anglo-American model’.³⁷³ Their findings showed that a high ownership concentration in the company management could potentially violate ‘the principle of the decision management and decision ratification’ leading to the ‘expropriation of wealth from minority shareholders to large shareholders’.³⁷⁴ Moreover, in Singapore, Paul Thompson and Agnes Hung found that ‘there is widely held perception that good corporate governance leads to good corporate results’.³⁷⁵ However, in his study,³⁷⁶ Haider Khan argued that the resilience of corporations in Singapore during modern economic crises can be attributed to effective ‘financial markets, government oversight and cooperation and coordination among the major domestic players’ within an open and competitive market system.

³⁷¹ Ibid.

³⁷² Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L184/17, *Publications Office of the European Union* (Web Document, 2024) <<https://eur-lex.europa.eu/eli/dir/2007/36/oj/eng>>.

³⁷³ Mak Yuen Teen and Philip H Phan, ‘Corporate Governance in Singapore: Recent Developments for the Next Millennium’ 2000 37(2) *Philippine Review of Economics* 68, 72.

³⁷⁴ Ibid 73.

³⁷⁵ Paul Thompson and Agnes Chu Hung, ‘Cracking the Singapore Code of Corporate Governance: A Step Towards World-Class Corporate Governance and Superior Performance?’ (Research Paper No 09/2002, Nottingham University Business School, The University of Nottingham, 2002) 7.

³⁷⁶ Haider A Khan, ‘Corporate Governance in Singapore and Hong Kong: What Can the Other Asian Economies Learn?’ (Discussion Paper No 228, July 2003) 15.

Corporate governance in Singapore is also governed by common law, which is based on the fiduciary duties of directors.³⁷⁷ As stated by Luh Luh Lan, Singapore adopted its corporate governance regime to meet international standards while addressing the needs of local companies, using both hard and soft law.³⁷⁸ Lan found that Singapore is now recognised for achieving ‘the highest international standards of corporate governance’, despite facing many challenges over the last five decades.³⁷⁹ According to Lan, the corporate landscape in Singapore ‘has traditionally been dominated by highly concentrated shareholding structures’.³⁸⁰ Lan observed that this structure poses ‘challenges in ensuring the accountability of controlling shareholders and protecting minority shareholder interests’.³⁸¹ According to Lan’s analysis, Singapore’s commitment to high corporate governance standards has led to its being recognised as having one of the world’s best corporate governance.

In Singapore, the *Companies Act* 1967 (Cap 50) (Singapore) is the primary legislation governing companies.³⁸² It was based on the Australian *Uniform Companies Act* of 1961, which was developed from the United Kingdom *Companies Act* of 1948.³⁸³ Consequently, it is a mixture of Australian and English laws, with elements from ‘Canada, New Zealand and Hong Kong, substantially modified by locally-drafted legislation’.³⁸⁴ Thus, the origins of s 216 of the *Singapore CMA* are found in s 210 of the United Kingdom *Companies Act* of 1948, the provisions on oppression in the Australian *Uniform Companies Acts* of 1961, and in the recommendations from the Report of the Company Law Committee 1962 (the Jenkins Committee Report of 1962).³⁸⁵ Singapore’s s 216 of the *Singapore CMA* has its roots in 1967, when the Singaporean *Companies*

³⁷⁷ Luh Luh Lan, ‘Corporate Governance in Singapore – The Road Thus Far’ (Working Paper No 667/2022, National University of Singapore and European Corporate Governance Institute, February 2023) 7.

³⁷⁸ Ibid 4.

³⁷⁹ Ibid 5.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Rini Agrawal, ‘The Legal Overview of Singapore’s Corporate Sector’ (2017) 4(3) *Court Uncourt* 15, 15.

³⁸³ Julie L Y Huan, ‘The Director’s Duty of Care: A Comparative Analysis of Delaware and Singapore Laws’ (1998) 12(2) *Columbia Journal of Asian Law* 279, 284-5.

³⁸⁴ Walter Woon, ‘Reforming Company Law in Singapore’ (2011) 23 *Singapore Academy of Law Journal* 795, 795.

³⁸⁵ Seah Chi-Ling, ‘Bondholder Rights and the Section 216 Oppression Remedy’ (2011) *Singapore Journal of Legal Studies* 432, 433.

Act of 1967 was enforced.³⁸⁶ However, unlike the United Kingdom legislation, under s 216 of the *Singapore CMA*, there is no stipulation of 'just and equitable' for the company to be wound up before the court grants a relief.³⁸⁷ Section 216 of the *Singapore CMA* includes terms such as 'oppression', 'unfair discrimination', 'otherwise prejudicial', and 'disregard of interests'.³⁸⁸ As a result, in theory, s 216 of the *Singapore CMA* may provide minority shareholder with 'a fair amount of ammunition' to protect their interests,³⁸⁹ therefore, providing a powerful remedy for minority shareholders wanting to petition in cases of oppressive conduct.

Seah Chi-Ling, in her work pertaining to Singapore, traced 'the origins of the references to 'debentureholders' in s. 216' of the *Singapore CMA*, in the United Kingdom *Companies Act* of 1948, in the Australian *Uniform Companies Act* of 1961, and also the recommendations of the Jenkins Committee Report in 1962.³⁹⁰ According to Chi-Ling, the references to 'debentureholders' in the oppression provisions could be traced to Gower's recommendations incorporated in the Ghana legislature of 1961, which outlined the reforms to the *Ghana Companies Ordinance*.³⁹¹ Chi-Ling emphasized that even though the 'debentureholders' limb has been present in s 216 of the *Singapore CMA* since 1967, it was not used 'due to the general perception that bonds are essentially creatures of contract and hence the rights of bondholders should be strictly confined to the contractual realm'.³⁹² As Chi-Ling's analysis suggests, s 216 of the *Singapore CMA* offers protection to 'debentureholders' of the company and allows holders of debentures to take oppression action when those in control engage in oppressive conduct. However, in practice, this provision seems to be overlooked.

Moreover, Pearlie Koh studied the scope of the oppression remedy in Singapore by carefully analysing Singaporean cases, and comparing them to approaches

³⁸⁶ Walter Woon, 'Protecting the Minority Shareholders' (1992) 4 *Singapore Academy of Law Journal* 123, 123.

³⁸⁷ Ibid 123-4.

³⁸⁸ Hans Tjio, 'An Empirical Look at the Consequences of Oppression Actions in Singapore' (2017) 17(2) *Journal of Corporate Law Studies* 405, 409-10.

³⁸⁹ Pearlie Koh, 'For Better or for Worse: The statutory Derivative Action in Singapore' (1995) 7 *Singapore Academy of Law Journal* 74, 80.

³⁹⁰ Chi-Ling (n 385) 433.

³⁹¹ Ibid.

³⁹² Ibid 455.

used in other common law jurisdictions.³⁹³ He found that s 216 of the *Singapore CMA* is based on the concepts of ‘unfairness, albeit assessed contextually’.³⁹⁴ As Koh stated, compared to the English provision, relevant conduct must be both ‘prejudicial’ and ‘unfair’.³⁹⁵ Koh concluded that a company is a mixture of ‘different interests, rights and expectations that have to be kept in harmony, and it is important, in any attempt to protect the minority, that the balance is not tilted too far in favour of the minority so as to be counter-productive’.³⁹⁶ Therefore, as demonstrated by Koh in her study,³⁹⁷ any uncertainty regarding the scope of oppression remedies should be clarified.

Also, Hans Tjio traced the history of Singaporean oppression claims.³⁹⁸ He compared the Singaporean ‘commercial unfairness’ test for shareholders’ oppression with United Kingdom ‘contractarian approach’ for ‘unfairly prejudicial’ conduct.³⁹⁹ Tjio reported that in the Court of Appeal judgement in *Over & Over Ltd v Bonvests Holdings Ltd*,⁴⁰⁰ the court held that ‘even in the case of ‘single-act’ (as opposed to ‘continuing conduct’) injustice, such as dilutive rights issue, the test of oppression was a broad one of fairness’.⁴⁰¹ Tjio noted that in Singapore, litigation has become more complex because of the ‘commercial unfairness’ approach.⁴⁰² He found that Singaporean courts have not adopted the ‘contractarian approach’ for unfairly prejudicial conduct.⁴⁰³ He also concluded that if the complexity and costs of litigation are seen as obstacles in oppression cases, consideration should be given to providing guidance to the courts on the general application of the ‘commercial unfairness’ test.⁴⁰⁴ In line with Tjio’s analysis, while minority oppression provides grounds for a claim before the Singaporean courts, the ‘commercial unfairness’ approach has increased the complexity of the process.

³⁹³ Pearlie M C Koh, ‘A Reconsideration of the Shareholder’s Remedy for Oppression in Singapore’ (2013) 42 *Common Law World Review* 61, 61.

³⁹⁴ *Ibid* 67.

³⁹⁵ *Ibid*.

³⁹⁶ *Ibid* 90.

³⁹⁷ *Ibid* 90.

³⁹⁸ Tjio (n 388) 407.

³⁹⁹ *Ibid*.

⁴⁰⁰ *Over & Over Ltd v Bonvests Holdings Ltd* [2010] SGCA 7, cited in Tjio (n 388) 407-8.

⁴⁰¹ Tjio (n 388) 407-8.

⁴⁰² *Ibid*, 419.

⁴⁰³ *Ibid* 422.

⁴⁰⁴ *Ibid* 422-423.

2.3.7 Corporate Governance and Shareholders Rights in India

India, as a former British colony, has been following developments in the United Kingdom's company law.⁴⁰⁵ According to Meghna Thapar and Arjun Sharma, the *India CMA* introduced progressive and transparent processes that benefit stakeholders, directors and company's management.⁴⁰⁶ Thapar and Sharma observed the board-of-directors' crucial role in governance.⁴⁰⁷ They also examined the need for effective control over company affairs 'in the interest of the company and minority shareholders'.⁴⁰⁸ According to Thapar and Sharma, 'corporate governance ensures strict and efficient application of management practices along with legal compliance in the continually changing business scenario in India'.⁴⁰⁹ They found that 'the corporate practices in India emphasize the functions of audit and finances that have legal, moral and ethical implications for the business and its impact on the shareholders'.⁴¹⁰ Thapar and Sharma concluded that 'corporate governance not only protects the management but also the interests of the stakeholders, fostering India's economic progress in the global economies'.⁴¹¹ Hence, consistent with Thapar and Sharma's analysis, corporate governance in India is a fundamental aspect of corporations, focusing on the board of directors and the legal and ethical implications for corporations.

In India, the oppression remedy in s 241 of the *India CMA* of 2013 was first found in s 153(1)(a) of the Indian *Companies Act* of 1913, which protected minority shareholders from 'oppression' and 'mismanagement' in Indian companies. This Act mandated that if 'just and equitable' to do so, the company could be wound up. The oppression remedy present in s 210 of the United Kingdom *Companies Act* of 1948, was adopted, in s 397 of the Indian *Companies Act* of 1956, as

⁴⁰⁵ Harpreet Kaur, *Facets of Corporate Governance and Corporate Social Responsibility in India* (Springer, 2021) ix.

⁴⁰⁶ Meghna Thapar and Arjun Sharma, 'Corporate Governance in India: An Analysis' (2017) 4(1) *Journal of Economic and Social Development* 81, 84.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.* 86.

⁴¹¹ *Ibid.*

observed by Umakanth Varottil.⁴¹² This provision prohibited conduct that is 'oppressive' to any member or members of the company (including any one or more of themselves).⁴¹³ As noted by Pradeep Jain,⁴¹⁴ the shareholders' oppression remedy under s 397 of the Indian *Companies Act* of 1956 was a foundation shareholders' oppression remedy for half a century.

In 2009, on the recommendation of the Parliamentary Standing Committee on Finance, ss 397 and 398 of the *Companies Act* of 1956 were replaced by s 241 and 242 in the *India CMA*, enacted in 2013. These changes were aimed at protecting minority shareholders from 'oppressive' and 'prejudicial' conduct. Therefore, as observed by Jain, s 241 of the *India CMA* tracks its predecessor in ss 397 and 398 of the Indian *Companies Act* of 1956, even though the *India CMA* of 2013 expanded and contrasted the shareholder remedies.⁴¹⁵ According to Jain, the legislator lowered the standard that the petitioner is required to meet before it revoked the oppression remedy, by introducing 'prejudice' aside from 'oppressive' behaviour.⁴¹⁶ Accordingly, while s 241 of the *India CMA* grants individual members in Indian companies the right to seek relief and prevent 'oppressive' and 'prejudicial' conduct, India still faces challenges in enforcing the provision.

In his study of Indian legislation,⁴¹⁷ Rishi Dugar observed that *Needle Industries (India) v Needle Industries Newey (India) Holding Ltd*⁴¹⁸ is a landmark case regarding minority oppression which 'continues to be an authority' in this area. In this case,⁴¹⁹ the Supreme Court rejected the petition for oppression and held that an illegal act, unless accompanied by 'mala fide' intention will not itself be treated

⁴¹² Umakanth Varottil, 'Unpacking the Scope of Oppression, Prejudice and Mismanagement under Company Law India' (Working Paper No 2020/020, NUS Law, July 2020) 6.

⁴¹³ *Companies Act* 1956 s 397(1).

⁴¹⁴ Pradeep Kumar Jain, *Corporate Acquisition and Merges in India* (Kluwer Law International 3rd ed, 2020) 4-5; See also s 398 of the Indian *Companies Act* of 1956, which stated that any member of the company could apply to the Tribunal complaining that '(a) the affairs of the company are being conducted a manner prejudicial to the public interest or in a manner prejudicial to the interests of the company;' (b) that a significant change has occurred in the management of the company, such as a change in the board of directors.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*

⁴¹⁷ Rishi M Kumar Dugar, 'Minority Shareholders Buying Out Majority Shareholders – An Analysis' (2010) 22(2) *National Law School of India Review* 105, 105.

⁴¹⁸ *Needle Industries (India) v Needle Industries Newey (India) Holding* [1981] SC 1298, cited in Dugar (n 417) 105.

⁴¹⁹ *Ibid.*

as oppressive. Dugar noted that the principles as defined in *Needle Industries (India) v Needle Industries Newey (India) Holding Ltd*⁴²⁰ were restated in *Dale and Carrington Investment (P) Ltd v PK Prathapan*,⁴²¹ where the Court held that 'the oppressor cannot be permitted to buy out the oppressed'.⁴²² Dugar determined that the duty of the court is to protect the company's interests, which always prevail and must be protected.⁴²³ These decisions, concerning oppression and mismanagement in Indian companies, specify that one act may not be sufficient for the court to establish oppression by majority shareholders.

Moreover, Sadhana and Kannappan studied the majority rule and minority shareholders' rights in India.⁴²⁴ They traced the origin of majority rule to *Foss v Harbottle*,⁴²⁵ which states that the proper plaintiff for the wrong done to the company is the company itself.⁴²⁶ Sadhana and Kannappan found that the Indian courts followed the majority rule allowing the majority shareholder's irregular rights to be made regular by resolution.⁴²⁷ Sadhana and Kannappan also examined the Indian case *Electric Supply Corpn Ltd v Nageshwara Rao*,⁴²⁸ where it was held that as long as directors in the company act within powers given under the articles of association of the company, the court will not interfere in the company's internal affairs.⁴²⁹ Also, Sadhana and Kannappan observed that the court in *Sri Ramdas Motor Transport Ltd v Tadi Adhinarayana Reddy*⁴³⁰ held that any member has the right to apply for an order if they believe that the company's affairs are being conducted in a prejudicial or oppressive manner.⁴³¹ Sadhana and Kannappan also examined the class action suit in India and the United States, and stated that it serves as an opportunity for the affected parties to join together.⁴³² Sadhana and Kannappan concluded that the majority rule in India 'is

⁴²⁰ Ibid.

⁴²¹ *Dale and Carrington Investment (P) Ltd v PK Prathapan* [2005] 1 SCC 212, cited in Dugar (n 417) 109.

⁴²² Dugar (n 417) 109.

⁴²³ Ibid 110.

⁴²⁴ S Sadhana and M Kannappan, 'A Study on the Oppression of the Minority Shareholders in India with Reference to the Majority' (2018) 119(17) *International Journal of Pure and Applied Mathematics* 887, 888.

⁴²⁵ [1843] 2 Hare 461, cited in Sadhana and Kannappan (n 424) 891.

⁴²⁶ Sadhana and Kannappan (n 424) 891.

⁴²⁷ Ibid 894.

⁴²⁸ *Electric Supply Corpn Ltd v Nageshwara Rao* AIR [1956] SC 213, cited in Sadhana and Kannappan (n 424) 894.

⁴²⁹ Sadhana and Kannappan (n 424) 894.

⁴³⁰ *Sri Ramdas Motor Transport Ltd v Tadi Adhinarayana Reddy* [1997] SC 2189, cited in Sadhana and Kannappan (n 424) 895.

⁴³¹ Sadhana and Kannappan (n 424) 895.

⁴³² Ibid 896.

not followed in its strict sense',⁴³³ and that the introduction of class action will lead to fewer minority oppression lawsuits as it involves a group of people against one defendant.⁴³⁴ Accordingly, in India, consistent with Sadhana and Kannappan's analysis, the low thresholds for class action claims against oppression provide an opportunity for oppressed minority shareholders to protect their rights.

Furthermore, Ashutosh Misra studied the concept of mismanagement and oppression under the *India CMA*, and the grounds that defines them.⁴³⁵ Misra examined the grounds for lodging complaint against mismanagement and oppression, as well as the court's jurisdiction.⁴³⁶ By comparing the changes in the *India CMA* and the *Companies Act* of 1956, Misra found that 'the minority has been incapable or unwilling due lack of time, recourse or capability-financial or otherwise' to protect their interest.⁴³⁷ Misra's concluded that 'the protection of the independent directors and the minority shareholders goes hand-in-hand and thereby, it is necessary for their protection and for the existence of corporate governance'.⁴³⁸ Finally, in her study,⁴³⁹ Misra emphasised that *India CMA* significantly strengthens the minority shareholders' protection.

Lastly, corporate governance in Singapore and India have a significant impact on the economies of both countries. The Singaporean regulatory framework adopts a rule-based approach, supported by corporate law and securities regulations. This approach creates a strong corporate environment, with governance rules that assist companies to promote responsible behaviours. Similarly, India's corporate governance has improved with the adoption of the Indian *Companies Act* of 2013, which established more effective governance standards for Indian companies. However, both countries still face challenges in ensuring efficient protection to minority shareholders.

⁴³³ Ibid 897.

⁴³⁴ Ibid.

⁴³⁵ Ashutosh Misra, 'An Analysis of Mismanagement and Oppression Under Companies Act, 2013' (2018) 4(6) *Journal of Legal Studies and Research* 21, 22.

⁴³⁶ Ibid 23-6.

⁴³⁷ Ibid 26.

⁴³⁸ Ibid 33.

⁴³⁹ Ibid 34.

2.4 Lessons and Recommendations for Australia

This chapter introduced the theories of corporate governance and shareholders' rights in Australia and the chosen jurisdictions of the United Kingdom, United States (specifically Delaware), Canada, Germany, Singapore, and India. It has shown that shareholder theory proposes that maximising shareholder value is essential for the successful performance of the company. In contrast, the stakeholder theory suggests that corporations are accountable to their stakeholders; thus, prioritising their interests can help reduce conflicts within the companies. Upon examining stewardship theory, it was demonstrated that directors, when acting in the best interest of the company, contribute to strong corporate performance; on the other hand, agency theory suggests that without efficient supervisory mechanisms, directors often prioritise their own interests over those of shareholders.

Moreover, although the term 'corporate governance' is not explicitly defined in Australia, it is understood to be a 'framework of rules, relationships, systems and processes' through which authority is exercised, as noted by Michael Adams. In the United States, corporate growth is linked to good corporate governance practices grounded in management control and accountability. In contrast, the United Kingdom views well-structured governance as a result of maximising shareholder value. Accordingly, the Australian governance structure focuses on the role of laws, procedures and systems in ensuring the effective exercise of corporate powers. While the United States model emphasize the roles and responsibilities of company management, the effective governance in the United Kingdom is seen as the result of prioritising shareholders' value.

Moreover, this chapter revealed that Canada's corporate governance, as an effective model, integrates elements from both the United Kingdom's and United States' systems, promoting fair and responsible behaviours in companies while safeguarding shareholders' interests. Additionally, this chapter established that corporate governance in Germany, Singapore and India is shaped by their legislatively enforced control mechanisms. In particular, Germany's strong corporate governance is attributed to its statutory-coordinated control structures.

Similarly, this chapter established that Singapore and India also emphasise the importance of laws and regulations to ensure responsible behaviours in companies. However, Australian corporate governance is imposed by statute but also supported by principles like fairness and responsibility to ensure the efficient management of companies.

This chapter identified that corporate governance structure in each country operates within a complex regulatory framework, prompting legal scholars to adopt a multilayered approach in their work. An analysis of the multilayered approach is important for comprehending the corporate governance theories, which form the foundation for legal frameworks designed to protect minority shareholders and support their rights in companies. While many scholars tend to argue from the perspective of a single corporate governance theory, this current study acknowledges that each of the various theories examined in this chapter offers a different perspective on the way that companies should be managed and directed in the best interest of shareholders. This thesis adopts the approaches of scholars such as Mark Rix, Sandra Miller, George Young, Vincent Cirelli, Kelli Walters, and Brian Cheffins, who support reforms of Australia's oppression laws by introducing a statutory definition of oppressive conduct and incorporating comparative models from jurisdictions such as Delaware and Canada to improve the Australian oppression remedies. By examining the multilayered theoretical approach adopted by legal scholars, this thesis seeks to offer perspectives that support stronger protection for minority shareholders within companies.

Chapter 3

The Australian Position on Minority Shareholder Protection

3.1 Overview

3.2 Roles and Duties of a Director in Australia

3.3 Legal framework and Structure of a Company

3.4 Members of a Company

3.5 Becoming a Shareholder

3.5.1 Share

3.5.2 Shareholder's Rights

3.5.3 Shareholder's Duties

3.5.4 Transfer of Shares in a Company

3.6 Minority Shareholders' Protection in Australia

3.6.1 The concept of Oppression

3.6.2 Requirements for Court Order for Oppression

3.6.3 Minority Shareholder Oppression Claims

3.6.4 Examples of 'Oppressive' and 'Unfair' Conduct

3.6.4.1 Early Case Law on Minority Oppression in Australia

3.6.4.2 Later Developments in the Australian Case Law on Minority Oppression

3.6.5 Non-oppressive Conduct

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3.1 Overview

This chapter examines oppression remedies available to minority shareholders in Australian companies who seek to challenge the actions of the company's controllers. It defines what constitutes oppression, reviews shareholder oppression cases, and analyses the requirements considered by the courts when establishing oppression, along with the remedies available to oppressed shareholders. The analysis reveals that minority shareholders (those who own less than 50% of shares in a company) may have little, if any, control over majority shareholders' corporate decisions. Without voting powers, minority shareholders are often overlooked by the majority. In Australia, minority shareholders are granted legal protection under the statutory law, particularly through the

provisions governing oppressive conduct in Part 2F.1, ss 232-235 of the *Corporations Act 2001* (Cth)⁴⁴⁰ ('CPA') for 'oppressive', 'unfairly prejudicial', or 'unfairly discriminatory' conduct, which must relate to 'the conduct of a company's affairs'.

Australian companies are governed by their boards of directors. The board of directors is permitted to run a company at their discretion within the limits of their directors' duties.⁴⁴¹ However, minority shareholders may encounter serious challenges when the company is run by the shareholders, either as directors or majority shareholders, acting in their own interest, as observed by Philip Lipton, Abe Herzberg and Michelle Welsh.⁴⁴² To provide a clearer understanding of the position of minority shareholders in Australian companies, this chapter begins by examining the roles and duties of company directors, with a focus on their fiduciary, common law, and statutory duties. It also examines the consequences arising from a breach of these duties.

Moreover, this chapter studies the nature of a company and the process of becoming a company's member. It analyses how a company, as a corporation of an artificial legal entity, once created, is recognised as a separate 'person' at law'.⁴⁴³ As a separate legal entity, a company has its own obligations and benefits.⁴⁴⁴ In Australia, companies are controlled mostly by a group of shareholders or a single shareholder with ultimate control of the affairs of the company and the right to claim the company's profits. In this context, this chapter examines how in the company, the ownership is created by a shareholding,⁴⁴⁵ with shareholders having an essential role in its functioning.

Further, the chapter explores the rights and duties of company directors, and the role of shareholders, with a focus on their rights and duties within the corporate structure. The chapter also considers the issuing of shares, shareholder

⁴⁴⁰ *Corporations Act 2001* (Cth) (n 3).

⁴⁴¹ Brockett (n 1) 101.

⁴⁴² Philip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook, 20th ed, 2020) 683.

⁴⁴³ David Morrison and Colin Anderson, *Company Law* (Oxford University Press, 2010) 7.

⁴⁴⁴ Michael Quilter, *Company Law Perspectives* (Lawbook, 2012) 8.

⁴⁴⁵ Christopher Bevan, *Corporations Law* (Lawbook, 8th ed, 2014) 83.

decisions and liabilities, the transfer of shares, and restrictions on the transfer of shares. The chapter reveals that shareholders with a majority of the votes can use their powers to elect directors, pass resolutions at general meetings or regulate the corporation.⁴⁴⁶ Also, with a majority voting power, majority shareholders may change the constitution and deprive members of their property rights such as their dividends, and voting rights, or even force the sale of minority shareholders' shares.⁴⁴⁷ Therefore, this chapter examines how majority shareholders, through their voting powers, are granted significant control within a company, in contrast to minority shareholders who lack such influence over the company's management, as noted by Richard Brockett and discussed in Chapter 2.

This chapter concludes that, in Australia, the rights of minority shareholders are not always equally protected. Moreover, when pursuing legal action, minority shareholders in Australian companies encounter considerable challenges. Thus, the efficient application of shareholders' rights and the promotion of the interests of all shareholders is crucial for ensuring efficient corporate governance in Australian companies. This chapter draws on the work of scholars such as Mark Rix, who argues that Australia must undertake timely reforms to its corporate governance framework to address the growing environmental, political and social pressure that compel the company board to reassess their corporate strategies, as discussed below.

3.2 Roles and Duties of a Director in Australia

Company directors function as a board of directors, whose duties are determined by both statutory and common law. The board is often regarded as an executive committee that protects stakeholders' interests. All company directors in Australia have duties specified under the common law rules, applicable equitable principles, the company's constitution, shareholder agreement, and duties specified in the statute. The *CPA* adds to the scope of those duties by increasing

⁴⁴⁶ Lipton, Herzberg and Welsh (n 442) 683.

⁴⁴⁷ Jason Harris, *Australian Corporate Law* (LexisNexis Butterworths, 6th ed, 2018) 580-1.

the standard of care required of company directors.⁴⁴⁸ The director's duties put a considerable onus on a director to act in a particular way.

In Australian companies, directors owe different duties to their companies, usually described as fiduciary duties, based upon equitable principles.⁴⁴⁹ In *ASIC v Adler*⁴⁵⁰ it was established that as a fiduciary, a director must ensure the success of the company. Also, Part 2D.1 of the *CPA* imposes specific statutory duties on directors and officers. Such duties are duties of care and diligence, duties to act in good faith, duties to avoid conflict of interest, duties to disclose material personal interests, prevention of insolvent trading, maintaining written financial records and prohibition of insider trading, outlined below.

The duties of care and diligence come from equity and common law principles,⁴⁵¹ as well as from Part 2D.1 of the *CPA*, and, where applicable, the director's contract of employment. Regardless of whether the source of duty is statutory, equitable, or derived from common law, the standard of care expected from directors is the same. Therefore, when discharging their duties, the company directors must exercise reasonable care and diligence.⁴⁵² The commonly known 'business judgment' rule is set out in s 180 of the *CPA*. Pursuant to s 180(3) of the *CPA*, a 'business judgement' is any judgement to take or not take action about the matter associated with the operation of the company.⁴⁵³ The 'business judgment' rule protects directors from liability for claims that they failed to act with the required care and diligence.

A company director may argue that they have met the duty of care and skill required in respect to the judgement if it is made 'in good faith for a proper purpose',⁴⁵⁴ or do not receive 'a material personal interest in the subject matter of the judgment'.⁴⁵⁵ Also, a director may argue that they have met the duties of

⁴⁴⁸ Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1, 2.

⁴⁴⁹ Colin Anderson et al, *Corporations Law* (LexisNexis Butterworths, 5th ed, 2016) 208.

⁴⁵⁰ *ASIC v Adler* (2002) NSWSC 171.

⁴⁵¹ *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187.

⁴⁵² *Corporations Act 2001* (Cth) (n 3) s 180.

⁴⁵³ *Ibid* s 180(3).

⁴⁵⁴ *Ibid* s 180(2)(a).

⁴⁵⁵ *Ibid* s 180(2)(b).

care and skill required in respect to the judgement if they, on the subject matter of the judgement, inform themselves to the extent that the director reasonably believes that it is appropriate,⁴⁵⁶ and that the judgment is in the best interests of the company.⁴⁵⁷ Accordingly, the *CPA* sets out the general rule and requires directors to discharge their duties with care and diligence, and the business judgement rule protects directors against breach-of-duties claims.

Furthermore, as fiduciaries, when directors exercise the powers of their office, they must demonstrate specific qualities of good faith, fairness, and loyalty.⁴⁵⁸ In this regard, in *Elder Trustee and Executor Co Ltd v E G Reeves Pty Ltd*,⁴⁵⁹ the court held that directors owe a duty to the company to act in good faith. Directors are also expected to perform in the best interests of the corporation while considering the interests of its shareholders.⁴⁶⁰ In this regard, *Daniels v AWA Ltd*⁴⁶¹ emphasised that directors owe the company a duty to take reasonable care when managing the company. In *Mernda Development Pty Ltd v Rambaldi*,⁴⁶² the court stated that the test applied when determining whether the director has made decisions in the best interests of the company would be if an honest and intelligent man as director could reasonably believe that the dealings benefit the company. As such, directors must act as an honest person would be expected to act and must not promote their own or another party's interests.

The Australian *CPA*, in s 181, reinforces the duties of directors to act in good faith and for the proper purposes of the company, ensuring that it benefits the company as a whole, and not for any external purpose. As seen in *Mills v Mills*,⁴⁶³ directors must act to serve the objectives given to them.

Moreover, as demonstrated in *Hodgson v Amcor Ltd*,⁴⁶⁴ directors must avoid any conflict of interest between their individual interests and those of the company. If

⁴⁵⁶ Ibid s 180(2)(c).

⁴⁵⁷ Ibid s 180(2)(d).

⁴⁵⁸ Yogaratnam, Xynas and O'Connell (n 17) 299

⁴⁵⁹ *Elder Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193.

⁴⁶⁰ Anderson et al (n 449) 210.

⁴⁶¹ *Daniels v AWA Ltd* (1995) 37 NSWLR 438.

⁴⁶² *Mernda Development Pty Ltd v Rambaldi* (2011) VSCA 392.

⁴⁶³ *Mills v Mills* (1938) 60 CLR 150.

⁴⁶⁴ *Hodgson v Amcor Ltd* (2012) VSC 94.

conflict occurs, directors should not take advantage of it; instead, they should ensure that the conflict is eliminated.⁴⁶⁵ This duty is reinforced in ss 182 and 183 of the Australian *CPA*, as the duty to avoid conflicts between the interests of the company and personal interests. Accordingly, a director must not profit or cause loss to the company by dishonest use of the position as director.⁴⁶⁶ Also, a company director must not dishonestly use information obtained because of the position as a company's director.⁴⁶⁷ This rule, known as the 'no-profit' rule, obliges directors to not improperly use their position for personal gain or to the company's detriment.

A director also has a duty to notify other directors in a company of any 'material personal interest'.⁴⁶⁸ As result, directors must give notice at a director's meeting once the directors become aware of their personal interest.⁴⁶⁹ In *McGellin v Mount King Mining NL*,⁴⁷⁰ 'material personal interest' was described as 'some real substance' with an ability to influence the director's vote.

Additionally, in Australian companies, there exists a 'fiduciary obligation flowing from the director to the company'.⁴⁷¹ As fiduciaries, directors owe loyalty and trust to the company. This duty broadly forbids directors from pursuing their interests in a way that is detrimental to the company.⁴⁷² Hence, company directors are prohibited from personally profiting from, or gaining any control of, the company for their own advantage.⁴⁷³ A director's fiduciary duty requires absolute loyalty and trust.

Moreover, for breach of director's duties, the court may impose civil and criminal penalties. The court may impose a civil pecuniary penalty (fine) of up to 5,000 penalty units.⁴⁷⁴ A penalty provision applicable to body corporate is 50,000

⁴⁶⁵ *Chan v Zacharia* (1984) 154 CLR 178.

⁴⁶⁶ *Corporations Act 2001* (Cth) (n 3) 182.

⁴⁶⁷ *Ibid* s 183.

⁴⁶⁸ *Ibid* s 191.

⁴⁶⁹ *Ibid* s 191(3)(b).

⁴⁷⁰ *McGellin v Mount King Mining NL* (1998) 144 FLR 228.

⁴⁷¹ Beth Nosworthy, 'A Directors' Fiduciary Duty of Disclosure: The Case(s) Against' (2016) 39(4) *University of New South Wales Law Journal* 1389, 1389.

⁴⁷² Yogarathnam, Xynas and O'Connell (n 17) 299.

⁴⁷³ Bevan (n 445) 119.

⁴⁷⁴ *Corporations Act 2001* (Cth) (n 3) s 1317G(3)(a).

penalty units.⁴⁷⁵ A penalty unit has been established in the *Crimes Act 1914* (Cth) (s 4AA), and currently is \$330. Also, directors can be held personally liable for compensating for any loss or damage to the company.⁴⁷⁶ Accordingly, if a person is found guilty of fraud, negligence, default, the breach of trust, or breach of duty, and a company suffered loss or damage as a result, the court may order that person to pay money or transfer property to the company, and to compensate the company for the amount of loss or damage.⁴⁷⁷ These penalties for breaching a director's duties are strong incentives for directors to exercise their duty in the company's interests.

Finally, according to s 1311 of the *CPA*, a breach of directors' duties, under the provisions of the *CPA*, may incur a criminal penalty, set out in Schedule 3 of the *CPA*. The maximum criminal penalty for breach of s 184 of the *CPA* is 15 years, imposed if a director is reckless,⁴⁷⁸ dishonest,⁴⁷⁹ and fails to exercise the director's duties in good faith,⁴⁸⁰ or for a proper purpose.⁴⁸¹ If a director dishonestly, intentionally, or recklessly uses their position for personal benefit causing detriment to the company,⁴⁸² they may also face a maximum 15-years imprisonment. As breach of their duties can lead to legal action against a director, compliance with these legal obligations is crucial for protecting their position in the company and promoting the company's best interests.

3.3 Legal framework and Structure of a Company

A company is a legal entity and type of business structure. The *CPA*, as the principal legislation regulating business entities in Australia, defines a corporation in s 57A and includes a company,⁴⁸³ 'any body corporate' whether incorporated in Australia or elsewhere,⁴⁸⁴ and certain unincorporated body that, under the law, 'may sue or be sued, or may hold property in the name of its secretary or of an

⁴⁷⁵ Ibid s 1317G(4)(a).

⁴⁷⁶ Ibid s 598.

⁴⁷⁷ Ibid s 598.

⁴⁷⁸ Ibid s 184(1)(a).

⁴⁷⁹ Ibid s 184(1)(b).

⁴⁸⁰ Ibid s 184(1)(c).

⁴⁸¹ Ibid s 184(1)(d).

⁴⁸² Ibid s 184(2).

⁴⁸³ Ibid s 57A(a).

⁴⁸⁴ Ibid s 57A(b).

office holder of the body duly appointed for that purpose'.⁴⁸⁵ It has a legal existence that is separate from the company's owners and possesses many of the rights and responsibilities of individuals, and may be formed by an individual or group. As a result, a company's rights and duties are distinct from those of its shareholders and directors.

The *CPA* outlines the types of companies registered in Australia, i.e., proprietary (private) or public companies.⁴⁸⁶ Accordingly, the liability of the shareholders for a proprietary company, under s 112 of the *CPA*, must be nominated as limited by shares and unlimited with share capital.⁴⁸⁷ However, for public companies, the liability of the shareholders must be nominated as limited by shares, limited by guarantee, unlimited with share capital and no liability company.⁴⁸⁸ In Australia, a proprietary company is the most common type of company.

A company may convert to another type by 'passing a special resolution resolving to change its type',⁴⁸⁹ and by complying with s 163 and 164 of the *CPA*.⁴⁹⁰ Pursuant to s 163 of the *CPA*, a company must lodge an application with ASIC to change its type.⁴⁹¹ Following this, ASIC will issue notice indicating its intention to alter the company's registration details.⁴⁹² Accordingly, the Australian company is a complex business structure that requires specific management, including compliance with the statutory duties.

A company comes into existence by registering with ASIC. This process is governed by Pt 2A.2 of the *CPA* and the *Corporations Regulations 2001* (Cth). The process starts by lodging an application with ASIC,⁴⁹³ which must be in the prescribed form.⁴⁹⁴ The application must state the type of the company to be registered,⁴⁹⁵ the company's proposed name,⁴⁹⁶ details of the person who

⁴⁸⁵ Ibid s 57A(c).

⁴⁸⁶ Ibid s 112.

⁴⁸⁷ Ibid s 112.

⁴⁸⁸ Ibid s 112.

⁴⁸⁹ Ibid s 162(1)(a).

⁴⁹⁰ Ibid s 162(1)(b).

⁴⁹¹ Ibid s 163(1).

⁴⁹² Ibid s 164(1).

⁴⁹³ Ibid s 177(1).

⁴⁹⁴ Ibid s 117(4).

⁴⁹⁵ Ibid s 117(2)(a).

⁴⁹⁶ Ibid s 117(2)(b).

consents to become a member,⁴⁹⁷ details of the person who consents to become a director,⁴⁹⁸ and of the secretary,⁴⁹⁹ and the address of the company's proposed office.⁵⁰⁰ Hence, registering a company involves forming an entity and requires following a number of steps.

In all circumstances, once the company is registered, it 'has the legal capacity and powers of an individual'.⁵⁰¹ Section 124 of the *CPA*, gives a company all the powers of a body corporate. These powers include the ability to issue and cancel shares,⁵⁰² 'issue debentures',⁵⁰³ 'grant options over unissued shares',⁵⁰⁴ distribute the company's property among the members,⁵⁰⁵ 'grant a security interest in uncalled capital',⁵⁰⁶ 'grant a circulating security interest over the company's property',⁵⁰⁷ and 'arrange for the company to be registered or recognised as body corporate in any place outside this jurisdiction'.⁵⁰⁸ Therefore, the legal capacity of the company is the same as that of an individual.

Unlike companies, non-corporate associations such as: sole trader, partnership, trust, not-for-profit association, and joint venture are not recognised as independent legal entities,⁵⁰⁹ and their members are personally liable for obligations incurred in conducting the business.

3.4 Members of a Company

Members of a company are usually its owners or shareholders but not all company members will always hold shares in the company. A corporation must have at least one member.⁵¹⁰ According to s 120(1) of the *CPA* 'a person

⁴⁹⁷ Ibid s 117(2)(c).

⁴⁹⁸ Ibid s 117(2)(d).

⁴⁹⁹ Ibid s 117(2)(e).

⁵⁰⁰ Ibid s 177(2)(g).

⁵⁰¹ Ibid s 124.

⁵⁰² Ibid s 124(1)(a).

⁵⁰³ Ibid s 124(1)(b).

⁵⁰⁴ Ibid s 124(1)(c).

⁵⁰⁵ Ibid s 124(1)(d).

⁵⁰⁶ Ibid s 124(1)(e).

⁵⁰⁷ Ibid s 124(1)(f).

⁵⁰⁸ Ibid s 124(1)(g).

⁵⁰⁹ Susan Woodward, Helen Bird, Sally Sievers, *Corporations Law: In Principle*, (Lawbook Co. 7th ed, 2005) 18.

⁵¹⁰ *Corporations Act 2001* (Cth) (n 3) s 114.

becomes a member, director or company secretary on registration if the person is satisfied in the application with their consent as a proposed member, director or company secretary'.⁵¹¹ When members specify in the application the number of shares they wish to receive, these shares are taken to be issued to them on the registration of the company.⁵¹² Accordingly, a member of a company may be a person or a corporation.

Any person is considered to be a member of the company if they are members when the company is registered,⁵¹³ or if after the company's registration, they agree to become a member, and have their name recorded on the members' register.⁵¹⁴ The company is required to keep the names and addresses of the members of the company.⁵¹⁵ Thus, a shareholder in a company is a person who is listed in that company's register of members.⁵¹⁶ The register of the company's members must have members' names and addresses⁵¹⁷ and also the entry date when the name of the member was registered.⁵¹⁸ The significance of the register, is that, in the absence of any other evidence to the contrary, it proves the materials presented in it.⁵¹⁹ A company register is a public record that contains a list of companies registered in Australia.

Members of the company are entitled to various rights, established by the *CPA*, common law and the company's constitution. Pursuant to s 247A of the *CPA*, members have right to information, including the right to inspect the company's books.⁵²⁰ However, the inspection must be made for a legitimate purpose and the members must act in good faith.⁵²¹ In any circumstances, these rights are granted to members by the *CPA*, and failure to honour them results in a dispute between the company and its members.

⁵¹¹ Ibid s 120(1).

⁵¹² Ibid s 120(2).

⁵¹³ Ibid s 231(a).

⁵¹⁴ Ibid s 231(b).

⁵¹⁵ Ibid s 168.

⁵¹⁶ Ibid s 169.

⁵¹⁷ Ibid s 169(1)(a).

⁵¹⁸ Ibid s 169(1)(b).

⁵¹⁹ Ibid s 176.

⁵²⁰ Ibid s 247A.

⁵²¹ Ibid s 247A(1).

Members with at least 5% of the votes (that may be cast at the general meeting) may request that directors call a general meeting.⁵²² Also, members with at least 5% of the votes (that may be cast at the general meeting) may hold a general meeting themselves at their own expense.⁵²³ However, members are not permitted to call a general meeting themselves.

In the proprietary companies, there is a limit of 50 non-employee shareholders.⁵²⁴ However, there is no upper limit on the membership of public companies.

Since the members of a company exercise ultimate control over the company and essentially own the company, the next section focuses on examining the company's shareholders.

3.5 Becoming a Shareholder

A shareholder in a company may also be known as a 'company member'.⁵²⁵ In corporate law, the terms 'member' and 'shareholder' are interchangeable.⁵²⁶ Any person can become a company's member, but there are limitations to becoming a shareholder.⁵²⁷ The company member may buy, sell or give away their shares, or use them to secure a loan,⁵²⁸ whereas a shareholder might have interests in a share, such as legal and equitable interests.⁵²⁹ Thus, to become a shareholder, a person must purchase shares of a company or have shares transferred to them. If a person receives shares, the company's share register must be updated to reflect the change of ownership. Accordingly, the company has the power to distribute a company's profit between its members.⁵³⁰ The corporate profit may be distributed to shareholders of the company by way of dividends representing 'a return on the shareholder's investment in the company'.⁵³¹ The payment of

⁵²² Ibid s 249(D).

⁵²³ Ibid s 249(F).

⁵²⁴ Ibid s 113.

⁵²⁵ Jeffrey F Fitzpatrick et al, *Business and Corporations Law* (LexisNexis Butterworths, 3rd ed, 2017) 511.

⁵²⁶ Ibid.

⁵²⁷ Ibid 512.

⁵²⁸ Ibid 511.

⁵²⁹ Ibid 511.

⁵³⁰ *Corporations Act 2001* (Cth) (n 3) s 124(1)(d).

⁵³¹ Lipton, Herzberg and Welsh (n 442) 204.

dividends, as a portion of the company's profit, increases shareholders' confidence and reinforces trust in company's further prospects.

However, in Australia, if a company has a constitution, the rights attached to shares or rights of members in a class of members may be varied or cancelled.⁵³² This involves changing the rights attached to a specific class of shares. Regardless, if members in a class do not agree with variation or cancellation, those holding at least 10% of the votes in that class 'may apply to the court to have the variation, cancellation or modification set aside'.⁵³³ Different classes of shares have different rights.

Under all circumstances, a company must lodge notice with ASIC of any division of shares into classes and of any conversion of one class of shares into another class of shares in the company.⁵³⁴ Also, if a public company 'attaches rights to issued or unissued shares', or cancels rights related to issued or unissued shares, or if it changes or cancels rights of members in a class of members of a company that does not have shares or if it 'binds a class of members',⁵³⁵ then the public company must lodge with ASIC a copy of any document related to the above.

3.5.1 Share

Members of a company usually 'acquire shares as form of investment'.⁵³⁶ As such, shares are considered property and can be 'bought, sold, mortgaged, and bequeathed by will'.⁵³⁷ It is often said that shares in the company are comparable to any other form of personal property.⁵³⁸ This was explored in *Gambotto v WCP Ltd*,⁵³⁹ in which case the High Court stated that members of the company owning shares in the company were given proprietary rights, and those rights could not

⁵³² *Corporations Act 2001* (Cth) (n 3) s 246(B)(1).

⁵³³ *Ibid* s 246(D)(1).

⁵³⁴ *Ibid* s 246F(1).

⁵³⁵ *Ibid* s 246F(3)(a).

⁵³⁶ Quilter (n 444) 124.

⁵³⁷ Leigh H French, *Guide to Company Law* (LexisNexis Butterworths, 3th ed, 1990) 62.

⁵³⁸ Tony Ciro and Christopher Symes, *Corporations Law: In Principle* (Lawbook Co., 8th ed, 2009) 355.

⁵³⁹ *Gambotto v WCP Ltd* (1995) 182 CLR 432 (n 187).

be taken away unfairly.⁵⁴⁰ In this regard, purchasing shares in a company gives the shareholders ownership of the company, equal to individual property.

Pursuant to s 124(1)(a) of the *CPA*, a company has all the powers to issue shares. This 'is one of the unique features of corporate personality'.⁵⁴¹ Section 254A(1) of the *CPA* expands on s 124(1)(a) of the *CPA* and provides that the power of the company under s 124 of the *CPA* to issue a company's shares comprises the power to issue bonus shares, preference shares and partly-paid shares.⁵⁴² This authority is vested in the board of directors, but could be subject to approval by the company's shareholders.

Moreover, shares vary regarding the terms under which the shares are issued and any restrictions attached to the shares.⁵⁴³ Ordinary shares are shares with no special rights or any restrictions attached to them.⁵⁴⁴ However, companies may also issue preference shares.⁵⁴⁵ These shares have special rights attached to them, such as the right to receive dividends by priority over ordinary shares.⁵⁴⁶ Preference shares give shareholders preferred treatment over ordinary shares, including the right to priority when declaring a dividend.

The *CPA* does not contain a definition of 'share'. Shares are categorised as intangible personal property and are referred to as 'choses in action'.⁵⁴⁷ Accordingly, a share is a personal property, as stated in s 1070A(1)(a) of the *CPA*. Also, shares are distinct from the corporation's property and are subject to restrictions as mandated by a corporate constitution. Consequently, a shareholder may sell their shares 'without hereby transferring any property

⁵⁴⁰ Ibid.

⁵⁴¹ Anderson et al (n 449) 252.

⁵⁴² *Corporations Act 2001* (Cth) (n 3) s 254A(1): '(a) bonus shares (shares whose issue no consideration is payable to the issuing company); and (b) preference shares (including redeemable preference shares); and (c) partly-paid shares (whether or not on the same terms for the amount of calls to be paid or the time for paying calls'.

⁵⁴³ *Corporations Act 2001* (Cth) (n 3) s 254B.

⁵⁴⁴ *Ciro and Symes* (n 538) 356.

⁵⁴⁵ *Corporations Act 2001* (Cth) (n 3) s 254A(1)(b).

⁵⁴⁶ *Ciro and Symes* (n 538) 356.

⁵⁴⁷ Anderson et al (n 449) 248.

interest in the corporation's assets'.⁵⁴⁸ Although shareholders own the company, they do not have ownership of the company's assets.

Notwithstanding the above, company shares are 'transferable or transmissible', as provided by the constitution of the company.⁵⁴⁹ Shares can be devolved by will or by operation of law.⁵⁵⁰ In any event, each company share must be distinguished by number.⁵⁵¹ However, company shares do not require a distinguishing number if the issued shares are fully paid,⁵⁵² and if they 'rank equally for all purposes'.⁵⁵³ Still, every share certificate must specify the company's name, the shares' class and, if any, the unpaid amount on the shares.⁵⁵⁴ Share certificates are issued on behalf of the company.

Finally, members of a company may hold shares for their own sole benefit, in other capacity, in a capacity as trustee, or on behalf of another person.⁵⁵⁵ They do so to potentially improve the company's performance and profit from increased share value.

3.5.2 Shareholder's Rights

As stated previously, company directors govern the company by way of everyday management decisions.⁵⁵⁶ Also, members of the company contribute to the affairs of the company, which right is reinforced by their entitlements in relation to members' meetings.⁵⁵⁷ Accordingly, at shareholder meetings, members may vote on amendments to the company's constitution or change of the company's name.⁵⁵⁸ As such, becoming a shareholder entitles them to be part of the corporate governance.

⁵⁴⁸ Roman Tomasis, Stephen Bottmley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 447.

⁵⁴⁹ *Corporations Act 2001* (Cth) (n 3) s 1070A(1)(b).

⁵⁵⁰ *Ibid* s 1070A(1)(c).

⁵⁵¹ *Ibid* s 1070B.

⁵⁵² *Ibid* s 1070B(2)(a)(i).

⁵⁵³ *Ibid* s 1070B(2)(a)(ii).

⁵⁵⁴ *Ibid* s 1070C.

⁵⁵⁵ *Ibid* s 1072H(8)(a).

⁵⁵⁶ Quilter (n 444) 176.

⁵⁵⁷ *Ibid*.

⁵⁵⁸ *Ibid*.

In companies, shareholders' rights typically include right to vote at general meetings, right to a dividend, and to take action for a wrong done to the company or its shareholders.⁵⁵⁹ When shareholders hold ordinary class shares, they have the right to attend a shareholders' meeting. A member who is entitled to vote at a shareholders' meeting has the right to receive written notice of a meeting.⁵⁶⁰ In a company, each member 'on a show of hands' has one vote.⁵⁶¹ On a poll, each member has one vote for each dollar of the total interests in the scheme.⁵⁶² As a general rule, each shareholder holding shares is entitled to one vote.

Moreover, as previously stated, a member has the right to receive a dividend.⁵⁶³ The same class shares in a public company have the same rights to a dividend. However, this can be altered if the company's constitution states different,⁵⁶⁴ or if a special resolution is passed that provides different dividend rights.⁵⁶⁵ Dividends are payable to the shareholders, with payments determined by the company's board of directors.

Moreover, the rights of the shareholders are given to them by the company's constitution, replaceable rules, and under the law.⁵⁶⁶ According to s 135 of the CPA, the replaceable rule applies to every company registered after 1 July 1988 and before 1 July 1998 that revoked its constitution after that day.⁵⁶⁷ If the company's constitution does not exclude the operation of the replaceable rules, they will apply.

A shareholder's agreement will complement the constitution or the replaceable rules which may affect the shareholders' rights as to dividend policy and the circumstances under which shareholders may sell shares. Therefore, it acts as a legal contract between the shareholders as it specifies their rights, expectations, and obligations.

⁵⁵⁹ Christopher Enright, *Law of Business Organisations* (Branxton Press, 2006) 146.

⁵⁶⁰ *Corporations Act 2001* (Cth) (n 3) s 252G(1)(a).

⁵⁶¹ *Ibid* s 253C(1).

⁵⁶² *Ibid* s 253C(2).

⁵⁶³ *Ibid* s 254W.

⁵⁶⁴ *Ibid* s 254W(1)(a).

⁵⁶⁵ *Ibid* s 254W(1)(b).

⁵⁶⁶ Enright (n 559) 146.

⁵⁶⁷ *Corporations Act 2001* (Cth) (n 3) s 135.

In addition to their rights, shareholders also have certain duties, which are discussed below.

3.5.3 Shareholder's Duties

The rights and liabilities of the company's shareholders are governed by the agreement 'represented by the memorandum of association and the articles of association'.⁵⁶⁸ Also, the company's constitution and the replaceable rules affect shareholders' rights and duties in companies. Specifically, the shareholder agreement may impose duties on shareholders regarding the disposal of shares, confidential information, restrictions, and other important provisions.

The main duty of shareholders in a company, therefore, is passing resolutions at general meetings. Shareholders, in their shareholder capacity, may pass a resolution by voting at general meetings. The shareholders may also vote through poll voting. At the general meeting, two resolutions can be voted on, i.e., the ordinary resolution which is passed if a simple majority of shareholders vote in favour of the proposal⁵⁶⁹ and a special resolution which is passed if a 75% majority of shareholders vote in favour of the proposal.⁵⁷⁰ In this manner, shareholders enforce their power on the corporation and the way it is managed.

As stated, shareholders of a company are not accountable for the company's legal responsibilities because the company is a separate legal entity. If the company shareholder is a director, he or she will have directors' duties under the *CPA*. As discussed, s 181(1) of the *CPA*, requires directors and other corporate officers to exercise their powers and discharge their duties 'in good faith in the best interest of the corporation'.⁵⁷¹ This statutory duty is one of the most important duties imposed on company's directors to ensure consistency in management and the company's direction.

⁵⁶⁸ French (n 537) 62.

⁵⁶⁹ *Corporations Act 2001* (Cth) (n 3) s 253J(2A).

⁵⁷⁰ *Ibid* s 253LA(1)(b).

⁵⁷¹ *Ibid* s 181(1).

In addition, shareholders' liability is restricted to the unpaid amount of their shares, and they are not personally responsible for the debts or obligations of the company. However, a court may disregard this corporate protection and hold shareholders personally liable.

By understanding their rights, duties and responsibilities, shareholders in the company may actively participate in the governance of the company and make informed decisions regarding the company's direction and performance. Shareholders can also exit the company by transferring their shares, as discussed below.

3.5.4 Transfer of Shares in a Company

The Australian *CPA*, as mentioned earlier, provides that 'a share, other interest of a member in a company, or interest of a person in a registered scheme' is personal property which is transferable or transmissible as provided by the company's, or scheme's, constitution, and 'is capable of devolution by will or by operation of law'.⁵⁷² Therefore, shares can be transferred from an existing shareholder to a new shareholder or other party.

The *CPA* also provides that a written application submitted by the transferor of a security of a company, requesting the transferee's name to be entered in the register, has the same effect (for the company's purpose) as if the application had been made by the transferee, and is 'subject to the same conditions as it would be if it had been made by the transferee'.⁵⁷³ However, if the transferor requests the company to execute this in writing, the company must, by written notice, require a person within a certain period to present the title document or the instrument of transfer at the company's office, so the document can be 'cancelled or rectified and the transfer registered or otherwise dealt with'.⁵⁷⁴ This section addresses the registration of securities transfers by allowing the transferor to initiate the registration.

⁵⁷² Ibid s 1070A.

⁵⁷³ Ibid s 1071D(1).

⁵⁷⁴ Ibid.

Additionally, a summons may be issued 'if a person refuses or fails to comply with a notice'.⁵⁷⁵ If the person appears before the court, it may '(i) examine the person upon oath or affirmation; and (ii) receive other evidence'.⁵⁷⁶ However, if the person, after being served with a summons, does not appear, the court may proceed to receive evidence in their absence.⁵⁷⁷ This court order empowers the transferor to seek court intervention if a person fails to comply with a notice, ensuring an efficient securities transfer process.

However, if the company refuses to register the transfer of securities, it must give the transferee notice of the refusal within two months after the date on which the transfer was lodged.⁵⁷⁸ Moreover, the transferee or transmittee may apply for a court order if the relevant authority refuses or fails to register, or to give its consent or approval for the registration of a transfer or transmission of a company's securities.⁵⁷⁹ Therefore, this right to seek court intervention offers protection and reduces risk in securities transactions.

The next section focuses on the minority shareholders' rights in Australia under ss 232-235 of the *CPA* and the remedies available for shareholder oppression.

3.6 Minority Shareholders' Protection in Australia

The majority shareholders in companies may sometimes use their power for their own benefit and can oppress minority shareholders. As previously stated, Part 2F.1 of the Australian *CPA*, specifically ss 232-235, sets out the oppression remedies available to oppressed minority shareholders who have been subject to unfair conduct by controlling majorities. These provisions are designed to protect minority shareholders from abuse of power within the company.⁵⁸⁰ As discussed in Chapter 2, such protections were initially contained in s 186 of the Australian *Uniform Companies Act 1961* (Cth), s 320 of the *Companies Act 1981*

⁵⁷⁵ Ibid s 1071D(4).

⁵⁷⁶ Ibid s 1071D(5)(a).

⁵⁷⁷ Ibid s 1071D(2)(b).

⁵⁷⁸ Ibid s 1071E.

⁵⁷⁹ Ibid s 1071F(1).

⁵⁸⁰ Yogaratnam, Xynas, O'Connell (n 17) 425.

(Cth) and s 260 of the *Corporations Act 1989* (Cth). These remedies will be examined in more detail below.

3.6.1 The concept of Oppression

The *CPA* contains no uniform definition of what constitutes oppression in companies. In general, minority shareholders' oppression is related to a conduct which falls within s 232 of the *CPA*. These provisions outline when the court may grant remedies under s 233 of the *CPA* and defines oppressive conduct as conduct which is contrary to the interests of the shareholders as a whole,⁵⁸¹ or 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or any other capacity'.⁵⁸² In *Re Dernacourt Investments Pty Ltd*,⁵⁸³ the court stated that in situations where there is a duty in equity or law to act in a positive manner, inactivity or negative action can be considered as 'conduct'. Also, shareholders losing confidence in company management, not granting the wishes of the minority shareholders and not having voting powers, cannot be considered to be oppressive in themselves.⁵⁸⁴ Accordingly, shareholder oppression refers to conduct by majority shareholders that oppresses the rights of minority shareholders, including failure to consider their interests.

In *Campbell v Backoffice Investment Pty Ltd*,⁵⁸⁵ the High Court held that wrongful exclusion from company's management may be 'oppressive' conduct. The court stated that 'it is not to be supposed that the only conduct of a company's affairs that is to be classified as 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member' is conduct of the company's affairs that is otherwise lawful'.⁵⁸⁶ Moreover, the case *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd*⁵⁸⁷ broadened the term 'oppressive'. In this case, the court held that 'oppressive' included something that was done against

⁵⁸¹ *Corporations Act 2001* (Cth) (n 3) s 232(d).

⁵⁸² *Ibid* s 232 (e).

⁵⁸³ *Re Dernacourt Investments Pty Ltd* (1990) 20 NSWLR 588.

⁵⁸⁴ *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd* (1991) 6 ACSR 63.

⁵⁸⁵ *Campbell v Backoffice Investment Pty Ltd* (2009) HCA 25.

⁵⁸⁶ *Ibid*.

⁵⁸⁷ *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd* (1991) 6 ACSR 63 (n 584).

the will of a person and also in spite.⁵⁸⁸ This case clarified that ‘oppressive’ acts must result from an overbearing action or attitude on the part of those committing the oppression.⁵⁸⁹ Also, in *Re Spargos Mining NL* (*‘Spargos’*),⁵⁹⁰ the court held that oppression does not need to be directed against the member that is applying for oppression relief.

The case law has developed tests for ‘unfair’ conduct and considers conduct to be ‘oppressive’ if there is a lack of fair dealing. The NSW decision in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (*‘Fexuto’*)⁵⁹¹ is an example of the court intervening to assist oppressed minority shareholders in a company, where majority shareholders used confidential information owned by the company in order to divert a business opportunity for their own benefit. In this case,⁵⁹² the court granted relief by applying the principles of oppression set out in s 232 of the *CPA* and found that the majority shareholders’ actions were unfair to the interests of the minority.

The most commonly applied test to determine if a conduct is ‘oppressive’ was demonstrated in *Wayde v NSW Rugby League Ltd* (*‘Wayde’*).⁵⁹³ The case established that if directors act in good faith and in the company’s interests, within the scope of their powers, no breach will occur on their behalf. The test to be applied in this situation would be whether the decision that director made is a decision beyond what a reasonable board of directors would approve. His Honour, Brennan J, stated that the test is objective, and that it is important, even though challenging, to require that directors be reasonable.⁵⁹⁴ In this case,⁵⁹⁵ his Honour, Brennan J, further stated that the test requires reasonable corporate directors to weigh the disadvantages and consider whether the proposed decision is ‘unfair’ to the shareholders.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

⁵⁹⁰ *Re Spargos Mining NL* (1990) 3 ACSR 1.

⁵⁹¹ *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672.

⁵⁹² Ibid.

⁵⁹³ *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459 (n 151).

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

Moreover, 'prejudice or discrimination' should always be considered unfair.⁵⁹⁶ This was examined in *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd*,⁵⁹⁷ which case considered the company operating as a quasi-partnership of two families, where 60% of shares were owned by the Lagerlow family, while the Bradfield family owned 40% of the shares. The company was controlled by both families. Two directors were from the Lagerlow family and one was from Bradfield. The Bradfield minority shareholding group alleged that the Bradfield director was forced to resign without being involved in the management of the company. The court in *Wayde*⁵⁹⁸ held that excluding one of the investors from the everyday management of the company's affairs is 'oppressive', and an example of 'unfair' conduct.

The recent case of *Hylepin Pty Ltd v Doshay Pty Ltd* ('*Hylepin*')⁵⁹⁹ reflected the significance of the phrase 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against', in s 232(e) of the CPA. His Honour, O'Bryan J, referred to the case *In Re Ledir Enterprises Pty Ltd*,⁶⁰⁰ where his Honour, Black J, stated that this phrase implies 'commercial unfairness' or departure from the standards of fair dealing. Moreover, his Honour, Black J, stated that this phrase involves the decision which imposes 'disadvantage, disability or burden on the plaintiff that, according to ordinary standards or reasonableness and fair dealing, is unfair'.⁶⁰¹ In addition, his Honour, O'Bryan J, referred to *Goozee v Graphic World Holding Pty Ltd* ('*Goozee*'),⁶⁰² and stated that it is objective to make an assessment when the conduct of company's affairs is 'contrary to the interests of the members as a whole'.⁶⁰³ His Honour, O'Bryan J, referring to *Wayde*⁶⁰⁴ stated that 'unfairness' is to be judged objectively. His Honour, O'Bryan, further specified that the relevant test in these circumstances would be if the reasonable directors in the company 'would have decided that it was unfair to make that decision'.⁶⁰⁵ The proceeding was dismissed by the primary judge and the Full Court of the Federal Court.

⁵⁹⁶ Harris (n 447) 598.

⁵⁹⁷ *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) NSWSC 153.

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Hylepin Pty Ltd v Doshay Pty Ltd* (2020) FCA 1370.

⁶⁰⁰ *In Re Ledir Enterprises Pty Ltd* (2013) NSWSC 1332.

⁶⁰¹ *Ibid.*

⁶⁰² *Goozee v Graphic World Holding Pty Ltd* (2002) 42 ACSR 534.

⁶⁰³ *Hylepin Pty Ltd v Doshay Pty Ltd* (2020) FCA 1370 (n 599).

⁶⁰⁴ *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459 (n 151).

⁶⁰⁵ *Hylepin Pty Ltd v Doshay Pty Ltd* (2020) FCA 1370 (n 599).

The judgements discussed above clarified the terms ‘oppressive’, ‘unfair’ and ‘unfairly prejudicial’ conduct and established the tests used in minority oppression cases and support scholarly observation, such as those of Lynden Griggs, that a broad judicial interpretation of these terms can overcome many of the difficulties associated with their application. The requirements that must be met in order for the court to grant relief in cases involving oppressive conduct are outlined below.

3.6.2 Requirements for Court Order for Oppression

Section 232 of the *CPA* addresses questions about a ‘company’, a ‘member’ and a ‘company’s affairs’.⁶⁰⁶ ‘Company’ is defined in s 9 of the *CPA* as a company registered under the *CPA*.⁶⁰⁷ ‘Member’ is not included in the definition in s 9 of the *CPA*. According to s 231 of the *CPA*, regarding a company, a person is considered to be a member of the company if he or she is a company’s member upon its registration.⁶⁰⁸ After the registration, a person must agree to become a member and to register his or her name on the register of members.⁶⁰⁹ As the company’s owners, members have a legal interest in the company’s management.

For a court to grant an order under s 232 of the *CPA*, the conduct must relate to ‘the conduct of a company’s affairs’.⁶¹⁰ The term ‘company’s affairs’ comprises the actions of the directors, majority shareholders, substantial shareholders and of the company itself.⁶¹¹ Section 53 of the *CPA* provides that the affairs of the company include, but not be limited to: ‘the promotion, formation, membership, control, business, trading, transactions and dealings, property liability and finances of the company’,⁶¹² the internal managing and proceedings of the body,⁶¹³ and ‘the ownership of shares in, debentures of, and interests in a

⁶⁰⁶ *Corporations Act 2001* (Cth) (n 3) s 232.

⁶⁰⁷ *Ibid* s 9.

⁶⁰⁸ *Ibid* s 231.

⁶⁰⁹ *Ibid* s 231.

⁶¹⁰ *Ibid* s 232(a).

⁶¹¹ Lipton, Herzberg and Welsh (n 442) 686.

⁶¹² *Corporations Act 2001* (Cth) (n 3) s 53(a).

⁶¹³ *Ibid* s 53(c).

manages investment scheme made available by, the body'.⁶¹⁴ This includes 'the circumstances under which a person acquired or disposed of' shared interests 'in a managed investment scheme',⁶¹⁵ and matters concerned with the identification of individuals who are or have been financially involved in the success or failure of the body, 'or are or have been able to control or materially to influence the policy of the body'.⁶¹⁶ The case *Australian Securities and Investments Commission v Lucas*⁶¹⁷ clarified that the conduct complained of must relate to the conduct of a company's affairs as defined in s 53 of the CPA. Moreover, the affairs of a company include, but are not limited to, 'any of the body's affairs',⁶¹⁸ the ownership of shares in the company and 'matters concerned with ascertaining the corporations with which the body is or has been connected'.⁶¹⁹ Therefore, the term 'company's affairs' is defined in s 53 of the CPA, but is also interpreted and applied by relevant case law.

Additionally, for the court to grant relief under s 232(b) of the CPA, there must be 'an actual or proposed act or omission by or on behalf of a company'.⁶²⁰ For example, in *Wayde v NSW Rugby League Ltd*,⁶²¹ the court clarified that establishing a breach of directors' duties is not a prerequisite for oppressive relief. However, in *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd ('Shum')*,⁶²² the court held that members may obtain oppression remedy when controllers of the company constantly refuse to hold directors' meetings. Also, in *Stanford v Stanford Courier Service Pty Ltd ('Stanford')*,⁶²³ the court held that the conduct is oppressive if a company refuses to pay dividends despite the company generating profit.

Moreover, after the court establishes the relation of the conduct to s 232(a), (b), or to (c) of the CPA, it must be established that the conduct is either contrary to

⁶¹⁴ Ibid s 53(e).

⁶¹⁵ Ibid s 53(h).

⁶¹⁶ Ibid s 53(g).

⁶¹⁷ *Australian Securities and Investments Commission v Lucas* (1992) 36 FCR 165.

⁶¹⁸ *Corporations Act 2001* (Cth) (n 3) s 53AA(a)

⁶¹⁹ Ibid s 53AA(b)

⁶²⁰ Ibid s 232(b).

⁶²¹ *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459 (n 151).

⁶²² *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd* (2002) NSWSC 13.

⁶²³ *Stanford v Stanford Courier Service Pty Ltd* (1987) 5 ACLC 394.

the interest of the members as a whole (s 232(d) of the *CPA*), or ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or any other capacity’: (s 232(e) of the *CPA*). In this regard, in *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd*,⁶²⁴ the court described ‘oppression’ as conduct imposed against a person’s will and emphasised that such conduct must be a result of an overbearing act or attitude on the part of the oppressor.⁶²⁵ As such, for an oppression claim to be successful, oppression must be proven.

The next section explains who may bring an oppression claim, along with relevant rulings to define the criteria for such claims.

3.6.3 Minority Shareholder Oppression Claims

Section 234 of the *CPA* sets out who may apply for an order under s 233 of the *CPA*. Thus, an application for an order under s 233 of the *CPA* may be made by:

- a member of the company,⁶²⁶ even if the application for an order under s 233 of the *CPA* ‘relates to act or omission that is against: (i) the member in a capacity other than as a member;⁶²⁷ or (ii) another member in their capacity as a member’;⁶²⁸
- ‘a person who has been removed from the register of members because of a selective reduction’;⁶²⁹ or
- ‘a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member’.⁶³⁰ In *Re Spargos Mining NL*,⁶³¹ the court held that if the applicants are members of the company when lodging the application, they may apply even though they were not members during the conduct. This is now confirmed in s 234(a) of the *CPA*.

⁶²⁴ *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd* (1991) 6 ACSR 63 (n 584).

⁶²⁵ *Ibid.*

⁶²⁶ As defined in s 231 of the *Corporations Act 2001* (Cth).

⁶²⁷ *Corporations Act 2001* (Cth) (n 3) s 234(a)(i).

⁶²⁸ *Ibid* s 234(a)(ii).

⁶²⁹ *Ibid* s 234(b).

⁶³⁰ *Ibid* s 234(c).

⁶³¹ *Re Spargos Mining NL* (1990) 3 ACSR 1 (n 590).

An order may be sought by:

- a person for whose benefit a company's share was transferred by will or by the law: s 234(d) of the *CPA*; and
- a person to whose advantage ASIC considers is appropriate having regard to investigations into: '(i) the company's affairs; or (ii) matters connected with the company's affairs': s 234(e) of the *CPA*.

In some instances, the sole shareholder of a company had a successful oppression claim, as seen in *Goozee v Graphic World Group Holdings Pty Ltd*,⁶³² where the plaintiff requested leave so he, on behalf of the company, could initiate court proceedings. In this case,⁶³³ his Honour, Barret J, concluded that 'as to the serious question to be tied', the fact that the plaintiff, as the sole shareholder, initiated proceedings following s 232 of the *CPA* does not affect the enquiry under s 237(2)(d) of the *CPA*.

Moreover, *Niord Pty Ltd v Adelaide Petroleum NL ('Niord')*,⁶³⁴ dealt with a situation where, before making an application for an order under s 232 of the *CPA*, a buyer of the company's shares did not register as a member of the company. The buyer had completed a contract for the purchase of shares but did not register in the company's share register. Therefore, the court *Niord*⁶³⁵ ruled that the buyer of a company's shares should not be treated as a member of the company before his or her name is recorded as a company shareholder.

Remedies under s 232 of the *CPA* are also available to members whose names were removed from the share register. Pursuant to s 175 of the *CPA*, if a member's name has been removed from the register, an application for a court order may be made by the company to have the register corrected.⁶³⁶ This can be done before requesting an order under s 232 of the *CPA*. If the application is successful and the court orders that the register be corrected, the court may also order compensation paid by the company for damages suffered by the party to

⁶³² *Goozee v Graphic World Holding Pty Ltd* (2002) 42 ACSR 534 (n 602).

⁶³³ *Ibid.*

⁶³⁴ *Niord Pty Ltd v Adelaide Petroleum NL* (1990) 54 SASR 87; See also: *In Re International Pty Ltd [No 2]* (2016) NSWSC 791 and *Re Independent Quarries Pty Ltd* (1994) 12 ACLC 159.

⁶³⁵ *Ibid.*

⁶³⁶ *Corporations Act 2001* (Cth) (n 3) s 175.

the application.⁶³⁷ Additionally, if the court orders the company to correct its register, the company is required to lodge a notice of the correction with ASIC.⁶³⁸ Hence, this section provides a remedy for the unlawful removal of an individual from the register of members.

Nevertheless, an oppression claim cannot be brought during the process of liquidating the company. However, an oppression claim may be brought by the liquidator of the company, on the company's behalf. In *Zempilas v JN Taylor Holding Ltd (in liq) [No 6]*,⁶³⁹ the court held that members of a company may apply, in the company's name, for the liquidator to bring this action on terms that the court considers appropriate. If this is the case, the court may order the company to be wound up.⁶⁴⁰ Thus, even during liquidation, members may influence the enforcement of the company's legal rights.

The following section examines instances where courts have identified conduct to be oppressive under s 232 of the *CPA*.

3.6.4 Examples of 'Oppressive' and 'Unfair' Conduct

Some cases in which courts have recognised conduct to be oppressive under s 232 of the *CPA* include: the improper diversion of legitimate corporate opportunity by majority members or directors, as seen in *Re Bright Pine Mills Pty Ltd ('Re Bright')*,⁶⁴¹ the denial of information, demonstrated in *Shum Yip Properties Development Ltd v Chatswood Investment and Development Co Pty Ltd*,⁶⁴² and breaches of directors' duties, as found in *HNA Irish Nominees Ltd v Kinghorn [No 2] ('HNA Irish')*.⁶⁴³ These cases are illustrated below.

⁶³⁷ Ibid s 175(2).

⁶³⁸ Ibid s 175(3).

⁶³⁹ *Zempilas v JN Taylor Holding Ltd (in liq) [No 6]* (1991) 5 ACSR 28.

⁶⁴⁰ *Corporations Act 2001* (Cth) (n 3) s 495B.

⁶⁴¹ *Re Bright Pine Mills Pty Ltd* (1969) VR 1002.

⁶⁴² *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd* (2002) NSWSC 13 (n 622).

⁶⁴³ *HNA Irish Nominees Ltd v Kinghorn [No 2]* (2012) 88 ACSR 427.

3.6.4.1 Early Case Law on Minority Oppression in Australia

The claim in *Re Bright Pine Mills Pty Ltd*⁶⁴⁴ arose between Swallow, the appellant, and Denton, the respondent who managed the company named Bright Pine Mills Pty Ltd, engaged in a sawmilling business. The company had three shareholders, Swallow, Denton and another individual. When Denton was removed from the board, a partnership was formed between Swallow's relatives, leading to the establishment of Pine Processing Company, diverting the business opportunity to the new company. The court in this case found that the conduct was oppressive as the company's assets were used by Swallow for personal gain and not for the company's profit.⁶⁴⁵ The Chief Justice, who heard the petition, ordered that Denton's shares be purchased by the majority shareholder at a fair value.⁶⁴⁶ The Chief Justice of Victoria further stated: 'Swallow, by his control of the company, was able to make the exploitation of [the valuable] licence over to the firm for his own personal advantage'.⁶⁴⁷ This case illustrates a key precedent in situations where majority shareholders diverted business opportunities to themselves for personal gain, thereby prioritising their individual interests to the disadvantage of the company and its minority shareholders.

Another ground for finding oppressive conduct in proper circumstances was a denial of information demonstrated by *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd*.⁶⁴⁸ In this case,⁶⁴⁹ the plaintiff, Shum Yip Properties Development Ltd ('Shum Yip'), sought an order that the first defendant, Chatswood Investment and Development Co Pty Ltd ('CIDC'), be wound up, on just and equitable grounds, for oppression to purchase shares or to appoint a receiver of CIDC's property. Also, Shum Yip, against the second defendant, Rosanna Wong, sought relief 'for breach of her fiduciary and statutory duties as a director of CIDC, to act honestly and not to make improper use of her position' and against the third defendant, Rolle Pty Ltd, 'for knowing participation

⁶⁴⁴ *Re Bright Pine Mills Pty Ltd* (1969) VR 1002 (n 641).

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd* (2002) NSWSC 13 (n 622).

⁶⁴⁹ *Ibid.*

in Ms Wong's breach of those duties'.⁶⁵⁰ His Honour made orders 'reflecting and vindication Shum Yip's personal and derivative rights under s 246AA by ordering the winding up of CIDC'.⁶⁵¹ The plaintiff pleaded that Rosanna Wong and Rolle Pty Ltd, 'have conducted the affairs of CIDC in a manner that is oppressive, unfairly prejudicial to, and/or unfairly discriminatory against the plaintiff, contrary to s 246AA'.⁶⁵² The oppression case was based, amongst other acts, upon 'Ms Wong's failure to provide information to Shum Yip about the financial affairs of CIDC'.⁶⁵³ His Honour stated that Shum Yip 'had an entitlement to receive information concerning the affairs of CIDC'.⁶⁵⁴ His Honour further stated that there was a persistent failure to obey requests to present information, despite Shum Yip being entitled to such information as a shareholder.⁶⁵⁵ In this regard, his Honour made orders to assess damages recoverable by CIDC from Ms Wong and orders for damages recoverable by Shum Yip for Rolle's breach of the joint venture agreement.⁶⁵⁶ This case is significant as it addresses whether the improper use of position is oppressive conduct under the Australian *CPA*. It underscores the importance of directors fulfilling their director's duties and reaffirms the rights of minority shareholders to participate in the company's management.

3.6.4.2 Later Developments in the Australian Case Law on Minority Oppression

Another example of 'oppressive' or 'unfair' conduct was established in *HNA Irish Nominees Ltd v Kinghorn [No 2]*.⁶⁵⁷ In this case,⁶⁵⁸ directors of the company breached their director's duties by not acting in the interests of the company as a whole. The proceedings concerned the international management of thirty-eight companies, each owner of an aircraft (the defendant RILAs), which were part of an aircraft agreement with Aviation Transaction, whereby RILAs was leasing the

⁶⁵⁰ Ibid.

⁶⁵¹ Ibid.

⁶⁵² Ibid.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

⁶⁵⁷ *HNA Irish Nominees Ltd v Kinghorn [No 2]* (2012) 88 ACSR 427 (n 643).

⁶⁵⁸ Ibid.

aircraft to an airline. The Aviation Transaction involved the allocation of preference shares in RILA to investors who lent the money as part of the arrangements.⁶⁵⁹ Upon finding oppressive conduct, the court ordered that HNA's shares be bought out.⁶⁶⁰ However, His Honour stated that, before making orders under s 233 of the *CPA*, 'he would require that the other holders of preference shares in the defendant, RILA, to be notified and given the opportunity to be heard'.⁶⁶¹ This case underscores the importance of directors fulfilling their duties in the best interests of the company.

Although rare, the court can find against minority shareholder, if a minority shareholder oppresses a majority shareholder and the conduct satisfies the oppression laws under the *CPA*. Accordingly, in the recent case of *Crow Inn Pty Ltd [No 2]*,⁶⁶² the Supreme Court ordered that the share register be rectified. In this case,⁶⁶³ it was sought that the share register be corrected on the basis that the shares were effectively transferred to the minority shareholder under the shareholder agreement which that shareholder rejected and only partly honoured. The minority shareholder obstructed majority shareholder from removing its share capital from it, as the minority shareholder had operational control of the company. Consequently, the minority excluded the majority from management decisions and prevented the majority shareholder from removing their capital on reasonable terms from the company. The court observed that this power to rectify the register is discretionary and it granted relief under s 233 of the *CPA* amending the share register to record the oppressed shareholders' share in the company (of 70%).⁶⁶⁴ In this case,⁶⁶⁵ Justice Ress concluded that, it was 'just and equitable' for minority shareholder to return 10% shares in the company transferred under the shareholder's agreement as it was oppressive for minority shareholder to retain the benefits while rejecting the burden of it. The case illustrates that the oppression remedy can be also used against minority shareholder in order to protect the interests of company members.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*

⁶⁶² *Crow Inn Pty Ltd [No 2]* (2020) 151 ACSR 210.

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

Other examples of oppressive conduct of affairs include:

- members or directors making an improper exclusion from management and excluding minority shareholders;⁶⁶⁶
- unfairly restricting dividends and excessive remuneration paid to directors out of profits;⁶⁶⁷
- failure to pay dividends;⁶⁶⁸
- where the profitability of the company increased significantly because of the director's contribution to the company, the decision to pay great fees to themselves is not considered oppressive if there is no element of unfairness and it is agreed by the majority of members;⁶⁶⁹
- corporate wrongs;⁶⁷⁰
- excluding minority shareholders from involvement in the company's affair;⁶⁷¹
- the diversion of a legitimate corporate opportunity to themselves or associate;⁶⁷²
- inaction can be considered oppressive;⁶⁷³
- where the voting powers of members are restricted;⁶⁷⁴
- making uncommercial loans to a company without the consent of minority shareholders;⁶⁷⁵
- failure to provide information about the company's affairs;⁶⁷⁶
- paying dividends only to some members.⁶⁷⁷

⁶⁶⁶ *Hogg v Dymock* (1993) WASC 401.

⁶⁶⁷ *Stanford v Stanford Courier Service Pty Ltd* (1987) 5 ACLC 394 (n 623).

⁶⁶⁸ *Roberts v Walter Developments Pty Ltd* (1997) 15 ACLC 882.

⁶⁶⁹ *Thomas v HW Thomas Ltd* (1984) 2 ACLC 610.

⁶⁷⁰ *Re Spargos Mining NL* (1990) 3 ACSR 1 (n 590); See also *Jenkins v Enterprise Gold Mines NL* (1992) 10 ACLC 136 and *Re Dalkeith Investments Pty Ltd* (1985) 3 ACLC 74.

⁶⁷¹ *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 (n 591).

⁶⁷² *Re Bright Pine Mills Pty Ltd* (1969) VR 1002 (n 641).

⁶⁷³ *Ibid.*

⁶⁷⁴ *Shears v Phosphate Co-operative Co Australia Ltd* (1989) 7 ACLC 812.

⁶⁷⁵ *Re George Raymond Pty Ltd* (2000) 18 ACLC 85.

⁶⁷⁶ *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd* (2002) NSWSC 13 (n 622).

⁶⁷⁷ *William Buck (WA) Pty Ltd v Faulkner [No 6]* (2013) WASC 342.

3.6.5 Non-oppressive Conduct

When there is an oppression claim under s 232 of the *CPA*, the proceedings are not always successful only because of alleged ‘unfairly prejudicial’ or ‘unfairly discriminatory’ conduct. Even in the circumstances where ‘oppression’ is proven, the court might not always make an order, i.e., when the conduct was considered not to be aggressive and contrary to s 232 of the *CPA*. The court decisions given below are examples of instances where the court did not find oppressive conduct.

In 1984, in *Re G Jeffery (Mens Store) Pty Ltd* (*‘Jeffery’*),⁶⁷⁸ the court found that the conduct was not oppressive. The court stated that it is not enough that dividends paid are not as high as they could be, as a low dividend policy is not oppressive.⁶⁷⁹ In this case, the companies were part of the estate of the deceased father of two brothers and two sisters. One of the brothers purchased his sisters’ shares and in his authoritarian management, the brother disregarded his brother’s wishes. The court in found that the refusal to buy shares was not deemed oppressive and held that there was nothing unfair in making the applicant accept the plaintiff’s decisions about the appropriate distributions of the dividends.⁶⁸⁰ However, in a more recent case, *Russell v Lee Holdings Pty Ltd*,⁶⁸¹ the Supreme Court of Western Australia permitted the group offering the highest bid to purchase other group’s share. The dispute arose from the existence of different classes of shares with varying control rights in the private company, Lee Holdings Pty Ltd. The main issue was whether, under these circumstances, the minority shareholders were entitled to a remedy, such as a buyout. The resolution was achieved by consent of the parties to a buyout. Judge Martin emphasised that the pro rata value per share should serve as the minimum price for any such buyout.

Furthermore, in *Morgan v 45 Flers Avenue Pty Ltd*,⁶⁸² the court held that in the context of a family company, it is not oppressive to increase a director’s

⁶⁷⁸ *Re G Jeffery (Mens Store) Pty Ltd* (1984) 2 ACLC 421.

⁶⁷⁹ *Ibid.*

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Russell v Lee Holdings Pty Ltd* (No 3) (2020) WASC 346.

⁶⁸² *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692.

remuneration while not making equivalent increases for dividends. The court held that, as a general rule, the court must be satisfied that conduct is so unfair 'that reasonable directors would consider the matter would not have thought the decision fair'.⁶⁸³ The court, in this case, ⁶⁸⁴ found that the words 'oppressive, unfairly prejudicial or unfairly discriminatory' offer a broader scope for the application of relief, compared to 'oppressive' used as a single term.

In *Shamsallah Holdings Pty Ltd v CBD Refrigeration and Airconditioning Services Pty Ltd*,⁶⁸⁵ his Honour accepted that paying high salaries to directors was not oppressive. His Honour stated that high salaries taken by the managers of the company was oppressive conduct but noted that the key question was whether the increase in salary was justified based on the work done.⁶⁸⁶ His Honour further explained that he was not suggesting that 'hands on directors can take, as salaries, whatever they like or whatever they think the company can bear and thus ignore the interests of persons whose interests are represented solely by invested capital'.⁶⁸⁷ His Honour stated that 'it is a notorious fact that executives of large companies in Australia, indeed in the Western economies generally, are paid astonishing salaries to create shareholder wealth'.⁶⁸⁸ The case clarified that directors' failure to review dividend policy constitutes oppressive conduct.

The next decision with a very different result for minority shareholders is the decision in *Shelton v National Roads and Motorists Association Ltd*.⁶⁸⁹ In this case,⁶⁹⁰ Shelton claimed that the general meeting, where various resolutions were passed by NRMS, was held in an 'oppressive', 'unfairly prejudicial', and 'unfairly discriminatory' way against the members under s 232 of the CPA, including him. Tamberlin J observed that the onus of establishing unfairness is on the applicant who has to actually prove oppression.⁶⁹¹ Tamberlin J found that oppression is not established by showing that the majority are in control of the

⁶⁸³ Ibid.

⁶⁸⁴ Ibid.

⁶⁸⁵ *Shamsallah Holdings Pty Ltd v CBD Refrigeration and Airconditioning Services Pty Ltd* (2001) WASC 8.

⁶⁸⁶ Ibid.

⁶⁸⁷ Ibid.

⁶⁸⁸ Ibid.

⁶⁸⁹ *Shelton v National Roads and Motorists Association Ltd* (2004) 51 ACSR 278.

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

company.⁶⁹² His Honour also found that ‘disagreement with the decision by a majority of shareholders and directors on the part of a minority shareholder does not entitle that shareholder to relief under the section ...’⁶⁹³ The case reinforced that not every injustice to minority shareholders in companies constitutes oppression. As demonstrated in both cases discussed above, while the courts are willing to protect minority shareholders against directors’ self-dealing, they still uphold a high threshold for establishing oppressive conduct, requiring substantial evidence of unfair conduct. Accordingly, both cases have contributed to the judicial interpretation and development of Australian oppression remedies.

Below is a discussion of the remedies the court may grant to protect minority shareholders from oppressive actions of controllers in Australian corporations.

3.6.6 Remedies for ‘Oppressive’ Conduct

In Australia, oppression remedies serve as the key mechanism for protecting shareholders from oppressive conduct within companies.⁶⁹⁴ These remedies protect minority shareholders against the risk of abuse by controlling shareholders. However, for the minority shareholder to have a successful oppression action against majority shareholders, the courts require that ‘a high level of ‘oppression’’ be demonstrated.⁶⁹⁵ Section 232 of the *CPA* is a key provision that defines an act that constitutes ‘oppressive’ conduct.⁶⁹⁶ When s 232 of the *CPA* is breached, remedies for oppressive conduct are available under s 233 of the *CPA*.⁶⁹⁷ Section 234 of the *CPA* lists those who can bring an action for an order under s 233 of the *CPA*,⁶⁹⁸ and s 235 of the *CPA* specifies requirements for a person to lodge an order with the ASIC.⁶⁹⁹ Nevertheless, relief for oppressed minority shareholders is not available to those who are dissatisfied with how the company is run, about their position in the company, or their inability to control

⁶⁹² Ibid.

⁶⁹³ Ibid.

⁶⁹⁴ Harris (n 447).

⁶⁹⁵ Adams (n 135).

⁶⁹⁶ *Corporations Act 2001* (Cth) (n 3) s 232.

⁶⁹⁷ Ibid s 233.

⁶⁹⁸ Ibid s 234.

⁶⁹⁹ Ibid s 235.

the company's management.⁷⁰⁰ The above provisions are intended to assist oppressed minority shareholders in addressing variety of circumstances where majority shareholders act oppressively.

Moreover, s 233 of the Australian *CPA* provides the court significant discretion in establishing if minority oppression has occurred and enforce wide variety of orders. This flexibility makes the minority oppression remedies in s 232 'particularly attractive'.⁷⁰¹ Section 233 of the *CPA* gives the court power to make 'any order that it considers appropriate'.⁷⁰² Such orders include, but are not limited to:

- an order under s 233(1)(a) of the *CPA* that the company is wound-up.⁷⁰³ If such order is made, the winding up provisions apply as if the order was made under s 461;⁷⁰⁴
- an order under s 233(1)(b) of the *CPA* to modify or repeal the company's existing constitution.⁷⁰⁵ If such order is made, the company cannot under s 136 of the *CPA* change or repeal the constitution of the company 'if that change or repeal would be inconsistent with the provisions of the order'.⁷⁰⁶ However, exception can be made if the court order 'states that the company does have the power to make such a change or repeal',⁷⁰⁷ or when 'the company first obtains the leave of the court';⁷⁰⁸
- an order under s 233(1)(c) of the *CPA* regulating the future conduct of company affairs.⁷⁰⁹ For example, in *Re Spargos Mining NL*,⁷¹⁰ the court ordered that the board of directors be replaced with a board of directors nominated by the court;
- an order under s 233(1)(d) of the *CPA* 'for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law'⁷¹¹ and under s 233(1)(e) of the

⁷⁰⁰ Brockett (n 1) 105.

⁷⁰¹ Anil Hergovan, *Corporations Law* (LexisNexis Butterworths, 4th ed, 2020) 287.

⁷⁰² *Corporations Act 2001* (Cth) (n 3) s 233.

⁷⁰³ *Ibid* s 233(1)(a).

⁷⁰⁴ *Ibid* s 233(2)(a).

⁷⁰⁵ *Ibid* s 233(1)(b).

⁷⁰⁶ *Ibid* s 233(3).

⁷⁰⁷ *Ibid* s 233(3)(a).

⁷⁰⁸ *Ibid* s 233(3)(b).

⁷⁰⁹ *Ibid* s 233(1)(c).

⁷¹⁰ *Re Spargos Mining NL* (1990) 3 ACSR 1 (n 590).

⁷¹¹ *Corporations Act 2001* (Cth) (n 3) s 233(1)(d).

CPA 'for the purchase of shares with an appropriate reduction of the company's share capital'.⁷¹² For instance, in *Rankine v Rankine*⁷¹³ the court held that the value of the shares should be determined by what their worth would have been if the oppressive conduct had not occurred;

- an order under s 233(1)(f) of the CPA directing the company 'to institute, prosecute, defend or discontinue specified proceedings',⁷¹⁴ or under s 233(1)(g) of the CPA authorising a member to do so 'in the name and on behalf of the company';⁷¹⁵
- an order under s 233(1)(h) of the CPA appointing a receiver and manager 'of any or all of the company's property'.⁷¹⁶ An example of such an order was given in *Re Enterprise Gold Mines NL*⁷¹⁷ where the oppressive conduct placed the company's property in jeopardy; and
- an order under s 233(1)(j) of the CPA 'requiring a person to do a specified act'.⁷¹⁸ For instance, in *Re Spargos Mining NL*⁷¹⁹ the court ordered to alter or add to the constitution of the company.

When the court finds that oppression has occurred, it prefers 'the least intrusive remedy' to eliminate oppression.⁷²⁰ Thus, in *Ubertini v Saeco International Group SpA [No 4]*⁷²¹ the court did not grant a winding up order, but attempted to address the causes of the conduct.

Accordingly, in Australia, oppression remedies are avenues whereby oppressed minority shareholders may end the oppressive conduct by majority shareholders, once such conduct is established, but not to address disagreements between shareholders that are neither unjust or oppressive. Even though not available in all circumstances, the most common remedies for oppressive conduct of affairs in Australia are the winding up of the company and the buy-out of minority shareholders' shares, granted at the court's discretion.

⁷¹² Ibid s 233(1)(e).

⁷¹³ *Rankine v Rankine* (1995) 124 FLR 340.

⁷¹⁴ *Corporations Act 2001* (Cth) (n 3) s 233(1)(f).

⁷¹⁵ Ibid s 233(1)(g).

⁷¹⁶ Ibid s 233(1)(h).

⁷¹⁷ *Re Enterprise Gold Mines NL* (1991) 3 ACSR 531.

⁷¹⁸ *Corporations Act 2001* (Cth) (n 3) s 233(1)(j).

⁷¹⁹ *Re Spargos Mining NL* (1990) 3 ACSR 1 (n 590).

⁷²⁰ *Yogaratnam, Xynas, O'Connell* (n 17).

⁷²¹ *Ubertini v Saeco International Group SpA [No 4]* (2014) VSC 47.

3.6.7 ASIC Requirement for Lodging Court Order

Section 235(1) of the *CPA* specifies that when an order was made under s 233 of the *CPA*, the applicant making an order must lodge, within 14 days after the order is made, a copy of the order with ASIC.⁷²² Section 235(2) provides that an offence based on s 235(1) is a strict liability offence.⁷²³

3.7 Conclusion

This chapter examined the oppression remedies available to minority shareholders in Australian companies facing oppression by the majority. It studied what constitutes oppression and the requirements the court must consider to make an order granting relief. The chapter also investigated who can bring an oppression claim, the available remedies for oppressive conduct, and the case law concerning minority shareholders' oppression in Australian companies. The chapter established that under s 232 of the Australian *CPA*, minority shareholders may seek oppression remedies for 'oppressive', 'unfairly prejudicial', or 'unfairly discriminatory' conduct by majority shareholders within companies, which relate to the conduct of a company's affairs. In this context, the court has broad discretion to issue any orders it considers appropriate in order to put an end to such conduct.

Moreover, this chapter examined the nature of companies and the roles and duties of directors in Australian corporations. It demonstrated that a company is an artificial legal entity and a separate 'person' at law, managed and governed by its directors for the benefit of its shareholders or other members. Building on the work of Philip Lipton, Abe Herzberg and Michelle Welsh, who argue that minority shareholders may face challenges when shareholders or directors act in their own interests, this chapter addressed in particular the fiduciary, common law, and statutory duties of company directors. The chapter demonstrated that, under the *CPA*, directors are required to fulfil a number of duties, such as duties

⁷²² *Corporations Act 2001* (Cth) (n 3) s 235(1).

⁷²³ *Ibid* s 235(2).

of care and diligence, duties related to acting in good faith in the best interests of the company, and for appropriate purposes. Moreover, directors have a duty to avoid conflict of interests and to disclose any material personal interest. These duties exist to ensure good governance structure, aligning with the company's long-term objectives.

Additionally, this chapter examined shareholders, shares, and shareholders' rights and duties. It found that majority shareholders, holding a larger ownership percentage, have higher voting powers than minority shareholders, and can significantly influence corporate decision-making. On the other hand, as Richard Brockett observed and discussed in Chapter 2, minority shareholders lack the power to influence the management and operations of the company. Considering the argument by Christopher Bevan, that ownership in a company is established by shareholding, with shareholders playing a fundamental role in its governance, this chapter established that when members hold a majority of votes at shareholder meetings, they become a decision-making body that directs, manages and operates the company. This often leads to a violation of minority shareholders' rights.

The chapter concludes that an effective exercise of shareholders' rights in Australian companies is vital to promoting efficient corporate governance practices. This involves coordinating the interests of all companies' shareholders and implementing rules and practices that reflect global corporate developments. Building on the work of Mark Rix, who argues that Australia must reform its governance principles to confront challenges before it becomes too late, this chapter concludes that while the Australian *CPA* offers some protection for oppressed minority shareholders, there remains a need for further improvements. Hence, this chapter identified key areas for a comparative study of Australian oppression laws and those of comparable jurisdictions, to propose recommendations for the amendment of oppression remedies in Australia.

Chapter 4

The United Kingdom Position on Minority Shareholder Protection

- 4.1 Overview
- 4.2 Brexit and the United Kingdom Company Law
- 4.3 Legal Foundation of the United Kingdom Company
- 4.4 Directors and Their Duties
- 4.5 Minority Shareholders' Protection in the United Kingdom
 - 4.5.1 Corporate Winding-up: Legal Framework and Procedure
 - 4.5.2 Origins and Development of the 'Unfair Prejudice' Presumption
 - 4.5.3 The Legal Framework for 'Unfair Prejudice' Remedies
- 4.6 Court Orders upon Showing 'Unfair Prejudicial' Conduct
- 4.7 Case Law on Minority Oppression in the United Kingdom: Early Developments
- 4.8 Recent Developments in the United Kingdom Case Law Strengthening Protection for Minority Shareholders
- 4.9 Conclusion

4.1 Overview

This chapter examines the corporate laws in the United Kingdom that protect minority shareholders, and the remedies available for oppression of controlling shareholders in companies under s 994-996 of the *Companies Act 2006* (UK)⁷²⁴ ('*United Kingdom CMA*'). It finds that, in the United Kingdom, minority shareholders are afforded various legal remedies to address oppressive conduct by majority shareholders. A closer analysis reveals that minority shareholders, who are at risk of misconduct by majority owners, particularly in cases of mismanagement that harm their interests, tend to file petitions under 'unfair prejudice' to protect their rights. This provides minority shareholders with a legal avenue for addressing their concerns regarding oppression by majorities. Therefore, this chapter examines the way that s 994 of the *United Kingdom CMA* grants minority shareholders the right to petition against 'unfairly prejudicial'

⁷²⁴ *Companies Act 2006* (UK) (n 4).

conduct by majority shareholders in public and private companies, and assesses its efficiency in protecting shareholder's interests.

This chapter also investigates how, historically, courts in the United Kingdom have developed equitable remedies, at their discretion, to address shareholder's conduct that has been 'unfairly prejudicial' to other company members. This judicial development of equitable remedies, at first on 'just and equitable' grounds, began with the decision made in *Ebrahimi v Westbourne Galleries Ltd*,⁷²⁵ where the House of Lords granted a 'just and equitable' order for winding up the company. The House of Lords found that majority shareholders had no right, in terms of either justice or equity, to take advantage of their powers to remove the petitioner from the director's position in the company.⁷²⁶ The chapter also reveals that with the subsequent introduction of the 'unfair prejudice', remedy, the court could issue a buy-out order instead of a winding-up order.

Accordingly, this chapter examines the provisions of the *Insolvency Act 1986* (UK)⁷²⁷ that relate to the winding up and insolvency of companies in the United Kingdom. It finds that s 122(1)(g) of the United Kingdom *Insolvency Act 1986*, which allows a company to be wound up on 'just and equitable' grounds, is considered to be a remedy of last resort. Therefore, this chapter examines how the broad discretion granted to the courts to determine whether winding up is justified applies to 'fairness' in the context of each case.

Moreover, this chapter explores provisions related to directors and their duties under the *United Kingdom CMA* as well as different types of companies in the United Kingdom. It also provides the background of the presumption of 'unfair prejudice'. Further, the chapter discusses early and recent developments in the United Kingdom case law pertaining to shareholders' oppression, examining their role in clarifying key aspects of the United Kingdom's oppression remedies.

⁷²⁵ *Ebrahimi Westbourne Galleries* [1972] 2 All ER 492 (n 210).

⁷²⁶ *Ibid.* See also *Re JE Cade & Son* [1991] BCC 360.

⁷²⁷ *Insolvency Act 1986* (UK), *The National Archives* (Web Document, 2024) <<https://www.legislation.gov.uk/ukpga/1986/45/contents>>.

Finally, this chapter concludes that, in the United Kingdom, oppression laws are broad in scope, particularly in terms of the standards used to assess oppressive conduct in companies. Accordingly, when action is brought by minorities, the court may consider a wide range of remedies at its discretion. The chapter provides a basis for a comparative analysis of oppression laws in the United Kingdom and Australia, offering recommendations for improving Australian oppression laws in line with those of the United Kingdom. Building on the work of authors such as Sandra Miller,⁷²⁸ the chapter emphasises the need for clearer definitions of ‘unfairly prejudicial’, ‘oppressive’ and ‘unfairly discriminatory conduct’ in the Australian *CPA*, along with clearer standards to improve their efficiency, as suggested by Amelia Schultz.⁷²⁹

This chapter begins with an overview of Brexit - the United Kingdom’s departure from the European Union, and its implications for the company law of the United Kingdom.

4.2 Brexit and the United Kingdom Company Law

‘Brexit’ refers to the process whereby the United Kingdom departed from the European Union, and its potential impact on corporate governance in both the United Kingdom and the European Union.⁷³⁰ Although Forbes William and Lynn Hodgkinson claim, as presented in Chapter 2, that shareholders in common law jurisdictions receive the most protection,⁷³¹ the challenges arising from Brexit are particularly important. One of these issues is the transformation of the relevant European Union law into United Kingdom law, alongside the challenges that the United Kingdom courts face in following the European Union court decisions in the future. This process entails ‘rethinking and re-legislating a vast number of policy areas’.⁷³² Even though United Kingdom company law has developed in close alignment with European Union law, it is unlikely to change thoroughly

⁷²⁸ Miller (n 218).

⁷²⁹ Schultz (n 55) 505.

⁷³⁰ Andrew Johnston, ‘Company Law and Corporate Governance After Brexit: From Short-Term Disruption to Long-Term Sustainability?’ (Policy Brief No 8/2020, European Economic, Employment and Social Policy, 2020) 1 <<https://ssrn.com/abstract=3699372>>.

⁷³¹ William and Hodgkinson (n 201) 4.

⁷³² Martill Benjamin and Uta Staiger, *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Pres, 2018) 1.

because of Brexit.⁷³³ Hence, Brexit introduced uncertainty for the United Kingdom's companies.

Post-Brexit, the *European Union (Withdrawal) Act 2018* (UK)⁷³⁴ repealed the *European Communities Act* of 1972 (UK),⁷³⁵ providing, in s 1, that European Union-derived domestic legislation has a continuing effect on United Kingdom national law 'on and after exit day'.⁷³⁶ The *European Union (Withdrawal) Act 2018* (UK) also incorporated direct European Union legislation into domestic law on and after exit day,⁷³⁷ enabling the transposition of existing European Union law into United Kingdom law. This resulted in a new category of domestic law for the United Kingdom, called '*Retained EU Law*' which came into effect at the end of the United Kingdom's post-Brexit transition period (31 December 2020). On 1 January 2024, the *Retained EU Law (Revocation and Reform Act) 2023* (UK)⁷³⁸ ('*Retained EU Law*') was introduced to distance the retained European Union law, established in the United Kingdom post-Brexit, from the European Union's law that previously applied in the United Kingdom. In addition, to reflect these changes, the retained European Union law is now referred to as 'assimilated law'.⁷³⁹ According to the *Retained EU Law*, 'no general principle of EU is part of domestic law after the end of 2023',⁷⁴⁰ as stated in s 4(2)(a). This means that in case of any conflict, domestic United Kingdom law prevails over the European Union legislation.

The legal landscape in the United Kingdom has undergone a significant transformation with the introduction of the '*Retained EU Law*' that also affected the rulings of the United Kingdom courts. After the introduction of the '*Retained EU Law*', the United Kingdom courts are not bound by retained case law.⁷⁴¹

⁷³³ Stuart Young and Anurag (Ragi) Singh, 'The Impact of Brexit on Existing UK Company Law and its Future Development' (Gowling WLG, Articles, 18 September 2018) <<https://gowlingwlg.com/en/insights-resources/articles/2018/the-impact-of-brexit-on-existing-uk-company-law/>>.

⁷³⁴ *European Union Withdrawal Act 2018* (UK), *The National Archives* (Web Document, 2024) <<https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>>.

⁷³⁵ *European Communities Act 1972* (UK).

⁷³⁶ *European Union Withdrawal Act 2018* (UK) (n 734) s 1.

⁷³⁷ *Ibid* s 3.

⁷³⁸ *Retained EU Law (Revocation and Reform Act) 2023* (UK), *The National Archives* (Web Document, 2024) <<https://www.legislation.gov.uk/ukpga/2023/28/contents/enacted>>.

⁷³⁹ *Ibid* s 5(1).

⁷⁴⁰ *Ibid* s 4(2)(a).

⁷⁴¹ *Ibid* s 6(2).

Furthermore, s 6(2) of '*Retained EU Law*' requires that the higher court consider certain factors when deciding whether to depart from the retained European Union case law.⁷⁴² Accordingly, the higher court must take into account the non-binding nature of foreign court decisions, any changes in circumstances relevant to the assimilated European Union case law, and the extent to which the assimilated European Union case law restricts the proper development of the United Kingdom law.⁷⁴³ While the '*Retained EU Law*' provided some continuity to avoid sudden disruptions to the United Kingdom's legal system, there are many challenges that need to be addressed.

All those legislative projects intended to amend, repeal and improve existing European Union legislation in United Kingdom law, are one of the largest legislative reforms undertaken in the United Kingdom.⁷⁴⁴ Those changes signify a significant shift and challenge in the United Kingdom's legal field which will be interesting to observe. This lack of clarity is difficult to navigate, resulting in uncertainty and potential consequences for the United Kingdom companies and company law, even though any immediate changes are unlikely. Although opposing voices persist in bids to undo Brexit and return to the European Union,⁷⁴⁵ this issue is expected to remain at the centre of discussions, leading to ongoing controversies and disputes. Given the complexity of the problem and that the United Kingdom company law has long been significantly influenced by European Union law, it would be wise for the United Kingdom to remain aligned with European Union company law, even in the event that Brexit is undone.

4.3 Legal Foundation of the United Kingdom Company

In the United Kingdom, the most popular business structure is the registered company.⁷⁴⁶ This is because the majority of commercial enterprises in the United Kingdom choose this structure as it is a stable and well-regulated vehicle for local and international business. The United Kingdom registered company can be

⁷⁴² Ibid.

⁷⁴³ Ibid s 6(3).

⁷⁴⁴ Benjamin and Staiger (n 732) 1.

⁷⁴⁵ Adam G Rudolf, *Brexit: Causes and Consequences* (Springer Nature, 2020) 208.

⁷⁴⁶ Miller (n 218) 399.

either a company limited by shares (publicly or privately owned), a company limited by guarantee (typically used for non-profit purposes), or an unlimited company (where shareholders have personal liability).⁷⁴⁷ In the United Kingdom, a 'company' is defined as a corporation that is formed and registered under the *United Kingdom CMA*.⁷⁴⁸ A company in the United Kingdom is not legally recognised and cannot enter into a contract or act through an agent before it is incorporated.⁷⁴⁹ Pursuant to s 51(1) of the *United Kingdom CMA* the contract intended to be made at the time when the United Kingdom company has not been formed, has effect as it is made with the person purporting to act for the company.⁷⁵⁰ This is subject to any agreement to the contrary.⁷⁵¹ Accordingly, this person is personally liable as stated on the contract.⁷⁵² The United Kingdom company law distinguishes between incorporated and unincorporated entities. The former has a separate legal personality, unlike the latter.

A company limited by shares can be either a public or a proprietary (private) company. Private United Kingdom companies are much less regulated and more favourable commercial enterprises⁷⁵³ for the potential business owners. For private United Kingdom companies, there are no statutory requirements to hold general meetings; there is no limit on the company's share capital; written resolutions can be passed without a meeting; and the company only needs one shareholder.⁷⁵⁴ Pursuant to s 4(1) of the *United Kingdom CMA*, any company that is not incorporated as a public company is considered to be a private company.⁷⁵⁵ A private company is commonly referred to as a 'private limited company'.

A public company in the United Kingdom must have a share capital and is either limited by shares or limited by guarantee.⁷⁵⁶ The certificate of incorporation must

⁷⁴⁷ Ibid.

⁷⁴⁸ *Companies Act 2006* (UK) (n 4) s 1.

⁷⁴⁹ Andreas Cahn and David C Donald, *Comparative Company Law* (Cambridge University Press, 2nd ed, 2018) 159.

⁷⁵⁰ *Companies Act 2006* (UK) (n 4) s 51(1).

⁷⁵¹ Ibid.

⁷⁵² Ibid. See also *Kelner v Baxter* [1866] LR 2 CP 174, where the Court held that if there is a clear intended contract, the person who entered the contract was liable personally for failing to pay for purchasing wine for a new hotel business.

⁷⁵³ James Marson and Katy Ferris, *Business Law* (Oxford University Press, 4th ed, 2015) 330.

⁷⁵⁴ Ibid.

⁷⁵⁵ *Companies Act 2006* (UK) (n 4) s 4(1).

⁷⁵⁶ Ibid s 4(2).

mention that it is a public company.⁷⁵⁷ Public limited companies are required to hold annual general meetings.⁷⁵⁸ The minimum share capital required for public limited companies is 50,000 pounds for public limited companies, as per s 761(3) and 763 of the *United Kingdom CMA*, but no such requirement exists for private companies. Public limited companies can offer shares to the public, while private companies are prohibited from doing so.⁷⁵⁹ Public companies with dominant shareholders present challenges in corporate governance because such shareholders may exercise their influence to secure personal benefits at the expense of the outside investors.⁷⁶⁰ Therefore, the legal distinction between public and private companies is that public companies may offer their shares to the public.

Section 7 of the *United Kingdom CMA* outlines the process for establishing a company. According to s 7(1) of the *United Kingdom CMA*, one or more persons can establish the company by subscribing their names in the memorandum of association and fulfilling the requirements of the *United Kingdom CMA*.⁷⁶¹ However, s 7(2) of the *United Kingdom CMA* prohibits the establishment of a corporation 'for an unlawful purpose'.⁷⁶² Once all the requirements of the *United Kingdom CMA* are met, the company is considered to be registered.⁷⁶³ Upon registration, the registrar issues a certificate of incorporation, which is considered 'conclusive evidence' that all the requirements of the *United Kingdom CMA* regarding the registration of the company have been met.⁷⁶⁴ For this reason, before a company in the United Kingdom can legally operate, it must be registered.

The recognition and existence of companies, whether corporate or partnership, are managed by the domestic law of the country where they are established.⁷⁶⁵

⁷⁵⁷ Ibid s 4(2)(a).

⁷⁵⁸ Ibid s 336(1).

⁷⁵⁹ Marson and Ferris (n 753) 328.

⁷⁶⁰ Brian R Cheffins, 'The Undermining of UK Corporate Governance(?)' (2013) 33(3) *Oxford Journal of Legal Studies* 503, 504.

⁷⁶¹ *Companies Act 2006* (UK) (n 4) s 7(1).

⁷⁶² Ibid s 7(2).

⁷⁶³ Ibid s 14.

⁷⁶⁴ Ibid s 14(4).

⁷⁶⁵ Hans Jurgen Hellwig, 'The Effect of Brexit on the Law of Companies and Financial and Legal Services in Europe: A Summary Overview' (2017) 14(2) *European Company and Financial Law Review* 252, 257.

Post-Brexit, the United Kingdom companies that operate in other European Union Member States experience new challenges, especially regarding the law that applies when determining their legal status, and they are dependent on the Member State's own rules. According to the *Trade and Cooperation Agreement of 2021 (UK)*⁷⁶⁶ established post-Brexit between European Union and the United Kingdom, any party to the agreement should not impose limitations on the number of companies established,⁷⁶⁷ the total value of the assets of transactions,⁷⁶⁸ and of the operations or the quantity of output.⁷⁶⁹ So, according to *Trade and Cooperation Agreement of 2021 (UK)*, European Union investors are allowed to establish and operate their companies in the territory of the United Kingdom without any limitations as specified by this agreement. Therefore, it is still 'widely believed that access by the EU companies to the UK market will remain very flexible, in line with the previously prevailing traditions and views'.⁷⁷⁰ However, in practice, it is unclear how post-Brexit challenges will be reflected in the corporate laws pertaining to the affected parties.

4.4 Directors and Their Duties

In the United Kingdom, a director is responsible for managing the 'commercial and administrative matters of a company'.⁷⁷¹ This term includes anyone holding the position of director, regardless of the name they use.⁷⁷² Every United Kingdom corporation must have at least one natural person as a director and every corporation must have at least one director.⁷⁷³ As long as the director is a natural person, the requirement is met.⁷⁷⁴ The rule applies even if the director was disqualified or has ceased to hold office.⁷⁷⁵ So, when this requirement is

⁷⁶⁶ *Trade and Cooperation Agreement 2021, Government UK* (Web Document, 2024)

<https://assets.publishing.service.gov.uk/media/608ae0c0d3bf7f0136332887/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf>.

⁷⁶⁷ *Ibid* s 128(a)(i).

⁷⁶⁸ *Ibid* s 128(a)(ii).

⁷⁶⁹ *Ibid* s 128(a)(iii).

⁷⁷⁰ Peter Cockli et al, 'The consequences of Brexit for Companies and Company Law' (Research Paper No 22/2017, Faculty of Law, University of Cambridge, April 2017) 8.

⁷⁷¹ Josephine Bisacre and Claire McFadzean, *Company Law Essential* (Edinburgh University Press, 2011) 53.

⁷⁷² *Companies Act 2006* (UK) (n 4) s 250.

⁷⁷³ *Ibid* s 155(1).

⁷⁷⁴ *Ibid* s 155(2).

⁷⁷⁵ *Ibid* s 161(1).

satisfied, even if there is an issue with the director's appointment, it will not affect the validity of their acts.

Historically, under the common law, the directors of United Kingdom companies had fiduciary duties to act for the benefit of the corporation as a whole, to avoid conflict of interests, and to act honestly and in good faith; they also owed a duty of care, skill and diligence to a company.⁷⁷⁶ Those duties are now part of the legislative framework of the *United Kingdom CMA*, specified in ss 171-177 of the *United Kingdom CMA*. Accordingly, directors must use their powers for the purposes for which they were granted.⁷⁷⁷ They are also required to follow the company's constitution.⁷⁷⁸ As discussed in Chapter 2, Marjan Parkinson notes that director duties are closely aligned with stakeholder interests.⁷⁷⁹ In the United Kingdom, directors owe duties to their company.

Therefore, in discharging their functions, directors have always had a fiduciary duty to act bona fide in the best interest of the company (duty of loyalty). This duty is now imposed by statute under s 172 of the *United Kingdom CMA*. According to this section, the directors must act in good faith to 'promote the success of the company for the benefit of its members as a whole'.⁷⁸⁰ In *Re Astec (BSR) plc*⁷⁸¹ the court stated that shareholders, on the other hand, are not bound by a similar duty. In this case,⁷⁸² Parker J clarified that shareholders have no obligation to vote in a way others consider to be in the best interests of the corporation. Further, Justice Parker stated that a shareholder may vote in their own interest even if it is not in accordance with others.⁷⁸³ Accordingly, if directors operate the corporation in a way that fulfils the wishes of the controlling shareholders, they risk breaching their duty.

Section 174(1) of the *United Kingdom CMA* requires directors to exercise reasonable care, skill, and diligence.⁷⁸⁴ This means that directors must act in a

⁷⁷⁶ Bisacre and McFadzean (n 771) 54.

⁷⁷⁷ *Companies Act 2006* (UK) (n 4) s 171.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ Parkinson (n 202) 15.

⁷⁸⁰ *Companies Act 2006* (UK) (n 4) s 172(1).

⁷⁸¹ *Re Astec (BSR) plc* [1998] 2 BCLC 556.

⁷⁸² *Ibid.*

⁷⁸³ *Ibid.*

⁷⁸⁴ *Companies Act 2006* (UK) (n 4) s 174(1).

way ‘that would be exercised by a reasonably diligent person’.⁷⁸⁵ Directors must avoid conflicts between their personal interests and those of the company.⁷⁸⁶ Additionally, directors must not accept benefits from third parties.⁷⁸⁷ Directors also have to declare any interest in a proposed transaction or arrangement.⁷⁸⁸ Furthermore, directors ‘must declare the nature and extent of that interest to the other directors’ in case he or she is directly or indirectly interested in a proposed transaction or arrangement.⁷⁸⁹ Moreover, directors must exercise independent judgement which means they must make decisions without bias and independently.⁷⁹⁰

Directors face further statutory restrictions under ss 171-177 of the *United Kingdom CMA*. Pursuant to s 188(1) and (2) of the *United Kingdom CMA*, the members’ approval is needed for transactions involving the buying of ‘a substantial non-cash asset (directly or indirectly) from such a director or person connected’.⁷⁹¹ Directors also need approval for loans. These approvals should be given by the company’s members by way of resolution.⁷⁹² Also, payments to any person connected to the director, or for the director’s benefit should be treated as a payment made to the director.⁷⁹³ Hence, the aforementioned sections set out the statutory duties imposed on directors.

Directors’ duties are a result of the powers they hold within the company, which arise from their ‘functional and normative role’ in managing affairs of the company, and have an impact on company’s legal relations.⁷⁹⁴ In the United Kingdom, the ability of shareholders to remove a company’s directors at any time, as provided in s 168 of the *United Kingdom CMA*, suggests that the United Kingdom operates as a ‘shareholder-centered model’.⁷⁹⁵ As result, if directors breach their directors’ duties, the company may not initiate procedure for the breach, particularly if the directors’ board is under the influence of controlling

⁷⁸⁵ Ibid s 174(2)

⁷⁸⁶ Ibid s 175.

⁷⁸⁷ Ibid s 176.

⁷⁸⁸ Ibid s 177.

⁷⁸⁹ Ibid.

⁷⁹⁰ Ibid s 173.

⁷⁹¹ Ibid s 190.

⁷⁹² Ibid s 197(1).

⁷⁹³ Ibid s 215(3).

⁷⁹⁴ Victor Joffe et al, *Minority Shareholders* (Oxford University Press, 6th ed, 2018) 5.

⁷⁹⁵ Eva Micheler, *Company Law* (Oxford University Press, 2021) 201.

shareholders.⁷⁹⁶ However, failure to carry out directors' duties may result in bringing a claim against the director(s).

Brexit has no significant impact on the duties of directors within companies. Even though the United Kingdom law on directors' duties is influenced by the European Union law, there are no current proposals for amendments to the *United Kingdom CMA* following Brexit. Following Brexit, directors still owe duties to their companies under the *United Kingdom CMA*. Although directors are held to the same standards as described above, the full impact of Brexit on director's duties is not yet known.

Moreover, in United Kingdom companies, minority shareholders are protected by the 'unfair prejudice' remedy which allows the courts to review transactions between the corporations and its majority shareholders.⁷⁹⁷ This remedy is discussed in more detail below.

4.5 Minority Shareholders' Protection in the United Kingdom

Under the United Kingdom company law, there are two statutory remedies available to protect shareholders: the 'unfair prejudice' remedy under the *United Kingdom CMA* and the 'just and equitable' winding-up remedy under the *Insolvency Act 1986*. The United Kingdom courts have established a jurisprudence that applies the 'control, integration and impact' test to determine whether there has been 'unfair prejudice' in corporate group structures.⁷⁹⁸ Minority shareholders in the United Kingdom companies may also bring a claim for breach of the shareholders' agreement or articles of association. Additionally, if the company's interests have been damaged as a result of the directors' actions or the conduct of third parties, company shareholders may bring a derivative claim under s 260-264 of the *United Kingdom CMA*. As highlighted in the work of Amelia Schultz,⁷⁹⁹ presented in Chapter 2, upon which this thesis builds,

⁷⁹⁶ Cheffins (n 760) 526.

⁷⁹⁷ Micheler (n 795) 196.

⁷⁹⁸ Zhong Xing Tan, 'Unfair Prejudice from beyond, Beyond Unfair Prejudice: Amplifying Minority Protection in Corporate Group Structures' (2014) 14(2) *Journal of Corporate Law Studies* 367, 371.

⁷⁹⁹ Schultz (n 55) 505.

shareholder oppression laws should promote economic efficiency and fairness when resolving corporate conflicts.

Post-Brexit, a significant part of United Kingdom company law is influenced by European Union directives. However, the *United Kingdom CMA* remains in effect unless the United Kingdom Parliament decides to amend it. Following Brexit, according to s 4(1) of the *European Union (Withdrawal) Act 2018* (UK), any European Union's 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' continue to be recognised by and available in domestic law.⁸⁰⁰ Consequently, all the European Union legislation in force at the time when the United Kingdom left the European Union (on 31 January 2020) was incorporated into domestic law and was not affected by Brexit. As a result, the United Kingdom may amend the *United Kingdom CMA* at its discretion.

The statutory remedy of 'just and equitable' winding-up is discussed below.

4.5.1 Corporate Winding-up: Legal Framework and Procedure

In the United Kingdom, there are several grounds under the *Insolvency Act 1986* for winding up a company. These include: if a special resolution is passed for the company to be wound up by the court,⁸⁰¹ if a public company has not been issued a certificate, and more than a year has passed since its registration: s 121(1)(b), if it is an old public company under the *Consequential Provisions Act*: s 122(1)(c), if it does not commence a business within a year of registration,⁸⁰² if the number of members of the company falls below two: s 122(1)(e) or if the company is unable to pay its debts.⁸⁰³ Section 122(1) of the *Insolvency Act 1986*, lists the situations in which the court may wind up a company. Pursuant to s 122(1)(g) of the *Insolvency Act 1986*, the company can be wound up if the court believes that it is 'just and equitable' to do so.⁸⁰⁴ As provided under s 124(1) and (4) of the

⁸⁰⁰ *European Union Withdrawal Act 2018* (UK) (n 734) s 4(1).

⁸⁰¹ *Insolvency Act 1986* (UK) (n 727) s 122(1)(a).

⁸⁰² *Ibid* s 122(1)(d).

⁸⁰³ *Ibid* s 122(1)(f).

⁸⁰⁴ *Ibid* s 122(1)(g).

Insolvency Act 1986, this remedy is available not only to shareholders, but also to directors, creditors, and secretaries of state.

Moreover, the court cannot refuse to issue a winding-up order just because the company's assets have been mortgaged for the amount equal to or greater than the value of those assets, or because the corporation has no assets.⁸⁰⁵ However, the court can order the winding up of a company only on 'just and equitable' grounds. In order to do so, the court should believe that: (a) the petitioners are justified in requesting that the company be wound up, and (b) if there is no other remedy available, that it would be 'just and equitable' to wind up the company.⁸⁰⁶ A dissolution remedy cannot be applied if there is an alternative remedy available and if petitioners are not acting reasonably when they petition for the corporation to be wound up instead of seeking other remedies.⁸⁰⁷ If the company is solvent and, under s 994 of the *United Kingdom CMA*, the petitioner has a suitable way to exit the company, the court will consider that the petitioner is not acting reasonably when petitioning for the company to be wound up.⁸⁰⁸ Therefore, winding up should be the ultimate measure,⁸⁰⁹ and remedy of last resort.

It is important to mention the leading case concerning the 'just and equitable' court's power to order a winding up of a company in accordance with equitable principles.⁸¹⁰ The case in point is *Ebrahimi v Westbourne Galleries Ltd*⁸¹¹ ('*Ebrahimi*'), wherein the House of Lords stated that without shareholder agreement, equitable factors justifying the winding up of the company include: (1) if the company was formed based on a personal relationship with a mutual confidence (usually when partnerships are to be converted into company); (2) if there is an agreement that all or some of the shareholders will be part of conducting the company's business; (3) if there is a restriction on the transfer of the members' interests in the company when the confidence is lost or if the member is removed from company's management and cannot take his or her

⁸⁰⁵ Ibid s 125(1).

⁸⁰⁶ Ibid s 125(2).

⁸⁰⁷ Ibid s 125(2).

⁸⁰⁸ Alan Dignam and John Lowry, *Foundational and Constitutional Issues in Company Law: Section D* (University of London Press, 2009) 28.

⁸⁰⁹ Ibid.

⁸¹⁰ Heger (n 219) 135.

⁸¹¹ *Ebrahimi Westbourne Galleries* [1972] 2 All ER 492 (n 210).

shares and go somewhere else. Furthermore, Lord Cohen stated that winding up is appropriate when minority shareholders' interests are 'unfairly' harmed.⁸¹² In this case,⁸¹³ the court found that when considering the winding up of the company, the shareholders' personal rights, expectations, and obligations should be considered. This case will be discussed in more detail later.

In respect to the insolvency proceedings, the European Union legislation refers to the Directive (EU) 2019/1023 of the European Parliament and of the Council⁸¹⁴ and the Regulation (EU) 2015/848 on insolvency proceedings.⁸¹⁵ Article 2(2) of the Directive (EU) 2019/1023 of the European Parliament and of the Council⁸¹⁶ establishes that the concept of insolvency is 'to be understood and defined by national law'.⁸¹⁷ Moreover, Member States must ensure that according to this Directive, 'insolvent entrepreneurs have access to at least one procedure that can lead to full discharge of debt'.⁸¹⁸ Therefore, this Directive provides a legal framework for the discharge of debts resulting from insolvency proceedings, rather than addressing the insolvency proceedings.

Regulation 2015/848 on insolvency proceedings in Article 3(1) establishes that the courts of the Member States where the debtor's main interests are located have jurisdictions to open main insolvency proceedings.⁸¹⁹ Accordingly, this regulation determines the jurisdiction of insolvency proceedings and if needed, enforces it across all Member States. In this regard, the case of *Re BRAC Rent-A-Car International Inc*⁸²⁰ involved a company that was incorporated under the

⁸¹² Ibid.

⁸¹³ Ibid.

⁸¹⁴ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventing restricting frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Restructuring and insolvency Directive) [2019] OJ L172/18, *The National Archives* (Web Document, 2024) <<https://www.legislation.gov.uk/eudr/2019/1023/contents>>.

⁸¹⁵ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141/19, *The National Archives* (Web Document, 2024) <<https://www.legislation.gov.uk/eur/2015/848/contents>>.

⁸¹⁶ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventing restricting frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Restructuring and insolvency Directive) [2019] OJ L172/18 (n 814).

⁸¹⁷ Ibid Article 2(2).

⁸¹⁸ Ibid Article 20(1).

⁸¹⁹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141/19 (n 815) Article 3(1).

⁸²⁰ *Re BRAC Rent-A-Car International Inc* [2003] EWHC 128 (Ch).

Delaware law. Although the debtor was a Delaware company, the High Court in London had jurisdiction under the Article 3 of Regulation 2015/848 on insolvency proceedings to issue an administration order. In this case,⁸²¹ Justice Lloyd stated that even though the company was incorporated in Delaware, it did not trade there, as its operations were managed in the United Kingdom. According to Susan Blok-Lieb, this case has broadened the scope of jurisdiction beyond what was previously available under the *Insolvency Act 1986*.⁸²² This was due to the fact that Article 3 of the Regulation 2015/848 on insolvency proceedings focuses on determining whether the 'centre of the debtor's main interests is within that Member State, as is the case in this instance'.⁸²³ Given Brexit, there are challenges to incorporating the directives and regulations under United Kingdom national company law.

The development of company law in the United Kingdom has been an ongoing process leading to one reform after another,⁸²⁴ as discussed below.

4.5.2 Origins and Development of the 'Unfair Prejudice' Presumption

From the early days of current company law, the United Kingdom legislation contained one type of action to oppressed minority shareholders: the compulsory winding up of the company on 'just and equitable' grounds.⁸²⁵ This power, as stated above, appears in s 122(1)(g) of the *Insolvency Act 1986*.

The statutory remedy of 'just and equitable' winding up in the United Kingdom has existed since the United Kingdom *Joint Stock Winding Up Act* of 1848 and as a result of the Cohen Committee's recommendations on company law (1945). The United Kingdom's *Companies Act* of 1947 prescribed the purchase of petitioner's shares as an 'alternative remedy to winding up in cases of

⁸²¹ Ibid.

⁸²² Susan Blok-Lieb, 'The UK and EU Cross-Border Insolvency Recognition: From Empire to Europe to Going It Alone' (2017) 40(5) *Fordham International Law Journal* 1373, 1396.

⁸²³ Ibid.

⁸²⁴ Clive M Schmitthoff, 'Judicial Reform of Company Law in the United Kingdom' (1962) 4(1) *Malaya Law Review* 76, 76.

⁸²⁵ Paul Davies, *Introduction to Company Law* (Clarendon Law Series 3rd ed, 2020) 160.

oppression'.⁸²⁶ Accordingly, under s 9 of this Act, oppressed members of a company could make an application to wind up the company, and the court could issue an order as it thinks fit, to regulate the affairs of the company in the future or for other members to purchase the members' shares.⁸²⁷ This was also prescribed in s 210 of the *Companies Act 1948* (UK) as an alternative remedy to winding up in case of oppression. Section 210 also gave the oppressed majority shareholders the right, if the affairs of the company were being conducted in an oppressive manner against some of the members or the company, and if the circumstances were 'just and equitable', to apply to the court by way of petition for an equitable remedy such as winding up.⁸²⁸

The United Kingdom *Companies Act* of 1980 allowed the winding up of the company to be ordered without having to prove that it would be 'just and equitable' to do so.⁸²⁹ However, a new provision inserted in s 75 of the United Kingdom *Companies Act* of 1980 introduced the concept of 'unfairly prejudicial' conduct. Under this section,⁸³⁰ to obtain relief, a member of the company had to prove that the company's affairs were conducted in manner that was 'unfairly prejudicial' against some of the members or that the actual or proposed act or omission of the company was or would be prejudicial.

Since then, the willingness of the United Kingdom courts to intervene in minority shareholders' protection in the companies increased significantly.⁸³¹ As result, s 75 of the United Kingdom *Companies Act* of 1980 was replaced by s 459 of the United Kingdom *Companies Act* of 1985 which gave a member the right to petition on the grounds that the company's affairs were conducted in an 'unfairly prejudicial' manner against the interests of some members.⁸³² In this regard, in *Re Sam Weller & Sons Ltd*,⁸³³ the court stated that this is now taken to include

⁸²⁶ Cem Veziroglu, 'Buy-Out of the Oppressed Minority's Shares in Joint Stock Companies: A Comparative Analysis of Turkish, Swiss and English Law (2018) 19 *European Business Organization Law Review* 527, 532.

⁸²⁷ *Companies Act 1947* (UK) s 9.

⁸²⁸ *Companies Act 1948* (UK) s 210.

⁸²⁹ Veziroglu (n 826) 532.

⁸³⁰ *Companies Act 1980* (UK) s 75.

⁸³¹ Nigel Furey, 'The Statutory Protection of Minority Shareholders in the United Kingdom' (1987) 22 *Wake Forest Law Review* 81, 81.

⁸³² Andrew Charman et al, *Shareholder Actions* (Bloomsbury Publishing, 2017) 213.

⁸³³ *Re Sam Weller & Sons Ltd* [1990] Ch 682.

all members. This section, however, now numbered as s 994 of the *United Kingdom CMA*, remains unamended in its essentials, as discussed below.

4.5.3 The Legal Framework for ‘Unfair Prejudice’ Remedies

Another grounds for protection of oppressed minority shareholders, rather than the winding up of the company, is the claim that the company’s operations are conducted in a manner that ‘unfairly prejudiced’ their rights. Accordingly, in the United Kingdom, shareholders may initiate proceedings on the grounds of ‘unfair prejudice’ if the company’s affairs are being conducted in a manner that ‘unfairly prejudices’ their interests. To initiate the proceedings for ‘unfair prejudice’, minority shareholders in closely-held corporations often rely on breach of the law based upon ‘informal undertakings and agreements’.⁸³⁴ However, in publicly traded companies, minority shareholders may petition based on other forms of wrongdoing identified as ‘unfairly prejudicial’.⁸³⁵ For instance, this may apply where the board of directors abuses its powers or engages in serious mismanagement of the company, as provided under ss 459-461 of the *United Kingdom CMA*. These situations may include failure to provide documents, information, and explanations,⁸³⁶ and/or failure to disclose information obtained under compulsory powers.⁸³⁷ On an ‘unfair prejudice’ petition, the court may make an order that considers fair and equitable when addressing the misconduct.

Part 30 of the *United Kingdom CMA* contains the right of oppressed shareholders to petition the court that the affairs of the company are being conducted in an ‘unfairly prejudicial’ manner. Section 994 of the *United Kingdom CMA* provides the basis for making a petition for a court order. Therefore, if ‘the company’s affairs are being or have been conducted in a manner that is ‘unfairly prejudicial’ to the interests of members generally or some part of its members (including at least himself)’, the company’s member may apply to the court by petition for an order under Part 30 of the *United Kingdom CMA*.⁸³⁸ This action may be initiated,

⁸³⁴ Cheffins (n 760) 528.

⁸³⁵ Ibid.

⁸³⁶ *Companies Act 2006* (UK) (n 4) s 459.

⁸³⁷ Ibid s 460.

⁸³⁸ Ibid s 994(1)(a).

if 'an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial'.⁸³⁹ Action under Part 30 of the *United Kingdom CMA* may be initiated against any person who is doing or not doing something in relation to the affairs of the company that 'unfairly prejudices' the petitioner.

Furthermore, pursuant to s 994(2) of the *United Kingdom CMA*, this section is also applicable to someone who is not a member of the company, but for whose benefit company shares have been 'transferred or transmitted by operation of law, as they apply to a member of a company'.⁸⁴⁰ Section 994(2) of the *United Kingdom CMA* expands the category of shareholders for standing to make petition under s 994(1) to include a person in favour of 'whom shares in the company have been transferred or transmitted'.⁸⁴¹ This section also includes 'persons, such as trustees in bankruptcy or personal representatives, who became entitled to shares in that capacity' but do not have their names registered as members.⁸⁴² The company's memorandum subscribers will be considered to have accepted to become company's members on the registration of the company, and 'must be entered as such in its register of members'.⁸⁴³ The section ensures that companies do not avoid responsibility for 'unfairly prejudicial' conduct if the petitioner has not yet been registered as member.

Section 994(3) of the *United Kingdom CMA* defines a 'company' as any company within the meaning of the *United Kingdom CMA*. If the company is in insolvent winding up, initiating an 'unfair prejudice' petition will not result in financial benefit for its members.⁸⁴⁴ In this regard, in *Gamlestaden Fastigheter AB v Baltic Partners Ltd*⁸⁴⁵ the Court of Appeal of Jersey ruled⁸⁴⁶ that relief is not precluded only on the grounds that it will not benefit the petitioner in their capacity as a member. This decision⁸⁴⁶ established that a member who is also a creditor may still have a successful petition.

⁸³⁹ Ibid s 994(1)(b).

⁸⁴⁰ Ibid s 994(2).

⁸⁴¹ Ibid s 994(2).

⁸⁴² Charman et al (n 832) 225.

⁸⁴³ *Companies Act 2006* (UK) (n 4) s 112(1).

⁸⁴⁴ Ibid s 237.

⁸⁴⁵ *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] 4 All ER 164.

⁸⁴⁶ Ibid.

Moreover, a complaint about the conduct of company affairs must relate to the company's affairs, i.e., the acts be done by the company, or authorised to act in the company and 'should not be attributable to the conduct of an individual shareholder acting in his private capacity'.⁸⁴⁷ As stated by the Court of Appeal in the case *Re Charterhouse Capital Ltd* ('Charterhouse'),⁸⁴⁸ the term the 'company's affairs' has a wide scope and covers all the matters decided by the board of directors.

Section 994 of the *United Kingdom CMA* does not provide a clear definition of what constitutes 'unfairly prejudicial' conduct. In *R A Noble & Sons (Clothing) Ltd*,⁸⁴⁹ his Honour Nourse J stated that it is not necessary for a petitioner seeking relief on the grounds of 'unfair prejudice', to demonstrate that the company's controllers 'have acted as they did in the conscious knowledge that this was unfair to the petitioner', or that they have acted in bad faith. His Honour Nourse J also found that the test for unfairness is objective rather than subjective.⁸⁵⁰ Thus, the test is 'whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests'.⁸⁵¹ The objective test was later applied (including or not the support of the 'reasonable bystander') in the case of *O'Neill v Phillips*.⁸⁵² When determining whether the conduct was 'unfairly prejudicial', the court considered whether the majority shareholders had acted contrary to 'good faith'.⁸⁵³ Lord Hoffmann held that 'unfairness may consist in a breach of the rules [on which it is agreed that the affairs of the company should be conducted] or in using the rules in a manner which equity would regard as contrary to good faith'.⁸⁵⁴ The House of Lords also held that the unfairness of the concept of 'unfair prejudice' should be assessed by determining whether the majority shareholders acted in a manner that in equity would be regarded contrary to good faith, and not to subjective notions of

⁸⁴⁷ Dignam and Lowry (n 808) 133-4.

⁸⁴⁸ *Re Charterhouse Capital Ltd* [2015] EWCA.

⁸⁴⁹ *R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273.

⁸⁵⁰ *Ibid.*

⁸⁵¹ *Ibid.*

⁸⁵² *O'Neill v Phillips* [1999] UKHL 24 (n 215).

⁸⁵³ *Ibid.*

⁸⁵⁴ *Ibid.*

fairness.⁸⁵⁵ The Court of Appeal in this case,⁸⁵⁶ allowing the appeal, ordered the majority shareholder to buy the minority shareholder's share. As discussed in Chapter 2, scholars such as Sandra Miller argued that in the United Kingdom, the definition of 'unfairly prejudicial' is established by the court's interpretation, which 'creates a considerable degree of uncertainty involving the resolution of shareholder disputes'.⁸⁵⁷ This highlights ongoing concerns about having a clear statutory definition of what constitutes 'unfairly prejudicial' conduct, crucial for promoting legal certainty and ensuring effective shareholder protection in companies.

Additionally, in *Grace v Biagioli*,⁸⁵⁸ the majority shareholders passed resolution to remove a minority shareholder as a director without making an offer to purchase his shares. In this case,⁸⁵⁹ Justice Patten stated that where fault has been proven, 'nothing less than a clean break' is generally required to satisfy court's intervention powers. The Court of Appeal held that 'the key to the exercise the Court's jurisdiction is a finding of 'unfair prejudice' in the conduct of the company's affairs' upon which 'the court has power to grant relief'.⁸⁶⁰ Furthermore, the decision in *Fulham Football Club (1987) Ltd v Richards & Anor*,⁸⁶¹ embraced the idea to 'contract out' the legal right for the relief under s 994 of the *United Kingdom CMA*. In this case,⁸⁶² the Court of Appeal decided that the allegation for 'unfair prejudice' conduct may be negotiable. According to Harry McVea,⁸⁶³ this decision 'has reasserted and extended the contractual analogy' in recent United Kingdom company law.

Moreover, the *United Kingdom CMA*, in s 995(2)(a), grants the Secretary of State the right to exercise powers and petition the court if the affairs of the company were conducted in a manner that is 'unfairly prejudicial' to the interests of

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid.

⁸⁵⁷ Miller (n 218) 406.

⁸⁵⁸ *Grace v Biagioli* [2005] EWCA Civ 1222.

⁸⁵⁹ Ibid.

⁸⁶⁰ Ibid.

⁸⁶¹ *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855.

⁸⁶² Ibid.

⁸⁶³ Harry McVea, 'Section 994 of the Companies Act 2006 and the Primacy of Contract' (2012) 75(6) *The Modern Law Review* 1123, 1123.

company's members.⁸⁶⁴ The Secretary of State may exercise powers to petition the court for an order, if 'an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial'.⁸⁶⁵ The Secretary of State may apply to the court by petition 'in addition to, or instead of, presenting a petition for the winding up of the company'.⁸⁶⁶ Thus, in situations where individual shareholders are unwilling to make an oppression claim, the Secretary of State may act to protect their rights.

Section 994 of the *United Kingdom CMA* also allows the courts to protect a shareholder in case of a breach of a particular agreement, whether oral or written, which serves as a basis for shareholders' investment in the company.⁸⁶⁷ In *O'Neill v Phillips*⁸⁶⁸ the court held that the petitioners may secure personal relief not only for the company's articles, but for breach of formal or informal agreement by which they become the company's member. So, when a controlling shareholder in a listed company breaches the terms of the particular agreement and the board of directors is unwilling to initiate legal action to enforce the terms in court, the minority shareholders may petition under s 994 of the *United Kingdom CMA*, rather than bring derivative action which can be initiated by the company only for breach of directors' duties.⁸⁶⁹ In those circumstances, s 994 of the *United Kingdom CMA* may assist in 'the enforcement of a relationship agreement that is in place'.⁸⁷⁰ Accordingly, this section provides statutory protection for unfairness and prejudice as described above.

In *Re Company (No 004475 of 1982)*,⁸⁷¹ it was established that for a successful petition, the petitioner must demonstrate that the conduct was 'unfairly prejudicial' to the petitioner's interest as a member of the company, and not to the petitioner in some other capacity. So, if company members are being 'unfairly prejudiced' the court has broad powers to provide remedies for the oppressed entities. In the United Kingdom, the most frequently granted remedy is for the majority

⁸⁶⁴ *Companies Act 2006* (UK) (n 4) s 995(2)(a).

⁸⁶⁵ *Ibid* s 995(2)(b).

⁸⁶⁶ *Ibid* s 995(3).

⁸⁶⁷ Keay et al (n 208) 87.

⁸⁶⁸ *O'Neill v Phillips* [1999] UKHL 24 (n 215).

⁸⁶⁹ Cheffins (n 760) 504.

⁸⁷⁰ *ibid*.

⁸⁷¹ *Re Company (No 004475 of 1982)* [1983] 1 All ER 36.

shareholders in the company to purchase the minority shareholders' shares at a value determined by the court. This value is usually the 'market value on a pro rata basis',⁸⁷² as outlined below.

Although Brexit itself has not yet resulted in any immediate changes to United Kingdom company law or minority oppression provisions, it is important for companies and the courts to carefully consider its implications and distance the retained European Union law from the national law. By taking a proactive approach and evaluating the impacts of Brexit, companies can better position themselves for success in the competitive landscape.

4.6 Court Orders upon Showing 'Unfair Prejudicial' Conduct

As stated, s 994 of the *United Kingdom CMA*, linked to s 996 of the *United Kingdom CMA*, provides remedies to minority shareholders for oppression in the companies. These provisions grant the court 'an unfettered discretion' to decide the order to be granted.⁸⁷³ Pursuant to s 996(1) of the *United Kingdom CMA*, if the court is satisfied that there has been 'unfairly prejudicial' conduct, and if the petition 'is well founded', it may 'make such order as it thinks fit for giving relief in respect of the matters complained of'.⁸⁷⁴ The court's order may include regulating the conduct of the corporation's affairs in the future.⁸⁷⁵ The court may also require the company 'to refrain from doing or continuing an act complained of' or to perform an act it has omitted to do.⁸⁷⁶ In addition, the court may 'authorise civil proceedings to be brought in the name and on behalf of the company' by a person or persons on terms directed by the court.⁸⁷⁷ The court may also order that the articles of incorporation cannot be changed without the leave of the court.⁸⁷⁸ The court may also authorise purchases of the shares by members or by company itself. If the company purchases the shares, provisions may be made for the

⁸⁷² Hasan Kadir Yilmaztekin, 'A Brief Overview of the Remedies Available to Minority Shareholder under the UK Law' (2019) 5(1) *Journal of Commercial and Intellectual Property Law* 131, 134.

⁸⁷³ Keay (n 208) 80.

⁸⁷⁴ *Companies Act 2006* (UK) (n 4) s 996(1).

⁸⁷⁵ *Ibid* s 996(2)(a).

⁸⁷⁶ *Ibid* s 996(2)(b).

⁸⁷⁷ *Ibid* s 996(2)(c).

⁸⁷⁸ *Ibid* s 996(2)(d).

reduction of the company's capital accordingly.⁸⁷⁹ On this basis, the court has broad discretion to grant appropriate remedies to a successful applicant.

In the United Kingdom, the most common oppression remedy given to a successful petitioner for oppressive conduct of affairs in the company is the buy-out remedy. In many court decisions based on 'unfairly prejudiced', grounds, the court often orders the majority shareholders in the company to buy out the shares of the complainant shareholder.⁸⁸⁰ However, one of the difficulties when using s 994 of the *United Kingdom CMA* is the high cost of litigation. To avoid this, the courts typically seek to encourage minority shareholders to accept offers for a buy-out at a fair price before litigation begins.⁸⁸¹ This is done under threat that, if the minority shareholders refuse the offer, the conduct of the majority shareholders 'will no longer be seen as unfairly prejudicial'.⁸⁸² Thus, when this remedy is granted by the court, minority shareholders will be no longer bound to the company. Furthermore, when the court orders a buy-out of the shareholder's shares, it establishes a fair market value and determines the price of the shares.⁸⁸³ Accordingly, an order requiring the buy-out of the minority's share by those who caused the 'unfair prejudice' includes a fair valuation of the shares.

In *Potamianos v Prescott*,⁸⁸⁴ their Honours, McCombe, Leggatt, and Rose, stated that the features of an offer cannot automatically make the offer reasonable or unreasonable. On the facts of this case,⁸⁸⁵ the Court of Appeal held that Potamianos was entitled to an order that his shares be bought at a fair price, as determined by the court. Furthermore, in *Profinance Trust SA v Gladstone*,⁸⁸⁶ His Honour, Walker LJ, held that minority shareholders' shares must be valued as closely as possible to the date of sale of the shares, to reflect their real value. The Court also stated that shares should be valued at the date of the buy-out order unless fairness justifies a different date.⁸⁸⁷ Also, in *Re Bird Precision*

⁸⁷⁹ Ibid s 996(2)(e).

⁸⁸⁰ Keay (n 208) 90.

⁸⁸¹ Davies (n 825) 165.

⁸⁸² Ibid.

⁸⁸³ Schultz (n 55) 512-3.

⁸⁸⁴ *Potamianos v Prescott* [2019] EWCA Civ 932.

⁸⁸⁵ Ibid.

⁸⁸⁶ *Profinance Trust SA v Gladstone* [2002] 1 BCLC 141.

⁸⁸⁷ Ibid.

Bellows Ltd,⁸⁸⁸ Nourse J stated that shares will be valued as to the value of all the issued share capital, and no discount should be applied.

In the United Kingdom, if dominant shareholders of a public company wish to buy out other shareholders, they must follow one of two procedures: 'squeeze-out' under s 979 of the *United Kingdom CMA* or use a scheme of arrangement, whereby the company proposes an arrangement for the shareholders to acquire all shares on specified terms.⁸⁸⁹ When it comes to squeeze-out, the dominant shareholder, under s 979(2)(a) and (b) of the *United Kingdom CMA*, has the right to buy out minority shareholder if they offer to acquire or have 'unconditionally contracted to acquire - (a) not less than 90% in value of the shares to which the offer relates,'⁸⁹⁰ and (b) in case of voting shares, 'not less than 90% of the voting rights carried by those shares'.⁸⁹¹ Alternatively, they can acquire '(a) not less than 90% in value of the shares of any class to which the offer relates', and (b) in case of voting shares, 'not less than 90% of the voting rights carried by those shares'.⁸⁹² This section allows the dominant shareholder to compulsorily acquire the remaining shares from minority shareholder when they have acquired 90% or more of the shares through offer.

To invoke s 979 of the *United Kingdom CMA*, the offeror must notify the holders of the shares concerned that they wish 'to acquire those shares'.⁸⁹³ When the notice is given, the court may order that the dominant shareholder 'is not entitled and bound to acquire the shares',⁸⁹⁴ or that the court will make the terms to acquire the shares 'as the Court thinks fit'.⁸⁹⁵ Unless the shares holder shows that the offer value for the shares would be unfair, the court would not require 'consideration of a higher value than that specified in the terms of the offer'.⁸⁹⁶

⁸⁸⁸ *Re Bird Precision Bellows Ltd* [1984] Ch 419.

⁸⁸⁹ Cheffins (n 760) 525-6.

⁸⁹⁰ *Companies Act 2006* (UK) (n 4) s 979(2)(a).

⁸⁹¹ *Ibid* s 979(2)(b).

⁸⁹² *Ibid* s 979(4).

⁸⁹³ *Ibid* s 979(2).

⁸⁹⁴ *Ibid* s 986(1)(a).

⁸⁹⁵ *Ibid* s 986(1)(b).

⁸⁹⁶ *Ibid* s 986(4)(a).

When majority shareholders use a scheme of arrangement, the company,⁸⁹⁷ or any creditor or member of the company,⁸⁹⁸ may apply to the court for the scheme. The court may order a meeting of members or creditors, or class of members or class of creditors, to be summoned in a manner directed by the court.⁸⁹⁹ The court may order a meeting of the shareholders, at which a majority in number representing 75% of the shares can agree to a 'compromise or arrangement'.⁹⁰⁰ This agreement is binding on the company,⁹⁰¹ and on all members or creditors, or class of members and class of creditors.⁹⁰²

Furthermore, under s 33(1) of the *United Kingdom CMA*, the constitution of the company and its provisions are binding on the company and the company's members in the same way as the agreement existed between the company and the company's members of those provisions.⁹⁰³ Usually, a shareholder cannot force the sale of another shareholder's shares unless the articles of association of the company or shareholders' agreement contain such provisions. However, the majority shareholders in the company may pass a special resolution and modify the articles of association of the company to include the ability to force the sale of a shareholder's shares.

Ultimately, cases involving 'unfair prejudice' often focus on the exclusion of shareholders from management of the company or their removal from the board of directors.⁹⁰⁴ The following section examines case law on minority oppression in the United Kingdom and explores how the courts address and remedy such conduct.

4.7 Case Law on Minority Oppression in the United Kingdom: Early Developments

In corporation law, it is generally accepted that 'the wishes of the majority prevail

⁸⁹⁷ Ibid s 896(2)(a).

⁸⁹⁸ Ibid s 896(2)(b).

⁸⁹⁹ Ibid s 896(1).

⁹⁰⁰ Ibid s 899(1).

⁹⁰¹ Ibid s 899(3)(b).

⁹⁰² Ibid s 899(3)(a).

⁹⁰³ Ibid s 33(1).

⁹⁰⁴ Marson and Ferris (n 753) 399.

over those of the minority'.⁹⁰⁵ This principle was established in the landmark case *Foss v Harbottle* ('Foss')⁹⁰⁶ in English corporate law. The case emphasised that shareholders cannot initiate legal action on behalf of the company if they have suffered an injury.⁹⁰⁷ In this case,⁹⁰⁸ the minority shareholders were dissatisfied with the directors of the company for selling their personal land to the corporation. They petitioned against the directors. Following the principle of *Foss v Harbottle*,⁹⁰⁹ the shareholders were prevented from taking legal action because, as a wrong was done to the company, the company is the proper plaintiff. Five years later, s 210 of the United Kingdom *Companies Act* of 1948 introduced a statutory exception to this rule, providing that members of the corporation can address oppressive conduct by majority shareholders.

There have been two significant developments in the United Kingdom for increasing 'the willingness and the ability' of the courts to protect the interests of minority shareholders over time.⁹¹⁰ The first occurred in *Ebrahimi v Westbourne Galleries Ltd*,⁹¹¹ where a 'just and equitable' winding up order was granted in a situation where majority shareholders removed a director of the company lawfully and constitutionally.⁹¹² The second development came with the United Kingdom *Companies Act* of 1980, which 'liberalized the remedy for oppressed minority shareholders' which first appeared in the *Companies Act* of 1948.⁹¹³ The case *Ebrahimi v Westbourne Galleries Ltd*⁹¹⁴ recognised the relief for minority shareholders based on the 'just and equitable' concept. The courts have since adopted 'equitable consideration' language to connect oppression with the 'just and equitable' grounds.⁹¹⁵ This development led to later government intervention and judicial developments in some countries, which included the term 'unfair prejudice' (in addition to 'oppression') in their statutory provisions for addressing minority oppression in companies.⁹¹⁶ Prior to this case, when a petition for

⁹⁰⁵ Nwafor (n 212) 37.

⁹⁰⁶ *Foss v Harbottle* [1843] 2 Hare 461.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ *Ibid.*

⁹⁰⁹ *Ibid.*

⁹¹⁰ Furey (n 831) 81.

⁹¹¹ *Ebrahimi Westbourne Galleries* [1972] 2 All ER 492 (n 210).

⁹¹² Furey (n 831) 81.

⁹¹³ *Ibid.*

⁹¹⁴ *Ebrahimi Westbourne Galleries* [1972] 2 All ER 492 (n 210).

⁹¹⁵ David Wishart, 'A Fresh Approach to Section 320' (1987) 17 *Western Australian Law Review* 94, 101.

⁹¹⁶ Nwafor (n 212) 47.

oppression was brought to court, the relief provided was limited to the legal rights of the company's shareholders as outlined in the company's constitution. However, this case offered a new course for relief based on legitimate or reasonable expectations, even if they are not related to the legal rights of the shareholders.

In the later decision of *Scottish Co-operative Wholesale Society Ltd v Meyer*,⁹¹⁷ the House of Lords made a significant contribution to the judicial reform of company law.⁹¹⁸ *Scottish*⁹¹⁹ established that oppressive conduct could be described as 'burdensome, harsh, and wrongful' conduct. Lord Keith further defined oppressive conduct as behaviour that involves a lack of probity and fair dealing in the affairs of the company to the prejudice of its members.⁹²⁰ The court held that the conduct of the company was oppressive and the affected members had the right to sue.⁹²¹ According to s 210 of the United Kingdom *Companies Act* of 1948, considered in this case, a company's member who alleges unfair and oppressive conduct may petition the court to issue an order under this section.⁹²² Consequently, it was argued on behalf of the petitioner, that if the majority shareholders acted oppressively, that could only be regarded as conduct in its own affairs.⁹²³ Accordingly, there was little doubt that the petitioner had acted oppressively. As emphasised by Clive Schmitthoff, *Scottish* 'gave unqualified effect to the intention of the legislator to prevent shareholders' oppression within the limits of section 210' of the *Companies Act* 1948.⁹²⁴ Therefore, the court restricted the application of the oppression remedy to address instances involving violations of shareholders' rights, focusing on rectifying only current misconduct.

Furthermore, in *Re Bugle Press Ltd* ('*Re Bugle*'),⁹²⁵ two shareholders of the prosperous company Bugle Press Ltd, owned 90% of all shares. A third shareholder held the remaining 10% of the shares. The two majority shareholders

⁹¹⁷ *Wholesale Society Ltd v Meyer* [1959] AC 324 (n 146).

⁹¹⁸ Schmitthoff (n 824) 77.

⁹¹⁹ *Wholesale Society Ltd v Meyer* [1959] AC 324 (n 146).

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*

⁹²² *Ibid.*

⁹²³ *Ibid.*

⁹²⁴ Schmitthoff (n 824) 77.

⁹²⁵ *Re Bugle Press Ltd* [1961] Ch 270.

wished to compel the minority shareholder to sell the shares. They formed a new company which acquired all the shares of Bugle Press Ltd. The proposal was approved by the two majority shareholders, but was refused by the minority shareholder. Consequently, the minority shareholder applied to the court to prohibit the takeover bid made by the majority shareholders. The court ruled in favour of the minority shareholder and disallowed the bid.⁹²⁶ His Honour, Harman J, stated that the majority shareholders' attempt to expropriate the minority shareholder was 'a barefaced attempt to evade the fundamental rule of company law which forbids the majority shareholders, unless the articles so provide, to expropriate a minority'.⁹²⁷ The Court of Appeal based its decision on the broad grounds that if the offeror and the assenting majority shareholders in the company to be taken over are the same, the law enables majority shareholders in the company to remove the minority.⁹²⁸ In this case,⁹²⁹ the Court of Appeal took the broad view consistent with the House of Lord reasoning in *Scottish Co-operative Wholesale Society Ltd v Meyer*,⁹³⁰ where the company was expected to deal fairly with its subsidiary, and in *Re Bugle Press Ltd*,⁹³¹ where the new company, established for making the takeover bid, was treated as the same business entity.

Before 1999, it was commonly believed by the United Kingdom courts that 'unfair prejudice' could include the violation of legitimate shareholders' expectations, which were not limited to the ones set out in the company's constitution or other company agreements.⁹³² For instance, in *Quinlan v Essex Hinge Co Ltd*,⁹³³ the court ruled that the minority shareholder, who was also the director of the company, had the right to relief after being excluded from the company's management, even though his dismissal, with a six-month notice, was allowed within the service agreement. In this case,⁹³⁴ the court held that the applicant had established continued participation in management based on an 'understanding'

⁹²⁶ Ibid.

⁹²⁷ Ibid.

⁹²⁸ Ibid.

⁹²⁹ Ibid.

⁹³⁰ *Wholesale Society Ltd v Meyer* [1959] AC 324 (n 146).

⁹³¹ *Re Bugle Press Ltd* [1961] Ch 270 (n 925).

⁹³² Matthew Berkahn, 'Unfair Prejudice: Who Has It Right, Economically Speaking' (2008) *Journal of the Australian Law Teachers Association* 55, 60.

⁹³³ *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417.

⁹³⁴ Ibid.

to that effect. Moreover, in *Re Saul D Harrison & Sons plc*,⁹³⁵ Lord Justice Neill found that the behaviour can be prejudicial but not unfair, and to be unfair but not prejudicial. His Honour held that it is not enough to satisfy only one of these two tests, and that fairness must be viewed as commercial relationship, where the first step in any 'unfair prejudice' claim should be to examine the articles of incorporation.⁹³⁶ In Lord Justice Neill's words: 'for the purpose of determining the legal rights of the petitioner one turns to the memorandum and articles of the company because the articles constitute the contract between the company and the member in respect of his rights and liabilities as a shareholder'.⁹³⁷

In the United Kingdom case of *O'Neill v Phillips*,⁹³⁸ the House of Lords established a two-stage test for determining unfairness: firstly, there must be a contravention of how the affairs in the company's affairs were conducted and, secondly, it is unfair to rely on strict lawful powers based on the company's constitution. This case was the first to consider the scope of 'unfair prejudice' remedy. In this case,⁹³⁹ the petitioner, who was a minority shareholder of the company, failed to obtain a remedy under s 459 of the United Kingdom *Companies Act* of 1989. The petitioner alleged that the majority shareholder had unfairly refused to make the minority shareholder a 50% shareholder in the company and to continue the profit-sharing agreement. Lord Hoffmann found that the first element of s 459 of the United Kingdom *Companies Act* of 1989 indicates that a company member cannot complain of unfairness unless the breach relates to the terms on which the company's affairs are supposed to be conducted.⁹⁴⁰ He also found that the second feature of s 459 of the United Kingdom *Companies Act* of 1989 suggests that 'unfairness' may arise from a breach of the rules or from using the rules contrary to good faith.⁹⁴¹ In this case, the ruling demonstrates the importance of relying on established equitable principles when assessing fairness, rather than using subjective notions.

⁹³⁵ *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*

⁹³⁸ *O'Neill v Phillips* [1999] UKHL 24 (n 215).

⁹³⁹ *Ibid.*

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.*

Moreover, in *Re Legal Costs Negotiations Ltd*⁹⁴² four individuals formed a company, as equal shareholders, directors and employees. Later on, the board of directors dismissed one of the shareholders from their position as an employee. As result, the shareholder resigned from the board but refused to sell the shares. The majority shareholders then filed a petition under s 994 of the *United Kingdom CMA*, seeking an order to transfer the shares of the dismissed shareholder. The Court of Appeal rejected the petition stating that the complained conduct must be related to the company's affairs, must be done by the corporation, and must not be the conduct of shareholders acting in a private capacity.⁹⁴³ In this regard, continuing as a shareholder of the company was not considered conduct related to the company's affairs.

Furthermore, in *Re Citybranch Group Ltd Gross v Rackind*,⁹⁴⁴ the Court of Appeal held that the action of a subsidiary company can also be considered as the actions of the parent company. In this case,⁹⁴⁵ Citybranch Group was owned equally by the Gross family and the Rackind family, each holding a 50% stake. The Gross family filed a petition to wind up the company, claiming unfair treatment. However, the Rackind family requested that the court dismiss the petition as the alleged conduct had occurred in two subsidiary companies. The Court of Appeal upheld the decision of the lower court and stated that it was not necessary to rule that the conduct of a subsidiary could never be considered as conduct of the parent company's affairs.⁹⁴⁶ Therefore, the court ruled that the acts were also part of the conduct of the parent company.⁹⁴⁷ This case established that if there are directors who serve in both companies, the affairs of one company may be seen as the affairs of the other company. This case signalled a significant broadening of the circumstances under which relief may be claimed under s 459 of the United Kingdom *Companies Act* of 1985.

The following section discusses recent developments in the United Kingdom case law regarding minority oppression.

⁹⁴² *Re Legal Costs Negotiations Ltd* [1999] 2 BCLC 171.

⁹⁴³ *Ibid.*

⁹⁴⁴ *Re Citybranch Group Ltd Gross v Rackind* [2004] 4 All ER 735.

⁹⁴⁵ *Ibid.*

⁹⁴⁶ *Ibid.*

⁹⁴⁷ *Ibid.*

4.8 Recent Developments in the United Kingdom Case Law Strengthening Protection for Minority Shareholders

In the United Kingdom, as previously stated, minority shareholders who are oppressed often initiate statutory action under s 994 of the *United Kingdom CMA* for 'unfair prejudice' or for 'just and equitable' winding up of the company under s 122 of the *Insolvency Act 1986*. After the implementation of the *United Kingdom CMA*, the United Kingdom case law developed by considering the terms 'company's affairs', 'interests as a member', and 'unfair prejudice' pursuant to s 994 of the *United Kingdom CMA*. The cases below illustrate the United Kingdom case law after the adoption of the *United Kingdom CMA* in 2006.

In *Kohli v Lit*,⁹⁴⁸ the court found that s 994 of the *United Kingdom CMA* involves 'prejudice' and 'unfairness'. In this case,⁹⁴⁹ Ms Kohli alleged that the issuing of new shares by the directors of the company reduced the value of her shares and her shareholding because the shares were issued at an 'unjustifiable discount'. Ms Kohli proved that the directors also failed to disclose their remuneration in the financial accounts of the company. Consequently, the court held that the directors acted in an 'unfairly prejudicial' manner towards Ms Kohli who was a minority shareholder of the company.⁹⁵⁰ The court also held that the directors' conduct caused a loss of trust and 'confidence in the competence and integrity of the board'.⁹⁵¹ The court stated that the offer may be 'unfairly prejudicial' if it involves unfair discrimination of one group of shareholders who may be unable or unwilling 'to invest further in a business in which that shareholder has no active role'.⁹⁵² This case serves as a reminder that directors have a responsibility to ensure that their decisions are not detrimental to the interests of minority shareholders in the company.

⁹⁴⁸ *Kohli v Lit* [2009] EWHC 2893.

⁹⁴⁹ *Ibid.*

⁹⁵⁰ *Ibid.*

⁹⁵¹ *Ibid.*

⁹⁵² *Ibid.*

One year later, the case of *Croly v Good* ('*Croly*')⁹⁵³ concerned allegations of 'unfairly prejudicial' conduct in a quasi-partnership corporation. The court in this case⁹⁵⁴ took notice to the correct date for shares valuation and whether the corporation was formed as a quasi-partnership. The key facts are: the company was selling postal franking machines based on a franchise agreement with manufacturers in Germany. Mr Good and his wife were the owners of the company and employed Mr Croly as a salesman. When Mr Croly purchased 40% of the share capital in the company, he agreed with Mr Good on a 'remuneration strategy' where he would give up his commission payments but instead draw a defined amount each month. When Mr Good's payments decreased, he excluded Mr Croly from the directors' board and the management of the company. The court held that this was 'unfairly prejudicial' conduct to the interest of a member of the company, especially because Mr Croly and Mr Good agreed on a quasi-partnership in managing the affairs of the company.⁹⁵⁵ The court also held that the agreement between Mr Croly and Mr Good was breached because of the failure to declare dividends from the company's profit which amounted to 'unfair prejudice'.⁹⁵⁶ Furthermore, Mr Good received payments from the profits of the company, excluding Mr Croly. Justice Cooke, concluded that Mr Croly was a quasi-partner since the relationship with Mr Good was personal rather than purely commercial.⁹⁵⁷ Justice Cooke also concluded that the valuation of shares after Mr Croly's removal was seriously unfair, as the company was under the sole control of Mr Good.⁹⁵⁸ Moreover, *Croly*⁹⁵⁹ emphasised that quasi-partnerships may be established at a later stage than the initial business partnership.

In 2012, the United Kingdom court case *Mc Killen v Misland (Cyprus) Investments Ltd*⁹⁶⁰ also brought attention to the significance of s 994 of the *United Kingdom CMA*, which provides relief in cases where the affairs of the company are conducted in an 'unfairly prejudicial' manner. The court emphasised the need to differentiate between the conduct related to the company's affairs and individual

⁹⁵³ *Croly v Good* [2010] EWHC 1.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ *Ibid.*

⁹⁵⁶ *Ibid.*

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.*

⁹⁵⁹ *Ibid.*

⁹⁶⁰ *Mc Killen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343.

capacity.⁹⁶¹ The judge dismissed the petition and held that the directors' breach of fiduciary duties did not cause any loss or make any difference to the petitioner.⁹⁶² One year later, *Re LCM Wealth Management Ltd*⁹⁶³ clarified that the jurisdiction of s 994 of the *United Kingdom CMA* does not grant the power to rewrite or disregard the contract between the parties. However, the court held that it may refrain from exercising the legal rights based on equitable considerations.⁹⁶⁴ Furthermore, in the 2015 case of *Apex Global Management Ltd & Anor v FI Call Ltd*,⁹⁶⁵ the court held that the 'prejudice' a company member may suffer is not restricted to financial harm. Also, the court, in *Yusuf v Yusuf*,⁹⁶⁶ argued that 'prejudice' may extend beyond the interests of the company's members, and may comprise infringements of the *United Kingdom CMA*.

In 2019, the United Kingdom case *Prescott v Potamianos (Re Sprintroom Ltd)*⁹⁶⁷ dealt with the issue of whether the breach of a director's fiduciary duties could justify seeking redress under an 'unfair prejudice' petition. The High Court found that the exclusion of Dr Potamianos from management was unfair.⁹⁶⁸ This was because Mr Prescott used his authority to vote to remove Dr Potamianos from the company's management without giving him the opportunity to remove his capital from the company on proper terms. The court, in the first instance, ordered the buy-out of Dr Potamianos's shares.⁹⁶⁹ The Court of Appeal upheld the first instance decision and rejected the appeal.⁹⁷⁰ The Court of Appeal found that Dr Potamianos' 'evasive', 'misleading', and 'dissembling' behaviour contributed to the court's findings in the first instance.⁹⁷¹ However, the Court of Appeal held that there is no legal provision under which the breach of fiduciary duty justifies exclusion from management; rather, 'it is always a question of fact and degree'.⁹⁷² The case affirms the courts' discretion to determine whether a minority

⁹⁶¹ Ibid.

⁹⁶² Ibid.

⁹⁶³ *Re LCM Wealth Management Ltd* [2013] EWHC 3957.

⁹⁶⁴ Ibid.

⁹⁶⁵ *Apex Global Management Ltd & Anor v FI Call Ltd* [2015] EWHC 3269.

⁹⁶⁶ *Yusuf v Yusuf* [2019] EWHC 90.

⁹⁶⁷ *Prescott v Potamianos (Re Sprintroom Ltd)* [2019] 2 BCLC 617.

⁹⁶⁸ Ibid.

⁹⁶⁹ Ibid.

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

⁹⁷² Ibid.

shareholder has been ‘unfairly’ excluded, even if they have breached their fiduciary duty to the company.

Finally, in *Primekings Holding Ltd v King*,⁹⁷³ the Court of Appeal held that, to successfully petition on the grounds of ‘unfair prejudice’, the petitioner must demonstrate that it is results from the conduct of company’s affairs and that, for a petition to be successful, there must be a clear connection between personal actions and the ‘unfair prejudice’. The case involved an allegation of ‘unfair prejudice’ where the majority shareholder was accused of depriving shareholders of the company’s shares, excluding the minorities from the business, and preventing minority shareholders from vindicating their legal rights. The issue before the Court of Appeal was whether it was acceptable to include allegations of ‘personal conduct’ within company’s affairs under s 994 of the *United Kingdom CMA*. As such, the Court of Appeal held that there is no justification for including allegations of ‘personal conduct’ that are not connected to an act or omission regarding the company’s affairs.⁹⁷⁴ This case is a reminder that, in ‘unfair prejudice’ claims, the petitioner must identify either an act or omission committed by the company, or conduct in the company’s affairs that has resulted in ‘unfair prejudice’. Accordingly, the Court of Appeal clarified the types of complaints that may be brought under s 994 of the *United Kingdom CMA*.

4.9 Conclusion

This chapter has examined the United Kingdom’s approach to minority shareholder protection and the remedies available to shareholders subjected to oppressive conduct by majority shareholders. The chapter identified that minority shareholder disputes in the United Kingdom present complex proceedings, posing significant challenges that can undermine the stability of the company and, more broadly, the country’s economy. Given that such conflicts frequently give rise to oppression claims, this chapter identified that s 994 of the *United Kingdom CMA* provides remedies for oppressed minority shareholders, recognising an action for ‘unfairly prejudicial’ conduct as a statutory right. This provision protects

⁹⁷³ *Primekings Holding Ltd v King* [2021] EWCA Civ 1943.

⁹⁷⁴ *Ibid.*

minority shareholders from actions by the majority shareholders that 'unfairly prejudice' their interests, including decisions by controllers that unjustly affect their shareholder rights. In this regard, the landmark case *O'Neill v Phillips*,⁹⁷⁵ discussed above, clarified that 'unfairness' may arise either from a breach of the rules or from using those rules in bad faith. Scholars such as Amelia Schultz, as presented in Chapter 2, argue that the primary aim of oppression laws should be to provide both efficient and equitable solutions to shareholder disputes.

Moreover, this chapter identified that s 122(1)(g) of the United Kingdom *Insolvency Act 1986* gives the court the authority to order a winding-up of the company on the grounds that it is 'just and equitable' to do so. This provision serves as remedy in situations where the conflict or disagreement cannot be resolved by less drastic measures. The chapter also highlighted that when a serious dispute arises between majority and minority shareholders, a buy-out court order is another remedy sought by the minority shareholders for oppressive conduct in the United Kingdom companies. Accordingly, the courts may issue any orders they find 'just and equitable', including orders to purchase minority shareholdings.

This chapter also discussed the legal foundation of the United Kingdom companies and provisions related to directors and directors' duties under the *United Kingdom CMA*. It examined the background of the presumption of 'unfair prejudice' and found that in the United Kingdom, s 210 of the United Kingdom *Companies Act* of 1948, included oppression provisions for the first time, allowing oppressed shareholders to bring direct action for relief in cases of 'oppression' or 'unfair prejudice'. Even though this provision changed over the years, its aim remained the same: to ensure the fair treatment of minority shareholders by preventing abuse of power by the majority.

This chapter also revealed that, in addition to statutory provisions, United Kingdom put in place judicial measures to address conflicts between shareholders in companies. Accordingly, the chapter examined early and recent

⁹⁷⁵ *O'Neill v Phillips* [1999] UKHL 24 (n 215).

developments in the United Kingdom case law on minority oppression in companies to illustrate how courts addressed this issue, and the impact of their decisions. As a result, this chapter settled that, under the United Kingdom common law, various significant decisions established key principles concerning minority oppression claims. For instance, in the case of *Scottish Co-operative Wholesale Society Ltd v Meyer*,⁹⁷⁶ the House of Lords, with Viscount Simonds, defined ‘oppressive’ as ‘burdensome, harsh and wrongful’, thereby ensuring the courts’ consistent application of the legal principles when dealing with shareholders’ disputes.

This chapter concludes that, in determining oppression claims, the United Kingdom courts consider what is ‘fair’ and ‘reasonable’ in the circumstances, while being empowered with a wide range of remedies to prevent ‘unfairly prejudicial’ conduct towards minorities. However, this approach lacks a clear statutory definition of what constitutes ‘wrongful conduct’, with the meaning of ‘unfairly prejudicial’ being shaped through judicial interpretation, as noted by Sandra Miller and discussed in this chapter. Drawing upon the work of scholars such as Miller, who argued that existing laws in the United Kingdom should be revised to incorporate clear guidelines regarding the factors to be considered when determining eligibility for the remedy, this chapter supports the argument for amendment of the corporate statutes in order to provide a clearer definition of ‘unfairly prejudicial’, ‘oppressive’ and ‘unfairly discriminatory’ conduct in Australia, currently left to the court’s interpretation. Accordingly, this chapter identified key aspects for a comparative study of the United Kingdom’s and Australian oppression laws, enabling this thesis to provide recommendations for amending Australian statutory oppression laws so as to best protect minority shareholders.

This chapter also demonstrated that Brexit led to a significant change in the United Kingdom’s relationship with European Union countries, greatly impacting operations of companies. However, it concludes that the *United Kingdom CMA* remains in effect.

⁹⁷⁶ *Wholesale Society Ltd v Meyer* [1959] AC 324 (n 146).

Chapter 5

Minority Shareholder Protection in the United States: Delaware's Position

5.1 Overview

5.2 Protection of Minority Shareholders in the United States

5.2.1 Oppression Remedies under the *MBCPA*

5.2.2 Oppression Remedies in the United States

5.2.2.1 Oppression Remedies in California

5.2.2.2 Oppression Remedies in New York

5.2.2.3 Oppression Remedies in Michigan

5.2.2.4 Oppression Remedies in Louisiana

5.2.2.5 Oppression Remedies in Pennsylvania

5.3 Delaware General Corporation Law

5.3.1 Provisions Related to Directors under the *DGCL*

5.3.2 Fiduciary Duties of Company Directors

5.4 Foundation of Minority Shareholder Claims in Delaware

5.5 Delaware's Case Law on Minority Oppression: Direct or Derivative Claim?

5.6 Protection of Delaware's Minority Shareholder in a Merger Situation

5.7 Recent Development in Delaware Case Law Strengthening Protection for Minority Shareholders

5.8 Conclusion

5.1 Overview

As detailed above, conflicts between shareholders often emerge when there is unfair or improper conduct by majority shareholders towards minorities. According to Amelia Schultz, such disputes arise when the interests of those in power, being the majority shareholders, differ from the interests of minority shareholders.⁹⁷⁷ Shareholder disputes in the United States, as in many other countries, can significantly impact the company's operation, impair its performance, and lead to serious legal implications. Scholars such as Brian Cheffins have argued that offering minority shareholders a legal instrument to challenge oppression by controllers in the company is an important mechanism

⁹⁷⁷ Schultz (n 55) 503.

for enhancing the confidence of outside investors.⁹⁷⁸ Therefore, the United States has established common law and statutory remedies for minority shareholders subjected to oppression.

This chapter examines the position in the United States, as regards to oppression remedies available to minority shareholders facing oppressive treatment by controlling shareholders in companies. It studies the minority protection under the *Model Business Corporation Act* (2016 Revision) of the United States⁹⁷⁹ ('*MBCPA*') for 'illegal,' 'oppressive,' or 'fraudulent' conduct under s 14.34 of the *MBCPA* and explores statutory oppression remedies in the states of California, New York, Michigan, and Pennsylvania. Notably, these states permit involuntary dissolution of a company in cases involving 'oppressive' conduct by majority shareholders. In Louisiana, however, minority shareholders often seek the buy-out of all the shares at a fair value determined by the court.

Moreover, this chapter specifically looks at the claims under the *Delaware General Corporation Law* (Title 8, Chapter 1 of the Delaware Code)⁹⁸⁰ ('*DGCL*') on fiduciary duties, which offer relief for minority shareholders from shareholders' oppression in companies incorporated in Delaware. As noted above, Delaware is particularly significant jurisdiction for examination due to its long-established reputation as a leading centre of corporate law in the United States. Its Court of Chancery is recognised for its expertise in handling minority oppression disputes, supported by a substantial body of case law and well-established precedents that guide its decisions. While Delaware does not provide minority shareholders with a statutory right of action for oppression by majority shareholders or its directors, this chapter explores how claims for breach of fiduciary duties can be brought for oppression against controlling shareholders. Further, this chapter examines the standards of review that Delaware courts have established for such claims, particularly the 'business judgement' rule and the 'entire fairness' standard. These doctrines ensure that shareholders who are treated unfairly can obtain

⁹⁷⁸ Brian Cheffins, 'Does Law Matter?: The Separation Of Ownership and Control in the United Kingdom' (Working Paper No 172, ESRC Centre for Business Research, University of Cambridge, September 2000) 1, 9.

⁹⁷⁹ *Model Business Corporation Act* (2016 Revision) (n 5).

⁹⁸⁰ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6).

relief that aligns with their reasonable expectations. Accordingly, this chapter examines the application of the ‘business judgement’ rule designed to protect directors against claims when they act in good faith and in the best interests of the company, granting them broad discretion in decision-making. The ‘entire fairness’ standard, however, as a stricter review, requires demonstrating both fair dealing and fair price in transactions involving controlling shareholders, thereby mandating that such transactions meet the high standard of fairness.

Furthermore, this chapter explores the foundation of minority shareholder claims in Delaware. It reveals that, historically, Delaware courts have reviewed transactions undertaken by a company’s controllers under the ‘business judgement’ rule or the ‘entire fairness’ standards. However, in 1991, Delaware’s courts recognised a claim for shareholder oppression, with one of the earliest successful cases being *Little v Waters*,⁹⁸¹ examined herein, which case addresses claims for breach of fiduciary duties and shareholders’ oppression regarding refusal to declare dividends despite a company’s profitability.

This chapter also explores minority shareholder’s protection in a merger situation and the recent developments in Delaware case law on minority oppression, highlighting that the courts, when addressing claims for minority oppression, consider not only minority shareholders’ interests, but also the broader context of effective corporate governance and the company’s affairs as a whole.

This chapter concludes that most courts in the United States recognise oppression as comprising ‘illegal, oppressive, or fraudulent’ conduct, retaining broad discretion in identifying such behaviours. However, in Delaware, oppression claims must be carefully pleaded as Delaware does not have a statutory cause of action for minority shareholder oppression. Hence, this chapter draws on the work of scholars such as George Young, Vincent Circelli, and Kelli Walter, presented in Chapter 2, who argue that other jurisdictions (such as Texas) could greatly benefit from adopting Delaware’s approach to minority shareholders protection.⁹⁸² It therefore identifies relevant areas for the comparative analysis of

⁹⁸¹ *Little v Waters* 1992 WL 25758 (Del Ch, 1992) (n 247).

⁹⁸² Young, Cirelli and Walter (n 259) 322.

oppression laws in the United States and Australia, focusing particularly on the application of Delaware's 'entire fairness' standard, to highlight potential advantages in enhancing minority shareholder protection in Australian companies.

5.2 Protection of Minority Shareholders in the United States

In the United States, corporations are subject to many rules and regulations at the federal, state, and local levels. Minority shareholders in the United States derive their rights from the statute and common law of the country where the company is incorporated, and also from the United States federal securities laws. The federal securities statutes are the *Securities Act* of 1933 (US)⁹⁸³ and the *Securities Exchange Act* of 1934 (US).⁹⁸⁴ In 2002, in response to governance failures and accounting deceptions,⁹⁸⁵ the *Sarbanes Oxley Act* of 2002 (US) was enacted, introducing new rules for shareholders and directors, accountants and auditors, thereby increasing the accountabilities of external directors in public companies.⁹⁸⁶ In the United States, each state and territory has its own corporate code, while corporate practices are also regulated under federal corporate statutes.

In the United States, the *MBCPA* is the foundation statute for corporations in most states.⁹⁸⁷ It dates back to 1940.⁹⁸⁸ The *MBCPA* was drafted in 1946 by the American Bar Association's Corporation Law Committee ('the committee') as an alternative to the *Uniform Business Corporation Act* of 1928,⁹⁸⁹ and published in 1950 by the American Law Institute. To retain its relevance, the committee revised the *MBCPA* continuously. In 1984, the committee adopted a complete revision of the *MBCPA* called the *Revised Model Business Corporation Act*. Since

⁹⁸³ *Securities Act* 1933 (US): focuses on governing securities issued by companies.

⁹⁸⁴ *Securities Exchange Act* 1934 (US): mainly deals with secondary trading of securities.

⁹⁸⁵ John F Olson and Aaron K Briggs, 'The Model Business Corporation Act and Corporate Governance: An Enabling Statute Moves Toward Normative Standards' (2011) 74(31) *Law and Contemporary Problems* 31, 31.

⁹⁸⁶ Darren C Skinner, 'Director Responsibilities and Liability Exposure in the Era of Sarbanes-Oxley' (2006) 52(3) *The Practical Lawyer* 30, 30.

⁹⁸⁷ Melvin Aron Eisenberg, 'The Model Business Corporation Act and the Model Business Corporation Act Annotated' (1974) 29(4) *American Bar Association* 1407, 1407.

⁹⁸⁸ *Ibid.*

⁹⁸⁹ John C Wilson 'The Uniform Business Corporation Act' (1947) 1(2) *Texas Law and Legislation* 309, 309.

then, the *MBCPA* continued to evolve, with minor revisions introduced over time. A comprehensive revision was undertaken in 2016, and it has been regularly amended since then. The *MBCPA* has been adopted by the majority of states in the United States; as such, it has a powerful influence on corporate laws across the country.

To address the problem of minority oppression, many states have passed some form of the *MBCPA*.⁹⁹⁰ In thirty-seven states, the term ‘oppression’ (or a similar term) has been included in the relevant corporate statutes.⁹⁹¹ Accordingly, in many states, shareholders may apply for relief if the affairs of the company were conducted in ‘oppressive or unfairly prejudicial’ manner.⁹⁹² However, in terms of their corporate laws, different states have adopted different remedies ‘in a way that requires the court to consider one specific remedy first, and other remedies only after determining the first is inadequate’.⁹⁹³ This is discussed below.

5.2.1 Oppression Remedies under the *MBCPA*

The *MBCPA* codifies court-ordered dissolution as a default remedy for shareholder oppression. Minority oppression, as grounds for dissolving the company, was introduced in the first *MBCPA* of 1946.⁹⁹⁴ Initially, however, the courts were unwilling to dissolve an ongoing corporate entity.⁹⁹⁵ Over time, courts have become more willing to consider this remedy.

Over the past thirty years, with the evolution of multiple state corporate law statutes, involuntary dissolution statutes have been expanded into a broader cause of action for addressing minority oppression.⁹⁹⁶ Also, the state legislation authorised more remedies as an alternative to dissolution.⁹⁹⁷ The courts, without precise statutory authorisation, have increasingly granted alternative

⁹⁹⁰ Stephanie Martinez, ‘The Power of Paradox: The Need for Alternative Remedies in Virginia Minority Shareholder Oppression Cases’ (2014) 49 *University of Richmond Law Review* 287, 287.

⁹⁹¹ Thompson (n 254) 709.

⁹⁹² Cheffins (n 978) 9.

⁹⁹³ Schultz (n 55) 503.

⁹⁹⁴ Thompson (n 254) 709.

⁹⁹⁵ *Ibid* 709-711.

⁹⁹⁶ *Ibid* 707.

⁹⁹⁷ *Ibid* 708.

remedies.⁹⁹⁸ Whilst the courts usually will not dissolve a company if there are alternative remedies, they will not disregard the rights of the company's shareholders granted by laws in the context of specific facts of the case.

In s 14.30, the *MBCPA* provides for the dissolution of a corporation, and states that the court may dissolve a corporation if it is established that 'the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent'.⁹⁹⁹ However, the terms 'oppressive' and 'oppression' are not defined in the statute. Without direction from the statute, it is up to the courts to define oppressive conduct.¹⁰⁰⁰ Hence, courts have described 'oppression' as a breach of the 'reasonable expectations' of minority shareholders, a breach of a fiduciary duty, and wrongful conduct or bad faith.¹⁰⁰¹ Moreover, in *Meiselman v Meiselman*¹⁰⁰² ('*Meiselman*'), the court held that the rights or interests of minority shareholders are to be determined by reference to their reasonable expectations.¹⁰⁰³ The Supreme Court of North Carolina stated that 'Many close corporations are companies based on personal relationship that give rise to certain "reasonable expectations" on the part of those acquiring an interest in the close corporation...'¹⁰⁰⁴ As such, s 14.30 of the *MBCPA* was followed in 'the most prevalent type of involuntary dissolution statute'.¹⁰⁰⁵ Consequently, courts in the *MBCPA* jurisdictions may dissolve a company when the conduct of controlling shareholders interrupts the reasonable expectations of minority shareholders, or when the controlling shareholders breach their fiduciary duties to the corporation and its minority shareholders.

Moreover, in the United States, corporate law statutes also contain provisions relevant to procedures that courts need to follow to force 'a buy-out and valuing the shares of the corporation'.¹⁰⁰⁶ According to Harry Haynsworth, in order to provide maximum flexibility, and to minimise the financial cost of share purchase,

⁹⁹⁸ *Ibid.*

⁹⁹⁹ *Model Business Corporation Act* (2016 Revision) (n 5) s 14.30(2)(ii).

¹⁰⁰⁰ Heger (n 219) 138-9.

¹⁰⁰¹ *Ibid* 138-153.

¹⁰⁰² *Meiselman v Meiselman* 307 SE 2d 551 (NC Sup Ct, 1983).

¹⁰⁰³ *Ibid.*

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ Haynsworth (n 253) 33.

¹⁰⁰⁶ Schultz (n 55) 503.

involuntary dissolution statutes comprising buy-out provisions should permit the company or any shareholder in the corporation to be a purchaser, and further, to authorise instalment purchases.¹⁰⁰⁷ Therefore, although under the *MBCPA*, dissolution is the only remedy explicitly stated in the statute for oppressive conduct, under s 14.34(a) of the *MBCPA*, the corporation or other shareholders ‘may elect to purchase all shares owned by the petitioning shareholder’.¹⁰⁰⁸ In this regard, Robert Thompson highlighted that the introduction of s 14.34 of the *MBCPA* was intended ‘to prevent minority shareholders’ strategic abuse of dissolution petitions by making the petitioner’s shares subject to a “call” for ninety days after the commencement of the action’.¹⁰⁰⁹ Nonetheless, the buy-out remedy, which mandates the purchase of minority shares, is also a common solution for minority shareholder oppression in the United States companies used by the courts to resolve shareholder disputes.

5.2.2 Oppression Remedies in the United States

In the United States, not all states have enacted statutes based on the *MBCPA*. For instance, California, New York, Michigan, Louisiana, Pennsylvania and Delaware have their own particular corporate statutes, as discussed below.

5.2.2.1 Oppression Remedies in California

The *California Corporations Code* of 2020 (Cal)¹⁰¹⁰ in s 1800(b)(4) of the Code, provides grounds for involuntary dissolution where ‘those in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness towards any shareholders or its property being misapplied or wasted by its directors or officers’.¹⁰¹¹ A verified complaint for involuntary dissolution of the corporation may be filed in the Superior Court by one-half or more of the directors,

¹⁰⁰⁷ Haynsworth (n 253) 48.

¹⁰⁰⁸ *Model Business Corporation Act* (2016 Revision) (n 5) s 14.34(a).

¹⁰⁰⁹ Thompson (n 254) 719.

¹⁰¹⁰ *California Corporations Code 2020 (Cal)*, *California Legislative Information* (Web document, 2024) <https://leginfo.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CORP&division=&title=1.&part=&chapter=&article=&nodetreepath=2>.

¹⁰¹¹ *Ibid* s 1800(b)(4).

or a shareholder or shareholders with not less than 33.33% of a total number of shares, the outstanding common shares, the equity of the corporation or by any other person authorised by the companies in the articles of association.¹⁰¹² However, the corporation, or 50% or more of the shareholders (the ‘purchasing parties’) may prevent the dissolution of the company ‘by purchasing for cash the shares owned by the plaintiffs or by shareholders so initiating the proceeding’ (the ‘moving parties’) at fair value.¹⁰¹³ If the ‘purchasing parties’ cannot agree with the ‘moving parties’ on a fair value of the shares, the court shall stay the dissolution proceedings and determine ‘the fair value of the shares owned by the moving parties’.¹⁰¹⁴ Once again, the courts use this remedy but only after considering its alternatives.

5.2.2.2 Oppression remedies in New York

The *New York Business Corporation Code* of 2010 (NY)¹⁰¹⁵ is the relevant corporate law statute in New York and an influential model for other states in the United States. In s 1104(a)(1) this statute provides that the holder of 20% or more of the votes of all outstanding shares of the company may bring a petition for involuntary dissolution of a corporation when ‘the directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions towards the complaining shareholders’.¹⁰¹⁶ Shareholders or the corporation may, within 90 days after filing of the petition, purchase the shares owned by the petitioners at their fair value, and upon terms and conditions approved by the court.¹⁰¹⁷ If shareholders or the corporations are unable to agree on the fair value of the shares, the court may determine the fair value of the shares ‘as of the day prior to the date on which such petition was filed’.¹⁰¹⁸ Also, prior to the actual purchase of shares, the court may require to secure a petition for the fair value of his shares by posting of a bond or other security.¹⁰¹⁹ As such, this remedy

¹⁰¹² Ibid s 1800.

¹⁰¹³ Ibid s 2000(a).

¹⁰¹⁴ Ibid s 2000(b).

¹⁰¹⁵ *New York Business Corporation Code* 2010 (NY), *Justia* (Web document, 2024) <<https://law.justia.com/codes/new-york/2010/bsc/>>.

¹⁰¹⁶ Ibid s 1104(a)(1).

¹⁰¹⁷ Ibid s 1118(a).

¹⁰¹⁸ Ibid s 1118(b).

¹⁰¹⁹ Ibid s 1118(c)(2).

empowers minority shareholders to negotiate a buy-out with the majority shareholders in order to prevent the possibility of dissolution or the forced purchase of minority shares.

5.2.2.3 Oppression Remedies in Michigan

The corporate law of the state of Michigan provides remedies for minority shareholders subject to unfair oppression by majority shareholders, or who are being squeezed out of the company. Section 450.1489(1) of *the Michigan Business Corporations Act 1972 (Act 284 of 1972)*¹⁰²⁰ provides a remedy for acts of directors or those in control of the corporation which are 'illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder'.¹⁰²¹ Under this section, the courts have wide-ranging statutory remedies for oppressed minority shareholders, including dissolution and liquidation of the assets and business,¹⁰²² the cancellation or alteration of articles of corporation,¹⁰²³ injunctive relief against a resolution or other act of the corporation,¹⁰²⁴ prohibition of an act of the corporation, shareholders, directors or other persons,¹⁰²⁵ order to purchase shares at fair value,¹⁰²⁶ or an award of damages.¹⁰²⁷ In this respect, 'wilfully unfair and oppressive' conduct is regarded as continuing conduct or action that is significant and affects the shareholder(s)' interests.¹⁰²⁸ This may include 'the termination of employment or limitations on employment benefits' if 'the actions interfere with distribution or other shareholders interests disproportionately as to the affected shareholder'.¹⁰²⁹ On this basis, Michigan courts have a range of options for remedying minority shareholders when their rights are oppressed, as stated above.

¹⁰²⁰ *Michigan Business Corporations Act 1972 (Act 284 of 1972)*, Michigan Legislature (Web document, 2024) <<https://legislature.mi.gov/Laws/MCL?objectName=MCL-ACT-284-OF-1972>>.

¹⁰²¹ *Ibid* s 450.1489(1).

¹⁰²² *Ibid* s 450.1489(1)(a).

¹⁰²³ *Ibid* s 450.1489(1)(b).

¹⁰²⁴ *Ibid* s 450.1489(1)(c).

¹⁰²⁵ *Ibid* s 450.1489(1)(d).

¹⁰²⁶ *Ibid* s 450.1489(1)(e).

¹⁰²⁷ *Ibid* s 450.1489(1)(f).

¹⁰²⁸ *Ibid* s 450.1489(3).

¹⁰²⁹ *Ibid*.

5.2.2.4 Oppression Remedies in Louisiana

Under the *Louisiana Business Corporation Act 2015* (La),¹⁰³⁰ oppression of a shareholder exists ‘if the corporation’s distribution, compensation, governance, and other practices’, affecting the shareholder, are not dealt with fairly and in good faith.¹⁰³¹ In Louisiana, when assessing the issues of fairness and good faith, it is relevant to take into account what ‘a reasonable shareholder would consider to be fair under the circumstances, considering the reasonable expectations of all shareholders in the corporation’.¹⁰³² Nonetheless, when the oppression of minority shareholders is established, minority shareholders may withdraw from the corporation and require that their shares be purchased at a fair value.¹⁰³³ Accordingly, a shareholder must give the corporation written notice of withdrawal on the grounds of oppression.¹⁰³⁴ This notice is considered to be an offer by the shareholders to sell their shares in the corporation at a fair value.¹⁰³⁵ This offer may be accepted by the corporation with written notice of its acceptance.¹⁰³⁶ If the offer is not accepted, the shareholders may enforce the right to withdraw by commencing court proceedings against the corporation.¹⁰³⁷ By way of unanimous written consent, shareholders of a corporation may waive the right to withdraw from the corporation on the grounds of oppression.¹⁰³⁸ As before, minority shareholders in Louisiana may force the corporation to buy out their shares if the majority shareholders have engaged in oppressive conduct.

5.2.2.5 Oppression Remedies in Pennsylvania

Pennsylvania allows for dissenter’s rights or appraisal rights for shareholders who object to a merger. Pursuant to s 1571 of the *Pennsylvania Business Corporation Code* of 2010 (Pa)¹⁰³⁹ shareholders ‘have the rights to dissent from, and to obtain

¹⁰³⁰ *Louisiana Business Corporation Act 2015* (La), Justia (Web document, 2024) <<https://law.justia.com/codes/louisiana/revised-statutes/title-12/>>.

¹⁰³¹ *Ibid* s 1-1435(B).

¹⁰³² *Ibid* s 1-1435(B)(2).

¹⁰³³ *Ibid* s 1-1435(A).

¹⁰³⁴ *Ibid* s 1-1435(D).

¹⁰³⁵ *Ibid*.

¹⁰³⁶ *Ibid* s 1-1435(F).

¹⁰³⁷ *Ibid* s 1-1435(G).

¹⁰³⁸ *Ibid* s 1-1435(J).

¹⁰³⁹ *Pennsylvania Business Corporation Code* 2010 (Pa), Justia (Web document, 2024) <<https://law.justia.com/codes/pennsylvania/2010/title-15/chapter-17/1723/>>.

payment of the fair value of his shares in the event of, any corporate action covered under the law'.¹⁰⁴⁰ Also, if the merger is approved by the majority shareholders, minority shareholders may demand payment at a fair value of the shares determined by the court.¹⁰⁴¹ Minority shareholders may also apply for an involuntary winding up and dissolution of the corporation (s 1981 of the statute above). If controlling directors or shareholders in a corporation have acted 'illegally, oppressively or fraudulently' toward owners of 5% or more of the outstanding shares of any class of the corporation, a custodian may be appointed to take control of the corporation.¹⁰⁴² In Pennsylvania, the terms 'illegal', 'oppressive' or 'fraudulent' conduct are not defined by statute, leaving their interpretation to the discretion of the courts.

Moreover, the state of Delaware does not have an involuntary dissolution statute for minority oppression, nor a standard cause of action for shareholder oppression. It does, however, provide a cause of action for breach of fiduciary duty, discussed below.

5.3 Delaware General Corporation Law

With a population of less than 860,000 people, Delaware is the second smallest state in the United States. However, there are approximately 370,000 companies registered in the state.¹⁰⁴³ Delaware has long been considered 'as the corporate home'¹⁰⁴⁴ of choice for major corporations. For decades, it has provided 'a stable and efficacious but responsive corporate law', which has reacted effectively to changing economic and related conditions.¹⁰⁴⁵ Hence, Delaware has a reputation as 'a management-friendly state', enticing companies to incorporate under its corporate statutes¹⁰⁴⁶ due to its well-established legal system.

¹⁰⁴⁰ Ibid s 1571(a).

¹⁰⁴¹ Ibid s 1579.

¹⁰⁴² Ibid s 1767(a)(2).

¹⁰⁴³ Randy J Holland, 'Delaware Corporation Law: Judiciary, Executive, Legislature, Practitioners' (2017) 72(4) *The Business Lawyer* 943, 943.

¹⁰⁴⁴ Kevin P Lane, 'Corporate Law – Delaware Supreme Court Extends Fairness Standard of Appraisal of Minority Shareholders' Stock in a Cash-Out Merger and Eliminates the Business Purpose Test' (1983) 5(4) *Whittier Law Review* 661, 661.

¹⁰⁴⁵ Mark J Roe, 'Is Delaware Corporate Law Too Big to Fall' (2008) 74(1) *Brooklyn Law Review* 75, 79.

¹⁰⁴⁶ Young, Cirelli and Walter (n 259) 320.

Delaware's dominance, and its ability to attract the largest United States corporations, is a combination of 'corporate flexibility and years of court decisions ruling in favour of management',¹⁰⁴⁷ together with its well-developed law regarding many common, but complex, corporate issues. As presented in Chapter 2, Kimble Cannon and Patrick Tangney, examining the minority shareholders' protection under Delaware law, noted that Delaware courts have long addressed the issue of protecting directors, when their decision-making is subject to self-interest.¹⁰⁴⁸ Moreover, the Delaware corporate law courts, and the state's tax system, have also contributed to its success.¹⁰⁴⁹ As such, Delaware, with its flexible corporate laws, is a popular and well-respected jurisdiction for United States corporations.

The *DGCL* is a statute governing corporations found in the Delaware Code (Chapter One of Title 8). It was adopted in 1899 as the new *General Corporation Law*. It provides, among other things, laws with respect to the governance, management and mergers of Delaware-based corporations. Drafted by a small group of expert corporate law practitioners, as an unofficial committee,¹⁰⁵⁰ the 1899 *General Corporation Law* was heavily drawn from New Jersey's General Law, which at the time was registered as 'the nation's most popular law'.¹⁰⁵¹

Moreover, the 1899 *General Corporation Law* grew in popularity due to three particular and business-related elements in Delaware: low taxes, simple procedures, and broad powers provided to corporations. Therefore, it became the dominant corporate law jurisdiction in the United States in the early 1960s.¹⁰⁵² In 1967, the Revision Committee revised the 1899 *General Corporation Law* and recommended the *General Corporation Law* of 1967, which evolved into today's *DGCL*.¹⁰⁵³ Corporate disputes for Delaware corporations are determined by reference to the *DGCL*, regardless of where they are litigated.¹⁰⁵⁴ This statute

¹⁰⁴⁷ Lane (n 1044) 661

¹⁰⁴⁸ Cannon and Tangney (n 255) 727.

¹⁰⁴⁹ Holland (n 1043) 943.

¹⁰⁵⁰ *Ibid* 945.

¹⁰⁵¹ Joel Seligman, 'A Brief History of Delaware's General Corporations Law of 1899' (1976) 1(2) *Delaware Journal of Corporate Law* 249, 251.

¹⁰⁵² Holland (n 1043) 945.

¹⁰⁵³ *Ibid* 946.

¹⁰⁵⁴ Stephen M Bainbridge et al, *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* (Cambridge University Press, 2018) 1, 1.

has served as a model for other states in the United States and also for other international jurisdictions.

Furthermore, the success of the Delaware judicial system is attributed to Delaware's Supreme Court, the Superior Court, and the Court of Chancery, respectively.¹⁰⁵⁵ The Court of Chancery was established by the Delaware Constitution of 1792. It deals with many corporate law cases, and has published leading judgements,¹⁰⁵⁶ developing significant expertise in shaping corporate law standards. The Superior Court in Delaware has general jurisdiction. Appeals from it, and appeals from the Court of Chancery, go directly to Delaware's Supreme Court.¹⁰⁵⁷ These courts have developed an extensive body of case law that shapes the application of the *DGCL*.

Under Delaware corporate law, Delaware companies are managed by its board of directors. In managing the corporation's affairs, directors owe duties to the corporation, and to the stockholders. This encompasses both a duty of care and a duty of loyalty, as discussed below.

5.3.1 Provisions Related to Directors under the *DGCL*

In Delaware, the business and affairs of corporations, are 'managed by or under the direction of a board of directors'.¹⁰⁵⁸ As such, the board of directors exercises the powers and duties as provided in the certificate of incorporation.¹⁰⁵⁹ The board of directors in Delaware corporations consists of one or more members.¹⁰⁶⁰ A majority of the total number of directors in the company 'constitute a quorum for the transaction of business' unless the certificate of incorporation or bylaws state differently.¹⁰⁶¹ Hence, in fulfilling their managerial responsibilities, the board members of Delaware's companies have authoritative powers as specified in the certificate of incorporation.

¹⁰⁵⁵ Holland (n 1043) 952.

¹⁰⁵⁶ Ibid.

¹⁰⁵⁷ Ibid 953-954.

¹⁰⁵⁸ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6) s 141(a).

¹⁰⁵⁹ Ibid s 141(a).

¹⁰⁶⁰ Ibid s 141(b).

¹⁰⁶¹ Ibid.

Section 141(d) of the *DGCL* gives the board flexibility to establish a board of different classes of directors who have different rights, terms, and powers, so that certain directors may have more votes than others.¹⁰⁶² Thus, the board of directors of Delaware companies can hold meetings, and have an office or offices, outside of the state.¹⁰⁶³ Also, under the *DGCL*, the board of directors may act without the need to hold a meeting if consent from the members has been given in writing or by electronic transmission.¹⁰⁶⁴ This section allows a company's board to be divided into different classes, thereby offering greater stability of governance.

The board of directors generally has the power to make business decisions for the corporation. Accordingly, Delaware corporate law jurisprudence is founded on the basic principle that directors 'have the power and obligation to direct and oversee the business and affairs of Delaware corporations'.¹⁰⁶⁵ The officers in the corporation will have titles and duties as stated in the by-laws or resolutions of the board that are not inconsistent with the by-laws.¹⁰⁶⁶ As well, if it is approved by the directors or officers, a corporation may engage in a contract or transaction with a company and one or more interested directors or officers, regardless of whether the material facts about the director's 'relationship or interest' and 'the contract or transaction' are disclosed or known to the board.¹⁰⁶⁷ Therefore, Delaware's board of directors is the ultimate decision-making body in Delaware corporations.

Moreover, s 141(k) of the *DGCL* allows the holders of a majority of the shares to remove a director or the board of directors with or without cause.¹⁰⁶⁸ However, at an election of directors, any removed director or the board of directors may be entitled to vote.¹⁰⁶⁹ The limitation of this right is contained in s 141(k)(1) of the

¹⁰⁶² *Ibid* s 141(d).

¹⁰⁶³ *Ibid* s 141(g).

¹⁰⁶⁴ *Ibid* s 141(f).

¹⁰⁶⁵ Bradley R Aronstam, R Franklin Balotti and Timo Rehbock, 'Delaware's Going-Private Dilemma: Fostering Protections for Minority Shareholders in the Wake of Siliconix and Unocal Exploration' (2003) 58(2) *The Business Lawyer* 519, 522.

¹⁰⁶⁶ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6) s 142.

¹⁰⁶⁷ *Ibid* s 144(a)(1).

¹⁰⁶⁸ *Ibid* s 141(k).

¹⁰⁶⁹ *Ibid*.

DGCL. Accordingly, pursuant to s 141(k)(1) of the *DGCL* directors may be removed by stockholders only for cause, unless it is otherwise specified in the certificate of incorporation. In the case of cumulative voting, however, the directors cannot be removed without cause.¹⁰⁷⁰ In *In re VAALCO Energy Inc Stockholder Litigation*,¹⁰⁷¹ the court explained that s 141(k) ‘provides that holders of a majority of stock may-not must-remove directors’, with or without cause where the power to remove director is subject to the majority vote. There are two exceptions to this: if the board is classified, and the company has cumulative voting.¹⁰⁷² Section 141(k) of the *DGCL* grants significant power to majority shareholders in Delaware’s corporations to remove a director or entire board with or without cause. However, this provision may be overridden by the certificate of incorporation.

Additionally, directors in Delaware are, potentially, subject to personal liability for their actions, although they are usually protected by the so-called ‘business judgement’ rule. This rule protects directors who, in respect of business decisions, make judgements ‘in good faith and in the honest belief that the action taken was in the best interests of the company’.¹⁰⁷³ Therefore, a company may indemnify a director for liability and expenses if the person acted in good faith, or was not acting contrary to the best interests of the corporation.¹⁰⁷⁴ Consequently, s 145(g) of the *DGCL* provides a corporation with a power ‘to purchase and maintain insurance’ against the risk of personal liabilities incurred by directors, regardless of whether the company has or does not have the power to indemnify the director.¹⁰⁷⁵ Also, in its certificate of incorporation, the corporation can include a provision for removing or restricting the personal liability of a director to the company or stockholders for monetary damages, but that provision does not limit the liability of a director for breach of the director’s duty of loyalty,¹⁰⁷⁶ for acts or omissions not in good faith or intentional misconduct and knowing violation of

¹⁰⁷⁰ *Ibid* s 141(k)(2).

¹⁰⁷¹ *In re VAALCO Energy Inc Stockholder Litigation*, (D Del Civ No 11775-VCL, 4 January 2016).

¹⁰⁷² Section 214 of the *DGCL* allows vote distribution between candidates when voting for company directors. As a result, each holder of stock or any class or classes or a series ‘may cast all of such votes for a single director or may distribute them among the number to be voted for, or for any 2 or more of them’ as holder see fit.

¹⁰⁷³ Aronstam, Balotti and Rehbock (n 1065) 522.

¹⁰⁷⁴ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6) s 145(a).

¹⁰⁷⁵ *Ibid* 145(g).

¹⁰⁷⁶ *Ibid* s 102(b)(7)(a).

law,¹⁰⁷⁷ or for any transaction that the director gained by way of an improper personal benefit.¹⁰⁷⁸ Accordingly, in Delaware, the ‘business judgement’ rule, as a fundamental aspect of its corporate laws, protects directors who exercise their authority in good faith and in the company’s best interests.

Under Delaware law, the abuse of power by controlling majority shareholders is dealt with through the imposition of fiduciary duties, requiring the controlling shareholders to use their authority to protect the interests of all shareholders, and not their personal interests.

5.3.2 Fiduciary Duties of Company Directors

Although, as a matter of general principle, shareholders do not owe duties to other shareholders, and can make decisions based on their best interests, they do owe a fiduciary type of duty to other shareholders if they have a majority interest or control the business affairs in the company.¹⁰⁷⁹ Alan Palmiter observed that Delaware directors and officers, or ‘any shareholder with voting control’, owe corporate fiduciary duties.¹⁰⁸⁰ Accordingly, directors of Delaware corporations are bound by fiduciary duties that govern their conduct in companies. In *Harris v Carter*,¹⁰⁸¹ the court held that these duties are owed to the corporation and its shareholders.

In Chapter 2, George Young, Vincent Circelli, and Kelli Walter emphasised that in Delaware, directors owe fiduciary duties of care, loyalty and good faith to the company.¹⁰⁸² Also, in *Malone v Brincat*,¹⁰⁸³ the court found that the two primary duties that directors in Delaware owe are a duty of care and a duty of loyalty. However, in publicly held corporations, shareholders ‘generally owe no duties to each other, except ‘the duties of controlling shareholders engaged in self-dealing

¹⁰⁷⁷ Ibid s 102(b)(7)(b).

¹⁰⁷⁸ Ibid s 102(b)(7)(d).

¹⁰⁷⁹ Aronstam, Balotti and Rehbock (n 1065) 519-20.

¹⁰⁸⁰ Alan R Palmiter, *Corporations* (Aspen Publishers, 6th ed, 2009) 9.

¹⁰⁸¹ *Harris v Carter* 582 A 2d 222 (Del Ch, 1990).

¹⁰⁸² Young, Cirelli and Walter (n 259) 226.

¹⁰⁸³ *Malone v Brincat* 722 A 2d 5 (Del Ch, 1998).

transactions'.¹⁰⁸⁴ Moreover, in closely held corporations, as found in *Donahue v Rodd Electrottype Co*,¹⁰⁸⁵ stockholders owe one another a fiduciary duty of fair treatment. Consequently, if directors comply with the demands of their fiduciary duties, they will be able to avoid breaches of those duties and protect themselves from potential liability.

The duty of care obliges directors to make careful and informed decisions on behalf of their corporations.¹⁰⁸⁶ This duty also obliges directors to use the 'amount of care which ordinarily careful and prudent men would use in similar circumstances' and to be informed of 'all material information reasonably available' to directors when they are making business decisions.¹⁰⁸⁷ Therefore, this duty requires deliberative decision-making based on all reasonably available information and an understanding of the consequences of each decision the directors make or transaction they carry out on the company's behalf. For these purposes, directors may rely on the information presented by consultants or experts, selected with reasonable care, and in good faith,¹⁰⁸⁸ if they believe the information to be reliable.

Moreover, in evaluating a director's actions under the duty of care, courts apply the 'business judgement' rule and will assume that directors made the decision in good faith. That is, on an informed basis, with a good faith belief that the decisions are in the best interests of the corporation.¹⁰⁸⁹ If the 'business judgement' rule applies, the plaintiff, in challenging the business decision of the board of directors, has the burden of proof to prove the breach of fiduciary duty.¹⁰⁹⁰ Accordingly, the duty of care mandates that Delaware's directors evaluate corporate actions and review their performance within the company.

¹⁰⁸⁴ Robert A Ragazzo, 'Towards a Delaware Common Law of Closely Held Corporations' (1999) 77 *Washington University Law Quarterly* 1099, 1102.

¹⁰⁸⁵ *Donahue v Rodd Electrottype Co* 328 NE 2d 505 (Mass, 1975).

¹⁰⁸⁶ *Smith v Van Gorkom*, 488 A 2d 858 (Del Ch, 1985).

¹⁰⁸⁷ Scott V Simpson and Ktherine Brody, 'The Evolving Role of Special Committees in M&A Transactions: Seeking Business Judgment Rule Protection in the Context of Controlling Shareholder Transactions and Other Corporate Transactions Involving Conflicts of Interest' (2014) 69(4) *American Bar Association* 1117, 1118.

¹⁰⁸⁸ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6) s 141(e).

¹⁰⁸⁹ *Aronson v Lewis*, 473 A 2d 805 (Del, 1984).

¹⁰⁹⁰ Simpson and Brody (n 1087) 1120.

When these decisions are made in good faith and with due care, directors' decisions are protected by the 'business judgement' rule.

The fiduciary duty of loyalty, as a concept in Delaware law,¹⁰⁹¹ requires acting or deciding to act on a disinterested and independent basis, in good faith together with an honest belief that the directors are acting in the best interests of the company. In Delaware, the fiduciary duty of loyalty derives from the leading case *Guth v Loft Inc* ('*Guth*'),¹⁰⁹² where the court held that directors are prohibited from using their position of trust and confidence for personal interests. In *Ivanhoe Partners v Newmont Mining Corp*,¹⁰⁹³ the court held that the duty of loyalty prohibits a director from representing interests other than the best interests of the corporation and its shareholders, and requires directors to act in good faith.

In Delaware, the strictest level of judicial review of the action of the board of directors is the 'entire fairness' standard,¹⁰⁹⁴ under which the director defendants must demonstrate that the transaction was fair. In *Weinberger v UOP Inc* ('*Weinberger*'),¹⁰⁹⁵ the Delaware Supreme Court divided the concept of fairness into 'fair dealing' and 'fair price'. The court highlighted that when circumstances arise and directors find themselves in a position of conflict of interests with the company, they need to demonstrate 'utmost good faith and the most scrupulous inherent fairness of the bargain'.¹⁰⁹⁶ The court found that 'fair dealing' embraced a series of questions pertaining to when the transaction took place, how it was structured, negotiated, initiated, disclosed to the directors, and how directors and the stockholder obtained the approvals.¹⁰⁹⁷ Therefore, as the most stringent standard of review, 'entire fairness' is the default standard. Once triggered, the board has the burden of demonstrating that the transaction was 'fair'. In *Shearin v EF Hutton Group Inc*¹⁰⁹⁸ the plaintiff, after being terminated from her position, alleged that the defendant's conduct in terminating her employment constituted a violation of the statute. She alleged that the defendant had conspired to use

¹⁰⁹¹ Holland (n 1043) 683.

¹⁰⁹² *Guth v Loft Inc* 5 A 2d 503 (Del Ch, 1939) ('*Guth*').

¹⁰⁹³ *Ivanhoe Partners v Newmont Mining Corp* 535 A 2d 1334 (Del Ch, 1987).

¹⁰⁹⁴ Simpson and Brody (n 1087) 1120-21.

¹⁰⁹⁵ *Weinberger v UOP Inc* 457 A 2d 701 (Del Ch, 1983).

¹⁰⁹⁶ *Ibid.*

¹⁰⁹⁷ *Ibid.*

¹⁰⁹⁸ *Shearin v EF Hutton Group Inc* 652 A 2d 578 (Del Ch, 1994).

Hutton Trust to charge customers of Hutton Inc fees for trust services that were never performed, and that she has been hired to give Hutton Trust the facade of a legitimate trust company but then dismissed to prevent her from disclosing the defendant's alleged illegal activities. The Delaware Court of Chancery dismissed the claim, finding no ground for relief under Delaware law because Shearin failed to demonstrate 'unfairness' in the transaction or 'bad faith' on part of the defendant. The court held that the plaintiff's hiring and the resulting 'loss' did not constitute a standard wrongful action. However, it concluded that her allegation that she was dismissed in furtherance of a conspiracy was sufficient to establish standing to pursue a conspiracy claim.

For breaches of fiduciary duty of care, s 102(b)(7) of the *DGCL* exculpates directors (but not officers) from monetary liability. However, it cannot exculpate breaches of the duty of loyalty. Moreover, s 102(b)(7) of the *DGCL* authorises a corporation, in the certificate of incorporation, to include a provision to eliminate or limit the personal liability of officers of the corporation or its stockholders for monetary damages for a breach of fiduciary duty. However, as mentioned above, not all officers are included, and not all fiduciary duty breaches can be exculpated, which makes the protections provided to officers by this section narrower than those offered to directors.

Delaware corporate law 'is replete with examples of safeguards' intended to protect minority shareholders from the oppressive conduct of controlling shareholders.¹⁰⁹⁹ Therefore, given the large number of corporations based in Delaware, the state has developed a number of precedents that exceed the standards of other states in the United States.¹¹⁰⁰ This reinforces Delaware's reputation as a preferred destination for company incorporation.

The foundation of minority shareholder claims in Delaware is discussed below, illustrated by three main cases applicable to oppression claims by minority shareholders.

¹⁰⁹⁹ Balotti and Rehbock (n 1065) 519.

¹¹⁰⁰ Bainbridge et al (n 1054) 1.

5.4 Foundation of Minority Shareholder Claims in Delaware

As noted earlier, in Delaware, minority shareholder oppression can occur when directors or majority shareholders act in bad faith, and ‘disregard the interests of the minorities’.¹¹⁰¹ Since the early 1990s, Delaware courts have adopted different positions regarding the cause of action for shareholder oppression.¹¹⁰² Historically, transactions by the controlling shareholders, have been reviewed under the ‘entire fairness’ standard and ‘business judgement’ rule. The courts first recognised a claim for minority shareholder oppression in 1991, ‘and no Delaware court has since rejected this cause of action’.¹¹⁰³ Delaware courts have held that claims by minority shareholders for mistreatment or for oppressive conduct in companies ‘fall under the general law of corporate fiduciary duties’.¹¹⁰⁴ To avoid such claims, company controllers must make sure that company’s shareholders receive equal treatment.

Initially, in the Delaware case *Little v Waters*,¹¹⁰⁵ minority shareholders prevailed on claims for breach of fiduciary duty and shareholder oppression. The facts of the case are as follows: the plaintiff (Little) formed two companies and managed them, while the defendant (Waters) provided the capital. Waters owned two-thirds of the stock, while Little owned one-third. Little and Waters never formally agreed that the company would pay dividends to cover taxes. Waters merged the two companies into a new one, not declaring dividends, which left Little to look for an alternative to paying the tax liability. Little sued Waters for breach of fiduciary duty arising from Waters’ refusal, as the majority shareholder, to declare dividends, which created a tax burden on Little. He alleged that Waters’ arrangements were improper for all stockholders and favoured one group at the expense of another. As both controlling directors were ‘interested directors’, this case ‘triggered a judicial review under the more stringent “entire fairness” standard’.¹¹⁰⁶ Also, Little

¹¹⁰¹ Nicola De Luca, ‘Unequal Treatment and Shareholders’ Welfare Growth: Fairness v Precise Equality’ (2009) 34(3) *Delaware Journal of Corporate Law* 853, 919-920.

¹¹⁰² Ladd A Hirsch and James D Sheppard, ‘Claims For Oppression By Minority Shareholders In Private Companies Under Texas And Delaware Law: A Plaintiff’s Perspective’ (Conference Paper, Securities Regulation and Business Law Conference, 10 February 2012) 6.

¹¹⁰³ *Ibid.*

¹¹⁰⁴ Young, Circelli and Walter (n 259) 266.

¹¹⁰⁵ *Little v Waters* 1992 WL 25758 (Del Ch, 1992) (n 247).

¹¹⁰⁶ Hirsch and Sheppard (n 1102) 7.

alleged that Waters's refusal to declare dividends causing him to bear a high tax burden, was oppressive. The key issue that the court examined in this case was whether it was oppressive conduct by the majority shareholder to withhold the distribution of dividends. This was conducted under two definitions of oppressive conduct, i.e., 'frustration of the reasonable expectations of minority shareholders' and whether the conduct was 'burdensome, harsh or wrongful'.¹¹⁰⁷ In this case,¹¹⁰⁸ the Delaware Court of Chancery held that under both standards, Litle's claim included sufficient allegations to make a claim for oppression.

In 1993, in the Delaware case *Nixon v Blackwell*,¹¹⁰⁹ the Delaware Supreme Court approved the concept of 'liquidity disparity' between minority and controlling shareholders. *Nixon*¹¹¹⁰ states that in deciding claims by minority shareholders against controlling shareholders '[t]he entire fairness test, correctly applied and articulated, is the proper judicial approach' to determine those claims. The details of the case are as follows: Nixon owned non-voting shares in E.C. Barton Corporation. The directors established an employee stock ownership plan, allowing employees to buy and sell stocks, and did not allow non-voting shareholders to buy or sell them. Nixon argued that the directors of E.C. Barton Corporation breached their fiduciary duties to minority shareholders by maintaining a discriminatory employee stock ownership plan. Nixon argued that this plan unfairly favoured employee stockholders over directors. The Delaware Court of Chancery held that Blackwell breached their fiduciary duties owed to plaintiffs by establishing and maintaining a discriminatory employment policy that unfairly favoured class A employee stockholders over plaintiffs who were class B non-employee stockholders.¹¹¹¹ The directors appealed the decision of the Delaware Chancery Court. The Delaware Supreme Court in *Nixon*¹¹¹² concluded that the defendants met their burden of establishing 'entire fairness' in their dealings, emphasising that directors must demonstrate that their decision benefits the company as a whole.

¹¹⁰⁷ Those definitions were outlined in *Gampel v Bolstein* 477 NYS 2d 1014 (NY Sup Ct, 1984).

¹¹⁰⁸ *Litle v Waters* 1992 WL 25758 (Del Ch, 1992) (n 247).

¹¹⁰⁹ *Nixon v Blackwell* 626 A 2d 1366 (Del Ch, 1993) (n 250).

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Ibid.*

¹¹¹² *Ibid.*

In *Ribley Products Corp v Nagy*,¹¹¹³ the Supreme Court of Delaware resolved the question of whether the majority shareholders breached a fiduciary duty owing to the minority shareholder who is the chief executive officer under the written employment contract. The case involved a minority shareholder suing the company and its majority shareholders following his termination of employment. The federal jury's verdict awarded punitive damages against the majority shareholders for breach of fiduciary duty for termination of employment.¹¹¹⁴ Also, the federal jury found that the majority shareholders had breached their fiduciary duties to Nagy and held them liable for compensatory damages.¹¹¹⁵ The defendants appealed the verdict. The Delaware Supreme Court held that 'although majority shareholders have fiduciary duties to minority shareholders qua stockholders, those duties are not implicated when the issue involves the rights of the minority stockholder qua employee under an employment contract'.¹¹¹⁶ The court further stated '[t]hat [the] fact that Ribley is closely-held does not, for this purpose, alter the duties of stockholder inter se from those which prevail for publicly held corporations'.¹¹¹⁷ Consequently, the Delaware Supreme Court narrowly addressed a certified fiduciary duty question from the Seventh Circuit Court of Appeals and found that no such duty existed in this case.

In Delaware, up to 2005, recognising a particular claim as direct or derivative, i.e., a claim by a shareholder on behalf of the company for harm done to the corporation, was challenging.¹¹¹⁸ This issue of direct or derivative standing in Delaware minority shareholders' action is discussed below.

¹¹¹³ *Ribley Products Corp v Nagy* 683 A 2d 37 (Del Ch, 1996) (n 251).

¹¹¹⁴ *Ibid.*

¹¹¹⁵ *Ibid.*

¹¹¹⁶ *Ibid.*

¹¹¹⁷ *Ibid.*

¹¹¹⁸ Richard Montgomery Donaldson, 'Mapping Delaware's Elusive Divide: Clarification and Further Movement Towards a Merits-Based Analysis for Distinguishing Derivative and Direct Claims in *Agostino v. Hicks and Tooley v. Donaldson, Lufkin & Jenrette, Inc.*' (2005) 30 *Delaware Journal of Corporate Law* 389, 389.

5.5 Delaware's Case Law on Minority Oppression: Direct or Derivative Claim?

Delaware courts have often struggled to distinguish between these two types of claims, as stockholders in the state may bring an individual action (direct claim) to address wrongdoings specific to them or a suit on behalf of the corporation (a derivative claim) for harm done to the corporation. The Delaware cases illustrated below help to clarify this issue.

The claim in the Delaware case *Gentile v Rossette*¹¹¹⁹ (*'Gentile'*) arose from a self-dealing transaction by the controlling stockholders, in which they overlooked its corporation debt in exchange for issuing stocks. This transaction wrongfully reduced the cash-value and voting powers of minority shareholders and increased the voting power of the majority controllers. Accordingly, the plaintiffs pursued a direct claim pertaining to a corporate dilution and overpayment, seeking to recover the value of which they had been wrongfully deprived by the debt conversion. However, the defendants moved to dismiss plaintiffs' direct claims, arguing that they were exclusively derivative. The plaintiffs were former minority shareholders of SinglePoint Financial Inc (*'SinglePoint'*) which, after the debt conversion, was acquired by a company called Cofiniti, in a merger. The Delaware Court of Chancery held that the debt conversion claim was derivative, and that in order for a direct claim to succeed, 'the dilution must result in a 'material decrease' in voting power'.¹¹²⁰ The Delaware Court of Chancery determined that there was no 'material decrease' in voting power, as the plaintiffs, before and after the debt conversion, were minority shareholders of SinglePoint and as result of the merger with Cofiniti, plaintiffs had lost standing for a claim on behalf of Single Point.¹¹²¹ In this case,¹¹²² the Delaware Court of Chancery dismissed the claim for conversion by the plaintiffs, granting summary judgement.

In this respect, the issue argued on appeal was whether the former minority shareholders of Single Point may bring a direct claim against the majority

¹¹¹⁹ *Gentile v Rossette* 906 A 2d 91 (Del Ch, 2006).

¹¹²⁰ *Ibid.*

¹¹²¹ *Ibid.*

¹¹²² *Ibid.*

shareholders responsible for the debt conversion transaction. The Supreme Court of Delaware reasoned that the requirement of a ‘material’ reduction in voting power should not be part of the analysis if the claim is direct, derivative or both.¹¹²³ The court further reasoned that the minority shareholders were individually harmed, resulting in breach of the fiduciary duty owed to them by the controlling shareholders, who benefited from this breach.¹¹²⁴ The Delaware Supreme Court reversed the judgement of the Court of Chancery and held that the claim was not exclusively derivative. *Gentile*¹¹²⁵ recognises that a specific kind of claim may be hybrid in nature, that is, as being derivative and direct. The Delaware Supreme Court further emphasised that former minority shareholders of Single Point could bring direct claims in situations when controlling shareholders allegedly diluted the minority’s financial and voting interests.¹¹²⁶ In this case,¹¹²⁷ the Delaware Supreme Court concluded that as SinglePoint no longer exists, the only available remedy would be damages that should equal the fair value of the shares that represent the overpayment by SinglePoint in debt conversion.

The decision in *Gentile*¹¹²⁸ contrasts with *Tooley v Donaldson, Lufkin & Jenrette Inc* (*Tooley*),¹¹²⁹ in which case the court imposed a two-pronged test to determine whether a claim was derivative or direct, i.e., (i) who suffered the alleged harm, the corporation or the stockholders, individually? and (ii) who would receive the benefit of any recovery or other remedy – the corporation or the stockholders, individually?¹¹³⁰ The details of the case are as follows: the plaintiffs, Pooley and Lewis, were minority shareholders in Donaldson Lufkin & Jenrette Incorporation (*Donaldson*). AXA Financial, which controlled Donaldson, merged with Credit Suisse Group and obtained the outstanding shares in Donaldson. The plaintiffs filed suit against the defendant corporation, along with its officer and directors, alleging a breach of fiduciary duties owed to them. The plaintiffs alleged that they suffered financial and time-value damages due to the corporation’s

¹¹²³ *Ibid.*

¹¹²⁴ *Ibid.*

¹¹²⁵ *Ibid.*

¹¹²⁶ *Ibid.*

¹¹²⁷ *Ibid.*

¹¹²⁸ *Ibid.*

¹¹²⁹ *Tooley v Donaldson, Lufkin & Jenrette Inc* 845 A 2d 1031 (Del Ch, 2004).

¹¹³⁰ *Ibid.*

delay in closing the merger. The Delaware Supreme Court stated that ‘The stockholder’s claimed injury must be independent of any alleged injury to the corporation’; thus the company’s stockholder ‘must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation’.¹¹³¹ In this case,¹¹³² the Delaware Court of Chancery granted a motion to dismiss the action with prejudice.

Gentile, with its dual natured exception, created difficulties to the application of *Tooley*. In 2021, the court decision in *Brookfield Asset Management Inc v Rosson* (*‘Brookfield’*),¹¹³³ which is addressed later, provided clarity to dilution claims by overruling *Gentile*.

Delaware Courts acknowledged the prevalence of the ‘entire fairness’ standard, especially in the context of mergers, as indicated above. The next section briefly examines s 253 of the *DGCL*, which governs mergers between a parent corporation and subsidiary corporation or corporations, with a focus on landmark decisions such as *Weinberg v UOP Inc*,¹¹³⁴ *Cede & Co v Technicolor Inc*¹¹³⁵ (*‘Cede’*), and *Delaware Open MRI Radiology Associates v Kessler* (*‘MRI Radiology’*).¹¹³⁶

5.6 Protection of Delaware’s Minority Shareholders in a Merger Situation

The state of Delaware in s 253(a) of the *DGCL* provides a mechanism for mergers where a corporation or corporations or a parent corporation owning 90% or more of the outstanding shares of each class of the stock may vote on such a merger, and may force the minority shareholders out of the company on the basis of a fair value cash buy-out.¹¹³⁷ Accordingly, such a merger may occur if one or more parent corporations and subsidiary corporation or corporations ‘is a corporation of this State’, unless the laws of the foreign company prohibits such a merger.¹¹³⁸

¹¹³¹ *Ibid.*

¹¹³² *Ibid.*

¹¹³³ *Brookfield Asset Management Inc v Rosson* 261 A 3d 1251 (Del Ch, 2021).

¹¹³⁴ *Weinberger v UOP Inc* 457 A 2d 701 (Del Ch, 1983) (n 1095).

¹¹³⁵ *Cede & Co v Technicolor Inc* 684 A 2d 289 (Del Ch, 1996).

¹¹³⁶ *MRI Radiology Associates v Kessler* 898 A 2d 290 (Del Ch, 2006).

¹¹³⁷ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6) s 253(a).

¹¹³⁸ *Ibid.*

In *Glassman v Unocal Exploration Corp*,¹¹³⁹ the Delaware Supreme Court ruled that, in a short-form merger under s 253 of the *DGCL*, the majority shareholder did not have to establish the 'entire fairness' concept. Pursuant to s 253(a) of the *DGCL*, the parent corporation may merge the subsidiary corporation into itself or merge itself into subsidiary corporation 'by executing, acknowledging and filling', a certificate of ownership and merger.¹¹⁴⁰ Hence, mergers are commonly used as business agreements for the combination of affiliated Delaware corporations.

The earliest decision regarding minority mergers is Delaware's case of *Sterling v Mayflower Hotel Corp* ('*Sterling*').¹¹⁴¹ In this case,¹¹⁴² the plaintiff claimed that the terms of the agreement between the defendants' corporations were both fraudulent and unfair to the minority stockholders, and sought a preliminary injunction restraining the merger. The key facts are as follows: the defendant's sole business was the owner of the Mayflower Hotel Corp ('Mayflower') in Washington D.C., while the Hilton Hotels Corporation ('Hilton') and its subsidiary corporations owned and operated numerous hotel properties in many of the large centres of the population across the country. Both corporations were Delaware corporations. When Hilton acquired a majority of the outstanding shares of Mayflower and had control of nearly five-sixths of the outstanding shares, it sought to merge with Mayflower. The corporations entered into a merger agreement based on the independent study conducted by a third party, which determined the exchange rates of the shares. However, it did not consider the liquidation value of Mayflower. The Delaware Court in Chancery held that the merger was fair, finding no evidence of fraud or bad faith; therefore, it denied a permanent injunction but issued a temporary restraining order.¹¹⁴³ Although the minority shareholders were unsuccessful in enjoining the merger, the Supreme Court of Delaware held that the controlling shareholders and the subsidiary's board of directors had a fiduciary duty to the minority shareholders and had the burden of establishing the 'entire fairness' of the transactions to the subsidiary minority shareholders.¹¹⁴⁴ It further held that because the parent company and its

¹¹³⁹ *Glassman v Unocal Exploration Corp* 777 A 2d 242 (Del Ch, 2001).

¹¹⁴⁰ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6) s 253(a).

¹¹⁴¹ *Sterling v Mayflower Hotel Corp* 93 A 2d 107 (Del Ch, 1952).

¹¹⁴² *Ibid.*

¹¹⁴³ *Ibid.*

¹¹⁴⁴ *Ibid.*

directors 'stand on both sides of the transaction, they bear the burden of establishing [the merger's] entire fairness, and it must pass the test of careful scrutiny by the courts'.¹¹⁴⁵ The case demonstrated that, even though the court did not explicitly define the 'entire fairness' standard, the relevant circumstances must be taken into account, rather than focusing solely on the liquidation value of the minority shares.

In Delaware, the judiciary's response to 'traditional freeze-out transactions' varied significantly over time.¹¹⁴⁶ For instance, the principle established in *Sterling v Mayflower Hotel Corp*¹¹⁴⁷ became unclear with the Delaware Court decisions in *Stauffer v Standard Brands Inc* ('*Stauffer*'),¹¹⁴⁸ where the minority stockholder brought a suit claiming that the merger was invalid on the grounds of constructive fraud, and sought the merger to be set aside. In *Stauffer*,¹¹⁴⁹ the Delaware Court of Chancery held that the statutory remedy under *DGCL* s 262 would be an exclusive means of relief, except in cases of fraud or illegality where the relief sought in a merger is the monetary value of the shares.

In 1977, the Delaware Court in *Singer v the Magnavox Co* ('*Singer*')¹¹⁵⁰ overruled *Stauffer*,¹¹⁵¹ demanding fiduciary duty standards and providing a powerful remedy to minority shareholders who were dissatisfied with the freeze-out merger of corporations. The facts in *Singer*¹¹⁵² are as follows: the North American Phillips Corporation ('North American'), operating through a subsidiary, acquired around 84% of Magnavox Company ('Magnavox'). The directors of Magnavox unanimously agreed to merge with a second subsidiary of North American. The plaintiff alleged that the merger did not serve any business purpose; moreover, it was fraudulent as it forced the removal of minority shareholders from an equity position at a clearly inadequate price. However, the Delaware Court of Chancery held that such a merger was not fraudulent.¹¹⁵³ On appeal, the Delaware

¹¹⁴⁵ *Ibid.*

¹¹⁴⁶ Letsou and Haas (n 257) 31.

¹¹⁴⁷ *Sterling v Mayflower Hotel Corp* 93 A 2d 107 (Del Ch, 1952) (n 1141).

¹¹⁴⁸ *Stauffer v Standard Brands Inc* 187 A 2d 78 (Del Ch, 1962).

¹¹⁴⁹ *Ibid.*

¹¹⁵⁰ *Singer v the Magnavox Co* 380 A 2d 969 (Del Ch, 1977).

¹¹⁵¹ *Stauffer v Standard Brands Inc* 187 A 2d 78 (Del Ch, 1962) (n 1148).

¹¹⁵² *Singer v the Magnavox Co* 380 A 2d 969 (Del Ch, 1977) (n 1150).

¹¹⁵³ *Ibid.*

Supreme Court reasoned that upon finding the breach of the majority's fiduciary duty, the court must grant relief 'by injunction, appraisal, damages, or other available equitable relief, if any, keeping in mind, however, the continuing legislative approval of mergers'.¹¹⁵⁴ The case set a precedent by affirming that mergers are subject to equitable scrutiny, especially in the light of fiduciary duties owed by shareholders.

Six years later, *Singer*,¹¹⁵⁵ was overruled by *Weinberg v UOP Inc*¹¹⁵⁶ which case dealt with a common loyalty problem and the fiduciary duty of a company's controlling shareholders. The details of the case are as follows: a minority shareholder brought a class action for breach of fiduciary duties challenging the validity of a freeze-out merger between UOP Incorporation and Sigco Incorporated, a subsidiary of Signal Companies Incorporated. The plaintiff challenged the fairness of the transaction and sought to block the freeze-out merger, alleging that: the merger was not for a legal business purpose; the minority's shares were undervalued; and directors breached their fiduciary duty to the minority shareholders by not negotiating a fair price for the shares. The Delaware Court of Chancery held that the merger was fair and valid, and for a business purpose.¹¹⁵⁷ However, the Supreme Court of Delaware, on appeal, reversed the decision and held that majority shareholders bear the ultimate burden of proving the fairness of a merger.¹¹⁵⁸ The court clarified that 'fairness' comprised two basic concepts: 'fair dealing' and 'fair price'.¹¹⁵⁹ Upon examining the events leading to the vote, the court concluded that minority shareholders were denied critical information, resulting in uninformed vote that failed to satisfy the requirements of fair dealing.¹¹⁶⁰ *Weinberger*¹¹⁶¹ intended to resolve the conflicts between statutory appraisal rights under the *DGCL* and common-law rights 'to have a merger enjoined on grounds of breach of fiduciary duty or fraud'.¹¹⁶² However, even though it did not fully resolve this conflict, it provided

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ *Ibid.*

¹¹⁵⁶ *Weinberger v UOP Inc* 457 A 2d 701 (Del Ch, 1983) (n 1095).

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ *Ibid.*

¹¹⁶¹ *Ibid.*

¹¹⁶² Helen M Richards 'Cede & Co. v. Technicolor, Inc.: A Whole New Ball Game for Dissenting Shareholders' (1989) 14 *Delaware Journal of Corporate Law* 999, 999.

the plaintiff with both the 'fair' value of shares and 'equitable' relief for unfair dealing in Delaware's companies.

The Delaware Supreme Court decision in *Cede & Co v Technicolor Inc*,¹¹⁶³ had a substantial impact on future cash-out mergers. The facts of the case are as follows: with the approval of a majority of Technicolor Incorporated ('Technicolor'), MacAndrews Forbes Group Incorporated ('MacAndrews') merged its subsidiary Macanfor Corporation ('Macanfor') into Technicolor. The plaintiff, being a minority shareholder of Technicolor sought a valuation reflecting the fair value of their shares. The Delaware Court of Chancery appraised the fair value of the minority's shares by use of the 'fairness opinion' (that Macanfor transaction was entirely fair to Technicolor shareholders), 'the market value at the time of the merger', and 'the conduct of knowledgeable insiders'.¹¹⁶⁴ Using these three checks to evaluate reasonableness of the Technicolor valuation, the Delaware Court of Chancery determined reasonable assessment of the fair value of Technicolor stocks to be USD \$21.98 at the time of the merger.¹¹⁶⁵ The Delaware Supreme Court concluded that the Court of Chancery's valuation model was supported by evidence.¹¹⁶⁶ The decision is significant as the court reaffirmed that once shareholders prove violation of the director's duty of care, the burden shifts on to the directors to prove the 'entire fairness' of the transaction. Also, for the first time, the court recognised that a majority shareholder in a two-step merger approved by the defendant, has the right to receive part of the gain.

The issue of whether minority shareholders of Delaware Open MRI Radiology Associates in a 'squeeze-out' merger of a closely-held private company received a fair value for their shares was addressed in *Delaware Open MRI Radiology Associates v Kessler*.¹¹⁶⁷ The details of the case are as follows: the 'squeeze-out' merger occurred when the radiologists split up and turned the eighth Radiology stockholders into two discrete blocks. The majority shareholders, Broder Group, controlled 62.5%, while the minority shareholders were the Kessler Group that

¹¹⁶³ *Cede & Co v Technicolor Inc* 684 A 2d 289 (Del Ch, 1996) (n 1135).

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ *MRI Radiology Associates v Kessler* 898 A 2d 290 (Del Ch, 2006) (n 1136).

owned 37.5% of the shares of Delaware Open MRI Radiology Associates ('Delaware Radiology'). The Court of Chancery of Delaware was required to determine the fair value of the minority shareholders' interests in S (small business) corporation. Subsequently, the court found that the merger price was unfair and that the Kessler Group prevailed in its fiduciary duty claim.¹¹⁶⁸ The court determined that when minority shareholders are deprived of the future benefits associated with S corporation status, they should be recompensated for those benefits.¹¹⁶⁹ The court further explained that 'to capture the precise advantage of the S corporation structure to the Kessler Group, it is necessary to use a method that considers the difference between the value that a stockholder of Delaware Radiology would receive in Delaware Radiology as a C corporation and the value that a stockholder would receive in Delaware Radiology as an S corporation'.¹¹⁷⁰ To measure the fair value of the Kessler Group's interest in the going concern value of Delaware Radiology, the court applied an effective tax rate of 29.4% to the earnings of Delaware Radiology. Hence, when this rate was combined with an assumed 15% dividend rate it reflected the after-tax benefits for S corporation shareholders.¹¹⁷¹ In this case,¹¹⁷² the Delaware Court of Chancery stated that 'in essence, when the court determines that the company's business plan as of merger included specific expansion plans or changes in strategy', these represent corporate opportunities that should be reflected in the firm's overall value. The case is significant as it expands the concept of 'fair price' to include lost future tax benefits, rather than focusing on the present market value of the share.

As previously mentioned, Delaware courts, as evident by their decisions, support minority shareholders' right to equal treatment in corporations. These rulings are relied upon in other states of the United States, increasing their importance. This chapter further explores some of the new developments in Delaware's approach regarding minority oppression.

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ *Ibid.*

¹¹⁷¹ *Ibid.*

¹¹⁷² *Ibid.*

5.7 Recent Developments in Delaware Case Law Strengthening Protection for Minority Shareholders

As Delaware courts typically have the discretion to find oppression of minority shareholders, dependent on the facts, the conduct for oppression claim 'may not be deemed oppressive in every case'.¹¹⁷³ For instance, in *Blaustein v Lord Baltimore Capital Corp*,¹¹⁷⁴ the Delaware Chancery Court held that the alleged failure by the controlling directors and shareholders to 'negotiate in good faith towards a reasonable purchase price' did not breach good faith and fair dealing arising from a shareholders' agreement to establish minimum voting powers, and that they do not owe fiduciary duty to the plaintiff, as a minority shareholder, to accept a 'reasonable' repurchase proposal. The case involves the following facts: Blaustein became a minority shareholder in Lord Baltimore Capital Corp, and entered into a shareholders' agreement which restricted the transfer of stocks and contained a penalty provision in case of violation of those restrictions. The plaintiff argued that the defendants were unreasonably denying the plaintiff an exit opportunity from this investment, and that the right to a non-conflicted board decision exists under the common law fiduciary duty, and also under the implied covenant of good faith and fair dealing. The Court of Chancery found that the common law did not impose any duties on directors to consider buying out minority shareholders, and that the implied covenant of good faith and fair dealing did not create a duty to negotiate a reasonable repurchase price.¹¹⁷⁵ This case is notable because the Delaware Supreme Court affirmed the Court of Chancery's denial of the plaintiffs' request to amend and include additional claim of breach of fiduciary duty, thereby setting a precedent for similar cases.

The warning to Delaware investors that their actions, even without a majority vote, may be subject to imposition of fiduciary duty of loyalty and a duty of care, is the decision in *Basho Technologies Holdco B LLC v Georgetown Basho Investors*

¹¹⁷³ Gerard V Mantese and Ian M Williamson, 'Litigation Between Shareholders in Closely-Held Corporations: Protecting Minority Shareholders from Abuse at the Hands Of Majority Owners' (2018) 1 *Wayne State University Journal of Business Law* 1, 4.

¹¹⁷⁴ *Blaustein v Lord Baltimore Capital Corp* (D Del Civ No 6685-VCN, 30 January 2013).

¹¹⁷⁵ *Ibid.*

LLC.¹¹⁷⁶ The facts of the case are as follows: the plaintiff, Basho Technologies Holdco B ('Basho'), was a software company; the defendant, Georgetown Basho Investors LLC ('Georgetown'), used its blocking rights to gain control of Basho, and by using a self-dealing transaction, forced Basho to comply with Georgetown's financial terms. Georgetown first invested in Basho in 2010 with continuing control through stock financing, to the detriment of the company and its investors in 2017. In 2013, when the company was in a desperate financial state, Georgetown and the defendant Davenport forced through a series G financing (final round of venture capital funding), favourable to Georgetown but unfair to Basho, to the detriment of the company and its investors. Davenport engaged in hostile behaviour, communicating in conflicting ways, including threatening to not provide funding to the company, and leaving the company in a position of crisis. After forcing through the series G financing, Georgetown gained the right to appoint a majority of the members of the board of directors, and added defendant Fotos, a Georgetown employee, to the board. The plaintiffs claimed that the defendants breached their fiduciary duties by forcing the company to accept a series of G financing, which damaged the value of Basho's shares. The second claim for breach of fiduciary duty pertained to the claim that after a series of G financing, Georgetown, Davenport and Fotos separately breached their fiduciary duty by managing Basho to serve Georgetown's interests and not the interests of Basho and its stockholders. The court found that Georgetown and Davenport breached their fiduciary duty to the plaintiff because they exercised control over the company by forcing Basho to enter into the series of G financing.¹¹⁷⁷ As a remedy, they were jointly and severally liable for \$17,490,650 plus post-judgment interest.¹¹⁷⁸ Further, the court found that Georgetown, Davenport, and Fotos, by operating Basho after the series of G financing for the benefit of Georgetown and by entering into self-interested transactions, breached their fiduciary duties. Hence, as damages for breach of fiduciary duties, they were jointly and severally liable for \$2,778,228 plus post-judgment interest.¹¹⁷⁹ The

¹¹⁷⁶ *Basho Technologies Holdco B LLC v Georgetown Basho Investors LLC* (D Del, Civ No 11802-VCL, 6 July 2018).

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ *Ibid.*

¹¹⁷⁹ *Ibid.*

case demonstrates that the fiduciary duty can be extended to investors who hold contractual rights in companies.

The Delaware Supreme Court, in the 2021 case of *Brookfield Asset Management Inc v Rosson*¹¹⁸⁰ ('*Brookfield*') overturned its 2006 decision in *Gentile* (previously discussed) which gave to minority shareholders the rights to pursue direct dilution claims and derivative standing. The details of the case concerned dilutive share issuance by TerraForm Power Inc ('TerraForm') in favour of its controlling stockholder, Brookfield Asset Management Inc ('Brookfield'), where TerraForm's board of directors approved a private placement. Subsequently, Brookfield acquired \$650 million shares of TerraForm, which increased Brookfield's interest in TerraForm from 51% to 65.3%. Minority shareholders in Brookfield filed a derivative class action in the Delaware Court of Chancery against the directors of TerraForm, alleging that TerraForm issued stock for insufficient value (unfair price), which diluted the minority shareholders' voting, and the value of its financial interest in the company. During the court procedure, TerraForm merged with Brookfield, which affiliates acquired all outstanding stock of TerraForm. Brookfield sought to dismiss the minority shareholders' class action on the grounds that the harm was done to the company, and not to the minority shareholders. They stated that the plaintiff's dilution claims were exclusively derivative, according to the principle established in *Tooley* (discussed above). The Delaware Court of Chancery found that the case was nearly identical to corporate overpayment claims by former shareholders in *Gentile* and that the plaintiff had stated a direct claim, rather than derivative.¹¹⁸¹ The Delaware Court of Chancery found that the overpayment claims fall into the derivative category under *Tooley*.¹¹⁸² The Delaware Court of Chancery denied the motion to dismiss, agreeing that the claims were derivative under *Tooley*.¹¹⁸³ In this case,¹¹⁸⁴ the Court of Chancery held that both derivative and direct claims could still be brought as the case was nearly identical to corporate overpayment claims by former

¹¹⁸⁰ *Brookfield Asset Management Inc v Rosson* 261 A 3d 1251 (Del Ch, 2021) (n 1133).

¹¹⁸¹ *Ibid.*

¹¹⁸² *Tooley v Donaldson, Lufkin & Jenrette Inc* 845 A 2d 1031 (Del Ch, 2004) (n 1129).

¹¹⁸³ *Brookfield Asset Management Inc v Rosson* 261 A 3d 1251 (Del Ch, 2021) (n 1133).

¹¹⁸⁴ *Ibid.*

shareholders in *Gentile*, which permitted direct claims on behalf of the shareholders and derivative on behalf of the company.

The Delaware Supreme Court overruled *Gentile* as it conflicted with *Tooley*. On appeal, the Supreme Court of Delaware found that the claim was derivative and affirmed the judgement of the trial court ‘as having correctly dismissed the complaint’.¹¹⁸⁵ The Delaware Supreme Court found that economic and voting dissolution was injurious to stockholders, independent of any injury to the corporation.¹¹⁸⁶ As a result of *Brookfield*, shareholders are no longer able to bring a derivative claim after a merger.

5.8 Conclusion

This chapter examined the oppression remedies available to minority shareholders in several United States jurisdictions, including California, New York, Michigan, Louisiana, Pennsylvania, and Delaware in particular, finding that they differ from state to state. The chapter determined that in the United States, a corporation may be dissolved on various grounds such as ‘illegality fraud, misapplication of assets, and waste’, as examined by Robert Thomson (Chapter 2). Therefore, most states, including California, New York, Michigan, and Pennsylvania recognise involuntary dissolution as a remedy for shareholder disputes. However, in Louisiana, in cases of minority shareholder oppression, minority shareholders generally seek to divest their shares by seeking oppression remedies such as buy-out at a fair value. In this respect, as detailed in Chapter 2, authors such as Amelia Schultz emphasised that in common law countries, oppression remedies available to oppressed minority shareholders include judicial dissolution, forced buy-out, and judicial supervision.

Moreover, this chapter examined the statutory oppression remedies in the United States under the *MBCPA*. It found that the *MBCPA*, pursuant to s 14.34 provides for the dissolution of a corporation if directors or those in control of the corporation have engaged in conduct that is ‘illegal’, ‘oppressive’, or ‘fraudulent’. This remedy

¹¹⁸⁵ *Ibid.*

¹¹⁸⁶ *Ibid.*

allows the court to dissolve the company when the conduct of controlling shareholders has undermined the reasonable expectations of minority shareholders. The chapter also found that, pursuant to s 14.34(a) of the *MBCPA*, the corporation or shareholders may purchase all shares held by the petitioning shareholder. As mentioned above, this remedy is commonly adopted by the courts to address disputes involving minority shareholders' oppression. In this context, scholars such as Robert Thompson, as discussed in this chapter, argued that the introduction of s 14.34 of the *MBCPA* was intended to address the strategic misuse of dissolution petitions by allowing the petitioner's shares to be subject to a "call" within ninety days of initiating the action.

This chapter further demonstrated that the Delaware corporate statute does not specifically authorise involuntary dissolution; nor does it recognise a right for oppressed minority shareholders to be bought out. This highlights the significant difference in the protection of minority shareholders between Delaware and the jurisdictions that have adopted the *MBCPA*. In particular, this chapter particularly examined the position in Delaware under the *DGCL*, and the available claims and remedies to minority shareholders for oppressive treatment by the majority shareholders. It determined that in Delaware, the 'business judgment' rule applied by the courts in various circumstance protects directors who exercise their authority within companies in 'good faith' and with reasonable care. The chapter also found that in Delaware, oppressed minority shareholders may seek relief through traditional causes of action grounded in general equitable principles, particularly for breach of fiduciary duties. As a result, Delaware has developed specific standards for addressing oppression claims, such as the 'entire fairness' doctrine, which shifts the burden of proof to the defendant. Under this doctrine, the defendant must demonstrate that the transaction was 'fair' in both price and process. This chapter also examined the shareholders' protection during mergers and identified that, in such disputes, courts tend to grant equitable relief for unfair treatment.

The chapter concludes that even though the United States' statutes permit involuntary dissolution of a company in cases involving oppressive conduct, the Delaware courts are not limited to statutory oppression remedies, and have

greater flexibility to grant equitable relief for breach of fiduciary duties by company's controllers. Building on the work of scholars such as George Young, Vincent Circelli, and Kelli Walter (Chapter 2) who argued that other countries could benefit from modelling their oppression laws on those of Delaware, this chapter advances the argument that minority shareholders in Delaware are protected adequately. This protection is primarily achieved through the judicial interpretation of fiduciary duties and a case-by-case approach designed to protect their rights in specific circumstances. Ultimately, this chapter establishes a foundation for comparing these laws with Australia's oppression laws, in order to address their advantages and uniqueness, aimed at forming recommendations for making proposals for statutory reform of Australian oppression remedies.

Chapter 6

The Canadian Position on Minority Shareholder Protection

6.1 Overview

6.2 Provisions Related to Directors under the *Canada BCRA*

6.3 Scope of Oppression and Statutory Oppression Remedies in Canada

6.3.1 Scope of Oppression

6.3.2 Oppression Remedies in Canada

6.4 Case Law on Minority Shareholders Oppression: Early Years

6.5 Later Significant Rulings on Minority Shareholders Oppression

6.6 Conclusion

6.1 Overview

This chapter explores Canadian oppression remedies available to minority shareholders for ‘oppressive’ and ‘prejudicial’ conduct of dominant shareholders in companies. In Canada, these remedies are recognised in the statute and as an equitable remedy. They are defined in two relevant statutes: the *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can)¹¹⁸⁷ (*‘Canada BCPA’*), as a federal statute and the *Business Corporations Act 1990* (Ontario)¹¹⁸⁸ (*‘Ontario BCRA’*), as its provincial counterpart. In the *Canada BCPA*, remedies are addressed under s 241. Similarly, the *Ontario BCRA* sets out oppression remedies in s 248, which is a provision nearly identical to s 241 of the *Canada BCPA*. Both provisions protect the rights of the shareholders, stakeholders and creditors of Canadian companies.

The chapter begins by examining the provisions related to directors and director’s duties under the *Canada BCRA*. It studies the statutory duty of loyalty and duty of care imposed on corporate directors in the management of the company, commonly referred to as fiduciary duties. Further, this chapter explores the scope

¹¹⁸⁷ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8).

¹¹⁸⁸ *Business Corporations Act 1990* (Ontario), *Government of Ontario* (Web Document, 2024) <<https://www.ontario.ca/laws/statute/90b16>>.

of oppression and how the court may make an order in favour of oppressed minority shareholders when the company's affairs have been conducted in a way that is 'oppressive', 'unfairly prejudicial', or that 'unfairly disregards' their rights under the Canadian corporate law. The chapter also investigates how oppression may arise in many situations such as mergers, squeeze-outs, non-distributions of dividends, share dilution 'or proportionate shareholding without fair competition, and unfair termination of employment and exclusion from management',¹¹⁸⁹ as observed by scholars such as Greta Fung.

This chapter also addresses Canadian case law on the oppression of minority in relation to oppressive conduct by majority shareholders in Canadian companies. While every case is different, the chapter identifies how Canadian courts are taking into account the claimant's reasonable expectations and whether the conduct was contrary to principles of 'fair' dealing, as emphasised in the Canadian landmark case of *BCE v 1976 Debentureholders* ('*Debentureholders*').¹¹⁹⁰ This chapter explores how this case, as one of the most important corporate law decisions handed by the Supreme Court in Canada, transformed the nature of the fiduciary duties from being owed to shareholders to encompassing all stakeholders, such as employees and creditors, and also clarified that oppressive conduct is not limited to illegal acts or bad faith.

Building on the work of scholars like Brian Cheffins (Chapter 2) who observed that the 'open-ended' nature of Canadian oppression remedies has contributed to their success,¹¹⁹¹ this chapter concludes that Canada offers a strong legal framework regarding minority oppression in companies, due to the broad provisions under the *Canada BCPA*, which apply in many situations concerning shareholders' disputes. To support this argument, this chapter identifies relevant areas for a comparative analysis of the Canadian and Australian oppression laws, in order to propose amendments to Australian legislation and thereby improve minority shareholders' protection in Australian companies.

¹¹⁸⁹ Fung (n 311) 72.

¹¹⁹⁰ *BCE v 1976 Debentureholders* [2008] 3 SCR 560.

¹¹⁹¹ Cheffins (n 306) 338.

This chapter begins with a discussion on directors and their duties in Canadian companies.

6.2 Provisions Related to Directors under the *Canada BCPA*

Over the past two decades, Canadian corporation law has evolved from a shareholder-oriented concept of fiduciary duties to a balanced consideration of the stakeholders' interests, as observed by scholars such as Camden Hutchison.¹¹⁹² As a result, directors play a crucial role in supervising corporate activities, with their responsibilities being clearly defined by law. In Canada, directors owe fiduciary duty to the company at all times.¹¹⁹³ When exercising these duties, directors must consider the interests of shareholders, 'employees, suppliers, creditors, consumers, governments and the environment'.¹¹⁹⁴ Therefore, the duties required of company directors are vital for good corporate governance practices as they protect the interests of Canadian corporations.

Directors of Canadian companies have two main duties codified in the *Canada BCPA*: the duty to act honestly and in good faith in the best interests of the corporation (duty of loyalty),¹¹⁹⁵ and the duty to exercise the care, diligence, and skill that a reasonably prudent person would exercise in similar circumstances (duty of care).¹¹⁹⁶ These duties are known as 'fiduciary duties'.

A duty to act honestly and in good faith in the best interests of the corporation (duty of loyalty) constitutes a legal standard of behaviour expected from a company's directors, and is legislated in s 122(1)(a) of the corporate statutes of Canada.¹¹⁹⁷ Under this duty of loyalty, directors must ensure that the interests of the company are paramount. The *Canada BCPA* sets out the factors that directors must consider when acting in the best interests of the corporation such as considering the interests of shareholders in the company, its employees,

¹¹⁹² Camden Hutchison, 'To Whom Are Directors' Duties Owed? Evidence from Canadian M&A Transactions' (2023) 68(2) *McGill Law Journal* 123, 126-127.

¹¹⁹³ *BCE v 1976 Debentureholders* [2008] 3 SCR 560 (n 1190).

¹¹⁹⁴ *Ibid.*

¹¹⁹⁵ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 122(1)(a).

¹¹⁹⁶ *Ibid* s 122(1)(b).

¹¹⁹⁷ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 122(1)(a).

creditors, retirees and pensioners, the environment and the long-term interests of the corporation, governments, and consumers.¹¹⁹⁸ Therefore, as fiduciaries, Canadian directors owe a duty to the company, its shareholders and all stakeholders to act openly and honestly, and to respect their trust and confidence.

In Canada, directors are also required to ‘exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances’ (duty of care).¹¹⁹⁹ Moreover, directors of the companies must act in accordance with the *Canada BCPA*, the regulation of the company, articles of association, by-laws and shareholders’ agreement.¹²⁰⁰ Pursuant to s 123(1) of the *Canada BCPA*, a director is deemed to have consented to resolutions passed at a directors’ meetings if they were present at the meeting. The exception to this rule arises when a director requests a dissension by notifying the secretary before adjourning of the meeting, or by sending a registered mail notice after the meeting is adjourned.¹²⁰¹ Accordingly, in Canada, a duty of care is a statutory obligation that requires directors of Canadian company to make reasonable decisions based on the circumstances.

The *Canada BCPA* allows a corporation to indemnify directors or officers against liability incurred in the course of their duties.¹²⁰² Additionally, the company may purchase and maintain insurance to cover any liability arising from an individual’s role as director.¹²⁰³ Such indemnity is usually obtainable if the director has acted honestly, in good faith, and in the best interests of the company.

As previously mentioned, in Canada, minority shareholders can seek redress if their reasonable expectations are breached by conduct that is ‘oppressive’, ‘unfairly prejudicial’, or that ‘unfairly disregarded’ their interest. This is explained in more detail below.

¹¹⁹⁸ Ibid s 122(1)(b)(1.1).

¹¹⁹⁹ Ibid s 122(1)(b).

¹²⁰⁰ Ibid s 122(2).

¹²⁰¹ Ibid s 123(1).

¹²⁰² Ibid s 124(1).

¹²⁰³ Ibid s 124(6)(a).

6.3 Scope of Oppression and Statutory Oppression Remedies in Canada

A key aspect of Canadian oppression law is that it can provide relief to all stakeholders in companies who have been treated unfairly by controlling shareholders. However, a number of requirements must be satisfied in order for the court to grant relief, as outlined below.

6.3.1 Scope of Oppression

Pursuant to s 241(2) of the *Canada BCPA*, if an act or omission is carried out in an ‘oppressive’ manner, or ‘unfairly prejudicial’ to, or in a manner that ‘unfairly disregards’ the interests of security holders, creditors, directors or officers, then the court can make an order ‘to rectify the matters complained of’.¹²⁰⁴ The determination of oppression depends directly on the effect of the conduct on the shareholders in the company, and not the motives or nature of the majority shareholders’ conduct, as emphasised in *Sparling v Javelin International Ltd*.¹²⁰⁵ Moreover, in *Nystad v Harcrest Apartments Ltd* (*‘Nystad’*),¹²⁰⁶ the court described oppressive conduct as ‘burdensome’, ‘wrongful’ and ‘harsh’ conduct, or conduct which lacks probity of fair dealings.

Under s 241 of the *Canada BCPA*, there are a number of requirements that must be satisfied before the court can grant relief for oppressive conduct. First, only a complainant can apply to the court for relief in cases where the conduct is ‘oppressive’, ‘unfairly prejudicial’ or ‘unfairly disregards’ the interests of security holders, creditors, directors or officers.¹²⁰⁷ Potential complainants, pursuant to s 241(2) of the *Canada BCPA*, include a holder of a security of the company who is registered, a creditor, a director, or an officer. Section 238 of the *Canada BCPA* expands the definition of complainant to include former directors and any person who is a proper person, in the court direction, to make an application.¹²⁰⁸ As such, present and past shareholders, directors and officers of the company or its

¹²⁰⁴ *Ibid* s 241(2).

¹²⁰⁵ *Sparling v Javelin International Ltd* [1986] RJQ 1073.

¹²⁰⁶ *Nystad v Harcrest Apartments Ltd* [1996] 3 BCLR 2d 39.

¹²⁰⁷ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 241(1).

¹²⁰⁸ *Ibid* s 238.

affiliates, or any other person whom the court decides can properly make an application, may apply to a court for an order under s 241(1) of the *Canada BCPA*.

Second, oppression must relate 'to the business or affairs of the corporations or any of its affiliates'.¹²⁰⁹ As result, the oppression remedies are associated with the powers of the directors of the corporations or its affiliates.¹²¹⁰ In this regard, 'affairs' refer to the non-business company's activities that relate to its internal management, as established in *Allard v Shaw Communications Inc*.¹²¹¹ Pursuant to s 2(1) of the *Canada BCPA*, 'affairs means the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate'.¹²¹² The case of *Rea v Wildeboer*¹²¹³ clarified that the conduct must affect the 'corporate body', and relate to the affairs of the corporation. Similarly, in *Stech v Davies*,¹²¹⁴ the court held that 'unfairly disregard' means 'unjustly' in relation to the affairs of the stakeholders. In *Miller v F Mendel Holdings Ltd ('Miller')*¹²¹⁵ the court further recognised that the acts or omissions of a company's affairs may be isolated or continued over a period of time. In this case,¹²¹⁶ the court found oppression, and issued a buy-out order as remedy.

The third grounds for making an application to the court regarding oppression under s 241(2) of the *Canada BCPA* is 'unfairness'.¹²¹⁷ Accordingly, conduct may not be 'burdensome', 'harsh' or 'wrongful' (and therefore oppressive) but may still be deemed 'unfairly prejudicial'.¹²¹⁸ In this context, the court in *RW-LB Holdings Ltd*¹²¹⁹ removed the defendant from their position as director and changed the company's voting structure to grant the plaintiff's shares voting rights. The court in this case¹²²⁰ held that the defendant's conduct amounted to 'unfair prejudicial' conduct, as the defendant managed the company's affairs without taking into

¹²⁰⁹ *Ibid* s 241(1)(b).

¹²¹⁰ *Ibid* s 241(2)(c).

¹²¹¹ *Allard v Shaw Communications Inc* [2009] ABQB 748.

¹²¹² *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 2(1).

¹²¹³ *Rea v Wildeboer* [2015] ONCA 373.

¹²¹⁴ *Stech v Davies* [1987] 53 Alta LR 2d 373.

¹²¹⁵ *Miller v F Mendel Holdings Ltd* [1984] 26 BLR 85.

¹²¹⁶ *Ibid*.

¹²¹⁷ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 241(2).

¹²¹⁸ *Miller v F Mendel Holdings Ltd* [1984] 26 BLR 85 (n 1215).

¹²¹⁹ *RW-LB Holdings Ltd* [1993] 11 BLR 2d 122.

¹²²⁰ *Ibid*.

account the equitable interests of the shareholders. In this case, the oppressive conduct involves actions that lack 'fairness' or that fall short of equity.

Section 248 of the *Ontario BCPA*, contains provisions similar to those in the *Canada BCPA*, allowing the court to remedy conduct that is 'oppressive or unfairly prejudicial to or that unfairly disregard the interests of any security holder, creditor, director or officer of the corporation'.¹²²¹ Like the *Canada BCPA*, this statutory remedy aims to promote fairness. Whether the *Canada BCPA* or the *Ontario BCPA* applies to the wrongful conduct of majority shareholders toward minority shareholders depends on the jurisdiction in which the company is incorporated.

6.3.2 Oppression Remedies in Canada

When the standard of 'unfairness' is breached, Canadian courts may issue an order to rectify the 'unfair' conduct.¹²²² As such, the court can make an order if:

- the court is satisfied that 'in respect of a corporation or any of its affiliates (a) any act or omission of the corporation or any of its affiliates effects a result; (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial'.¹²²³

Canadian courts have broad discretionary power to make any order the court sees fit including:

- an order restraining the conduct complained of,¹²²⁴
- appointing a receiver or receiver-manager,¹²²⁵ or
- amending the articles or by-laws 'or creating or amending a unanimous shareholder agreement'.¹²²⁶

¹²²¹ *Business Corporations Act 1990* (Ontario) (n 1188) s 248.

¹²²² *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 241(3).

¹²²³ *Ibid* s 241(2).

¹²²⁴ *Ibid* s 241(3)(a).

¹²²⁵ *Ibid* s 241(3)(b).

¹²²⁶ *Ibid* s 241(3)(c).

If the court order directs that the company amend the articles of association or by-laws of the company, then company directors must comply with s 191(4) of the *Canada BCPA*,¹²²⁷ and no amendment should be made without the court's consent or order.¹²²⁸ Subsequently, directors are obliged to give effect to the court's order.

Moreover, the court may issue an order, including:

- 'an order directing an issue or exchange of securities',¹²²⁹ and
- 'an order appointing directors in place' of any of the directors in office,¹²³⁰
- directing a corporation to purchase securities of a security holder,¹²³¹ and
- directing a corporation to pay a security holder any part of the monies that the security holder paid for securities.¹²³²

However, the company must not make any payment to a shareholder if there are substantial grounds to demonstrate that the company cannot pay its liabilities or the corporation's assets would be less 'than the aggregate of its liabilities'.¹²³³ This applies in cases where there is a serious risk that the company may be unable to meet its financial obligations.

Furthermore, the Canadian court can issue an order for:

- 'varying or setting aside the transaction or contract' and providing compensation to the company or any party involved in the transaction or contrast,¹²³⁴
- requiring the corporation to produce financial statements,¹²³⁵
- compensating the aggrieved person,¹²³⁶
- directing the register's rectification,¹²³⁷
- liquidation and dissolution of the corporation,¹²³⁸

¹²²⁷ Ibid s 241(4)(a).

¹²²⁸ Ibid s 241(4)(b).

¹²²⁹ Ibid s 241(3)(d).

¹²³⁰ Ibid s 241(3)(e).

¹²³¹ Ibid s 241(3)(f).

¹²³² Ibid s 241(3)(g).

¹²³³ Ibid s 241(6).

¹²³⁴ Ibid s 241(3)(h).

¹²³⁵ Ibid s 241(3)(i).

¹²³⁶ Ibid s 241(3)(j).

¹²³⁷ Ibid s 241(3)(k).

¹²³⁸ Ibid s 241(3)(l).

- directing an investigation,¹²³⁹
- requiring the trial of any issue.¹²⁴⁰

Buy-out remedies are the most often sought and most common oppression remedies granted by the Canadian court.¹²⁴¹ If the court grants a buy-out order, the company or the company's shareholders can buy the applicant's shares.¹²⁴² This remedy will not be ordered, if other remedies are deemed sufficient to remedy the oppressive conduct, as established in *Jarman v Brown*.¹²⁴³ If the court grants a buy-out remedy, the applicant is entitled to a fair value of the shares, as set out in *Mason v Intercity Properties Ltd*.¹²⁴⁴ As a result, when Canadian courts order buy-out remedies, the purchase price is generally based on the fair market value of the shares, as set by the court.

Ontario BCPA also provides appraisal rights to shareholders, allowing the company to purchase their shares at a 'fair value' if:

- (1) the shareholders are granted rights of dissent upon amendments to the articles of corporation, amalgamations with another company, and sales, lease, or exchange of all or substantially all of the corporation's property (s 185(1) of the *Ontario BCPA*);
- (2) compulsory acquisitions, when the offerees hold more than 90% or more of the shares of a particular class (s 188(1) of the *Ontario BCPA*);
- (3) holders of any outstanding shares (10% or less) of a class are entitled to request the acquisition of their securities of that class (s 189(1) of the *Ontario BCPA*).

Moreover, s 207(1) of the *Ontario BCPA* provides that the court may order the winding up of the corporation if:

- its conduct is 'oppressive', 'unfairly prejudicial', or 'unfairly disregard' the interests of creditors, security holders, directors or officers,¹²⁴⁵

¹²³⁹ *Ibid* s 241(3)(m).

¹²⁴⁰ *Ibid* s 241(3)(n).

¹²⁴¹ Cheffins (n 306) 329.

¹²⁴² *Ibid*.

¹²⁴³ *Jarman v Brown* [1979] 13 BCLR 152.

¹²⁴⁴ *Mason v Intercity Properties Ltd* [1987] 37 BLR 6.

¹²⁴⁵ *Business Corporations Act 1990* (Ontario) (n 1188) s 207(1)(a).

- the court is satisfied that a unanimous shareholder agreement gives the shareholder the right to make an application for dissolution,¹²⁴⁶
- is in the interest of contributories and creditors,¹²⁴⁷
- the corporation cannot by reason of its liabilities continue its business,¹²⁴⁸
- it is 'just and equitable' for some reason, other than the bankruptcy or insolvency of the company, that it should be wound up.¹²⁴⁹

In summary, this section grants Ontario courts, among others, the authority to dissolve a company for unfair treatment of stockholders, an inability to continue operations, or other reasons deemed just and equitable.

The next section illustrates early case law regarding minority shareholders' oppression in Canadian companies and the resulting court decisions.

6.4 Case Law on Minority Shareholders Oppression: Early Years

An early and influential case on minority oppression in Canada was decided by the Supreme Court of British Columbia in *Diligenti v RWMD Operations Inc.*¹²⁵⁰ The facts of the case are as follows: four individuals were operating a restaurant as a partnership. When disagreements arose, Diligenti, one of the four directors, was voted out of his job as manager of the business. Shortly after, the directors' fees to the other three directors were raised, and a management fee was redirected to a management company owned by the three remaining directors. Diligenti, as the applicant, initiated court proceedings alleging that he had acquired all the franchises and was entitled to remuneration for his management duties in the company. The court held that there are equitable rights and obligations which are independent of the company and legislation.¹²⁵¹ His Honour, Fulton J, stated that Diligenti's removal as a director of the company was not oppressive but found that it was 'unfairly prejudicial'.¹²⁵² His Honour further

¹²⁴⁶ Ibid s 207(1)(b)(i).

¹²⁴⁷ Ibid s 207(1)(b)(ii).

¹²⁴⁸ Ibid s 207(1)(b)(iii).

¹²⁴⁹ Ibid s 207(1)(b)(iv).

¹²⁵⁰ *Diligenti v RWMD Operations Inc* [1976] 1 BCLR 36.

¹²⁵¹ Ibid.

¹²⁵² Ibid.

reasoned that the applicant enjoyed rights as a shareholder and as a member of the company, under which he could participate in company's affairs.¹²⁵³ As a result, the court held that it was 'unjust and inequitable' to deny his rights and expectations which led to 'unfair prejudicial' conduct to him in his capacity as a member.¹²⁵⁴ This case remains significant in the development of Canadian corporate law.

Moreover, in *Re Ferguson & Imax Systems Corp (Re Ferguson)*,¹²⁵⁵ the majority shareholders sought to defeat the minority shareholders' expectation of equal participation by restructuring the capital of the company. The details of the case are as follows: IMAX was the company incorporated to exploit IMAX film technology. Shareholders of the company included several couples, with the husbands holding common voting shares and the wives holding preferred non-voting shares. Following the divorce of one couple, the company attempted to squeeze out the ex-wife by redeeming her shares. Her former husband influenced the other shareholders to pass a resolution at a general meeting to redeem her shares and persuaded them to refrain from declaring dividends. In response, the ex-wife-initiated proceedings under the oppression remedy to prevent the corporation from implementing the resolution. The Ontario court of Appeal held that there was 'unfair' conduct by the majority shareholders of the company.¹²⁵⁶ This decision was relied upon later in *Re Brant Investments Ltd v KeepRite Inc*,¹²⁵⁷ especially in regard to the following: '...the court must consider the bona fides of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholders'.¹²⁵⁸ The case reinforced the application of Canadian oppression remedies when a shareholder's reasonable expectations are violated, even in the absence of bad faith.

The following section examines subsequent rulings on cases involving minority shareholders' oppression in Canadian companies.

¹²⁵³ *Ibid.*

¹²⁵⁴ *Ibid.*

¹²⁵⁵ *Re Ferguson & Imax Systems Corp* [1983] 43 OR 2d 128.

¹²⁵⁶ *Ibid.*

¹²⁵⁷ *Re Brant Investments Ltd v KeepRite Inc* [1987] 60 OR 2d 737.

¹²⁵⁸ *Re Ferguson & Imax Systems Corp* [1983] 43 OR 2d 128 (n 1255).

6.5 Later Significant Rulings on Minority Shareholders Oppression

In *BCE Inc v 1976 Debentureholders*,¹²⁵⁹ directors sought court approval for a plan of arrangement involving a leveraged buyout. This required BCE Inc to take on additional debt that would diminish the value of the plaintiff's debentures. In response, the debentureholders sought relief for oppression under s 241 of the *Canada BCPA*. The central issue in this case was whether the company directors breached their duty of loyalty. The Quebec Court of Appeal ruled in favour of BCE Inc and held that the debentureholders' interests were not sufficient to override the director's decision. The decision was appealed. The Canadian Supreme Court held that directors of the corporation must act in the best interests of the company and, in doing so, may consider the interests of shareholders of the company and debentureholders, although they are not required to do so.¹²⁶⁰ The court restated the position that 'oppression' is related to 'burdensome', 'harsh' and 'wrongful conduct', which constitutes a visible departure from standards of fair dealing and an abuse of power.¹²⁶¹ The court further emphasised that 'oppression' refers to conduct that is 'coercive and abusive' indicating 'bad faith'.¹²⁶² Thus, bad faith is not a necessary condition for granting an oppression remedy.

The Canadian Supreme Court further clarified that 'oppression' is an equitable remedy that aims to ensure fairness.¹²⁶³ It highlighted that the oppression remedy focuses on the harm of the 'legal and equitable interest' of stakeholders of the corporation which are affected by the acts of directors or corporations that are oppressive, and specified that oppressive remedies give the court power to enforce 'not just what is legal but what is fair'.¹²⁶⁴ Accordingly, the court held that 'what is just and equitable is judged by the reasonable expectations of the

¹²⁵⁹ *BCE v 1976 Debentureholders* [2008] 3 SCR 560 (n 1190).

¹²⁶⁰ *Ibid.*

¹²⁶¹ *Ibid.*

¹²⁶² *Ibid.*

¹²⁶³ *Ibid.*

¹²⁶⁴ *Ibid.*

stakeholders in the context and in regard to the relationships at play'.¹²⁶⁵ In doing so, the court acknowledged the interests of all stakeholders in the company.

The Canadian Supreme Court also alleged that 'conduct that may be oppressive in one situation may not be in another' and that s 241 of the *Canada BCPA* applies even 'where the impugned conduct is wrongful, even if it is not actually unlawful'.¹²⁶⁶ The court emphasised that the corporation is entitled to maximise its profits but by doing so, it cannot treat individual stakeholders unfairly.¹²⁶⁷ Consequently, the court ruled in favour of the applicant, BCE Inc, as it was not established by the debentureholders that they had 'reasonable expectations' that, by bringing forward the arrangement plan, BCE Inc would protect their economic interests.¹²⁶⁸ This case is significant as it affirms that oppressive conduct does not require bad faith, as previously understood.

Moreover, in *Wilson v Alharayeri*,¹²⁶⁹ the Canadian Supreme Court held that there may be situations where directors are personally liable for oppression under s 241 of the *Canada BCPA*. The facts of the case are as follows: Alharayeri, the respondent, was a director, president, and shareholder of a company named Wi2Wi Corporation. While negotiating a merger, Alharayeri made a private agreement to sell his shares to another company, without notifying the board. When this was discovered by the board, Alharayeri resigned. Then, the applicant, Wilson, became the president of the company. However, the board decided to issue private placement to its common shareholders, which had the effect of diluting the proportion of common shares held by shareholders who did not participate in it. Still, before the board issued private placement to its common shareholders, it accelerated the conversion of the Class C preferred shares of the applicant into common shares without meeting the requirements of the financial test. Even though the respondent met these requirements, the board refused to allow the respondent to convert his Class A and Class B preferred shares into common shares, which resulted in reducing the respondent's proportion of

¹²⁶⁵ *Ibid.*

¹²⁶⁶ *Ibid.*

¹²⁶⁷ *Ibid.*

¹²⁶⁸ *Ibid.*

¹²⁶⁹ *Wilson v Alharayeri* [2017] 1 SCC 1037.

common shares. His Honour, Justice Cote, established a two-pronged test for personal liability: 'that the oppressive conduct is properly attributable to the director because of his/her action or inaction; and that the imposition of personal liability be fit in all the circumstances'.¹²⁷⁰ By applying this test, Justice Cote found that the non-conversion, by Wilson and Black, of Alharayeri's Class A and Class B preferred shares was oppressive, since they played lead roles in the discussions of the board of directors.¹²⁷¹ The case broadened the scope of personal liability for corporate directors, establishing that oppression can be found even in the absence of personal gain.

In *V M Koury Investments Ltd v Bolton Steel Tube Co Ltd*,¹²⁷² the court ordered a buy-out of the applicant shares when the majority shareholders operated the corporation in a manner oppressive to minority shareholders. The details of the case are as follows: the applicant owed 30% of the shares of the corporate respondent, where her late husband worked until 2008. The respondent's company was operated by its sole officer and director, the individual respondent. After the applicant's husband stopped working, the majority shareholders began operating the company in a manner that was 'oppressive' and 'unfairly prejudicial', and disregarded the interests of the applicant and her husband. As a result, in 2009, the company stopped paying dividends to the applicant, and failed to prepare financial statements. In response, the majority shareholder argued that the applicant had already received \$2 million in dividends, referred to the business challenges affecting the steel industry, and claimed that the advances he received were compensation for salary that he had agreed upon with the applicant's late husband. The court granted several remedies:

- in 2013, the court ordered the financial statements to be delivered for the 2011 and 2012 financial years, which the company did not do;
- in 2017, the court ordered the company to provide financial statements for the fiscal years from 2014 to 2016 but the work on 2016 financial statements did not start until 2018;

¹²⁷⁰ Ibid.

¹²⁷¹ Ibid.

¹²⁷² *V M Koury Investments Ltd v Bolton Steel Tube Co Ltd* [2021] ONSC 3408.

- in 2020, the court ordered the audited financial statements for the fiscal year ending in 2020 but the company did not do so. Also, the financial records for fiscal years before 2018 were erased from the company's computer system.

Accordingly, Justice Koehnen found that the majority shareholder operated the company as his private company.¹²⁷³ The court held that the plaintiff's conduct amounted to 'oppression' and 'unfair prejudice', and with 'unfair disregard' of the applicant's interests.¹²⁷⁴ In this case,¹²⁷⁵ the court intervened with a buying-out order of the shares of the applicant, and appointing a receiver to regulate the company's operations.

The limits of Canadian oppression remedies were highlighted in the recent Supreme Court decision in *McDougall v Knutsen* ('*McDougall*').¹²⁷⁶ This case involved three primary shareholders who planned a corporate reorganisation to combine their skills and share in the company's growth and profits. However, the reorganisation did not proceed. The plaintiff brought oppression proceedings, seeking \$150,000 based on the freeze price of the Class A preferred shares, and \$1,213,000 for the Class A common shares he expected to receive through the reorganisation. He also claimed damages for his termination as an employee of the company. The court emphasised the impact of the alleged oppressive conduct, quoting the Supreme Court of Canada's decision in *BCE Inc v 1976 Debentureholders*¹²⁷⁷ as follows:

*'Returning to BCE Inc., the Court specifically noted that "as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression": BCE Inc. at para. 90...'*¹²⁷⁸

Consequently, the court did not find oppression arising from the collapse of the reorganisation, noting that the parties had contemplated from the beginning the possibility of delays in reorganisation, and that the defendants were not

¹²⁷³ *Ibid.*

¹²⁷⁴ *Ibid.*

¹²⁷⁵ *Ibid.*

¹²⁷⁶ *McDougall v Knutsen* [2023] BCSC 211.

¹²⁷⁷ *BCE v 1976 Debentureholders* [2008] 3 SCR 560 (n 1190).

¹²⁷⁸ *McDougall v Knutsen* [2023] BCSC 211 (n 1276).

responsible for any of those delays.¹²⁷⁹ As result, the oppression claim could not proceed. In this case,¹²⁸⁰ the court awarded the plaintiff damages of \$98,075.00 for termination without cause and without reasonable notice.

The cases discussed above demonstrate that legal action against ‘oppressive’ and ‘prejudicial’ conduct is a well-justified means of protecting the rights of minority shareholders in Canadian companies. Oppression remedies serve as important avenues for minority shareholders to hold controlling shareholders accountable for their misconduct. Ultimately, these legal protections help promote trust in the corporations and support the development of stronger corporate governance practices.

6.6 Conclusion

In Canada, oppression remedies serve as a powerful legal avenue available to minority shareholders for oppressive conduct of affairs by majority shareholders in companies. Drawing on the work of scholars such as Mohamed Khimji and Jon Viner (Chapter 2), these remedies have been described as ‘the broadest, most comprehensive and most open-ended’ shareholder remedies in the common law world. Given their significance as one of the most powerful means available to protect shareholders from oppressive conduct in companies, this chapter examined the scope and application of those remedies under the Canadian corporate law. The chapter found that they are specified in two key statutes: the *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) and the *Business Corporations Act 1990* (Ontario). Specifically, the oppression provisions set out in s 241 of the *Canada BCPA* and s 248 of the *Ontario BCPA* grant courts broad authority to provide relief for oppressive conduct by majority shareholders in a wide range of circumstances. The chapter identified that these statutes contain similar provisions, offering redress for corporate conduct that is ‘oppressive’, ‘unfairly prejudicial’, or that ‘unfairly disregards’ the interests of security holders, creditors, directors, or corporate officers.

¹²⁷⁹ Ibid.

¹²⁸⁰ Ibid.

This chapter also examined the provisions related to directors and their duties under the Canadian corporate law. It demonstrated that directors in Canadian companies are responsible for managing the company and corporate affairs, and are required to exercise reasonable care, diligence and skill in fulfilling their role, consistent with the duty of care. The chapter found that directors, therefore, play a crucial role in the governance of corporate structure. Additionally, directors must not prioritise their personal interests above the interests of the corporation, in accordance with the duty of loyalty. These two main duties govern the conduct of directors in Canadian companies, thus ensuring that they act in the best interests of the company and its shareholders.

The chapter also examined the early development of Canadian case law on minority oppression, and its later significant decisions. It found that in the landmark Canadian case of *BCE Inc v 1976 Debentureholders*,¹²⁸¹ the Supreme Court of Canada established a two-part test to determine ‘oppressive’ or ‘unfairly prejudicial’ conduct: whether the ‘reasonable expectations’ of shareholders or other stakeholders have been violated to such an extent that the conduct amounts to oppression, and whether it was contrary to ‘fair’ dealing. Moreover, the Court ruled that directors must consider not only the interest of shareholders, but also of all stakeholders affected by the acts of directors of corporations. As a result, Canadian courts have broadly interpreted and applied the remedy in this context, with the authority to make any order the court thinks fit, pursuant to s 241 of the *Canada BCPA*.

This chapter concludes that Canadian oppression remedies, as broad remedies, empower corporate shareholders and other stakeholders to take action against various wrongful conducts including, but not limited to, non-payment of dividends, squeeze-outs, mergers, dilution of shares, exclusion from management, and unfair termination of employment. Accordingly, when a party is alleged to have acted oppressively, Canadian courts have wide remedial powers to make any order they think fit to rectify the matters complained of. Building on Brian Cheffins’ argument (Chapter 2), who links the ‘open-ended’ nature of oppression remedy

¹²⁸¹ *BCE v 1976 Debentureholders* [2008] 3 SCR 560 (n 1190).

to its success, this thesis draws on these findings and identifies the Canadian model as a valuable comparative reference for proposing amendments to the Australian oppression laws.

Chapter 7

The German Position on Minority Shareholder Protection

7.1 Overview

7.2 Incorporations in Germany

7.3 Board Structures in German Companies: Management Board and Supervisory Board

7.4 Directors' Duties in German AG and GmbH

7.5 Members' Right

7.6 Majority Shareholders' Conduct in German Companies

7.7 Protecting Minority Shareholders in German Companies

7.7.1 Judicial Dissolution and Liquidation of the Company

7.7.2 Withdrawal and Expulsion

7.7.3 Squeeze-out

7.8 Practices of German Courts

7.9 Conclusion

7.1 Overview

As a civil law system, Germany's legal framework is primarily governed by statute. As Martin Schulz and Oliver Wasmayer observe, the judicial landscape in Germany 'has traditionally been dominated by comprehensive codes and statutes promulgated by the legislature in all major areas of the law'.¹²⁸² The power to make laws in Germany is usually separated between individual states (*Länder*) and the federal government (*Bund*).¹²⁸³ However, the federal government has the authority to make laws 'in most areas of civil, commercial and business law'.¹²⁸⁴ Accordingly, German corporate governance is often regarded as 'a viable and superior alternative' to the corporate models of the United Kingdom and the United States, as argued by scholars such as Marco Becht and Ekkehart Boehmer.¹²⁸⁵ Germany's distinctive 'corporate control

¹²⁸² Martin Schulz and Oliver Wasmayer, *The Law of Business Organizations: A Concise Overview of German Corporate Law* (Springer Nature, 2012) 6.

¹²⁸³ *Ibid.*

¹²⁸⁴ *Ibid.*

¹²⁸⁵ Marco Becht and Ekkehart Boehmer, 'Voting Control in German Corporations' (2003) 23 *International Review of Law and Economics* 1, 2.

arrangements' have therefore gained significant attention in the economic literature and also in international law.¹²⁸⁶

This chapter begins by examining the two most popular types of companies in Germany: stock corporations and companies with limited liability. It highlights that various statutes apply to different forms of corporate companies in Germany, depending on their legal structure. Accordingly, the primary sources of regulation for capital companies in Germany are the *German Stock Corporations Act 1965* (Ger)¹²⁸⁷ (*Aktiengesetz* or '*AktG*') and the *German Limited Liability Companies Act 2008* (Ger)¹²⁸⁸ (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* or '*GmbHG*'). The *AktG* governs joint-stock corporations, while the *GmbHG* governs limited liability companies. Moreover, partnerships in Germany must submit to the rules of the *German Civil Code 2002* (Ger)¹²⁸⁹ (*Bürgerliches Gesetzbuch* or '*BGB*'), and the *Commercial Code 1998* (Ger)¹²⁹⁰ (*Handelsgesetzbuch* or '*HGB*'). This chapter studies these laws and regulations regarding the company's management, directors' duties, formation and operation of corporations, and shareholders' rights in companies.

Furthermore, this chapter explores the role of directors in German companies, focusing on their duties, as well as the members' rights at general meetings, including their voting powers. Building on Oliver Krackhardts' work from Chapter 2, which highlights that corporate law in Germany is defined by a two-tier board system consisting of the managing board and the supervisory board,¹²⁹¹ this chapter studies how the managing board operates under the supervisory board but is accountable for managing the affairs of the company on its own account.

Moreover, this chapter explores the oppression remedies under German corporate laws, studying the scope of oppression in this context. It examines the statutory exit remedy available under the *GmbHG* for minority shareholders

¹²⁸⁶ Ibid.

¹²⁸⁷ *German Stock Corporations Act 1965* (Ger) (n 9).

¹²⁸⁸ *German Limited Liability Companies Act 2008* (Ger) (n 10).

¹²⁸⁹ *German Civil Code 2002* (Ger), *Federal Ministry of Justice* (Wed Document, 2024) <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html>.

¹²⁹⁰ *Commercial Code 1998* (Ger), *Federal Ministry of Justice* (Wed Document, 2024) <https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html>.

¹²⁹¹ Krackhardt (n 338) 320.

facing oppression in German companies. In this way, s 61 of the *GmbHG* allows for the winding-up of the company as a remedy for oppression caused by controlling shareholders. However, this chapter reveals that in Germany, this remedy can be granted only if an important reason (*wichtiger Grund*) exists, such as failure to achieve the company's objectives, or serious disputes among shareholders.

Additionally, the chapter examines how German courts have recognised two other instruments for protecting minority shareholders' interests. As noted by Sandra Miller, German case law allows a shareholder to either 'withdraw' from the company (*Austritt*) or seek the 'expulsion' of a shareholder from the company (*Ausschlissung*) based on 'substantial causes', often related to the personal characteristics of the shareholder.¹²⁹² Therefore, this chapter examines how these concepts of 'withdrawal' and 'expulsion' serve as instruments protecting the minority shareholders in German companies, and examines German court practices regarding minority shareholders' oppression. The chapter concludes that the strong performance of German companies is largely due to a well-developed statutory framework that provides effective protection to oppressed shareholders in companies. The findings in this chapter provide a foundation for a comparative analysis of shareholder oppression remedies in Germany and Australia, offering perspectives for the future development of Australian oppression laws.

7.2 Incorporations in Germany

In Germany, companies are recognised as important economic and social associations.¹²⁹³ There are several forms of business associations in this country including 'corporations, partnership and association',¹²⁹⁴ as discussed below.

In Germany, the majority of private businesses are incorporated as limited liability companies (*'Gesellschaft mit beschränkter Haftung'* or *'GmbH'*). Under s 1 of the

¹²⁹² Miller (n 218) 393.

¹²⁹³ Schulz and Wasmaier (n 1282) 3.

¹²⁹⁴ *Ibid* 26.

GmbHG, the limited liability company, or *GmbH*, can be established by one person or several individuals.¹²⁹⁵ Upon establishment, all shareholders must sign and notarise the articles of association.¹²⁹⁶ Accordingly, the articles of association must include the business name, purpose, share capital amount, and the number of nominal values of the shares 'to which each shareholder subscribes against payment of the capital contribution into the share capital'.¹²⁹⁷ As such, the German *GmbHG* is one of the most popular form of incorporations in the country.

Also, in German limited liability companies, the share capital of the company must be no less than 25,000 euros.¹²⁹⁸ Following the formation of the *GmbH*, a 'shareholder may subscribe to several shares'.¹²⁹⁹ Although shareholders own the company through their shares, the management of the *GmbH* is carried out by one or more managing directors appointed by the company's shareholders, who are responsible for operations of the company.¹³⁰⁰ Directors should conduct the company affairs with due care and are jointly and individually liable to the company for any damage caused,¹³⁰¹ where liability is limited to their capital contributions. Accordingly, the German *GmbH* offers limited liability and flexibility of the company's management.

Another common form of company in Germany is a public limited company (*Aktiengesellschaft* or 'AG') also known as a stock corporation. According to *AktG*, the stock corporation, or AG, is a separate legal entity.¹³⁰² Under s 2 of the *AktG*, this form of company must be established by one or more individuals who acquire shares against payment of contributions.¹³⁰³ These individuals also form the articles of association.¹³⁰⁴ Under s 8(1) of the *AktG*, the shares in a stock corporation can be either par or non-par shares.¹³⁰⁵ Par shares have a minimum par value of one euro,¹³⁰⁶ while non-par shares do not have a par value, but

¹²⁹⁵ *German Limited Liability Companies Act 2008* (Ger) (n 10) s 1.

¹²⁹⁶ *Ibid* s 2.

¹²⁹⁷ *Ibid* s 3(1).

¹²⁹⁸ *Ibid* s 5(1).

¹²⁹⁹ *Ibid* s 5(2).

¹³⁰⁰ *Ibid* s 6.

¹³⁰¹ *Ibid* s 43.

¹³⁰² *German Stock Corporations Act 1965* (Ger) (n 9) s 1.

¹³⁰³ *Ibid* s 2.

¹³⁰⁴ *Ibid* s 2.

¹³⁰⁵ *Ibid* s 8(1).

¹³⁰⁶ *Ibid* s 8(2).

contribute equally to the company's share capital.¹³⁰⁷ The minimum par value of the share capital in a stock corporation is 50,000 euros.¹³⁰⁸ Consequently, as AG increases wealth through public stock offerings, it is subject to strict regulatory requirements and is often preferred by larger German businesses than by private individuals.

In Germany, partnerships are also selected as commercial ventures for small entities of family-owned businesses.¹³⁰⁹ The partners may mutually agree to undertake a duty to promote 'the achievement of a common purpose in the manner stipulated by the contract'.¹³¹⁰ Therefore, if not otherwise agreed, partners are expected to contribute equally during the partnership.¹³¹¹ In discharging their duties, partners are liable only 'for the care they customarily exercise in their own affairs'.¹³¹² This form of German business structure enables parties to grow their wealth considerably by joining their enterprises, having lower establishing requirements than *GmbH* and *AG*.

7.3 Board Structures in German Companies: Management Board and Supervisory Board

As stated above, Germany has a two-tier board system of company governance. This is one of the most distinctive features of the German corporate governance, as well as 'the presence of employee representatives on the supervisory board'.¹³¹³ As such, in a stock corporation, or *AG*, there is a distinction between the management board (*Vorstand*) and supervisory board (*Aufsichtsrat*). These boards have strictly separated tasks and duties.¹³¹⁴ In this regard, the business affairs of the company are conducted by the managing board, which is also directly responsible for the management of the company.¹³¹⁵ Accordingly, in

¹³⁰⁷ *Ibid* s 8(3).

¹³⁰⁸ *Ibid* s 7.

¹³⁰⁹ Schulz and Wasmaier (n 1282) 26.

¹³¹⁰ *German Civil Code 2002* (n 1289) s 705.

¹³¹¹ *Ibid* s 706(1).

¹³¹² *Ibid* s 708.

¹³¹³ Christian Strenger, Julia Redenius-Hovermann and Gul Demirtas, 'The Governance System of Germany: Background and Discussion of its Code' (Working Paper No 2023, Frankfurt School, Corporate Governance Institute, July 2023) 4.

¹³¹⁴ Theodor Baums and Kenneth E Scott, 'Corporate Governance in the US and Germany' (2005) 53 *American Journal of Comparative Law* 31, 54.

¹³¹⁵ *German Stock Corporations Act 1965* (Ger) (n 9) s 76(1).

German practices, the management board, as a central body of AG, is directly dependent on the supervisory board, although it manages the company's affairs on its own account.

Furthermore, in AG, the members of the management board are appointed by the supervisory board.¹³¹⁶ The members can be appointed for five years only.¹³¹⁷ Under s 84(2) of the *AktG*, the supervisory board can appoint one or more individuals as members of the board of management.¹³¹⁸ In such a case, the supervisory board can appoint one member as chairman of the management board.¹³¹⁹ However, the supervisory board, for cause, can revoke the appointment of the member.¹³²⁰ This may occur due to 'gross dereliction of duties', inability to properly manage the company, or a 'vote of no confidence by the general meeting'.¹³²¹ Consequently, in Germany, shareholders at general meetings have no impact on who becomes a member of the management board, as these members are appointed by the supervisory board.

Moreover, in Germany, the *AktG* specifies the rights and duties of the supervisory board. According to s 111(1) of the *AktG*, the supervisory board is responsible for overseeing the management of the corporation.¹³²² The supervisory board has the authority to inspect and examine the company's books and records, as well as the company's assets,¹³²³ and to call a shareholders' meeting if it is in the best interests of the company.¹³²⁴ However, if determined by the by-laws or the supervisory board, certain transactions 'may be implemented only with the supervisory board's consent'.¹³²⁵ Therefore, as a controlling body, the supervisory board is accountable for monitoring and, if necessary, directing the management board in German companies.

¹³¹⁶ *Ibid* s 84(1).

¹³¹⁷ *Ibid* s 84(1).

¹³¹⁸ *Ibid* s 84(2).

¹³¹⁹ *Ibid*.

¹³²⁰ *Ibid* s 84(3).

¹³²¹ *Ibid* s 84(4).

¹³²² *Ibid* s 111(1).

¹³²³ *Ibid* s 111(2).

¹³²⁴ *Ibid* s 111(3).

¹³²⁵ *Ibid* s 111(4).

As specified in the *AktG*, a member of the supervisory board cannot also be a member of the management board.¹³²⁶ Moreover, the supervisory board must make the decisions by way of resolution.¹³²⁷ In these cases, the necessary quorum for making decisions can be determined in the by-laws.¹³²⁸ Also, by delivering written votes, absent members of the supervisory board may take part in the adoption of resolutions by the supervisory board.¹³²⁹ Accordingly, not only is the work of the management board monitored by the supervisory board; if necessary, it also intervenes by making decisions by resolution.

In addition, according to s 35(1) of the *GmbHG*, the limited liability company, or *GmbH*, is represented by its directors.¹³³⁰ If no director is appointed, the shareholders of the company will represent the company.¹³³¹ However, if there are several directors appointed to represent the company, all of them are jointly entitled to the company's representation.¹³³² In *GmbH*, under s 37(1) of the *GmbHG*, directors are required to observe restrictions on their power of representation as set out in the articles of association.¹³³³ Nonetheless, the appointment of directors to represent the company can be revoked at any time without affecting any compensation claim 'resulting from existing agreements'.¹³³⁴ Also, if company directors are temporarily unable to carry out their duties, they are entitled to request revocation.¹³³⁵ Therefore, according to German law,¹³³⁶ company directors may be revoked or directors may resign from their position at any time.

Next, this chapter summarises the duties of managing directors in German corporations.

¹³²⁶ *Ibid* s 105(1).

¹³²⁷ *Ibid* s 108(1).

¹³²⁸ *Ibid*.

¹³²⁹ *Ibid* s 108(3).

¹³³⁰ *German Limited Liability Companies Act 2008 (Ger)* (n 10) s 35(1).

¹³³¹ *Ibid* s 35.

¹³³² *Ibid* s 35(2).

¹³³³ *Ibid* s 37(1).

¹³³⁴ *Ibid* s 38(1).

¹³³⁵ *Ibid* s 38(2).

¹³³⁶ *German Limited Liability Companies Act 2008 (Ger)* (n 10).

7.4 Directors' Duties in German *AG* and *GmbH*

The general duty of a director in a German stock corporation, or *AG*, is to act with the 'due care of a prudent manager faithfully complying with the relevant duties'.¹³³⁷ This duty 'appears to be quite rigorous, especially considering that this is a principle of mandatory law'.¹³³⁸ Breach of this duty triggers joint and individual liability to the company.¹³³⁹ Section 93(1) of the *AktG* provides that the directors are not considered to have breached the duty to act with the due care of a prudent manager faithfully complying with the relevant duties if, at the time of making a business decision, directors had a good reason to believe that they were acting in the best interests of the company, based on adequate information.¹³⁴⁰ Consequently, management boards in German companies are expected to act in the company's best interests and to optimise its profits, fulfilling the duties imposed by German legislation.

As part of their duty of care and responsibility, directors must not disclose 'confidential information and secrets of the company', including trade and business secrets that they become aware of through their role on the management board.¹³⁴¹ Also, s 116 of the *AktG* outlines the duty of care and responsibility of members of the supervisory board.¹³⁴² This duty requires the members of the supervisory board to maintain confidentiality regarding confidential reports or deliberations.¹³⁴³ Furthermore, in companies with limited liabilities, directors must 'conduct the company's affairs with due care of a prudent businessperson'.¹³⁴⁴ In this regard, the company is protected from the loss of competitive advantage by its directors and remains in compliance with legal standards.

Moreover, in German companies, directors are held responsible for breach of directors' duties and may face joint or individual liability for damages caused to

¹³³⁷ *German Stock Corporations Act 1965* (Ger) (n 9) s 93(1).

¹³³⁸ Baums and Scott (n 1314) 44.

¹³³⁹ *German Stock Corporations Act 1965* (Ger) (n 9) s 93(2).

¹³⁴⁰ *Ibid* s 93(1).

¹³⁴¹ *Ibid*.

¹³⁴² *Ibid* s 116.

¹³⁴³ *Ibid*.

¹³⁴⁴ *German Limited Liability Companies Act 2008* (Ger) (n 10) s 43(1).

the company.¹³⁴⁵ In addition, s 117 of the *AktG*, provides for joint or individual liability for a member of the management board or the supervisory board if they violated their duties to the company. However, if the management board members acted by a lawful resolution passed by the shareholders' meeting, they should not be held liable for any damages caused to the company.¹³⁴⁶ Accordingly, in case of any breaches of directors' duties, the liability of directors in German companies relies strongly on their own company's conduct.

In *GmbH*, under s 43(1) of the *GmbHG*, directors have to exercise the due care and diligence of a prudent businessperson. Therefore, in the *GmbH*, the director can be held liable to the company for failing to exercise the standard owed to the company.

7.5 Members' Rights

In Germany, shareholders in a stock corporation, or *AG*, are entitled to various property rights assigned to them by the *AktG*. These are:

- the company's shareholders may receive distributable profit, unless it is prevented by the law, or in the by-laws, by a resolution of the shareholders' meeting, or if it is considered an additional expense: s 58(4) of the *AktG*;¹³⁴⁷
- shareholders of the stock corporations also have subscription rights and they are entitled to subscribe to new shares in proportion to their holdings in the existing share capital: s 186(1) of the *AktG*;¹³⁴⁸
- outside shareholders may receive adequate compensation through recurring payments in proportion to their shares in the share capital (compensation payment): s 304 of the *AktG*;¹³⁴⁹
- a shareholder owning 95% of a stock corporation's share capital (the principal shareholder) may request the transfer of shares from minority

¹³⁴⁵ *Ibid* s 43(2).

¹³⁴⁶ *German Stock Corporations Act 1965* (Ger) (n 9) s 117(2)(3).

¹³⁴⁷ *Ibid* s 58(4).

¹³⁴⁸ *Ibid* s 186(1).

¹³⁴⁹ *Ibid* s 304.

shareholders, in exchange for the payment of adequate cash compensation: s 327(a)(1) of the *AktG*.¹³⁵⁰

- the principal shareholder may claim cash compensation, which amount should reflect the corporation's circumstances at the time of adoption of the resolution: s 327(b)(1) of the *AktG*.¹³⁵¹

Additionally, in a limited liability company, or *GmbH*, under s 45(1) of the *GmbHG*, shareholders' rights, especially in the management and performance of the business, are determined by the articles of association 'unless precluded by statutory provision'.¹³⁵² Hence, under s 51(a)(1) of the *GmbHG*, upon request, shareholders are entitled to receive information regarding the company's affairs from directors without delay.¹³⁵³ However, if it is assumed that the shareholders will make use of this information to cause a disadvantage to the company, the managing director may refuse to provide this information.¹³⁵⁴ Hence, this right to information under *GmbHG* is in the interests of the company.

7.6 Majority Shareholders' Conduct in German Companies

German corporate law establishes mechanisms to regulate the majority shareholders' conduct in German companies. In the case of *AG*, an action against the controlling shareholder may be initiated by the company or by an individual shareholder for breach of duties owed either to the shareholders or to the company. However, if members of the management board violate their duties, they will be held liable for any resulting damages to the company.¹³⁵⁵ Pursuant to s 93(4) of the *AktG*, the members of the management board will not be liable for damages to the company if they act in accordance with the resolution passed by the shareholders' meeting.¹³⁵⁶ In this regard, claims for damages may be waived or compromised after three years from the time the claim has arisen.¹³⁵⁷ This will

¹³⁵⁰ *Ibid* s 327(a)(1).

¹³⁵¹ *Ibid* s 327(b)(1).

¹³⁵² *German Limited Liability Companies Act 2008* (Ger) (n 10) s 45(1).

¹³⁵³ *Ibid* s 51(a)(1).

¹³⁵⁴ *Ibid* s 51(a)(2).

¹³⁵⁵ *German Stock Corporations Act 1965* (Ger) (n 9) s 93(2).

¹³⁵⁶ *Ibid* s 93(4).

¹³⁵⁷ *Ibid* s 93(4).

also be the case if the minority with an aggregate holding that equals or exceeds one-tenth of the share capital has no objection.¹³⁵⁸

Moreover, according to s 120(1) of the *AktG*, at the annual meetings, the company's shareholders can make resolutions to approve the acts of the management board and the supervisory board.¹³⁵⁹ If the acts are those of the individual members of the company, there is a separate vote for ratification of these acts.¹³⁶⁰ This is also the case if it is requested by a minority whose aggregate holding equals or exceeds one-tenth of the share capital or to a stake of one million euros.¹³⁶¹ However, the ratification of the acts of management will not waive claims for damages.¹³⁶² Moreover, s 241 of the *AktG* provides grounds for the nullification of the resolution of the shareholders' meeting. According to this section, an individual shareholder in the stock corporation, or AG, has the right to bring actions to cancel as null and void a resolution of the shareholders' meeting.¹³⁶³ In sum, even though the scope of powers of AG directors may be restricted by decisions of the shareholders, German law provides the right to nullify shareholders resolutions.

Additionally, s 148 of the *AktG* offers a more extensive right to minority shareholders whose shares together amount to 1% of the share capital or amount to at least 100,000 euros. These shareholders may file a petition to the court for permission to bring a claim for damages, on behalf of the company, in their own name.¹³⁶⁴ To succeed, the petition must demonstrate that there are existing facts that the company has suffered a loss due to breaches of the law or articles,¹³⁶⁵ or there must be no overriding interests that would prevent the assertion of such a damage claim.¹³⁶⁶ This action is usually used when the company itself refuses to pursue such a claim.

¹³⁵⁸ *Ibid.*

¹³⁵⁹ *Ibid* s 120(1).

¹³⁶⁰ *Ibid.*

¹³⁶¹ *Ibid.*

¹³⁶² *Ibid* s 120(2).

¹³⁶³ *Ibid* s 241.

¹³⁶⁴ *Ibid* s 148(1).

¹³⁶⁵ *Ibid* s 148(1)(3).

¹³⁶⁶ *Ibid* s 148(1)(4).

In the *GmbHG*, there are few provisions for the protection of the minority shareholders and the company from the company's controllers and their abusive use of power. This is because the shareholders in the limited liability companies, or *GmbH*, are expected to have closer relationships than the shareholders of stock corporations, or *AG*. An important provision in the *GmbHG* to prevent the abuse of power by the majority shareholders is the restriction on the shareholders' right to vote. In this context, section 47(4) of the *GmbHG* provides that if, by passing a resolution with a majority of the votes cast, shareholders are waived from their obligation to vote, they will have no voting right or be prohibited from exercising their voting right for another matter.¹³⁶⁷ The same applies if the resolution concerns a transaction between a shareholder and the company, or relates to the initiation or termination of a shareholder's status, in which case the shareholder against whom the decision is made is not entitled vote.¹³⁶⁸ As voting powers allow German shareholders to influence corporate affairs, the conduct of majority shareholders can be controlled by placing restrictions on these rights, which enables minority shareholders to exercise greater influence over corporate decisions.

Pursuant to s 50(1) of the *GmbHG*, the minority shareholders in *GmbH* have the right to request a general meeting.¹³⁶⁹ The meeting may be requested by the shareholders whose shares in total account for one-tenth of the share capital.¹³⁷⁰ Under s 50(3) of the *GmbHG*, the minority shareholders can call the meeting if their request is not granted. Also, the *GmbHG*, in s 51(a), provides for shareholders' right to information and inspection. Therefore, at the shareholders' request, directors are required to provide information on the company's affairs.¹³⁷¹ Directors are also required to allow shareholders to inspect the company's books and other documents.¹³⁷² A refusal to provide such information requires a shareholders' resolution and may be justified if there is concern that

¹³⁶⁷ *German Limited Liability Companies Act 2008* (Ger) s (n 10) 47(4).

¹³⁶⁸ *Ibid.*

¹³⁶⁹ *Ibid* s 50(1).

¹³⁷⁰ *Ibid.*

¹³⁷¹ *Ibid* s 51(a).

¹³⁷² *Ibid.*

the shareholder may use this information for 'non-company purposes'.¹³⁷³ These rights are enforceable in court and cannot be excluded.

Lastly, s 53(1) of the *GmbHG* requires that any amendment of the articles of association must be approved by a shareholders' resolution. In order to protect minority shareholders, such a resolution requires a majority of three-quarters of the shareholders' votes cast.¹³⁷⁴ In this way, minority shareholders are given the right to influence fundamental decisions in the corporation.

Apart from German statutory law, one of the most effective means for minority shareholders' protection is 'a well-drawn shareholders' agreement entered in contemporaneously with the formation of a corporation'.¹³⁷⁵ These agreements are of practical importance to German shareholders in companies, as they set out the terms of shareholders' relationships and contain provisions regarding the company's operation.

The following section explores in detail the protection of minority shareholders in Germany.

7.7 Protecting Minority Shareholders in German Companies

In Germany, as revealed, if there is a dispute between shareholders in the company, the *GmbHG* provides statutory remedies to oppressed minority shareholders. As shareholders' behaviours and the standards of expected shareholders' conduct are central points in court practices in Germany, when those standards are breached, there are several remedies available to oppressed minority shareholders. To some extent, these remedies serve to further regulate shareholder conduct in German corporations.¹³⁷⁶ Their objective is to provide adequate protection for minority shareholders in German companies. They are considered in the subsequent section.

¹³⁷³ *Ibid.*

¹³⁷⁴ *Ibid* s 53(2).

¹³⁷⁵ Rainer Kulms, 'A Shareholder's Freedom of Close Corporations – Shareholder Agreements in the USA and Germany' (2001) 2 *European Business Organization Law Review* 685, 685.

¹³⁷⁶ Miller (n 218) 396.

7.7.1 Judicial Dissolution and Liquidation of the Company

The concept of *wichtiger Grund* serves as a flexible legal mechanism that enables minority shareholders in Germany to seek the winding up of a company. Under s 61 of the *GmbHG*, the court may wind up a company if the company cannot accomplish its purpose. The company may also be wound up if there is any other important reason (*wichtiger Grund*) for doing so, resulting from circumstances in the company.¹³⁷⁷ *Wichtiger Grund*, or 'important reason', encompasses circumstances such as deadlock, abuse of power by majority shareholders, or the impossibility of fulfilling the company's purpose. It applies in situations where the continuation of the company would be unreasonable or inequitable to the affected shareholders, thereby providing protection for their rights. In such cases, s 60(2) of the *GmbHG* applies, requiring a three-quarters majority vote to dissolve the company. However, only shareholders with at least one-tenth of the share capital may initiate an action for judicial dissolution against the German company.¹³⁷⁸ The dissolution of the company must be filed for entry in the Commercial Register.¹³⁷⁹ Accordingly, in Germany, the impossibility of achieving a company's purpose or other important reason (*wichtiger Grund*) are the main concepts that determine whether the shareholder can use the right to wind up the company.

Moreover, unless otherwise specified in the articles of association, or by shareholders' resolution, the company's directors would initiate the liquidation of the company.¹³⁸⁰ According to s 67 of the *GmbHG*, the directors must register the liquidators of the company for entry in the Commercial Register. Also, the liquidators must affirm that there are no reasons against their appointment and that directors 'have been instructed about their unlimited duty to disclose information to the court'.¹³⁸¹ Pursuant to s 72 of the *GmbHG*, the company's assets will be distributed among the company's shareholders in the same

¹³⁷⁷ *German Limited Liability Companies Act 2008 (Ger)* (n 10) s 61(1).

¹³⁷⁸ *Ibid* s 61(2).

¹³⁷⁹ *Ibid* s 65(1).

¹³⁸⁰ *Ibid* s 66(1).

¹³⁸¹ *Ibid* s 67(3).

proportion as their shares. Consequently, the judicial dissolution of a German company offers minority shareholders a judicial-ordered mechanism for the winding up of the company provided that there is an important reason (*wichtiger Grund*) for doing so. Accordingly, this standard requires the demonstration of substantial and objective justification that the company's purpose cannot be fulfilled. Such a claim must be supported by evidence of mismanagement, deadlock, or other conduct that obstructs the company's purpose.

7.7.2 Withdrawal and Expulsion

As the dissolution remedy is a severe one, German case law has developed two additional remedies for minority oppression in companies: the withdrawal (*Austritt*) and the expulsion (*Ausschließung*). These remedies are not found in the German statutes, but their existence is undisputed in the case law and German corporate literature. They are explained below.

Under the **withdrawal** concept, the aggrieved shareholder seeks to withdraw from the company by obtaining the fair market value of his or her interest in the company.¹³⁸² As stated, the basis for obtaining this relief depends on the existence of a substantial basis (*wichtiger Grund*).¹³⁸³ The substantial basis may arise from personal situations of the shareholder, such as illness or inability to perform duties, and also from the behaviour of other shareholders, such as shareholders' disputes, or by any circumstance in the company, such as a change to the company's purpose.¹³⁸⁴ As this remedy is not found in the German statutes, the withdrawal procedure can be regulated by the articles of association.¹³⁸⁵ Accordingly, this concept can be justified only if there is a serious conflict between the company's shareholders because of the existence of a substantial basis.

¹³⁸² Miller (n 218) 396.

¹³⁸³ Scogin (n 351) 155.

¹³⁸⁴ *Ibid.*

¹³⁸⁵ *Ibid.*

Expulsion occurs when the aggrieved shareholder seeks to remove one or more shareholders¹³⁸⁶ by purchasing their interest at a fair market price (*Verkehrswert*). It 'represents the extinction of the expelled shareholder's right to a voice in company affairs'.¹³⁸⁷ As such, for the expulsion to occur, 'the company must decide to expel the shareholder in question by shareholders' vote'.¹³⁸⁸ In the Judgement of 13 January 2003, BGZH II ZR 227/00 (2003) (Ger),¹³⁸⁹ the German court confirmed that resolution to expel a shareholder requires a majority of three-quarters of votes cast, excluding that of the shareholder in question, and that in this instance, s 60(2) of the *GmbHG* applies.

The basis for obtaining expulsion also includes the existence of a substantial basis (*wichtiger Grund*), such as a shareholders' personal circumstances (e.g. illness, relocation, or inability to fulfil their duties), dispute with other shareholders, or issues affecting the company.¹³⁹⁰ In the German Judgement of 1 April 1953, BGHZ II ZR 235/52 (1953) (Ger),¹³⁹¹ it was stated that: 'it can therefore happen that a majority shareholder can be expelled by the court upon the decision of a minority if a substantial basis is present', as stated above. Consequently, expelling a shareholder from a German company requires the shareholders' vote and existence of substantial basis (*wichtiger Grund*) for expelling the shareholder by court decision.

7.7.3 Squeeze-out

Division 4 of the *AktG* in ss 327a to 327f, provides for a squeeze-out of minority shareholders in German corporations. In such cases, upon a request of the shareholder with 95% of the share capital, so-called principal shareholders, the shares of minority shareholders can be transferred to the principal shareholder.¹³⁹² In return, the minority shareholders are entitled to receive 'the

¹³⁸⁶ Miller (n 218) 396.

¹³⁸⁷ Scogin (n 351) 156.

¹³⁸⁸ Ibid 157.

¹³⁸⁹ Bundesgerichtshof [German Federal Court of Justice], II ZR 227/00, 13 January 2003 reported in (2003) 153 BGZH 285.

¹³⁹⁰ Scogin (n 351) 154-5.

¹³⁹¹ Bundesgerichtshof [German Federal Court of Justice], II ZR 235/52, 1 April 1953 reported in (1953) 9 BGZH 157.

¹³⁹² *German Stock Corporations Act 1965* (Ger) (n 9) s 327a(1).

appropriate cash settlement'.¹³⁹³ The principal shareholder must set the amount of the cash compensation, which must reflect the circumstances of the corporation when the resolution is adopted by its general meeting.¹³⁹⁴ Moreover, the principal shareholder must provide the notice of the transfer¹³⁹⁵ and a written report with the preconditions for the transfer and justification of the adequacy of the cash compensation.¹³⁹⁶ Hence, ss 327a to 327f of the *AktG* give majority shareholders the power to squeeze-out minority shareholders in German companies in exchange for appropriate cash compensation, demonstrating the continued exercise of majority control in German companies.

This chapter also discusses a number of selected cases from the German jurisdiction which illustrate how courts, in line with German statutory provisions, have ruled in favour of or against the minority shareholders and companies' directors.

7.8 Practices of German Courts

In Germany, as case law is not viewed as a formal legal source, the German courts most often apply the statute rather than creating the law. However, it has developed another significant mechanism for controlling the shareholder conduct in companies: the imposition of a duty of loyalty on majority shareholders. This duty requires the majority shareholders to take into consideration the minority shareholder's interests.¹³⁹⁷ Even though German judicial decisions do not have mandatory legal effect, they still play an important role in the protection of minority shareholders. Several notable cases are discussed below.

In the Judgement of 1 February 1988, BGZH II ZR 75/87 (1988) (Ger),¹³⁹⁸ the High Federal Court in Germany held that the resolution to dissolve the company was not a violation of the duty owed to minority shareholders and to the company

¹³⁹³ *Ibid.*

¹³⁹⁴ *Ibid* s 327b(1).

¹³⁹⁵ *Ibid* s 327c(1).

¹³⁹⁶ *Ibid* 327c(2).

¹³⁹⁷ Schulz and Wasmaier (n 1282) 109.

¹³⁹⁸ Bundesgerichtshof [German Federal Court of Justice], II ZR 75/87, 1 February 1988 reported in (1988) 103 BGZH 184.

even in circumstances when the resolution to dissolve the company was made to acquire the dissolved assets of the company. Hence, the defendant Linotype held 96% of the company's shares in a stock corporation, whereas Linotype's print technologies manufacturing division held over 80% of the turnover. Linotype intended to acquire the facilities and employees of the stock corporation. The management and supervisory board adopted the proposal to dissolve the corporation, approved with the Linotype's votes. The High Federal Court in its judgement¹³⁹⁹ held that, if Linotype agreed to the acquisition of the shares, he would have violated his fiduciary duty because this would deprive minority shareholders of the chance to bid for the assets of the dissolved company.

In another German case of 20 March 1995, BGZH II ZR 205/94 (1995) (Ger),¹⁴⁰⁰ the plaintiff held 350 shares of Girmes stocks company. Experiencing financial difficulties, the company had recorded losses and not paid dividends. In order for the minority shareholders to obtain special benefits, they voted against the reorganisation plan of the company. The High Federal Court in Germany in this case¹⁴⁰¹ held that there was a violation of the minority shareholders' duties when they rejected the reorganisation plan for their own selfish reasons, which caused the bankruptcy of the company and that obstruction of the reorganisation plan was a violation of the duty of care, not the duty of loyalty.

The Judgement of 13 December 2012, NJW 5 StR 407/12 (2012) (Ger),¹⁴⁰² focused on the issue of whether the director of the company, who was not formally appointed, could be subject to fiduciary duty towards the company that already had a properly appointed director. The German Federal Supreme Court held that if the individual assumes that he or she has a director's position, the lack of formal agreement prohibits him or her from fiduciary duties applicable to the appointed director.¹⁴⁰³ The court found that the managing director's fiduciary duty prevented the director from carrying out the business in his or her own

¹³⁹⁹ Ibid.

¹⁴⁰⁰ Bundesgerichtshof [German Federal Court of Justice], II ZR 205/94, 20 March 1995 reported in (1995) 129 BGZH 136.

¹⁴⁰¹ Ibid.

¹⁴⁰² Bundesgerichtshof [German Federal Court of Justice], 5 Str 407/12, 13 December 2012 reported in (2013) NJW 624.

¹⁴⁰³ Ibid.

account.¹⁴⁰⁴ Therefore, the court held that the director must not take advantage of the transactions which are allocated to the company and must do ‘everything considerable’ to permit the company to realize the opportunity.¹⁴⁰⁵ Furthermore, the court in this case¹⁴⁰⁶ held that the burden of proof in the circumstances was on the managing director to show that the company made the decision to prevent the opportunity before the director could take advantage of it.

These cases illustrate how German courts, in line with German statutory provisions, have ruled in favour of company dissolution, as seen in BGZH II ZR 75/87 (1988) (Ger); recognised violation of the duty of care, as in BGZH II ZR 205/94 (1995) (Ger); and affirmed that fiduciary duties continue to apply to former directors, even if a company has appointed new directors, as evidenced in NJW 5 StR 407/12 (2012) (Ger).

7.9 Conclusion

This chapter examined the establishment, structure, and management of the main forms of incorporations in Germany, i.e., limited liability companies, or *GmbH*, and stock corporations, or *AG*. It revealed that in Germany, the *AktG* governs stock corporations, or *AG*, whereas the *GmbHG* governs the limited liability company, or *GmbH*. This chapter demonstrated that in *AG*, the management board is responsible for managing the company, and the supervisory board is a controlling corporate body responsible for appointing and removing members of the management board, supervising the company’s management, and representing the company. Moreover, it was seen that the *GmbH* has a flexible management structure and, if created, the supervisory board does not participate in the management of the company.

This chapter also examined the directors in German companies and their statutory duties. It found that, in Germany, directors are expected to act within their directors’ duties and must use due care and diligence of prudent managers.

¹⁴⁰⁴ *Ibid.*

¹⁴⁰⁵ *Ibid.*

¹⁴⁰⁶ *Ibid.*

Moreover, the chapter examined the rights of members at general meetings, as well as the measures taken to regulate the majority shareholders' conduct. It established that, in Germany, conflicts among company members can present a significant challenge in corporations, which has taken many forms. To address these concerns, German law provides statutory oppression remedies as a legal mechanism to protect the rights of oppressed minority shareholders in German companies.

Accordingly, this chapter examined oppression remedies available under the German corporate law and their effectiveness in protecting the rights of minority shareholders. It found that s 61 of the *GmbHG* provides for winding up a company when the company is unable to accomplish its purpose, or for any other important reason. Moreover, this chapter established that German case law has developed two additional remedies, i.e., withdrawal and expulsion, where expulsion requires a shareholders' vote and can be justified only by the existence of a substantial basis (*wichtiger Grund*). Although German case law is not a formal source of law, this chapter highlighted its significant role in shaping the protection of minority shareholders in German companies.

The chapter concludes that, as a leading economic power, companies in Germany play an important role in driving the country's economic growth. Building on Martin Schulz's and Oliver Wasmair's analysis that Germany's judicial landscape is traditionally governed by statutory law across all major areas of law, this chapter concludes that the success of German companies is influenced mainly by a strong corporate legal framework which contributes to the effective protection of minority shareholders in these companies. Nonetheless, German case law, despite not having mandatory legal authority, continues to supplement statutory provisions and plays an important role in strengthening the protection offered to minority shareholders. Accordingly, this chapter lays the foundation for a comparative analysis of German and Australian oppression laws, to deepen the understanding of shareholder protection in both jurisdictions and to formulate recommendations for potential reforms to Australia's oppression remedies.

Chapter 8

Singapore and India: Position on Minority Shareholder Protection

8.1 Singapore

8.1.1 Overview

8.1.2 Incorporations in Singapore

8.1.3 Directors of Singaporean Companies and Directors' Duties

8.1.4 Members' Rights at General Meetings

8.1.5 Scope of Oppression and Legal Remedies for Oppression of Minority Shareholders

8.1.6 Case Law on Minority Shareholders' Oppression: Early Years

8.1.7 Later Significant Rulings on Minority Shareholders' Oppression

8.1.8 Conclusion

8.1.1 Overview

This chapter examines the statutory oppression remedies available to oppressed minority shareholders in Singaporean companies. As noted by Pearlie Koh, in Singapore, such remedies are a significant aspect of the legal framework protecting a company's minority shareholders.¹⁴⁰⁷ The Singaporean oppression remedies are found in s 216 of the *Companies Act 1967* (Cap 50) (Singapore)¹⁴⁰⁸ ('*Singapore CMA*'), which allows minority shareholders in Singaporean companies to initiate statutory action in their name for 'unfair prejudice' by majority shareholders. These proceedings, under s 216 of *Singapore CMA*, often result in personal remedies for the oppressed minority shareholders.

Moreover, this chapter reveals that corporate governance in Singapore is based on common law tradition and draws from legal precedents set by the United States, United Kingdom, and other Commonwealth nations, as observed by scholars such as Phillip Phan.¹⁴⁰⁹ Hence, the chapter begins by examining the

¹⁴⁰⁷ Koh (n 393) 61.

¹⁴⁰⁸ *Companies Act 2006* (Cap 50) (Singapore) (n 11).

¹⁴⁰⁹ Phillip H Phan, 'Effective Corporate Governance in Singapore: Another Look' (1998) 20(2) *Singapore Management Review* 43, 46.

Singaporean incorporations, directors and their duties in companies, as well as the rights of Singaporean shareholders at general meetings to explore their similarities to their corporate governance structures. The chapter studies how directors in Singaporean companies owe fiduciary duties to the company, and how a breach of those duties may include 'unfair' treatment of minority shareholders. Furthermore, the *Singapore CMA* also imposes duties on corporate directors, such as the duty of disclosure of interests in transaction under s 156 of the *Singapore CMA*, ensuring transparency and accountability in Singaporean companies. The chapter reveals that shareholders in Singaporean companies, among other rights, possess the right to vote on significant matters, enabling them to participate in the company's decisions.

Moreover, this chapter explores the scope of Singaporean statutory oppression remedies. It reveals how the proceedings under s 216 of the *Singapore CMA* focus on minority shareholders' claims that the company's affairs are or have been managed in a manner that is 'oppressive to', 'in disregard of', 'discriminatory against' or otherwise 'prejudicial' to their interests, as observed by Seah Chi-Ling.¹⁴¹⁰ The chapter then examines how under s 254(1)(i) of the *Singapore CMA*, oppressed minority shareholders may seek wind-up orders on 'just and equitable' grounds, which remedy ensures the protection of minority shareholder when the continued existence of the company would be deemed 'unjust'. This chapter also studies how the purchase of minority shareholders' shares is also available as a remedy for oppressed minority shareholders, which remedy ensures effective resolutions of shareholders' disputes by allowing minority shareholders to exit the company on fair terms through the sale of their shares. Lastly, this chapter analyses the Singaporean cases of minority oppression in companies, from the early years to the most recent significant rulings.

Given Singapore's recognition as having one of the world's leading corporate governance frameworks, its dedication to high standards of corporate conduct, as observed by Luh Luh Lan (Chapter 2), and the important role of its statutory oppression remedies play in protecting the rights of minority shareholders, this

¹⁴¹⁰ Chi-Ling (n 385) 432.

chapter concludes that shareholder protection in Singapore is effectively upheld. This is achieved through the broad discretion of the court to grant oppression remedies as it considers fit, including winding up as an equivalent solution and, in part, by using an alternative dispute resolution to obtain timely and economically viable solutions. The findings of this chapter provide a foundation for a comparative analysis of oppression laws in Singapore and Australia, and support proposals for best minorities protection in Australian companies.

The chapter also groups Singapore and India as common law jurisdictions and relevant comparators. Both countries share close trading and investment relationships, reinforced by mutual economic interests. Additionally, the Indian community forms one of the major ethnic groups in Singapore, further strengthening these connections. Each jurisdiction has adopted statutory oppression remedies influenced by the United Kingdom's corporate law framework. These shared features, make Singapore and India important comparators for the analysis that follows.

8.1.2 Incorporations in Singapore

In Singapore, companies can be formed by any person, whether individually or together with any other person.¹⁴¹¹ The company is formed by submitting a person's name to a memorandum and by complying with the registration requirements.¹⁴¹² Moreover, for a Singaporean company to be incorporated, it must have at least one member.¹⁴¹³ Section 22(1) of the *Singapore CMA* provides that the memorandum must be dated, include the company's name, and specify whether the members of the company have limited or unlimited liability.¹⁴¹⁴ According to s 35(1) of the *Singapore CMA*, the company's constitution must include the company's regulations.¹⁴¹⁵ Accordingly, all Singaporean companies must comply with mandatory requirements at the time of incorporation so as to establish their presence within this jurisdiction.

¹⁴¹¹ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 17(1).

¹⁴¹² *Ibid.*

¹⁴¹³ *Ibid* s 20A.

¹⁴¹⁴ *Ibid* s 22(1).

¹⁴¹⁵ *Ibid* s 35(1).

Once the company's constitution and memorandum is registered, the Registrar will issue a notice of incorporation, stating that the company has been incorporated.¹⁴¹⁶ The effect of incorporation is set out in s 19(5) of the *Singapore CMA*, which states that the company will be a body-corporate immediately capable of exercising its functions under the name included in the memorandum.¹⁴¹⁷ In *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd*,¹⁴¹⁸ the court emphasised that the corporation has an individual existence and its own identity separate from the company's members. Therefore, a company registered in Singapore has a separate legal personality and is solely liable for its own responsibilities and debts.

Moreover, a Singaporean company can sue or be sued under its own name and it has 'perpetual succession and a common seal with power to hold land'.¹⁴¹⁹ In this regard, in *Ng Heng Liat v Kiyue Co Ltd*,¹⁴²⁰ the court held that the company is the proper plaintiff for all rights it possesses. Thus, only the company can commence a legal action on its behalf. However, if shareholders want to enforce certain rights but the company's directors refuse to do so, s 216A of the *Singapore CMA* provides an exception, allowing shareholders to bring a statutory derivative action to address the company's wrongdoings.

In Singapore, company's directors direct the operations of the corporation, as discussed below.

8.1.3 Directors of Singapore Companies and Directors' Duties

The powers of the board of directors in Singapore usually enable them to act on behalf of a company.¹⁴²¹ However, if the company is not entitled to perform certain activities, the board of directors also cannot perform these activities on behalf of

¹⁴¹⁶ Whether a company limited by shares, a company limited by guarantee or an unlimited company: *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 19(4).

¹⁴¹⁷ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 19(5).

¹⁴¹⁸ *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd* [2015] SGHC 303.

¹⁴¹⁹ *Ibid* s 19(5).

¹⁴²⁰ *Ng Heng Liat v Kiyue Co Ltd* [2003] 2 SLR 218.

¹⁴²¹ Agrawal (n 382) 15.

the company.¹⁴²² Moreover, if a director of a Singaporean company prioritises his or her own interests over the company's interests, or personally profits from his or her position in the company without the company's informed consent, the director may be held accountable to the company for those profits.¹⁴²³ This ensures that directors prioritise the interests of the company over their own personal gain.

Section 156(1) of the *Singapore CMA* requires that a company's director, who has an interest in a contract or proposed contract with the corporation, must declare to the company the nature of his or her interests.¹⁴²⁴ This should be done at directors' meetings.¹⁴²⁵ Also, s 156(6) of the *Singapore CMA* provides that any director who holds an office or owns property, that may create conflict with his duties as a director, must declare this fact and also the character, nature, and extent of the conflict, at the directors' meeting.¹⁴²⁶ As such, directors in Singaporean companies have ultimate authority within the company and must ensure that the company is managed according to the established governance principles.

Directors of Singaporean corporations must be aware that some of the transactions might be considered self-dealing. For those transactions, the *Singapore CMA* requires appropriate disclosure.¹⁴²⁷ The case *Yeo Geok Seng v PP* ('Yeo')¹⁴²⁸ is particularly significant in this context, as it provides an interpretation of s 156 of the *Singapore CMA* and illustrates the disclosure standards expected from directors in Singaporean companies, as Suet Lee observed.¹⁴²⁹ The case involved conflicting interests in a transaction as the director held an office in another company, i.e., Triple Star Shipping. In this case,¹⁴³⁰ the court established that, Yeo Geog Seng, who was the managing

¹⁴²² *Ibid.*

¹⁴²³ *Ibid* 17.

¹⁴²⁴ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 156(1).

¹⁴²⁵ *Ibid.*

¹⁴²⁶ *Ibid* s 156(6).

¹⁴²⁷ Suet Lin Joyce Lee, "Case Note: Yeo Gek Seng v. PP [2000] 1 SLR [Singapore Law Reports] 195: A Director's Duty of Disclosure under Section 156 Companies Act' (2000) 12(2) *Singapore Academy of Law Journal* 463, 463.

¹⁴²⁸ *Yeo Geok Seng v PP* [2000] 1 SLR 195.

¹⁴²⁹ Lee (n 1427) 463.

¹⁴³⁰ *Yeo Geok Seng v PP* [2000] 1 SLR 195 (n 1428).

director of Mcspec Far East Development, a director of Xiamen Mcspec, and a shareholder in Triple Star Shipping, had failed to declare his interest in a supply agreement with Triple Star Shipping, and in a contract with Mcspec Far East Development, and held that s 156 of the *Singapore CMA* is 'clear and sufficiently comprehensive' to enforce a duty of disclosure on a director who also holds a position in another company.

The *Singapore CMA* gives the company's directors wide powers to manage the company's affairs and also sets forth some specific powers.¹⁴³¹ Accordingly, s 157A(1) of the *Singapore CMA* specifies that 'the business of a company shall be managed by or under the direction of the directors'.¹⁴³² Also, pursuant to s 157A(2) of the *Singapore CMA*, the company directors 'may exercise all the powers of a company, except any power that this Act or the memorandum and articles of the company require the company to exercise in general meeting'.¹⁴³³ However, if the constitution of the company places any limits on the director's powers, the directors must perceive those restrictions as part of directors' duties owed to the company.¹⁴³⁴ Hence, in managing corporate affairs, company directors are granted broad powers to act on behalf of the company.

Moreover, directors in Singaporean companies owe fiduciary duties to the corporations at common law.¹⁴³⁵ The Singaporean court carefully examines directors' actions and omissions to decide whether the company directors have acted with the required care.¹⁴³⁶ Under s 157(1) of the *Singapore CMA*, directors must act honestly at all times, and use reasonable diligence in discharging their duties.¹⁴³⁷ In this regard, the word 'diligence' in s 157(1) of the *Singapore CMA*, imposes on the company's directors duty to exercise care, skill, and diligence in the performance of their responsibilities.¹⁴³⁸ In *Re Brazilian Rubber Plantations and Estates Ltd*,¹⁴³⁹ the court held that directors in Singaporean companies must

¹⁴³¹ Agrawal (n 382) 15.

¹⁴³² *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 157A(1).

¹⁴³³ *Ibid* s 157A(2).

¹⁴³⁴ Agrawal (n 382) 15.

¹⁴³⁵ *Ibid* 17.

¹⁴³⁶ Huan (n 383) 290.

¹⁴³⁷ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 157(1).

¹⁴³⁸ Huan (n 383) 285.

¹⁴³⁹ *Re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425.

take care as 'an ordinary man might be expected to take' in the same situation. Additionally, under s 157(2) of the *Singapore CMA*, any company officer or agent is prohibited from improperly using information that is obtained through his or her position to gain, directly or indirectly, an advantage for themselves or others, or to cause loss to the company.¹⁴⁴⁰ Consequently, directors in Singaporean companies have many duties and responsibilities arising from both statute and common law designed to protect the interests of the companies' shareholders.

Pursuant to s 159 of the *Singapore CMA*, when exercising their powers, directors are permitted to consider the employees' and members' interests.¹⁴⁴¹ This does not imply that directors must comply with the wishes of the majority shareholders or a particular shareholder. However, under their fiduciary duties, directors must act in the best interests of the company and its shareholders as a whole. In case of a conflict with the interests of the company, directors are obliged to act in the best interests of the company.

Lastly, s 157(3) of the *Singapore CMA* provides that an office or agent who breaches ss 157(1) and 157(2) of the *Singapore CMA* will be liable for any profit made or company losses as a result of the breach.¹⁴⁴² Hence, if Singaporean directors violate their duties, they may face severe legal consequences.

8.1.4 Members' Rights at General Meetings

One of the key roles and responsibilities of the shareholders in Singapore companies is to attend and vote at the general meetings.¹⁴⁴³ According to s 180(1) of the *Singapore CMA*, every member of the company may attend the general meetings and, before the meeting, may speak and vote on any resolution.¹⁴⁴⁴ If the company's articles provide that the company's members cannot vote 'unless all calls or other sums personally payable by him in respect of shares in the company have been paid', then shareholders are not entitled to

¹⁴⁴⁰ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 157(2).

¹⁴⁴¹ *Ibid* s 159.

¹⁴⁴² *Ibid* s 157(3).

¹⁴⁴³ *Ibid* s 180(1).

¹⁴⁴⁴ *Ibid*.

attend or vote in a general meeting.¹⁴⁴⁵ Nevertheless, in Singapore, shareholders are generally entitled to voting rights proportional to their company shares.

Additionally, under s 177(1) of the *Singapore CMA*, a company meeting may be held at the request of two or more members of the company who hold at least 10% of the company's shares (excluding treasury shares).¹⁴⁴⁶ If the company has no share capital, the meeting can be called by not less than 5% of the members, or a lower percentage as specified in the company's articles.¹⁴⁴⁷ This provision gives members the right to participate in company decisions requiring shareholder approval.

In a Singaporean company, ordinary matters require passing an ordinary resolution. An ordinary resolution can be passed if one or more of the company's members who represent a majority formally agree or, if the constitution requires, a 'greater majority, of the total voting rights of all members' entitled to vote.¹⁴⁴⁸ On the other hand, a special resolution requires at least 75% of the total voting rights of all members who on a certain date would have the right to vote.¹⁴⁴⁹ Moreover, the Singaporean court 'may, either of its own motion or on the application of any director or any member' entitled to vote at the meeting to order 'a meeting to be called, held, and conducted' in such manner 'as the Court thinks fit'.¹⁴⁵⁰ This can be done on the application of the company's directors or members who are entitled to vote at the general meeting, or on its own motion.¹⁴⁵¹ Accordingly, an ordinary resolution requires a simple majority of at least 50%, and a special transaction requires a majority voting rights of at least 75% for the special resolution to be passed, and is usually used for major company decisions.

Under Singaporean law, a company is required to follow certain rules such as prohibiting the company from giving financial assistance on acquisition of the

¹⁴⁴⁵ Ibid.

¹⁴⁴⁶ Ibid s 177(1).

¹⁴⁴⁷ Ibid.

¹⁴⁴⁸ Ibid s 184A(4).

¹⁴⁴⁹ Ibid s 184A(3).

¹⁴⁵⁰ Ibid s 182.

¹⁴⁵¹ Ibid.

company's shares,¹⁴⁵² or those of its holding company.¹⁴⁵³ The company should follow certain rules when depriving the company of acquisition of its own shares or shares in its holding company,¹⁴⁵⁴ as well as lending of the 'money or security of its own shares or units of its own shares'.¹⁴⁵⁵ A company may allow the reduction of share capital only if it is permitted by the Acts,¹⁴⁵⁶ and may distribute dividends to shareholders only from available profits.¹⁴⁵⁷ Therefore, to ensure compliance with the above provision, it is essential for Singaporean companies to conduct their shareholder meetings in accordance with procedural requirements.

8.1.5 Scope of Oppression and Legal Remedies for Oppression of Minority Shareholders

In Singaporean companies, minority oppression may occur when majority shareholders engage in abusive conduct towards minority shareholders, or when the minority shareholders are treated 'prejudicially' or 'unfairly'. Under s 216(1)(a) of the *Singapore CMA* 'any member or holder of a debenture of a company' or the Minister ('in the case of a declared company under Part IX') may apply to the court for an order if he or she believes that 'the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company'.¹⁴⁵⁸ Pursuant to s 216(1)(b) of the *Singapore CMA*, a similar application may be made if some act performed by a company 'has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself)'.¹⁴⁵⁹ This section is commonly referred to as the 'oppression remedy'.

¹⁴⁵² Ibid s 76(1)(a)(i)(A).

¹⁴⁵³ Ibid s 76(1)(a)(i)(B).

¹⁴⁵⁴ Ibid s 76A(1)(a).

¹⁴⁵⁵ Ibid s 76A(1)(b).

¹⁴⁵⁶ Ibid s 78A(2).

¹⁴⁵⁷ Ibid s 403(1).

¹⁴⁵⁸ Ibid s 216(1)(a).

¹⁴⁵⁹ Ibid s 216(1)(b).

In Singapore, under s 216 of the *Singapore CMA*, courts may issue an order only if they determine that the case falls within the two limbs of s 216(1) of the *Singapore CMA*, which 'appears to be four separate grounds of: oppression; disregard of interests; unfair discrimination; and prejudicial conduct', as Alan Koh observed.¹⁴⁶⁰ Hence, if the court 'is of the opinion that either such grounds is established', it may 'make such order as it thinks fit and, without prejudice to the generality of the foregoing',¹⁴⁶¹ an order for any of the following legal remedies: injunction, corporate regulation, damages, buy-out and winding up.

Furthermore, pursuant to s 216(2) of the *Singapore CMA*, upon establishing oppression in companies, the courts have broad discretion to make the following orders:

- (a) directing and prohibiting any act or cancelling or changing any transaction or resolution;
- (b) regulating the conduct of company's affairs in the future;
- (c) authorising civil proceedings to be brought on behalf of the company by a person or persons and as directed by the court;
- (d) providing for the purchase of a company's shares or debentures by other members, the company itself, or holders of debentures of the company;
- (e) providing for the reduction of the company's capital if shares are purchased by the company; or
- (f) ordering the winding up of the company.¹⁴⁶²

Under s 215 of the *Singapore CMA*, the controlling shareholders may make an offer to acquire share of minority shareholders. Also, under s 210 of the *Singapore CMA*, the controlling shareholders may gain control of the company by having the court grant 'its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just'.¹⁴⁶³ Moreover, under s 215A and 215G of the *Singapore CMA*, there are alternative ways to conduct a buy-out.

¹⁴⁶⁰ Koh (n 393) 64.

¹⁴⁶¹ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 216(2).

¹⁴⁶² *Ibid.*

¹⁴⁶³ *Ibid* s 210(4).

One such method is by statutory amalgamation, where two or more companies merge and continue as a single entity, which could either 'be one of the amalgamating companies or a new company'.¹⁴⁶⁴ Therefore, s 215 of the *Singapore CMA* allows an acquirer to obtain the shares of shareholders who have not accepted the offer to have their shares purchased. An alternative way to conduct buy-outs is through statutory amalgamations, where two or more related companies combine as one.

A minority shareholder in a Singaporean company who is facing difficulties resulting from the actions of the company's controllers may seek to wind up the company under s 216 of the *Singapore CMA*; however, he or she must prove that the controlling shareholders have engaged in oppressive behaviour. Alternatively, minority shareholders may also apply to the court for an order to wind up the company under s 254(1)(i) of the *Singapore CMA* on the grounds that it is 'just and equitable' to do so.

Several significant legal cases have greatly influenced Singapore's position on minority shareholders' oppression, in which minority shareholders have invoked their rights under s 216 of the *Singapore CMA*, outlined below.

8.1.6 Case Law on Minority Shareholders' Oppression: Early Years

In the case of *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* ('Kuah'),¹⁴⁶⁵ the minority shareholders sought relief under s 216 of the *Singapore CMA*. The primary issue was whether the proceedings initiated under s 216 of the *Companies (Winding Up) Rules* 1969, seeking an order for the company to be wound up or, alternatively, that company directors be removed as directors, were winding-up proceedings.¹⁴⁶⁶ In this case,¹⁴⁶⁷ the company applied to dismiss the proceedings on the grounds that they were not winding-up proceedings and that the actions should have been initiated by filing an originating petition pursuant to the *Rules of the Supreme Court* 1970. Justice Chan held that the petition was

¹⁴⁶⁴ *Ibid* s 215(A).

¹⁴⁶⁵ *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1989] 3 MLJ 343.

¹⁴⁶⁶ *Ibid*.

¹⁴⁶⁷ *Ibid*.

improperly presented as a winding-up petition and ordered the petition to be struck out.¹⁴⁶⁸ Justice Chan stated that, in his view, the court would not wind up the company if other reliefs were sufficient to end the matters about which the petitioner was complaining.¹⁴⁶⁹ Justice Chan further stated that the company would be wound up only as a last resort to give effect to the object of s 216.¹⁴⁷⁰ Moreover, the Court of Appeal agreed with Justice Chan on the object of s 216, and in this respect argued that a shareholder applying for relief under s 216 may or may not obtain a winding-up order against the company even if such relief is expressly asked for.¹⁴⁷¹ The Appeal judges disagreed with Justice Chan's view that winding up under s 216 should be a remedy of last resort, and held that this relief under s 216(2) ranks equally.¹⁴⁷² Therefore, in this case,¹⁴⁷³ the Appeal judges found that it is not correct to treat this relief as the last resort if all other reliefs under s 216(2) are inadequate.

Another important decision concerning s 216 of the *Singapore CMA* is the case of *Re Gee Hoe Chan Trading Co Pte Ltd ('Re Gee')*¹⁴⁷⁴ where the petitioners alleged oppression on the grounds that they had received little return on their shareholdings. However, the petitioner claimed that the respondents had received substantial returns in the form of directors' fees. The petitioners also requested the granting of proportional board representation on the company's board of directors, a buy-out of their shares by the respondents at the price given by an independent expert, or the winding up of the company. The practitioners relied on a number of facts to prove oppression under s 216. Justice Chao considered three of these relevant facts: not declaring the dividends, representation on the board of directors, and managing the affairs of the company diligently and honestly in the interests of the shareholders.¹⁴⁷⁵ Justice Chao was satisfied that the respondents, by not declaring dividends, prioritised their own interests over those of the company's members and found that removal from the board of directors of the petitioner who was the only director, was an act to

¹⁴⁶⁸ Ibid.

¹⁴⁶⁹ Ibid.

¹⁴⁷⁰ Ibid.

¹⁴⁷¹ Ibid.

¹⁴⁷² Ibid.

¹⁴⁷³ Ibid.

¹⁴⁷⁴ *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137.

¹⁴⁷⁵ Ibid.

prevent the petitioner from examining the company's accounts. Thus, the High Court found oppression in these circumstances and held that the directors' refusal to declare dividends was 'oppressive' conduct, given the fact that directors continued to pay themselves substantial amounts, and consequently allowed the application and ordered the winding up of the company.¹⁴⁷⁶ This High Court case was the first Singaporean case in which the court issued a winding-up order under s 216.

These decisions reaffirmed the main principles regarding protection of minority shareholders in Singaporean companies and the availability of oppression remedies under Singaporean oppression laws. The court's broad discretion to grant appropriate remedies under s 216 of the *Singapore CMA*, was firmly established in *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd*¹⁴⁷⁷ and has since been reaffirmed in later cases. Similarly, in the judgement of *Re Gee Hoe Chan Trading Co Pte Ltd*,¹⁴⁷⁸ the court acknowledged that under s 216 of the *Singapore CMA*, the winding up of the company on just and equitable grounds may be an appropriate remedy for minority oppression, especially when the relationship between shareholders has irretrievably broken down. Moreover, the Singaporean Court of Appeal in *Ho Yew Kong v Sakae Holdings Ltd*¹⁴⁷⁹ recognised that negligent conduct amounting to serious 'mismanagement' of a company's operations can constitute oppressive behaviour. The Court of Appeal held that a plaintiff may bring an oppressive claim even where the relief sought also benefit the company. The Court of Appeal further emphasised that the distinction between a personal wrong to a shareholder and a corporate wrong to the company is not always straightforward.

8.1.7 Later Significant Rulings on Minority Shareholders' Oppression

The Court of Appeal decision, in *Lim Swee Khiong v Borden Co Pte* ('*Lim Swee*'),¹⁴⁸⁰ sets out the guiding principles for what constitutes 'oppressive'

¹⁴⁷⁶ *Ibid.*

¹⁴⁷⁷ *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* (n 1465).

¹⁴⁷⁸ *Re Gee Hoe Chan Trading Co Pte Ltd* (n 1474).

¹⁴⁷⁹ [2018] SGCA 33.

¹⁴⁸⁰ *Lim Swee Khiong v Borden Co Pte* [2006] 4 SLR 745.

conduct under s 216 of the *Singapore CMA*. In this case,¹⁴⁸¹ the petitioner applied for the winding up of the company under s 216 of the *Singapore CMA*. The appellants were minority shareholders of the Borden Co Pte. The trial judge dismissed the claim and held that the applicants failed to establish a prima facie case of oppression and that the action was an abuse of the process as the appellants rejected the respondent's offer of a buy-out.¹⁴⁸² However, the Court of Appeal found that the majority shareholders had acted in a manner that promoted the commercial interests of another company, neglecting their own company's interests.¹⁴⁸³ The Court of Appeal held that winding up would not be a sufficient remedy and ordered the majority shareholders to buy the shares of the minority.¹⁴⁸⁴ In this case,¹⁴⁸⁵ the Court of Appeal found that purchasing the appellants' shares was the most appropriate remedy and made the buy-out orders.

In 2005, an important decision involving ss 216 and 254 of the *Singapore CMA* was made in *Ng Sing King v PSA International Pte Ltd*.¹⁴⁸⁶ In this case,¹⁴⁸⁷ seven plaintiffs were minority shareholders in eLogicity International Pte Ltd. The first defendant, PSA International Pte Ltd, and the second defendant, P&O Australia Pty Ltd, acquired the majority of shares in eLogicity by entering into a shareholders' agreement with the plaintiffs. As a result, they were entitled to nominate directors in the board of directors. At that time, the first plaintiff, Ng Sing King, was chairman of the board of directors. The second plaintiff, Lim Khoon Hock, was a director. The court found no oppression under s 216 of the *Singapore CMA*.¹⁴⁸⁸ However, his Honour, Rubin J, wound up the company on 'just and equitable' grounds under s 254(1)(i) of the *Singapore CMA* because the parties' inability to work together severely impacted the company's business. In this case,¹⁴⁸⁹ his Honour, Rubin J, clarified that what was 'unfair' was a question of facts.

¹⁴⁸¹ Ibid.

¹⁴⁸² Ibid.

¹⁴⁸³ Ibid.

¹⁴⁸⁴ Ibid.

¹⁴⁸⁵ Ibid.

¹⁴⁸⁶ *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56.

¹⁴⁸⁷ Ibid.

¹⁴⁸⁸ Ibid.

¹⁴⁸⁹ Ibid.

Later, in the case of *Over & Over v Bonvests Holding Ltd*,¹⁴⁹⁰ his Honour, Woo Bih Li J, disagreeing with his Honour, Rubin J, observed that ‘prejudice’ is an important consideration in the assessment of unfairness, although it is not an essential requirement. Also, the Court of Appeal affirmed the same and found that, when deciding, the court must consider all circumstances of the conduct.¹⁴⁹¹ The facts of the case are as follows: Richvein Pte Ltd was a company that began as a joint venture between the Lauw family’s Oven v Oven Ltd as a minority shareholder of 30% of the shares and the Sianandar Family’s Unicurrent Finance Limited, initially holding 70% of the shares. Over time, Sianandars began making more decisions without the Lauws. It terminated a hotel management contract and diverted it to a company where he had a substantial interest. Also, Ngo, a company that wanted to acquire Unicurrent’s 70% shareholding, threatened not to seek Over & Over’s consent required by the articles of association. A few years later, Ngo received an offer for the outstanding loan to be refinanced. The court had to determine whether the transactions, the share transfer, and the issued rights constituted oppression.¹⁴⁹² The Court of Appeal confirmed that for minority oppression to have occurred (whether by a single act or continuing conduct) there must be ‘a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect’.¹⁴⁹³ Therefore, in this case,¹⁴⁹⁴ the Court of Appeal emphasised that the cumulative effect of individual acts, which may not be oppressive on their own, could constitute oppression under s 216 of the *Singapore CMA*.

The Singaporean Court of Appeal decision in *Ng Kek Wee v Sim City Technology Ltd*¹⁴⁹⁵ considered the issue of whether the complainant could be a majority shareholder and if the oppressive conduct could relate to a subsidiary of the company, suggesting that s 216 of the *Singapore CMA* is a residual remedy. In this case,¹⁴⁹⁶ Sim City Technology Ltd (‘Sim City’), which controlled almost 54%

¹⁴⁹⁰ *Over & Over v Bonvests Holding Ltd* [2010] SGCA 7.

¹⁴⁹¹ *Ibid.*

¹⁴⁹² *Ibid.*

¹⁴⁹³ *Ibid.*

¹⁴⁹⁴ *Ibid.*

¹⁴⁹⁵ *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723.

¹⁴⁹⁶ *Ibid.*

of the shares in the company, commenced an oppression action against Ng Kek Wee ('Ng'), the company's managing director, alleging commercial unfairness due to Ng's wrongful acts, wherein this case, Sim City entered into a joint venture with another corporation BF, into which joint venture vehicle SI was duly incorporated. Ng, the managing director and shareholder of BF, was appointed as managing director of SI to purchase BF's subsidiaries. The High Court found that Sim City was entitled to relief under s 216 of the *Singapore CMA*.¹⁴⁹⁷ However, the Court of Appeal overruled the High Court's decision, holding that the appellant was not entitled to relief under s 216 of the *Singapore CMA* as the wrongs alleged by Sim City were not wrongs suffered in its personal capacity as a shareholder, and that the conduct exhibited commercial unfairness.¹⁴⁹⁸ The key question before the Court of Appeal was whether Sim City, as plaintiff, had the power to take control of the company and 'end the prejudicial state of affairs'.¹⁴⁹⁹ In this case,¹⁵⁰⁰ the Court of Appeal found that since Sim City had the authority to remove Ng from the board of directors and take control of Si's board of directors, it was not eligible for relief under s 216 of the *Singapore CMA*.

The aforementioned judgements acknowledge that minority shareholders in companies often have legitimate expectations regarding the management of a company, and a departure from these expectations by controlling shareholders can constitute oppressive conduct in Singapore. Accordingly, the rights of minority shareholders must be protected, particularly when controlling shareholders abuse their powers. This protection, as reinforced by the courts in the judgements discussed above, demonstrates the judiciary's willingness to uphold principles of fairness, as previously discussed.

8.1.8 Conclusion

Singaporean corporate governance is based on the Anglo-American model, as noted by Mak Teen and Phillip Phan and discussed in Chapter 2 of this thesis. According to Luh Luh Lan (Chapter 2), Singapore has adopted its corporate

¹⁴⁹⁷ Ibid.

¹⁴⁹⁸ Ibid.

¹⁴⁹⁹ Ibid.

¹⁵⁰⁰ Ibid.

governance framework to align with international standards while focusing on the needs of local companies, and implementing both hard and soft law. As such, guided by its commitment to high corporate standards and its recognition as one of the best world corporate structures, also observed by Lan, this chapter, in line with the objectives of this study, examined Singaporean corporate laws regarding the oppression of minority shareholders in Singaporean companies.

The chapter began by examining the legal framework governing Singaporean incorporations under the *Singapore CMA* and the role and duties of Singaporean directors. It established that, in Singapore, a company must have at least one director, shareholder, and a registered company name in order to be incorporated. This chapter also revealed that directors of Singaporean companies, when operating their company, are able to exercise all the company's powers as outlined in the *Singapore CMA* or the company's articles and constitution. However, they are required to not prioritise their personal interests over the company's best interests.

The chapter also explored the rights of company members and found that one of the primary roles of Singaporean shareholders is to exercise their voting rights at a general meeting. It was determined that an ordinary resolution may be passed with a simple majority of at least 50% of the total voting rights, while a special resolution requires at least 75% of the total voting rights. Additionally, the chapter settled that the Singaporean courts, under the *Singapore CMA*, have the authority to order shareholder or director meetings to be conducted in the way that the court thinks fit. This power gives the court the right to regulate how these meetings are conducted and intervene when disputes arise, thereby protecting the interests of minority shareholders.

Moreover, this chapter examined the scope of oppression and legal remedies available to oppressed minority shareholders in Singaporean companies, along with the Singaporean case law on minority oppression. The chapter demonstrated that, in order for conduct to be deemed wrongful under s 216 of the *Singapore CMA*, a company must be managed in a manner that is 'oppressive', 'disregards', is 'discriminatory' or otherwise 'prejudicial' to the

interests of minority shareholders. Pursuant to s 216 of the *Singapore CMA*, the courts are vested with broad discretion to grant appropriate remedies to parties subjected to oppressive conduct. This principle was clearly affirmed in *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd*,¹⁵⁰¹ where the Court of Appeal held that a winding-up order should not be regarded as a remedy of last resort, but rather as a remedy that ranks equally with other available remedies. This case reinforces the notion that courts can choose the most appropriate remedy based on the specific facts and circumstances of each case, including winding up as an equivalent solution.

The chapter concludes that while *Singapore CMA* provides a broad range of remedies for oppressive conduct towards minority shareholders, the use of alternative dispute resolution is prioritised as an approach that promotes fairness in corporate disputes while also offering time-efficient and cost-effective solutions for resolving corporate conflicts. Accordingly, the findings in this chapter established the basis for a comparative analysis of Singaporean and Australian oppression laws, for proposing amendments to Australian oppression laws for more effective minority shareholders' protection.

¹⁵⁰¹ *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1989] 3 MLJ 343 (n 1465).

8.2 India

8.2.1 Overview

8.2.2 Provisions Related to Directors under the *Companies Act 2013* (India)

8.2.3 Directors' Duties in Indian Companies

8.2.4 Scope of Oppression and Statutory Oppression Remedies in India

8.2.5 Indian Case Law on Minority Oppression: Early Period

8.2.6 Later Significant Rulings on Minority Shareholders' Oppression

8.2.7 Conclusion

8.2.1 Overview

India ranks among the top three destinations for foreign investors, and marks its presence 'as one of the fastest-growing economies in the world, as noted by Pradeep Jain'.¹⁵⁰² In India, companies play a crucial role in the country's economy where directors hold central positions in corporate management.¹⁵⁰³ As such, protecting the rights of minority shareholders in India has a significant impact on corporate governance and investor protection in the country. These protections are provided under ss 241-246 of the *Companies Act 2013* (India)¹⁵⁰⁴ ('*India CMA*'), which addresses issues of 'oppression', 'prejudice' and 'mismanagement' in Indian companies. The flexibility of Indian statutory remedies is strengthened by judicial interpretation and case law, where the National Company Law Tribunal ('NCL Tribunal') has wide discretionary powers to decide disputes between a company's shareholders.

This chapter begins by examining the provisions related to directors and their duties in Indian companies, appointed by the company's shareholders. It reveals how directors owe fiduciary duties to their shareholders and the company as a whole, as outlined in Indian corporate law. Moreover, this chapter explores how

¹⁵⁰² Jain (n 414) 13.

¹⁵⁰³ Raj Kumar Goel, 'Source of Directors' Authority in India, England and the United States' (1968) 10(2) *Journal of the Indian Law Institute* 294, 294.

¹⁵⁰⁴ *Companies Act 2013* (India) (n 12).

directors must conduct the company's affairs in the best interests of both the company and its stakeholders. However, there are many instances where dominant shareholders or directors act for their own benefit, often oppressing minority shareholders' interests. In response, Indian corporate law intervenes to moderate the behaviours of company controllers and ensure that the interests of minority shareholders are not adversely affected, as observed by Jain.¹⁵⁰⁵ This promotes accountability in companies which, when combined with the appointment of independent directors, reinforces the principles of effective corporate governance.

This chapter also investigates the scope of oppression and the statutory remedies available for 'oppression', 'prejudice', and 'mismanagement' in companies under s 241 of the *India CMA*. In this regard, scholars such as Jain have observed that 'to restore the balance of power' disrupted by oppression, mismanagement, and prejudice,¹⁵⁰⁶ Indian courts have available broad oppression remedies under the *India CMA*. Therefore, this chapter examines how s 242 of the *India CMA* empowers the NCL Tribunal to issue orders to address and resolve conflicts between the company's shareholders. Additionally, the chapter explores key court decisions that have shaped the interpretation of minority oppression in Indian companies.

Moreover, this chapter concludes that the threshold for obtaining relief against oppression in India is relatively high as, under s 241 of the *India CMA*, minority shareholders must meet eligibility criteria before filing the petition, where the NCL Tribunal exercises significant discretion, depending on the facts of the case. This chapter also determined that buy-out mechanisms have proven to be a successful means of overcoming the deadlock and ensuring that Indian companies continue to operate despite shareholder conflicts. The findings in this chapter form a basis for a comparative analysis of the minority oppression laws in Australia and India. Building on that comparison, this thesis will then propose recommendations for improvements to the legal provisions on minority oppression in Australia, in order to best protect all shareholders.

¹⁵⁰⁵ Jain (n 414) 2.

¹⁵⁰⁶ *Ibid.*

8.2.2 Provisions Related to Directors under the *Companies Act 2013*

In India, company directors are responsible for managing the company and the business operations within companies. They control the company and play an essential role in the management of company affairs. A company's board is responsible for making major business decisions, and exercising the powers granted to them under the *India CMA*. Accordingly, the board of directors in Indian companies must ensure that companies operate in the best interests of all stakeholders and the corporation as a whole.

Moreover, the *India CMA* outlines the roles, duties, and responsibilities of independent directors in Indian companies. Section 150 of the *India CMA* specifies how independent directors are selected. An independent director can be appointed from a data bank that contains the 'names, addresses and qualifications of persons who are eligible and willing to act as independent directors'.¹⁵⁰⁷ Moreover, under the *India CMA*, there are additional requirements for the person to be appointed as an independent director: the director must possess a director identification number,¹⁵⁰⁸ must not be disqualified from being a company director,¹⁵⁰⁹ and the total number of directorships held by the independent director cannot exceed the limit specified in the *India CMA*.¹⁵¹⁰ Therefore, independent directors in Indian companies are non-executive directors appointed to ensure independent judgement.

Furthermore, pursuant to s 151 of the *India CMA*, a small shareholder may elect one director in a listed company.¹⁵¹¹ For this purpose, 'small shareholder' is defined as 'a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed'.¹⁵¹² If the articles of a company do not contain provisions for the director's appointment, a member will

¹⁵⁰⁷ *Companies Act 2013* (India) (n 12) s 150(1).

¹⁵⁰⁸ *Ibid* s 152(3).

¹⁵⁰⁹ *Ibid* s 164.

¹⁵¹⁰ *Ibid* s 165.

¹⁵¹¹ *Ibid* s 151.

¹⁵¹² *Ibid*.

be considered director until the director's appointment.¹⁵¹³ Also, the central government issues a director identification number for a period of one month from the time when the application for allotment of director was received.¹⁵¹⁴ A director is prohibited from applying for another identification number.¹⁵¹⁵ Once the director receives the identification number, the company must be informed accordingly.¹⁵¹⁶ This process ensures the transparency and accountability of directors in Indian companies.

A company director must act in accordance with the company's articles.¹⁵¹⁷ These articles may be changed by special resolution, subject to the provisions of the *India CMA* and the memorandum of the company. These alterations may include 'alterations having the effect of conversion of - (a) a private company into a public company; or (b) a public company into a private company'.¹⁵¹⁸ However, any alteration that converts a public company into a private one will not have effect unless it is approved by the NCL Tribunal, which may issue an order 'as it may deem fit'.¹⁵¹⁹ In *Sidebottom v Kershaw*,¹⁵²⁰ the court held that if directors act in good faith when effecting a proposed alteration of the company's articles, this alteration will be allowed even if minority shareholders find it to be to their disadvantage. The case involved the alteration of a company's articles to give a director the power to buy out, at a fair price, any shareholder who competes with the company's business. The court upheld the alteration as it was made for the company's benefit, allowing it to buy out members who compete with its best interests.¹⁵²¹ In short, the *India CMA* contains provisions not only for the appointment of independent directors, but also regarding the alteration of the company's articles to ensure compliance with the law.

¹⁵¹³ *Ibid* s 152(1).

¹⁵¹⁴ *Ibid* s 154.

¹⁵¹⁵ *Ibid* s 155.

¹⁵¹⁶ *Ibid* s 156.

¹⁵¹⁷ *Ibid* s 166(1).

¹⁵¹⁸ *Ibid* s 14.

¹⁵¹⁹ *Ibid* s 14(1).

¹⁵²⁰ *Sidebottom v Kershaw* [1920] 1 Ch 154.

¹⁵²¹ *Ibid*.

8.2.3 Directors' Duties in Indian Companies

The powers to manage the company entail specific directors' duties, as set out in the *India CMA*. The following duties and obligations are imposed on directors of Indian companies:

- a director must act in good faith 'in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community, and the protection of environment';¹⁵²²
- directors of companies must exercise their duties 'with due and reasonable care, skill and diligence and shall exercise independent judgment';¹⁵²³
- directors of Indian companies should not involve themselves in a situation where their own interests, either direct or indirect, are in conflict with the company's interests;¹⁵²⁴
- directors of Indian companies must not achieve undue gain or advantage for themselves or others;¹⁵²⁵
- they shall not assign their office;¹⁵²⁶
- if found guilty of making undue gain, they shall be liable to the company to pay an amount equal to that gain.¹⁵²⁷

Finally, a company director who breaches his or her statutory directors' duties under s 166 of the *India CMA*, will be punished 'with a fine'.¹⁵²⁸ Also, under s 149(12) of the *India CMA*, an independent Indian director is liable for any violations of the provisions if such violations occur as result of his or her failure to act diligently.¹⁵²⁹ Thus, the *India CMA* imposes various duties and responsibilities on independent directors, which influence their decision-making in companies.

This chapter further discusses the scope of oppression and remedies available to oppressed minority shareholders in Indian companies.

¹⁵²² *Companies Act 2013* (India) (n 12) s 166(2).

¹⁵²³ *Ibid* s 166(3).

¹⁵²⁴ *Ibid* s 166(4).

¹⁵²⁵ Such as relatives, partners, or associates: *Companies Act 2013* (India) s 166(5).

¹⁵²⁶ *Companies Act 2013* (India) (n 12) s 166(6).

¹⁵²⁷ *Ibid* s 166(5).

¹⁵²⁸ *Ibid* s 166(7).

¹⁵²⁹ *Ibid* s 149(12).

8.2.4 Scope of Oppression and Statutory Oppression Remedies in India

The *India CMA* provides relief for minority shareholders in case of oppression and mismanagement, as specified in ss 241-246 of the *India CMA*. Section 241(1) of the *India CMA* outlines the scope of oppression, while s 242 of the *India CMA* empowers the NCL Tribunal to issue an order if specific requirements are fulfilled, as noted above. Also, s 245 of the *India CMA* allows for the filing of a class action, to prevent unlawful conduct.

The *India CMA* does not provide a specific definition of the term 'oppression'. This term 'has been understood as an act or omission on the part of the management'.¹⁵³⁰ The courts have played a key role in establishing the principles that define this concept.¹⁵³¹ For instance, in *Elder v Elder & Watson Ltd*¹⁵³² the court held that 'oppression' refers to a deviation from the standards of fair dealing, and violation of the conditions of fair play, on which every shareholder, who invests money in a company is entitled to rely. Moreover, in *Re Albert David Ltd*,¹⁵³³ the court held that 'mismanagement', applies to situations where the affairs of the company were 'prejudicial' to either public interests or the interests of the company.

Under s 241(1)(a) of the *India CMA*, any member of an Indian company may apply to the NCL Tribunal if '(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members' or in a way that is prejudicial to the company's interest;¹⁵³⁴ or (b) if the material change, which is not a change brought about by, or in the interest of, creditors (including debenture holders) 'or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share

¹⁵³⁰ Dugar (n 417) 106.

¹⁵³¹ Varottil (n 412) 7.

¹⁵³² *Elder v Elder & Watson Ltd* [1952] SC 49.

¹⁵³³ *Re Albert David Ltd* [1964] 68 CWN 163.

¹⁵³⁴ *Companies Act 2013* (India) (n 12) s 241(1)(a).

capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members'.¹⁵³⁵ By prohibiting inefficient management of company's affairs, this section ensures that companies do not harm the interests of shareholders and stakeholders.

Additionally, s 241(1)(b) of the *India CMA*, provides a remedy in cases involving 'mismanagement'. However, in order for petitioning shareholders to invoke this remedy, they must establish the grounds of 'just and equitable winding up'.¹⁵³⁶ In this regard, 'mismanagement' may encompass a variety of issues such as failure to keep basic records, to hold general meetings for the adoption of accounts, to have accounts audited or finalised, and to file documents with the Companies Registrar.¹⁵³⁷ Accordingly, in India, the petitioner may initiate legal action before the NCL Tribunal if the controlling shareholders conduct the company's affairs in a manner that is 'prejudicial' to the applicant, or another member or members, and also to the public interests or the company's interests.

Moreover, s 242(1) of the *India CMA* governs the conditional limb and provides that the NCL Tribunal may 'make such order as it thinks fit' if it 'is of the opinion that:

- (a) the affairs of the company 'have been or are being conducted in manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and
- (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up'.¹⁵³⁸

¹⁵³⁵ *Ibid* s 241(1)(b).

¹⁵³⁶ Varottil (n 412) 16.

¹⁵³⁷ Dugar (n 417) 107.

¹⁵³⁸ *Companies Act 2013* (India) (n 12) s 242(1).

The NCL Tribunal can make specific orders to regulate the company's affairs in the future,¹⁵³⁹ as follows:

- the purchase of shares or interests of the members by other members or by the company.¹⁵⁴⁰ In case of a purchase of shares by company, the NCL Tribunal may also order a reduction of its share capital;¹⁵⁴¹
- impose restrictions on the transfer or allotment of the shares;¹⁵⁴²
- termination or setting aside agreements between the company and its managing directors;¹⁵⁴³
- termination of any agreement between company and any other person, and set aside transfer.¹⁵⁴⁴

The NCL Tribunal may also issue the following orders:

- to set aside any transfer, payment, delivery of goods, execution of acts relating to property against the company,¹⁵⁴⁵
- the removal of the directors,¹⁵⁴⁶
- to recover any undue gains made by directors,¹⁵⁴⁷
- to regulate the appointment of a managing director,¹⁵⁴⁸
- appointment of directors who must report to the NCL Tribunal.¹⁵⁴⁹

The NCL Tribunal may also impose costs¹⁵⁵⁰ and address any other matter that it considers to be just and equitable.¹⁵⁵¹

In essence, s 242 of the *India CMA* provides remedies for oppression and empowers the NCL Tribunal to intervene and protect shareholders and all stakeholders in a company from oppressive conduct of company affairs. As the authority responsible for resolving corporate disputes, the NCL Tribunal is

¹⁵³⁹ Ibid s 242(2)(a).

¹⁵⁴⁰ Ibid s 242(2)(b).

¹⁵⁴¹ Ibid s 242(2)(c).

¹⁵⁴² Ibid s 242(2)(d).

¹⁵⁴³ Ibid s 242(2)(e).

¹⁵⁴⁴ Ibid s 242(2)(f).

¹⁵⁴⁵ Ibid s 242(2)(g).

¹⁵⁴⁶ Ibid s 242(2)(h).

¹⁵⁴⁷ Ibid s 242(2)(i).

¹⁵⁴⁸ Ibid s 242(2)(j).

¹⁵⁴⁹ Ibid s 242(2)(k).

¹⁵⁵⁰ Ibid s 242(2)(l).

¹⁵⁵¹ Ibid s 242(2)(m).

granted broad discretion to address cases of oppression and mismanagement in Indian companies. Consequently, all the matters related to ‘oppression’ and ‘mismanagement’ in India are decided exclusively by the NCL Tribunal.

The following case law helps to illustrate the Indian court rulings related to minority oppression in companies.

8.2.5 Indian Case Law on Minority Oppression: Early Period

The Indian *Companies Act* of 1956 established the principle of the rule of the majority, under which all matters of Indian companies were ruled by the majority shareholders. The practical application of this rule was found as early as 1934, in the case of *Bhajekar v Shinkar*.¹⁵⁵² In this case,¹⁵⁵³ the company directors challenged the resolution passed by the board of directors and an extraordinary resolution passed in a general meeting, which was later confirmed as a special resolution in another extraordinary general meeting of the shareholders. The board of directors appointed managing agents, with the appointment being confirmed by the company in general meeting. In response, minority shareholders brought a claim alleging that the resolution was irregular and should be declared invalid. The court ruled that the ‘dissentient shareholders were at the meeting’ and could ‘complain and object the validity of the meetings’.¹⁵⁵⁴ Also, that after taking into account ‘the minutes of the meetings, the notice itself, the advertisement of the notice and the resolution’ itself, resolution in question was not obtained by deception.¹⁵⁵⁵ The court held that the appointment of managing agents should not interfere with the company’s internal affairs.¹⁵⁵⁶ However, in this case,¹⁵⁵⁷ the court held that minority shareholders with limited authority were not entitled to file a lawsuit to intervene in these types of matters.

¹⁵⁵² *Bhajekar v Shinkar* [1934] 36 BomLR 483.

¹⁵⁵³ *Ibid.*

¹⁵⁵⁴ *Ibid.*

¹⁵⁵⁵ *Ibid.*

¹⁵⁵⁶ *Ibid.*

¹⁵⁵⁷ *Ibid.*

In the 1956 case of *Rajahmundry Electric Supply Corpn Ltd v Negashwara Rao*,¹⁵⁵⁸ the court observed that if directors act within the powers given by the articles of association of the company, the court will not interfere in the internal affairs of the company. In this case,¹⁵⁵⁹ the plaintiff alleged that directors misappropriated company funds and acted against the rights and interests of the shareholders with their majority of votes. The application was filed for winding up of the company on the grounds that 'the affairs of the company were being mismanaged and that the directors had misappropriated the funds of the company'.¹⁵⁶⁰ The court ruled that the company should sue in its own name, as the defendant's conduct resulted in an injury not just to the plaintiff, but to the whole company.¹⁵⁶¹ In this case¹⁵⁶² the Supreme Court of India defined 'oppression' as a lack of probity and fair dealing in the affairs of the company, to the prejudice of some of its members.

One of the most important landmark judgements of the Supreme Court of India is *Needle Industries (India) v Needle Industries Newey (India) Holding Ltd ('Needle')*.¹⁵⁶³ In this instance, the majority shareholder was bought out, rather than the minority shareholders being squeezed out. It focused on a claim of 'oppression' under ss 397 and 398 of the Indian *Companies Act* of 1956, brought by the foreign majority shareholder in Needle Industries Newey (India) Holding Ltd, based in the United Kingdom, against its subsidiary, Needle Industries (India). The *Foreign Exchange Regulation (Amendment) Act* of 1993 required that the shares held by non-residents be reduced from 60% to 40% within a twelve-month period. The managing director of the subsidiary suggested issuing excess shares to Indian shareholders, which was rejected by the foreign majority shareholder. Despite this, the managing director of the subsidiary went ahead and issued rights shares to its shareholders at a much lower price than the market value, without properly consulting the foreign majority shareholder. This action resulted in the foreign majority shareholder becoming a minority shareholder company. The issue in this case was whether issuing shares at a much lower

¹⁵⁵⁸ *Rajahmundry Electric Supply Corpn Ltd v Negashwara Rao* AIR [1956] SC 213.

¹⁵⁵⁹ *Ibid.*

¹⁵⁶⁰ *Ibid.*

¹⁵⁶¹ *Ibid.*

¹⁵⁶² *Ibid.*

¹⁵⁶³ *Needle Industries (India) v Needle Industries Newey (India) Holding Ltd* [1981] SC 1298.

price than the market value constituted an act of oppression against the foreign majority shareholder under s 379 of the Indian Companies Act of 1956. The High Court held that the action was oppressive, and ordered compensation for the loss suffered.¹⁵⁶⁴ However, on Appeal, the Supreme Court of India rejected the petition reasoning that even though the directors benefited from the process of issuing the shares at a much lower price than the market value, it could not be alleged that they had the intention to benefit from the act when they were deciding what would be the best course of action for the company.¹⁵⁶⁵ Even though the petition failed, the Supreme Court of India ordered the foreign majority shareholder (later minority) to purchase the shares of the subsidiary at a premium rate to accomplish 'fairness'.¹⁵⁶⁶ In the case of *Shanti Prasad Jain v Kalinga Tubes Ltd*,¹⁵⁶⁷ The Supreme Court of India held that oppression should be considered as a series of events and not as one separate act. Accordingly, the court ruled that the term 'oppressive' includes acts that are 'burdensome, harsh and wrongful' and that an isolated act cannot be 'oppressive' unless it is accompanied by a mala fide intention.¹⁵⁶⁸ With this judgement,¹⁵⁶⁹ the rule of the supremacy of the majority shareholders in companies, which hold that only the company can institute a suit against the wrongdoer, as established by *Foss v Harbottle*,¹⁵⁷⁰ was weakened.

Consequently, over the years, the Indian courts 'deviated from the strict sense of the majority rule to safeguard the interest of minority over majority shareholders'.¹⁵⁷¹ As such, in *Sri Ramdas Motor Transport Ltd v Tadi Adhinarayana Reddy*,¹⁵⁷² the court held that under s 397 of the *Indian Companies Act* of 1956, any company's member who complains that the company's affairs are 'irregular or prejudicial to the public interest or are oppressive to any member may apply to Company Law Board for an order'.¹⁵⁷³ In this case,¹⁵⁷⁴ the Supreme

¹⁵⁶⁴ Ibid.

¹⁵⁶⁵ Ibid.

¹⁵⁶⁶ Ibid.

¹⁵⁶⁷ *Shanti Prasad Jain v Kalinga Tubes Ltd* AIR [1965] SC 1535.

¹⁵⁶⁸ *Needle Industries (India) v Needle Industries Newey (India) Holding Ltd* [1981] SC 1298 (n 1563).

¹⁵⁶⁹ Ibid.

¹⁵⁷⁰ *Foss v Harbottle* [1843] 2 Hare 461 (n 906).

¹⁵⁷¹ *Sadhana and M Kannappan* (n 424) 894-5.

¹⁵⁷² *Sri Ramdas Motor Transport Ltd v Tadi Adhinarayana Reddy* [1997] SC 2189.

¹⁵⁷³ Ibid.

¹⁵⁷⁴ Ibid.

Court of India held that any member may appeal to the NCLT under s 397 of the Indian *Companies Act* of 1956 if the company's affairs are against the public order and interests or if they are a violation of members' rights.

Moreover, in *Dale and Carrington Investment (P) Ltd v PK Prathapan*,¹⁵⁷⁵ the issues raised concerned the validity of allotment of the additional equity shares, the relief granted, and whether the actions were carried out with bona fide intentions. The court also examined the fiduciary duty of directors to shareholders of the company. The court held that if a director attempts to acquire majority control of a corporation by issuing shares to themselves, this act would be considered oppressive.¹⁵⁷⁶ Accordingly, increasing the company's capital to gain control or power can be characterised as oppression.

This chapter will also explore recent landmark cases related to minority oppression in Indian companies.

8.2.6 Later Significant Rulings on Minority Shareholders' Oppression

In the recent case of *Tata Consultancy Services Ltd v Cyrus Investments Pvt Ltd*,¹⁵⁷⁷ Cyrus Investments Pvt Ltd, as a minority shareholder in Tata Sons, filed a complaint under s 241 and 242 of the *India CMA*, alleging 'prejudice', 'oppression' and 'mismanagement', following the removal of Cyrus Mistry as Executive Chairman and director in various companies of the Tata Group. Upon his removal, Cyrus Investments Pvt Ltd challenged the scheme of arrangements and sought to stop its implementation arguing that it would 'prejudice' the interests of minority shareholders as the scheme was 'oppressive' to them. The issue raised in this case was whether the approval of minority shareholders was necessary in order to approve the scheme of arrangement between Tata Sons and Tata Consultancy Services. The NCLT held that the company's operations were 'oppressive' as it believed that the dismissal of Cyrus as Executive Chairman and from company's board was unconstitutional.¹⁵⁷⁸ However, the

¹⁵⁷⁵ *Carrington Investment (P) Ltd v PK Prathapan* [2005] 1 SCC 212.

¹⁵⁷⁶ *Ibid.*

¹⁵⁷⁷ *Tata Consultancy Services Ltd v Cyrus Investments Pvt Ltd* [2021] SCC 179.

¹⁵⁷⁸ *Ibid.*

Supreme Court held that the conduct of the Tata Group did not constitute oppressive conduct; therefore, the director's removal from his position was insufficient to justify oppression case, but relief could be granted under s 242 of the *India CMA* if the removal of the director 'forms part of a larger design to oppress or prejudice the interest of some members'.¹⁵⁷⁹ The Supreme Court, in this case,¹⁵⁸⁰ also found that s 241 and s 242 of the *India CMA* do not give the NCLT powers of reinstatement.

Another important judgement concerning oppression and mismanagement in India is *Union of India v Delhi Gymkhana Club Ltd*,¹⁵⁸¹ where the Government of India petitioned for 'oppression' and 'mismanagement' under s 241(2) of the *India CMA*. In this case,¹⁵⁸² Delhi Gymkhana Club ('Club') had been operating for more than a century on land leased to it by the Government. The Club's main objective was to promote various sports. On receiving complaints against the Club, the Ministry of Corporate Affairs issued an order to inspect the club. In its report, the Ministry of Corporate Affairs detailed numerous violations and mismanagement of the affairs of the Club. The Union of India filed a petition under s 242(2) of the *India CMA* alleging that the Club conducted affairs in a manner 'prejudicial' to the public interest, seeking that the Central Government nominate directors to manage the affairs of the Club and report to the NCL Tribunal. The main issue in this case was whether the affairs of the Club were conducted in a manner 'prejudicial' to public interest and if the Union of India had authority to nominate directors. The NCL Tribunal found that when Government files a complaint under s 241(2) of the *India CMA*, it is required to record its opinion about affairs of the company conducted in a 'prejudicial' manner.¹⁵⁸³ It further found that such recordings were essential for applying to the NCLT under this section.¹⁵⁸⁴ In this case,¹⁵⁸⁵ the NCL Tribunal issued an order for the suspension of the General Committee and directed the Union to appoint an Administrator to manage the affairs of the Club.

¹⁵⁷⁹ *Ibid.*

¹⁵⁸⁰ *Ibid.*

¹⁵⁸¹ *Union of India v Delhi Gymkhana Club Ltd* [2021] NCLAT 123.

¹⁵⁸² *Ibid.*

¹⁵⁸³ *Ibid.*

¹⁵⁸⁴ *Ibid.*

¹⁵⁸⁵ *Ibid.*

Moreover, in *Deloitte Haskins & Sells LLP v Union of India No 190*,¹⁵⁸⁶ the Central Government filed a petition under s 241(2) of the *India CMA*, against Infrastructure Leasing and Financial Services Limited ('Infrastructure') claiming 'mismanagement' and conduct 'prejudicial' to the public interest. The case involved Deloitte Haskins & Sells LLP ('Deloitte') serving as the statutory auditors of Infrastructure from 2008 to 2018, alongside BSR & Associates LLP, which was appointed as a joint statutory auditor in 2017. In 2018, Infrastructure defaulted on debt repayments, which was caused by corporate governance failures. As both Deloitte and BSR & Associates LLP had conducted the statutory audit of Infrastructure for 2017 and 2018, proceedings were initiated against them based on a report prepared by the Serious Fraud Investigation Office. In response, BSR & Associates LLP issued a letter of resignation, arguing that, as they were no longer the auditors of Infrastructure, the proceedings against them should be dismissed. Deloitte made similar arguments. The NCLT held that under s 242 of the *India CMA*, it has broad powers to protect the public interest or the interests of the company, and that it can hear any party, including the former auditors.¹⁵⁸⁷ This decision was challenged before the Bombay High Court, which upheld the validity of the proceedings; however, the Union of India appealed this decision. In this case,¹⁵⁸⁸ the Supreme Court of India held that the resignation of the auditors does not lead to the termination of the proceedings against them, and that an auditor cannot avoid legal consequences merely by resigning as auditor of a company.

The court judgements above demonstrate a significant development in India's legal framework for minority oppression, affirming the broad remedial powers of the courts under the *India CMA* to restrict abuse of power and uphold minority shareholders' rights in Indian companies.

¹⁵⁸⁶ *Deloitte Haskins & Sells LLP v Union of India No 190* [2019] NCLAT 1.

¹⁵⁸⁷ *Ibid.*

¹⁵⁸⁸ *Ibid.*

8.2.7 Conclusion

As observed by Meghna Thapar and Arjun Sharma (Chapter 2), in India, good corporate governance requires the effective implementation of management practices while maintaining legal compliance within a continuously evolving business landscape. As further examined by Ashutosh Misra (Chapter 2), the protection of both directors and minority shareholders in Indian companies is closely connected, and essential for efficient and effective governance. On this basis, and with the view that insights into Indian corporate governance practices may enhance the Australian corporate governance framework, this chapter began with a discussion of directors and their roles in companies.

Accordingly, this chapter established that directors in Indian companies, as elected representatives, are appointed to manage the company and its operation, and therefore have an important role in overseeing the company's affairs. The chapter identified that pursuant to s 150 of the *India CMA*, a director may be elected as an independent director, with this provision outlining specific requirements for such appointment. These directors do not have any direct relationship with the company and are appointed to ensure transparency in the decision-making process. Their presence in Indian companies helps mitigate conflicts of interest and strengthens the protection of minority shareholders. This chapter further demonstrated that, in India, directors' duties are set out in the *India CMA*, including, among others, the duty to act in good faith, to exercise due and reasonable care, skill and diligence, and to exercise independent judgement.

Moreover, this chapter examined the minority shareholders' protection under the *India CMA* and the scope of oppression remedies. The chapter revealed that oppression remedies are available to oppressed minority shareholders under ss 241 and 242 of the *India CMA*, and are commonly invoked in cases of shareholders' disputes. The chapter also established that s 242 of the *India CMA* grants the NCL Tribunal broad powers to issue any order as it may deem fit to address issues of 'oppression', 'prejudice', and 'mismanagement' caused by majority shareholders in Indian companies. Additionally, the chapter reviewed Indian court cases related to minority shareholders' oppression, including early

precedents and more recent significant rulings. These cases reaffirmed the broad power granted to Indian courts under the *Indian CMA* to prevent majority shareholders from abusing their powers in companies.

The chapter concludes that, as a specialized authority for the resolution of corporate disputes in India, the NCL Tribunal offers a more efficient and expedient resolutions process for corporate disputes compared to traditional courts. It further concludes that in India, buy-out remedies have been effective in resolving corporate deadlock, allowing Indian companies to continue operating. Consequently, the findings presented in this chapter will be considered in the next chapter which provides a comparative analysis and offers recommendations for improvements of the Australian oppression remedies in line with the jurisdictions reviewed.

Chapter 9

Comparative Analysis and Recommendations for Improvements

9.1 Overview

9.2 Remedies for Minority Oppression in Australia and United Kingdom

9.3 Remedies for Minority Oppression in Australia and the United States (specifically Delaware)

9.4 Remedies for Minority Oppression in Australia and Canada

9.5 Remedies for Minority Oppression in Australia and Germany

9.6 Remedies for Minority Oppression in Australia, Singapore, and India

9.7 Proposed Law Reform Recommendations

9.8 Conclusion

9.1 Overview

This chapter provides a comparative analysis of the remedies for minority oppression in Australia and those in the United Kingdom, United States (specifically Delaware), Canada, Germany, Singapore and India. In undertaking this comparison, it becomes evident that while majority shareholders have significant influence over a company's direction, their conduct must not oppress minority shareholders. Therefore, despite their considerable power, majority shareholders' rights are limited to prevent them from acting unfairly towards minority shareholders. Notwithstanding the above, in practice, the rights of minority shareholders are not always afforded equal treatment by a company. A key issue arises when controlling shareholders take unfair advantage of their corporate position and breach their fiduciary and statutory duties for personal interest. In such circumstances, minority shareholders may claim that they were subjected to oppressive conduct by majority shareholders, prompting the court to grant remedies for such conduct.

The current position in Australia seeks to mitigate minority shareholders' oppression through existing statutory oppression remedies. These remedies play a crucial role in protecting the interests of minority shareholders by addressing

unfair treatment of minority shareholders and oppressive conduct within companies. By enabling minority shareholders to seek judicial relief for abuse of their rights in companies, these remedies help protect their interests and contribute to the development of better corporate governance practices.

This thesis argues that there are persuasive arguments for why Australia ought to align with the approaches adopted by the countries examined and compared in this study. To support this argument, this chapter provides an analysis of the remedies available to minority shareholders' oppression under the Australian *CPA*, discussed in Chapter 3, and compares them with the oppression remedies available under the corporate laws of the United Kingdom, United States (specifically Delaware), Canada, Germany, Singapore, and India, discussed in Chapters 4, 5, 6, 7 and 8, respectively. This analysis highlights the differences in the standards for oppressive conduct across the legal systems examined in this study, along with the advantages and disadvantages of each legal framework, in order to identify which country best protects the minority shareholders in companies.

The chapter highlights the importance of the proposed law reforms intended to strengthen the existing Australian remedies for minority shareholder oppression under the *CPA*.

9.2 Remedies for Minority Oppression in Australia and United Kingdom

The corporate laws governing directors and their duties in Australia and the United Kingdom have similarities. In both countries, directors' duties are derived from the statute, common law, and equity. Also, in both countries, directors are considered 'fiduciaries', who act and make decisions in the best interests of the corporations, and not for their own interest. In this regard, the duty of care and the duty to act in good faith in the company's best interests are some of the statutory duties imposed on company directors in both countries, with these duties being owed to the company. In both Australia and the United Kingdom, in order to prevent conduct that could lead to oppression or unfair treatment of

minority shareholders in companies, the boards of directors run the company at their discretion, complying with directors' duties.

However, a close look at the minority shareholders' oppression laws in Australia and the United Kingdom reveals several differences. Under the Australian *CPA*, the oppressed minority shareholder in companies may seek relief from 'oppressive' conduct by the company's controllers, which includes acts that are 'contrary to the interests of the members as a whole': s 232(d) of the Australian *CPA*. In Australia, 'oppressive' conduct also encompasses acts that are 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members', whether in their capacity as a member or otherwise': s 232(e) of the Australian *CPA*. On the contrary, the United Kingdom refers only to those company affairs that are 'unfairly prejudicial' to other members or to some segments of its members (including at least himself): s 994(1)(a) of the *United Kingdom CMA*. In the United Kingdom, the court in *Scottish Co-operative Wholesale Society Ltd v Meyer*¹⁵⁸⁹ described 'oppressive' conduct as being 'burdensome, harsh and wrongful'. As in Australia, this section extends to include any person in favour of 'whom shares in the company have been transferred or transmitted': s 994(2) of the *United Kingdom CMA*.¹⁵⁹⁰ Accordingly, in the United Kingdom, oppressive conduct only needs to be deemed as 'unfair' towards minority shareholders. Hence, in the United Kingdom, the courts tend to be more inclined to rule in favour of the minorities rather than majorities, as the standard of oppressive conduct is less rigorous compared to that in Australia.

Correspondingly, this means that in Australia, oppressive conduct requires more severe forms of oppression. Also, in Australia, this conduct must be intentional.¹⁵⁹¹ Although in the United Kingdom 'unfairly prejudicial', discussed in Chapter 4, has been invoked in different circumstances, it appears that its scope is broader than the protection against 'oppressive', 'unfairly prejudicial', or 'unfairly discriminatory' conduct under the Australian *CPA*, as discussed in Chapter 3. This is because minority shareholders in the United Kingdom may

¹⁵⁸⁹ *Wholesale Society Ltd v Meyer* [1959] AC 324 (n 146).

¹⁵⁹⁰ *Companies Act 2006* (UK) (n 4) s 994(2).

¹⁵⁹¹ *ASIC v Rich* (2009) 75 ACSR 1.

petition for wrongdoing identified as ‘unfair’, particularly when their interests are ‘prejudiced’ by majority shareholders, in which cases the courts focus on the ‘fairness’ of the conduct and the legitimate interests of minority shareholders in protecting their rights. Contrary, in Australia, minority oppression is found in actions that are ‘harsh or abusive’ by controllers in the companies, decided on a case-by-case basis, and it is more narrowly focused.

Moreover, in the United Kingdom, ‘unfair prejudice’, under the *United Kingdom CMA*, addressed in Chapter 4, has an unclear scope. This applies in particular since s 994 of the *United Kingdom CMA* does not provide a clear definition of what constitutes ‘unfairly prejudicial’ conduct, however ensures that an act must be ‘unfairly prejudicial’. Therefore, in the United Kingdom, ‘unfairness’ and ‘prejudice’, explored in Chapter 4, may often become personal focusing on harm to the individual minority shareholders’ interests. This is due to the broad view that courts take when determining ‘unfairness’ and ‘prejudice’, which creates uncertainty in minority shareholder petitions. Similarly, in Australia, there is no uniform definition of what constitutes ‘oppression’ under the Australian *CPA*, as discussed in Chapter 3. However, ‘oppressive’ conduct under s 232(d) of the *CPA* is classified as conduct that is contrary to the interests of the shareholders as a whole, and also ‘oppressive’, ‘unfairly prejudicial’, or ‘unfairly discriminatory’, as examined in Chapter 3. Accordingly, in Australia, oppression claims usually relate to disputes between shareholders and directors of a company where the courts apply an objective test to determine whether the conduct was ‘oppressive’. In this regard, the Australian case *Wayde v NSW Rugby League Ltd*,¹⁵⁹² established that ‘standard’ involves evaluating the conduct of a reasonable director, assessing whether he or she would make a decision that any reasonable acting board of directors would have made. Furthermore, in the United Kingdom’s case *Re Charterhouse Capital Ltd*,¹⁵⁹³ the court observed that the term ‘company’s affairs’ has a wide scope and covers all the matters decided by the board.¹⁵⁹⁴ However, this term is not explicitly defined in any specific section of the *United Kingdom CMA*. In Australia however, s 53 of the Australian *CPA* states the

¹⁵⁹² *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459 (n 151).

¹⁵⁹³ *Re Charterhouse Capital Ltd* [2015] EWCA (n 848).

¹⁵⁹⁴ *Ibid.*

meaning of ‘affairs of the company’ (including promotion, formation, membership, control, business, trading, transactions and dealings, property liability and finances of the company), as considered in Chapter 3, which also assists the courts in determining oppression cases.

Moreover, in Australia, the Australian *CPA* provides various remedies available to minority shareholders facing oppression in companies.¹⁵⁹⁵ The Australian *CPA* lists all the remedies the court may grant in no particular order, where the Australian court does not prioritize one remedy over another. Nevertheless, the two main remedies in Australia are the buyout remedy, and the winding up of the company. Similarly, in the United Kingdom, s 996(2)(a) to (d) of the *United Kingdom CMA* sets out the ‘unfair prejudice’ remedies available to the oppressed minority shareholders.¹⁵⁹⁶ Like in Australia, in the United Kingdom, the two main statutory remedies for minority shareholders’ protection are the buy-out remedy,¹⁵⁹⁷ and the ‘just and equitable’ winding-up remedy.¹⁵⁹⁸ Similar to the Australian *CPA*, s 996(1) of the *United Kingdom CMA* grants the court the discretionary power to provide relief for oppressive conduct in companies.

Accordingly, with a buy-out remedy, the courts in both countries order that the majority shareholders buy out the minority shareholders’ shares in the company at a fair market value determined by the courts. The corporate statutes in both countries have provisions regarding the procedure that the court must follow in forcing the buy-out of minority shareholders’ shares and valuing the company’s shares. In Australia, the buy-out order may be made if the court considers it appropriate in relation to the company for the purchase of any shares by any member or by another person to whom a share has been transmitted by will or

¹⁵⁹⁵ Under s 233 of the *Corporations Act 2001* (Cth), these remedies are: an order that the company be wound up, that the company’s constitution be modified or replaced, regulating the conduct of the company’s affairs in the future, for the purchase of any shares by any member or by other person, for the company to institute, prosecute, defend or discontinue specified proceedings, appointing a receiver or a receiver and manager of any or all of the company’s property, restraining a person from engaging in specific conduct and requiring a person to do a specified act.

¹⁵⁹⁶ See *Companies Act 2006* (UK) s 996(2) which specifies five oppression remedies: regulating the conduct of the corporation’s affairs in the future; the company ‘to refrain from doing or continuing an act complained of’ or to do an act it has omitted to do; to authorise a civil proceedings to be brought in the name and on behalf of the company; that the articles of incorporation should not be changed without the leave of the Court; and purchases of the shares by members or by company itself.

¹⁵⁹⁷ *Companies Act 2006* (UK) (n 4) s 996(2)(d).

¹⁵⁹⁸ *Insolvency Act 1986* (UK) (n 727) s 122.

operation of law,¹⁵⁹⁹ or with an appropriate reduction of the company's share capital.¹⁶⁰⁰ In the United Kingdom, however, aggrieved minority shareholders have the buy-out remedy enshrined in ss 994-999 of the *United Kingdom CMA* under the title 'protection of members against unfair prejudice'. Therefore, under s 996 of the *United Kingdom CMA*, the court usually makes such an order as it thinks fit, if the court is satisfied that the petition is well founded.¹⁶⁰¹ As in Australia, the United Kingdom's court may order for the shares to be purchased by any member of the company, by other members, or by the company.¹⁶⁰² Moreover, in the United Kingdom, s 996(2) of the *United Kingdom CMA* explicitly allows the court to oblige the controller, rather than the company, to purchase the claimant's shares. Consequently, in the United Kingdom, a buy-out remedy is usually granted when the United Kingdom's court focuses primarily on resolving shareholders' disputes, rather than determining what is fair or suitable for the company. However, the Australian court may approve a purchase or a reduction in share capital if it considers these actions appropriate, given the circumstances of the company. Nonetheless, in both countries, it falls upon the court to determine the fair value of shares being bought. Also, in both countries, this remedy excels at protecting the company's existence.

Additionally, the corporate statutes in both, Australia and the United Kingdom, allow for the winding-up of a company. In Australia, under s 233 of the *CPA*, the court may make any order it considers appropriate in relation to the company, including an order that the company be wound up.¹⁶⁰³ In cases of severe shareholder conflict in companies, the Australian court may determine that it is fair and necessary for the company to be wound up, especially when no other remedy can adequately address the matter at hand. The United Kingdom's court, nonetheless, may wind up the company if the court is of the opinion that this measure is 'just and equitable',¹⁶⁰⁴ as highlighted in Chapter 4. In this regard, the United Kingdom's court may wind up the company if it finds it to be the most 'just and equitable' solution in relation to all shareholders involved, as presented in

¹⁵⁹⁹ *Corporations Act 2001* (Cth) (n 3) s 233(1)(d).

¹⁶⁰⁰ *Ibid* s 233(1)(e).

¹⁶⁰¹ *Companies Act 2006* (UK) (n 4) s 996(1).

¹⁶⁰² *Ibid* s 996(2).

¹⁶⁰³ *Corporations Act 2001* (Cth) (n 3) s 233(1)(a).

¹⁶⁰⁴ *Insolvency Act 1986* (UK) (n 727) s 122(1).

Chapter four. This suggests that in the United Kingdom, the courts have more discretion under 'just and equitable' grounds, which is broader than the Australian winding-up oppression remedy, and offers a more flexible approach. In contrast, Australian oppression laws focus on more specific and severe grounds for winding up, such as 'oppressive' or 'unfair' and 'discriminatory' conduct against shareholders in companies, and is limited as a remedy for minority shareholders' oppression when other remedies are not appropriate.

In sum, while Australia and the United Kingdom start from similar positions regarding minority shareholders' oppression, the jurisdictions' provisions differ from one another. In many respects, it might be thought that compared to Australian oppression laws, the United Kingdom's oppression laws are broader in their scope in terms of the oppressive conduct standards. While Amelia Schultz criticises the remedies available to oppressed minority shareholders in closely-held corporations in common law countries,¹⁶⁰⁵ arguing that they do not provide adequate protection to oppressed shareholders,¹⁶⁰⁶ she also notes that, historically, the laws governing minority shareholders in common law countries have been more protective compared to those in civil law countries.¹⁶⁰⁷ Accordingly, this thesis argues that Australia could benefit from adopting practices from the United Kingdom, as outlined below and discussed in more detail later, including the following:

- putting greater emphasis on how both the past and current behaviours of controlling shareholders in companies undermine the minority shareholders' interests;
- creating certainty as to whether the course of action for oppression ought to be contrary to all shareholders or members in companies collectively, or whether it can also affect certain members in different ways.

This thesis also identifies that in both Australia and the United Kingdom, the term 'unfair prejudice' lacks a clearly defined scope, as their corporate laws do not provide a clear definition of what constitutes 'unfairly prejudicial' conduct.

¹⁶⁰⁵ Schultz (n 55) 500.

¹⁶⁰⁶ Ibid 501.

¹⁶⁰⁷ Ibid 500-1.

Consequently, it is argued in this thesis that both jurisdictions need to clarify the definitions of ‘oppressive’ and ‘unfairly prejudicial’ conduct so as to provide clearer guidance to courts and shareholders regarding their scope and application. In light of this, both countries would benefit from statutory reform with a focus on establishing clear definitions of each country’s respective standard for oppressive conduct.

9.3 Remedies for Minority Oppression in Australia and the United States (specifically Delaware)

Similar to the United Kingdom, the laws governing directors and their duties also reveal similarities between Australia and the United States. In both countries, the directors’ duties discussed in Chapters 3 and 5, respectively, are derived from corporate statutes and case law. In the United States, under the *MBCPA*, directors owe fiduciary duties of care and loyalty to the corporation, and are expected to act in good faith. However, Delaware relies on equitable directors’ duties. In Delaware, as found in *Guth v Loft Inc*,¹⁶⁰⁸ all duties owed by directors are classified as ‘fiduciary’ duties which require ‘undivided and unselfish loyalty to the corporation and its shareholders’, as shown in Chapters 3 and 5, respectively. Conversely, in the United Kingdom, the court in *Percival v Wright*¹⁶⁰⁹ ruled that a director owes fiduciary duties only to the company.

A closer examination of the minority shareholders’ oppression laws in Australia and the United States reveals some differences between the two countries, especially when comparing Australia’s oppression laws with those of Delaware. Primarily, in the United States, even though most corporate laws vary according to state, the *MBCPA* has been adopted by the majority of states. In the United States, under the *MBCPA*, as in Australia, the term ‘oppressive’ conduct is not defined in the statute and it is up to the courts to define it. As such, in Australia, the term ‘oppressive’ is interpreted through case law to mean conduct that is ‘burdensome, harsh and wrongful’.¹⁶¹⁰ In this regard, the United States court in

¹⁶⁰⁸ *Guth v Loft Inc* 5 A 2d 503 (Del Ch, 1939) (n 1092).

¹⁶⁰⁹ *Percival v Wright* [1902] 2 Ch 421.

¹⁶¹⁰ *Wholesale Society Ltd v Meyer* [1959] AC 324 (n 146).

Meiselman v Meiselman,¹⁶¹¹ held that a conduct is considered ‘oppressive’ with reference to ‘reasonable expectations’ of minority shareholders in companies and interrupting these expectations. In Australia, the court in *Gambotto v WCP Ltd*,¹⁶¹² emphasized that the ‘reasonable expectations’ of shareholders should be taken into account when determining if oppression has occurred. This thesis argues that this approach, grounded in Australian case law, offers a general framework for assessing oppressive conduct based on the specifics of each case, while providing some protection to minority shareholders. However, this thesis argues that this approach leads to inconsistencies, as it allows for various interpretations of oppressive conduct depending on the facts and circumstances of each case. In this regard, this thesis has identified that both countries would benefit from a clearer statutory definition of what constitutes ‘oppressive’ conduct, in order to identify and address violation of the minority shareholders’ rights more effectively, as demonstrated in Chapters 3 and 5, respectively. Such clarity would reduce the risk of powers being misused within companies, and support better corporate governance practices.

Furthermore, in the United States, under the *MBCPA*, shareholder dissolution is a default remedy for minority shareholder oppression where s 14.30 of the *MBCPA* sets the ground for involuntary dissolution of companies. In the United States, for dissolution of the company, it must be established that the company’s directors or those in control of the company have acted, are acting, or will act in an ‘illegal’, ‘oppressive’, or ‘fraudulent’ manner,¹⁶¹³ as discussed in Chapter 5. In the United States, however, some states have corporate laws that provide different grounds for minority oppression, not adopting the *MBCPA*. In California, for example, minority shareholders may file a claim for minority oppression alleging fraud, mismanagement, or unfairness on the part of majority shareholders who engage in oppressive conduct,¹⁶¹⁴ as presented in Chapter 5. Therefore, the *California Corporations Code 2020* establishes the grounds for dissolution whereby, subject to s 17707.01(b), a limited liability company may be

¹⁶¹¹ *Meiselman v Meiselman* 307 SE 2d 551 (NC Sup Ct, 1983) (n 1002).

¹⁶¹² *Gambotto v WCP Ltd* (1995) 182 CLR 432 (n 187).

¹⁶¹³ *Model Business Corporation Act* (2016 Revision) (n 5) s 14.30(2)(ii).

¹⁶¹⁴ *California Corporations Code 2020* (n 1010) s 1800(b)(4).

dissolved by the vote of 50% or more of the company's members.¹⁶¹⁵ Moreover, in New York, for an oppression claim to be successful, the minority shareholders must prove that the company's controllers engaged in illegal, fraudulent or oppressive conduct.¹⁶¹⁶ The court then must ensure that the oppression remedies (including dissolution) are justified or reasonably necessary for the protection of substantial numbers of shareholders.¹⁶¹⁷ Therefore, in the United States, not all states follow the *MBCPA*; instead, they have their own corporate codes that reflect their objectives.

In Australia, however, if 'oppressive' conduct occurs, a company may be subject to a compulsory winding up by the court,¹⁶¹⁸ as explored in Chapter 3. The involuntary dissolution in the United States and winding-up oppression remedy in Australia differ significantly in terms of the legal grounds and processes involved. In Australia, for example, the courts have wide discretion to determine when they consider appropriate 'that the company be wound up'.¹⁶¹⁹ Also, in Australia, applicants for an order to wind up a company may be the company, creditors, liquidator, Australian Securities and Investments Commission, or the Australian Prudent Regulatory Authority.¹⁶²⁰ Upon the winding up of the company and paying of the debts, any money left will be transferred to its shareholders. In the United States, however, the company may continue to run its business during the dissolution process, and minority shareholders may still be bought out by the company or by any shareholder in the company.¹⁶²¹ In this regard, s 14.34 of the *MBCPA* offers protection from the abuse of the dissolution process by allowing the corporation or other shareholders to elect to purchase all of the shares held by the petitioning shareholder, at a fair value rather than lowering the value of their shares. This can be done by filing to the court an 'election' to purchase the shares within 90 days of filing the petition for involuntary resolution.¹⁶²² So, unlike in Australia, in the United States, involuntary dissolution of a corporation as an oppression remedy allows minority shareholders to pressure majority

¹⁶¹⁵ *Ibid* s 17707.01(b).

¹⁶¹⁶ *New York Business Corporation Code* 2010 (n 1015) s 1104(a)(1).

¹⁶¹⁷ *Ibid* s 1104(b)(2).

¹⁶¹⁸ *Corporations Act 2001* (Cth) (n 3) s 233(2)(a).

¹⁶¹⁹ *Ibid* s 233(a).

¹⁶²⁰ *Ibid* s 462.

¹⁶²¹ *Model Business Corporation Act* (2016 Revision) (n 5) s 14.34(a).

¹⁶²² *Ibid* s 14.34(b).

shareholders into discontinuing the oppressive conduct. Accordingly, in the United States, this remedy is used as a tool to force changes in the conduct of majority shareholders. This contrasts with the approach in Australia, where the main intention behind the winding-up remedy is to protect minority shareholders from oppressive conduct within companies.

However, in its corporate statute, Delaware does not directly address shareholders' oppression. In Delaware, oppressed minority shareholders may seek relief through traditional causes of action based on general equitable principles. Therefore, the claims for oppressive conduct by majority shareholders in Delaware companies are often brought against those in control of companies for breach of fiduciary duties.¹⁶²³ In Delaware, moreover, the oppression claim may be pursued as direct action if minority shareholders can demonstrate that they were personally injured by the controlling shareholders. Consequently, shareholders in Delaware cannot make direct claims based on the company's rights.

Moreover, Delaware has developed standards to evaluate oppression claims by minority shareholders. These standards, as established in *Weinberger v UOP Inc*,¹⁶²⁴ include the 'entire fairness' standard, which requires of the defendants to demonstrate fairness of a transaction, divided into: 'fair dealing' and 'fair price'. Additionally, as established in *Reis v Hezelett Strip-Casting Corp*,¹⁶²⁵ the 'business judgement' standard presumes that directors made an educated decision in good faith and in the best interests of the company. Nevertheless, in *Nixon v Blackwell*,¹⁶²⁶ the court highlighted that under the 'entire fairness' standard the majority shareholder defendant may still defeat the claim for breach of fiduciary duty. In Australia, the 'entire fairness' concept is not recognised. Therefore, the Australian courts do not evaluate board decisions based solely on fairness alone, which defendants might seek to demonstrate.

¹⁶²³ *Little v Waters* 1992 WL 25758 (Del Ch, 1992) (n 247); see also *Nixon v Blackwell*, 626 A 2d 1366 (Del Ch, 1993).

¹⁶²⁴ *Weinberger v UOP Inc* 457 A 2d 701 (Del Ch, 1983) (n 1095).

¹⁶²⁵ *Reis v Hezelett Strip-Casting Corp* 28 A 3d 442 (Del Ch, 2011).

¹⁶²⁶ *Nixon v Blackwell* 626 A 2d 1366 (Del Ch, 1993) (n 250).

Delaware law also gives broad discretion to majority shareholders and company's directors in structuring mergers. In Delaware, s 253(a) of the *DGCL* provides a mechanism for mergers, where minority shareholders may be forced out of the company on the basis of a fair value cash buy-out.¹⁶²⁷ Yet, its scope is limited, as it applies only to mergers between a parent corporation and its direct subsidiaries.¹⁶²⁸ Moreover, in Delaware, for minority shareholders to have the right of redemption for a fair value of their shares or secure a buy-out, they must close a shareholders' agreement when they are making the investment. This should be done in order to secure the right to demand a buy-out or compel the company to redeem their shares. Thus, mergers under Delaware corporate law also present one of the core concepts that diverge from Australian oppression laws, which is primarily addressed through judicial scrutiny of the fairness under the 'entire fairness' standard.

While Australia and the United States have different oppression remedies, and the courts in the United States retain the power to dissolve the corporation, in Australia, the statutory framework for a claim of minority shareholders' oppression in companies is more comprehensive and uniform than that of the United States. As noted by Harry Haynsworth, even though every state in the United States has a statute that authorises the dissolution of a corporation, these laws vary significantly.¹⁶²⁹ Haynsworth further explained that in the United States, a few states have narrowly-drawn statutes that are 'useless as an effective device' for resolving shareholder disagreement.¹⁶³⁰ Hence, he concluded that in the absence of alternative forms of relief, the United States courts have limited options, often restricted to authorising the dissolution of the company or dismissing the claim.¹⁶³¹ Building on Haynsworth work, this thesis finds that introducing the concept of involuntary dissolution in Australia, based on the United States model, would offer limited additional protection for minority shareholders. While the threat of dissolution might potentially pressure majority shareholder to discontinue their oppressive conduct, the court may be reluctant

¹⁶²⁷ *Delaware General Corporations Law* (Title 8, Chapter 1 of the Delaware Code) (n 6) s 253(a).

¹⁶²⁸ *Ibid* s 253(a).

¹⁶²⁹ Haynsworth (n 253).

¹⁶³⁰ *Ibid* 32.

¹⁶³¹ *Ibid* 41.

to apply such a drastic remedy, especially when a buy-out remedy is a less drastic alternative.

Unlike Australia, Delaware's courts are not limited to statutory remedies, and have greater flexibility to order equitable remedies for breach of fiduciary duties towards oppressed minority shareholders, based on the specific facts and circumstances of each case. In their study, George Young, Vincent Circelli, and Kelli Walter found that in Delaware, courts protect oppressed minority shareholders in limited circumstances, such as squeeze-out and freeze-out in a case-specific approach.¹⁶³² Moreover, they highlighted that this protection is based primarily on the Delaware courts' interpretation of fiduciary, disclosure duties, and appraisal rights.¹⁶³³ Building on their work, this thesis argues that Australia could benefit from incorporating aspects of Delaware's 'entire fairness' doctrine to provide better protection for minority shareholders in Australian companies.

9.4 Remedies for Minority Oppression in Australia and Canada

In Canada, duties imposed on the company's directors are very similar to directors' duties in Australia. Directors' duties under Australian corporate law to act in good faith and, in the best interest of the company found in s 181(1)(a) of the Australian *CPA* closely resemble the duties of the directors under s 122(1)(a) of the *Canada BCPA*. Therefore, when acting as a director or officer in a Canadian company, s 122(1)(a) of the *Canada BCPA* ensures that the company's interests are paramount and prioritised over any personal interests. Accordingly, directors in Canadian companies must 'act honestly in good faith with a view to the best interests of the corporation'.¹⁶³⁴ Also, as in Australia,¹⁶³⁵ in performing their duties, Canadian directors must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.¹⁶³⁶ Hence, under the Canadian corporate statute, directors are required to make

¹⁶³² Young, Circelli and Walter (n 259) 260.

¹⁶³³ *Ibid.*

¹⁶³⁴ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 122(1)(a).

¹⁶³⁵ *Corporations Act 2001* (Cth) (n 3) s 180(1) states that directors must exercise reasonable care and diligence when discharging their duties.

¹⁶³⁶ *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 122(1)(b).

reasonable decisions based on the circumstances and act on an informed basis, as required under the duty of care.

With respect to oppression laws, a detailed study of the oppression remedies in Australia and Canada also reveals several similarities. Initially, similar to Australia, s 241(2) of the *Canada BCPA*, gives the court broad powers to remedy conduct that is 'oppressive' or 'unfairly prejudicial'.¹⁶³⁷ In this regard, in the Canadian case *Nystad v Harcrest Apartments Ltd*,¹⁶³⁸ as in Australia, the 'oppression' was defined as 'burdensome', 'wrongful' and 'harsh' conduct but also as a conduct that lacks 'probity' of 'fair' dealings. In Canada, the primary standard by which courts determine whether there has been oppressive conduct is 'unfairness', which also serves as the general ground for bringing an action for oppression. This was highlighted in *BCE Inc v 1976 Debentureholders*,¹⁶³⁹ where the Supreme Court of Canada ruled that the applicant may bring a claim if the majority's conduct was 'unfair', even though it was lawful. Therefore, in Canada, minority shareholders may pursue a claim for oppression even without breach of law, provided that the conduct is deemed 'unfair' and disregards the interests of the complainant. Similarly, in Australia, the conduct must be seen to violate minority shareholders' rights even if there is no breach of law, as long as the conduct is 'oppressive', 'unfairly prejudicial', or 'discriminatory' to shareholders' interests. Moreover, in Canada, the *Canada BCPA* allows for an oppression action against the company, which can be applied to both the parent and subsidiary companies. This derives from s 2(1) of the *Canada BCPA*, which defines 'affairs' as 'the relationship among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such body corporate'. Conversely, the Australian *CPA* does not specifically address the actions of directors towards a subsidiary

¹⁶³⁷ Ibid s 241(2). This includes restraining the conduct complained of, appointing a receiver, regulating the company's affairs, directing an issue or exchange of securities, appointing directors, forcing the acquisition of securities, compensating the security holder for the monies paid for securities, setting aside a transaction or contract where corporation is a party, producing financial statements, compensating an aggrieved person, amending charter documents, liquidating and dissolving the corporation, directing an investigation, requiring the trial of any issue: s 241(3) of the *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can).

¹⁶³⁸ *Nystad v Harcrest Apartments Ltd* [1996] 3 BCLR 2d 39 (n 1206).

¹⁶³⁹ *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560: the Court held that "Actual unlawfulness is not required to invoke s. 241; the provision applies where the impugned conduct is wrongful, even if it is not actually unlawful".

company. This is particularly relevant when the director's conduct directly impacts the interests of minority shareholders in a subsidiary.

Similar to Australia, Canada also provides an appraisal remedy to oppressed minority shareholders, much like the court's power under s 233(1) of the Australian *CPA* to order the purchase of shares. In this regard, in Canada, minority shareholders in companies may force the corporation to purchase their shares for a 'fair' value of the shares. This appraisal remedy is triggered by three circumstances: when shareholders are granted rights to dissent upon certain circumstances,¹⁶⁴⁰ in the case of a compulsory acquisition of purchase of 90% or more of the shares of a particular class,¹⁶⁴¹ or when the shareholder (holding 10% or less of the outstanding shares of a particular class) has the right to request an acquisition.¹⁶⁴² Accordingly, this remedy allows Canadian minority shareholders to dissent from the company's decisions, and exit the company if the controlling shareholders abuse their corporate powers. Moreover, in Canada, minority shareholders may also oppose mergers and require the purchase of their shares at fair value. Similarly, in Australia, under s 661A of the Australian *CPA*, during a takeover bid and compulsory acquisition process, the shareholders holding at least 10% of the securities in a bid class (by number) may block a compulsory acquisition under a takeover bid if the bidder holds at least 90% of the securities and has acquired at least 75%. These provisions, in Australian, as in Canada, prevent the oppression of minority shareholders during mergers and a corporate takeover, and ensure that minority shareholders are not unfairly excluded from the company.

Furthermore, in Australia, the rights attached to shares in a class of shares may be varied or cancelled according to the company's constitution, by a special resolution of the company, or written consent of members holding 75% of the votes in the class.¹⁶⁴³ Thus, in Australia, shareholders who hold at least 25% or more of the voting rights may prevent some significant decisions being made in the company. Accordingly, in Australia, if members in a class do not agree for the

¹⁶⁴⁰ *Business Corporations Act 1990* (Ontario) (n 1188) s 185(1).

¹⁶⁴¹ *Ibid* s 188(1).

¹⁶⁴² *Ibid* s 189(1).

¹⁶⁴³ *Corporations Act 2001* (Cth) (n 3) s 246(B).

shares to be varied or cancelled, members with at least 10% of the votes in that class may apply to the court for variation, cancellation or modification to be set aside. This allows minority shareholders in Australia to protect the rights attached to shareholders' shares. No such right exists under Canadian corporate laws.

Moreover, similar to Australia, the courts in Canada may order a winding up of the company which is also the most drastic form of shareholder relief in Canada, as illustrated in *Re Domglas Inc.*¹⁶⁴⁴ In both countries, winding up is usually sought as a remedy of last resort.

In essence, Canadian oppression remedies are broader than those in Australia, granting Canadian courts a greater discretion to address oppressive conduct by majority shareholders in companies. This extended authority allows Canadian court to determine appropriate remedies for 'oppressive' or 'unfairly prejudicial' treatment by the majority shareholders or the corporation itself, based on a wider range of circumstances. As noted by Brian Cheffins, the Canadian experience appears to strongly supports the adoption of a broad remedy for minority oppression as an effective solution for protecting minority shareholders in companies.¹⁶⁴⁵ Available remedies may include amending shareholder agreements, the setting aside of transactions or contracts, and modifying the corporation's articles or by-laws. As such, building on Cheffins' analysis, this thesis argues that the Australian *CPA* could benefit from adopting a similarly broad approach to address minority shareholders oppression, as implemented in Canada, in particular by introducing a compensation remedy that allows the court to award monetary damages for the harm incurred by minority shareholders.

Given the increasing complexity of corporate structures, where directors often make decisions that affect subsidiaries, this thesis also argues that the Australian *CPA* should be amended to address this legislative gap and provide better protection for minority shareholders in subsidiary companies. This would allow minority shareholders in the subsidiary to bring an oppression claim against oppressive conduct by the parent company's controllers.

¹⁶⁴⁴ *Re Domglas Inc* [1980] 13 BLR 135.

¹⁶⁴⁵ Cheffins (n 306) 339.

9.5 Remedies for Minority Oppression in Australia and Germany

As discussed in this thesis, the German legal system is based on the civil law tradition. It differs from other Commonwealth systems, including Australia, as its corporate laws are organised in systematic written codes. This is different from the Commonwealth systems where the foundation of the corporation laws are also the legal precedents established by the court decisions. Still, when comparing directors' duties under German corporate laws,¹⁶⁴⁶ and those under Australian corporate laws,¹⁶⁴⁷ similarities emerge in terms of the scope of responsibilities of company directors in both countries, but there are also some differences in how directors' duties are framed in each country. In Germany, similarly as in Australia, directors are required to perform their duties with the level of care that a prudent manager would apply in similar circumstances 'faithfully complying with the relevant duties'.¹⁶⁴⁸ Under the German corporations law, a breach of this duty triggers the company's liability for damages.¹⁶⁴⁹ Similarly, Australian corporations law holds directors accountable for decisions made in bad faith or for improper purposes.¹⁶⁵⁰ Moreover, Germany's two-tier board system provides an additional layer of oversight, comprising a management board and a supervisory board, with the management board accountable to the supervisory board. As such, in Germany, the management board is solely responsible for managing the company's affairs on its own responsibility.¹⁶⁵¹ In contrast, Australia has a one-tiered board system, where a single board of directors manages the company's affairs. Unlike in Germany, the entire board of directors shares responsibility for the company's operations.

In relation to oppression laws, in Germany, minority shareholders can petition against directors or company's shareholders focusing on specific instances of 'unfair' behaviours of majority control. In contrast, Australian *CPA* provides a more comprehensive framework for oppression claims, focusing on conduct that

¹⁶⁴⁶ *German Stock Corporations Act 1965* (Ger) (n 9).

¹⁶⁴⁷ *Corporations Act 2001* (Cth) (n 3).

¹⁶⁴⁸ *German Stock Corporations Act 1965* (Ger) (n 9) s 93(1).

¹⁶⁴⁹ *Ibid* s 93(2).

¹⁶⁵⁰ *Corporations Act 2001* (Cth) (n 3) s 181.

¹⁶⁵¹ *German Stock Corporations Act 1965* (Ger) (n 9) s 76(1).

is 'oppressive', 'unfairly prejudicial' or 'discriminatory' against shareholders in companies.

In Germany, as in Australia, winding up is the remedy most commonly used to resolve minority shareholders' oppression. In Germany, a *GmbH* may be wound up if it cannot achieve its purpose or if there is another 'important reason' for winding up, based on the company's circumstances.¹⁶⁵² However, in Germany, unlike in Australia, a party seeking the winding up of the company must demonstrate that an 'important reason' cannot be resolved among the members of the company. In this respect, s 61 of the German *GmbHG* sets out what constitutes 'important reason', i.e. if it is no longer possible for the company to achieve the purpose for which it was established. Nonetheless, this remedy can only be petitioned by shareholder or shareholders owning 10% of the company's shares.¹⁶⁵³ Additionally, in Germany, the winding-up remedy is restricted to achieving the purpose of the company and does not apply to individual shareholders' rights. This is because this remedy focuses on the company's affairs, rather than on the personal interests of shareholders seeking relief. Accordingly, its limitations are tied to the company's business objectives, rather than to individual considerations.

Moreover, in Germany, the winding-up remedy is mandatory¹⁶⁵⁴ and leads to liquidation of the company. In contrast, in Australia, the winding-up remedy is applied within the broader framework of s 233 of the Australian *CPA*, where it does not automatically result in liquidation. However, in Australia, this remedy can still lead to liquidation, particularly when internal disputes or breakdowns prevent the company from operating. Nevertheless, in both countries, courts will refrain from ordering a winding up if less drastic remedies are available. Consequently, as in Australia, a German court may order the company to be wound up if other means of addressing oppressive conduct by majority shareholders are inadequate.

¹⁶⁵² *German Limited Liability Companies Act 2008 (Ger)* (n 10) s 61(1).

¹⁶⁵³ *Ibid* s 61(2).

¹⁶⁵⁴ *Ibid* s 61(2).

Moreover, unlike in Australia, German courts developed two other instruments for minority shareholders' protection such as 'withdrawal' and 'expulsion'. These concepts are not found in the German statute, but are exit remedies developed through time by German courts. In this connection, in Germany, a shareholder may 'withdraw' or seek the 'expulsion' of a fellow shareholder upon showing 'substantial causes' that relate to the personal characteristics of the shareholders and their relationships. The shareholder with an 'important reason' to exit a German company may claim its exit without court intervention. However, if the company refuses to cooperate with the shareholder's exit rights, this cannot be enforced through court. This is contrary with Australian oppression remedies, which require court intervention. In Germany, the concept of 'withdrawal' often pertains to personal conflicts of minority shareholders with other shareholders. Therefore, the German 'withdrawal' remedy is suitable for shareholders who wish to exit the company for personal reasons, allowing them to receive monetary value for their shares while leaving the company in the hands of the remaining shareholders. On the other hand, 'expulsion' grants shareholders the right to a voice in the company's affairs, so during the 'expulsion' process, shareholders are expelled by means of a shareholders' vote.

In sum, the current Australian corporation laws do not recognise the remedies of 'withdrawal' and 'expulsion'. In this regard, Alan Koh observed that, even though 'withdrawal' remedies may be considered 'drastic', they are still 'final and effective legal solutions to intractable shareholder conflict'.¹⁶⁵⁵ Building on Koh's analysis, this thesis argues that incorporating such remedies into Australian corporate laws could prove beneficial in resolving minority shareholder disputes, offering a more personal view of shareholders' relationships and conflicts in companies.

9.6 Remedies for Minority Oppression in Australia, Singapore, and India

As in Australia, directors in Singapore are subject to both common law and statutory duties. Similar to Australia,¹⁶⁵⁶ under s 157(1) of the *Singapore CMA*,

¹⁶⁵⁵ Koh (n 365) 227.

¹⁶⁵⁶ Section 180(1) of the *Corporations Act 2001* (Cth) states: 'a director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise'.

directors must act honestly and use reasonable diligence in the discharge of the duties of their office.¹⁶⁵⁷ Also, directors in both countries are required to act in the company's best interests and the interests of current shareholders in the company as a whole. While both Australian and Singaporean corporate laws contain similar directors' duties, Australian law places greater emphasis on shareholders' protection, whereas Singaporean law focuses more on the overall management of the company. In both jurisdictions, if conflict arises between the company and its shareholders, the company directors should prioritise the company's interests as a whole.

Moreover, in India, directors' duties closely align with those found in Australia, particularly the duty to act in good faith and in the company's best interests, as outlined in s 181(1)(a) of the Australian *CPA*. Like Australian directors, those in India must act in good faith and promote the interests of the company and its shareholders.¹⁶⁵⁸ Similarly, Indian directors are required to exercise their duties with care and diligence reasonably expected from persons of their knowledge and status, and exercise independent judgement.¹⁶⁵⁹ As in Australia,¹⁶⁶⁰ Indian directors must not put themselves in a situation where their interests conflict with those of the company.¹⁶⁶¹ As evident, director's duties in Indian companies share many similarities with those in Australian companies, intended to protect shareholders' interests and ensure responsible corporate governance.

When examining oppression remedies in Australia, Singapore, and India, some key similarities emerge. Primarily, in Singapore, s 216 of the *Singapore CMA*, known as the 'oppression' jurisdiction, provides minority shareholders with remedies against 'oppressive' conduct by majority shareholders that disregards the interests of the members of the company, or against conduct that 'unfairly discriminates', or is otherwise prejudicial to one or more of the members.¹⁶⁶² Section 216 of the *Singapore CMA* gives four key grounds for oppression claims:

¹⁶⁵⁷ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 157(1).

¹⁶⁵⁸ *Companies Act 2013* (India) (n 12) s 166(2).

¹⁶⁵⁹ *Ibid* s 166(3).

¹⁶⁶⁰ Section 182(1) of the *Corporations Act 2001* (Cth) prohibits improper use of position for gaining an advantage or cause detriment to the corporation.

¹⁶⁶¹ *Companies Act 2013* (India) (n 12) s 166(4).

¹⁶⁶² *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 216.

‘oppression’, ‘disregard of a shareholder’s interests’, ‘unfair discrimination’, and ‘prejudice’. Similarly, in Australia, s 232 of the Australian *CPA*, details oppressive conduct as ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory against a shareholder or shareholders’.¹⁶⁶³ However, there is a notable difference between the two jurisdictions: in Singapore, only minority shareholders can bring an action under s 216 of the *Singapore CMA*, as a form of minority shareholder protection, whereas in Australia, s 234 of the *CPA* allows both current and past shareholders to apply for the oppression remedy. As such, Australia’s oppression remedy, as set out in s 232 of the Australian *CPA*, is broader provision compared to the remedy available in Singapore under s 216 of the *Singapore CMA*, giving courts more flexibility to address wider oppressive conduct.

Furthermore, in Singapore, oppression laws are also found under s 254(1)(i) of the *Singapore CMA*, as the ‘just and equitable jurisdiction’.¹⁶⁶⁴ Under this provision, the Singaporean court may order the winding up of a company where management deadlock has reached such an extent that other remedies would be ineffective. Similar to Australia, the Court of Appeal of Singapore in *Lim Swee Khiong v Borden Co (Pte)*,¹⁶⁶⁵ emphasised that the winding up of a company should be considered as remedy only when ‘no other remedy is available’.¹⁶⁶⁶ Also, in *Re Kong Thai Sawmill (Miri) Sdn Bhd*,¹⁶⁶⁷ the Court of Appeal of Singapore reaffirmed this approach, stating that winding up should be treated as a last resort.

Moreover, unlike Australia, Singapore does not provide a statutory right of minority buy-out or appraisal right for oppressed minority shareholders in public companies. However, in private companies, minority shareholders may have appraisal rights if these are expressly provided in the constitution or a shareholders’ agreement of the Singaporean company. In this respect, until recently, the winding up of a company in Singapore was the only remedy where the ‘just and equitable’ circumstances apply. In Singapore, while litigation

¹⁶⁶³ *Corporations Act 2001* (Cth) (n 3) s 232.

¹⁶⁶⁴ *Companies Act 2006* (Cap 50) (Singapore) (n 11) s 254(1)(i).

¹⁶⁶⁵ *Lim Swee Khiong v Borden Co Pte* [2006] 4 SLR 745 (n 1480).

¹⁶⁶⁶ *Ibid.*

¹⁶⁶⁷ *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227.

remains the primary recourse for minority oppression claims, the use of alternative dispute resolution methods is strongly encouraged. These methods have proven to be effective and efficient in resolving shareholders' disputes in companies.

Essentially, while both Singapore and Australia offer similar oppression remedies for minority shareholders, there are also key differences in the oppression laws in both countries. This thesis takes into account Alan Koh's study, which emphasises that efforts to protect minority shareholders should not distort the overall balance in their favour.¹⁶⁶⁸ Koh further noted that any ambiguity about the scope and limitations of the oppression remedy should be acknowledged and clearly defined.¹⁶⁶⁹ Therefore, this thesis argues that even though Australian oppression remedies are broader than those of Singapore, Australia could benefit from adopting alternative dispute resolution methods to resolve shareholders' disputes, with a greater focus on fairness, to prevent escalation to litigation.

In India however, ss 241-246 of the *India CMA* provide remedies to the company's members who face oppression by majority shareholders. According to the *India CMA*, the 'oppression', 'prejudice' and 'mismanagement' provisions in ss 241 and 242 form the foundation for these remedies. Specifically, s 241(a) of the *India CMA*, offers relief to minority shareholders against oppression if they are subject to conduct 'prejudicial' to the public interest, or 'prejudicial' or 'oppressive' to the member of the company or to the interests of the company.¹⁶⁷⁰ Accordingly, under the *India CMA*, a petitioner shareholder in oppression claims must demonstrate the existence of 'oppression', 'prejudice', or both. Therefore, s 241(1)(a) of the *India CMA* uses the terms 'prejudicial' or 'oppressive' separately, meaning that the petitioner must show that one or both conducts have occurred.

Similar to Australia, the term 'oppression' is not clearly defined under the *India CMA*. As the *India CMA* does not define 'oppression', the judiciary have taken the role of determining the concept based on the specific facts and circumstances

¹⁶⁶⁸ Koh (n 393) 90.

¹⁶⁶⁹ Ibid.

¹⁶⁷⁰ *Companies Act 2013* (India) (n 12) s 241(a).

in each case. Likewise, the term 'mismanagement' is not clearly defined under the *India CMA*. Nonetheless, the key difference between oppression remedies available to oppressed shareholders in Australia and India lies in the wording of the respective provisions. While s 232 of the Australian *CPA* refers to 'unfair prejudice' the *India CMA* uses the term 'prejudice'. This distinction narrows the Australian approach and places a heavy burden on the applicant to prove oppressive conduct.

Similar to Australia, India also requires 'just and equitable' grounds for winding up a company as an oppression remedy. Hence, minority shareholders in Indian companies must prove that the oppressive conduct is serious enough to justify such remedy. Accordingly, the conditional nature of this remedy, under s 242 of the *India CMA*, presents a significant challenge for minority shareholders seeking relief from oppressive conduct of affairs in Indian companies, as they must provide sufficient evidence to support such claims.

Nevertheless, in India, the National Corporate Law Tribunal ('NCL Tribunal') serves as a specialised entity for resolving shareholders' disputes. It intervenes in such disputes when a petition is filed on the grounds of 'oppression', 'prejudice', and 'mismanagement', as specified in ss 241-246 of the *India CMA*. As a specialised entity, the NCL Tribunal is designed to offer faster resolutions than the civil courts, offering more informed and accurate decisions. In this context, Sadhana and Kannappan observed that when a class action is filed, the NCL Tribunal issues a public notice, providing the opportunity for any affected party to join the proceedings.¹⁶⁷¹ Accordingly, the NCL Tribunal plays a crucial role in resolving shareholders' disputes in India.

Overall, India's approach to minority shareholders' oppression highlights the potential benefits of having specialised tribunals for the resolution of shareholders' oppression claims. By adopting India's model, Australia could strengthen its protection of minority shareholders in cases of oppression, offering

¹⁶⁷¹ Sadhana and Kannappan (n 424) 896.

a more specialised, cost-effective and efficient approach to provide relief for oppressed minority shareholders in companies.

9.7 Proposed Law Reform Recommendations

Considering the above, this thesis argues that even though Australian oppression remedies offer minority shareholders some safeguards against oppressive conduct of affairs in companies, still they do not offer adequate protection from the abuse of powers by company's directors and majority shareholders. By drawing insights from the oppression laws in jurisdictions such as the United Kingdom, United States (particularly Delaware), Canada, Germany, Singapore and India, the thesis suggests several reforms that have the potential to improve the effectiveness of the current oppression remedies for better minority shareholders' protection in Australia. Accordingly, amendments to sections 53, 232, 233, 234 and 235 of the Australian *CPA* are proposed, as detailed in the appendix below.

9.8 Conclusion

This chapter compared oppression laws in Australia with those of several jurisdictions recognised for their most advanced corporate governance systems: the United Kingdom, United States (specifically Delaware), Canada, Germany, Singapore, and India. It identified potential areas in which Australian oppression laws could be improved to provide clearer and more consistent protection for minority shareholders in companies. These key areas for improvement form the basis for recommendations proposed in this chapter, for amendments to the Australian oppression laws in order to provide more effective protection for minority shareholders in Australian companies and promoting better corporate governance practices in the country.

In comparing Australian oppression laws with those of selected jurisdictions, this chapter found that while there are some similarities between Australia and other Commonwealth systems, such as the United Kingdom, United States (specifically Delaware), and Canada, with regard to oppression remedies, notable differences

also exist. Namely, the United Kingdom's oppression laws provide oppression remedies for 'unfair prejudicial' conduct, which encompasses 'unfairness' towards shareholders in companies, whereas Australia and Canada have adopted statutory oppression remedies that address conduct deemed 'oppressive' or 'unfairly prejudicial' under the Australian *CPA* and the *Canada BCPA*. Moreover, similar to Australia, the 'oppression' concept in the United States is based primarily on the 'reasonable expectations' standard, i.e., whether majority shareholders violated the 'reasonable expectations' of the minority shareholders. In some states however, such as Delaware, minority shareholders are protected by a combination of fiduciary duty, class actions, and shareholders' appraisal rights.

Furthermore, this chapter demonstrated that when compared to the position in Germany, Singapore, and India, it is apparent that in Australia, minority shareholders receive more protection in Australian companies but could also benefit from some of the aspects of oppression laws in these countries. Accordingly, this chapter found that, in Germany, oppression claims are generally based on principles of 'fair dealing' and 'bad faith'. It further revealed that, in Singapore, s 216 of the *Singapore CMA* provides minority shareholders with an effective remedy to address 'oppressive', 'unfairly prejudicial', or 'discriminatory' conduct. For the resolution of shareholder disputes, Singapore encourages the use of alternative dispute resolution measures. This chapter further settled that in India, oppressed shareholders in a company may enforce strict actions against the company, its management, and its majority members by approaching the specialised NCL Tribunal.

In light of the preceding analysis, the chapter presented the following proposals for reforming ss 232 to 235 of the Australian *CPA*:

1. The phrase in s 53(a) of the *CPA* '**the affairs of a body corporate**', should be amended to include the following: '**and refers to the relationships between a corporation, its subsidiary, and the directors, shareholders, and officers of such body corporate**'. This will address the action of company's controllers and their impacts towards the

subsidiary company, thereby opening avenues for oppression actions for minority shareholders in subsidiary company.

2. The phrase in s 232 of the *CPA* '**conduct of a company's affairs...**', '**...is either...**', should be replaced by more precise words such as the '**company's affairs...**', '**...are being or have been conducted in a manner that is...**', for a better clarity and enabling the courts to take into account not just present, but also the past behaviours of company's controllers and their current influences on minority shareholders.
3. The phrase in s 232(d) of the *CPA* '**contrary to the interests of the members as a whole**' to be amended to '**contrary to the interests of members generally or every member of the company**', in order to clarify the right of every member of the company to individually seek oppression action when controlling shareholders harm their rights, yet not deemed contrary to members' interest as a whole;
4. A clear statutory definition within s 232 of the Australian *CPA*, should be provided for what constitutes wrongful conduct in companies, to ensure clarity. Therefore, this is proposed:

For the purposes of this Part, oppressive to, unfairly prejudicial to, or unfairly discriminatory against refers to actions or behaviours by a member or members of the company that abuse the decision-making powers in company's affairs, with such conducts being deemed unreasonable according to the standard of a reasonable director.

5. Section 233 of the *CPA* should be amended by adding a new provision, s 233(k), to include the words '**compensating an aggrieved person**', which would provide an additional avenue of relief for aggravated minority shareholder and establish a compensatory mechanism.

6. Section 234(a) of the *CPA* should be amended by replacing the words '**a member of the company**' with '**members or every member of the company**', to dispel the uncertainty as to whether an action constituting oppression must affect all shareholders or members collectively, or it may arise from conduct that impact certain members differently.

Subject to further in-depth analysis, this thesis proposed adopting the 'entire fairness' doctrine to provide additional protection for minority shareholders, imposing stricter expectations on the conduct of directors and shareholders. It also recommended introducing the 'withdrawal' and 'expulsion' mechanisms as exit rights for minority shareholders without the need for court intervention. The thesis also identifies that Australia could benefit from the use of alternative dispute resolutions, such as practices in Singapore that focus on fairness. Additionally, the introduction of specialised courts, as in India, could offer faster, more expert and cost-effective relief for minority shareholders.

In sum, while the scope of the oppression remedies in Australia has been broadened over time, these remedies still fail to address all the challenges faced by oppressed minority shareholders. Accordingly, this thesis contributes to the existing body of knowledge by advancing the above recommendations intended to provide more effective remedies for shareholders.

Chapter 10

Conclusion

- 10.1 Overview**
- 10.2 Outline and Findings of the Research**
- 10.3 Conclusion**

10.1 Overview

This concluding chapter provides an outline of the research and presents the overall conclusions. It reaffirms the key findings and outcomes of this study, highlighting the thesis's contribution to deepening the understanding of minority shareholders' protection in Australia and compared jurisdictions. Based on the analysis presented in earlier chapters, it emphasises that, in companies, not all shareholders' interests are always treated equally. There may be circumstances in which the interests of the company or minority shareholders are usurped in favour of those of the majorities. To counter this issue, Australia, under Part 2F.1 of the *CPA*, specifically in ss 232 to 235, provides a statutory remedy for the oppression of minority shareholders, which serves as legal protection available to the oppressed shareholders in companies. By comparison, countries such as the United Kingdom, United States (specifically Delaware), Canada, Singapore and India, have also developed statutory and common law causes of action to address minority oppression in companies. Germany, however, as a civil law jurisdiction, provides minority shareholder protection in different ways.

This research examined the oppression remedies available to minority shareholders in the selected jurisdictions and provided a comparative analysis of their oppression laws. Subsequently, the concluding chapter confirms that, based on the findings in this study, Australia's oppression laws would greatly benefit from the implementation of reforms inspired by the approaches adopted in the United Kingdom, United States (specifically Delaware) and Canada, as discussed in the previous chapters. Among the suggested proposals, some reforms include

clarifying wording in the *CPA*, introducing a statutory definition of the terms ‘oppressive’, ‘unfairly prejudicial’, or ‘unfairly discriminatory’ conduct, and incorporating compensation as a specific remedy for such conduct. These reforms, along with the recommendations presented in Chapter 9, would strengthen the protection of minority shareholders in Australian companies, and promote improved corporate governance practices in Australia.

The following sections of this concluding chapter summarise the structure of the research and its key findings.

10.2 Outline and Findings of the Research

Chapter 1 of this thesis introduced the topic and outlined its structure. It defined the main research question: whether the oppression remedies under ss 232 to 235 of the Australian *CPA* adequately protect oppressed minority shareholders in companies and if not, how this issue can be addressed and what reforms could be implemented. The chapter also explained the purpose of the study: to conduct a comparative analysis of the oppression laws in Australia and the selected jurisdictions, mentioned earlier. It also identified the research methodologies applied in this study, including comparative legal research, doctrinal research and qualitative research approaches. These methods assisted in the analysis of similarities and differences in the oppression laws in the examined countries, helping to identify the most suitable models informing the legislative reforms proposed for Australia’s oppression laws. The methodologies were also used to locate, interpret and analyse relevant legal principles, providing evidence to support the arguments presented in the study. The chapter further pointed out that the research is grounded on a comprehensive review of legislation, case law, and corporate law literature from the examined jurisdictions. Additionally, Chapter 1 discussed the significance of the research and its contribution to the field, pointing out that, as a new area of study, this research is original and contributes to the existing body of knowledge.

In **Chapter 2**, this thesis presented a review of the relevant literature on corporate governance and shareholders rights in Australia and the jurisdictions under

examination. The chapter explored different theories of corporate governance and found notable differences in corporate governance frameworks of the examined countries. It identified that, to ensure more effective protection for minority shareholders that effectively meet shareholders' and investors' expectations, as well as global developments, Australian corporate governance standards require further improvements. Therefore, the chapter determined that, in order to strengthen its corporate framework and provide better protection for minority shareholders in companies, Australia should consider adopting elements of the corporate structures from the examined jurisdictions, which are recognised for their advanced corporate frameworks.

In **Chapters 3, 4 and 5**, this thesis examined the minority shareholders' protection in Australia, the United Kingdom and United States (specifically Delaware), respectively. These chapters explored the foundation of the companies, the roles of their directors and the statutory, common law, and the fiduciary duties of directors in the selected jurisdictions. The chapters also examined the oppression remedies and case law on minority shareholders' oppression in the examined countries. The findings of these chapters confirmed that in each jurisdiction, company directors are expected to carry out their responsibilities and perform their duties in a manner that upholds the best interests of the company. In Delaware, however, directors are also required to act in the best interests of both the company and its shareholders. The findings further affirmed that for a company to run efficiently and effectively, directors in all these jurisdictions must comply with obligations stipulated by corporate laws and fulfil the directors' duties prescribed by such laws.

Moreover, the findings in these chapters suggest that, although similar, there are notable differences in the oppression laws of these countries. For instance, in Australia, minority shareholders have access to legal remedies when the conduct of a company's controllers is 'contrary to the interest of the members as a whole', as provided in s 232(d) of the Australian *CPA*. Such conduct may also be 'oppressive', 'unfairly prejudicial', or 'unfairly discriminatory', which terms are not statutorily defined and are, instead, subject to judicial interpretation. Accordingly, s 233 of the *CPA* specifies a number of remedies available to minority

shareholders who have suffered oppression in companies. In the United Kingdom, however, s 994 of the *United Kingdom CMA* provides a remedy for oppressed minority shareholders if the company's affairs are found to be 'unfairly prejudicial'. The concept of 'unfair prejudice' is interpreted in a broad manner, with the applicable standard requiring an assessment of the conduct in terms of what is expected of a director acting reasonably. However, if an oppression claim is found in favour of the minority shareholders, the court may issue various orders under s 996 of the *United Kingdom CMA*, where the two most common remedies are the buy-out of shares under s 996(2)(e) of the *United Kingdom CMA* and the statutory remedy for a 'just and equitable' winding up under s 122(1) of the *United Kingdom Insolvency Act 1986*.

The findings further established that in Delaware, the Delaware Court of Chancery addresses shareholders' oppression through the imposition of fiduciary duties, as the *DGCL* does not recognise a cause of action for minority shareholders' oppression. As Delaware courts rely heavily on equity, minority shareholders may seek remedies for breach of fiduciary duties under the 'entire fairness' doctrine, which requires shareholders to demonstrate the fairness of both the 'price' and the 'dealing' in any transaction.

Moreover, in **Chapter 6**, this thesis examined the protection of minority shareholders in Canada. The findings indicated that the Canadian oppression remedy, as outlined in s 241 of the *Canada BCPA*, provides a powerful tool for addressing directors' conduct that is 'oppressive', 'unfairly prejudicial', or 'unfairly disregards' the interests of security holders, creditors, directors or officers. This approach extends protection to oppressed minority shareholders in subsidiaries, as Canadian law interprets a company's affairs to include its relationship with affiliates, unlike s 53(a) of the *Australian CPA*, which limits the scope to matters concerning the body corporate itself. The findings in this chapter also indicate that the grounds for initiating an oppression claim in Canada are broader than those in Australia, with Canadian courts having the authority to grant remedies and issue any order they consider fit. However, the most commonly sought and granted remedy remains the buy-out remedy, usually based on the fair market value of the shares.

Chapters 7 and 8 introduced the position on minority shareholders' oppression taken by Germany, Singapore and India, and examined their oppression laws. In Chapter 7, this thesis highlighted that German corporate law recognises the concepts of shareholder 'withdrawal' and 'expulsion' based on the existence of 'substantial causes' related to the personal characteristics of the shareholders. These mechanisms provide minority shareholders with exit rights without requiring court intervention, an approach not reflected in Australia's current corporate laws. The findings also affirmed that in Germany, as a civil law jurisdiction, s 61 of the *GmbHG* allows for the winding up of a company if it is unable to accomplish its purpose or for any other 'important reason' based on the specific circumstances. In Germany, this remedy is mandatory, unlike Australia, where the winding up of a company, under s 233 of the *CPA*, is discretionary.

Moreover, Chapter 8 found that Singapore emphasises alternative dispute resolutions methods when addressing shareholders' disputes, despite allowing shareholders to petition the court under s 216 of the *Singaporean CMA*. In India, however, minority shareholders facing oppression may enforce strict actions against controlling shareholders by approaching a specialised authority such as the NCL Tribunal. The findings also confirmed that s 242 of the *Indian CMA* grants the NCL Tribunal broad discretionary powers to issue any order as it sees fit in cases involving 'oppression', 'prejudice', and 'mismanagement' by majority shareholders in Indian companies. Similar to the approach in Australia, they are determined based on the specific facts and circumstances in each case.

In **Chapter 9**, this thesis presented a comparative analysis of Australia's oppression laws and those of the selected jurisdictions, proposing legal reforms and recommendations to improve the effectiveness of the Australian *CPA*, as discussed above.

10.3 Conclusion

In conclusion, based on the research conducted, analysis undertaken and the findings presented in this study, it is argued that while the scope of oppression

remedies has evolved over time, the current oppression laws in Australia are inadequate in providing effective protection to minority shareholders in Australian companies. Key shortcomings include the lack of clarity in the wording of the Australian *CPA*, the absence of a clear definition of what constitutes unlawful or oppressive conduct in companies, and the failure to recognise compensation as a specific remedy for shareholder oppression. Accordingly, the concluding chapter underscores the need to amend the current statutory oppression remedies under the Australian *CPA* by incorporating key aspects of oppression laws from the comparator jurisdictions in order to improve the effectiveness of Australia's legal framework and advance its overall corporate governance structure, as outlined above.

APPENDIX - Law Reform Recommendations

I

AMENDMENT OF THE CORPORATIONS ACT 2001 – SECTION 53

Meaning of affairs—body corporate other than a CCIV

For the purposes of the definition of *examinable affairs* in section 9, section 53AA, 232, 233, 234, paragraph 461(1)(e), section 487, subsection 1307(1) or section 1309, or of a prescribed provision of this Act, the affairs of a body corporate (other than a CCIV) include:

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body; **and refers to the relationships between a corporation, its subsidiary, and the directors, shareholders, and officers of such body corporate.**

It is proposed that the rest of this section remain unchanged.

This thesis contends that the phrase ‘the affairs of a body corporate’, in s 53(a) of the Australian *CPA* should be amended to include the following words: ‘**and refers to the relationships between a corporation, its subsidiary, and the directors, shareholders, and officers of such body corporate**’. Currently, the Australian *CPA* does not address the actions of director towards subsidiary, which cannot be considered in isolation. Rather, regard should be given to the actions of directors in the company and their impact towards its subsidiary. This approach would provide an opportunity for oppressed minority shareholders in the subsidiary to bring an oppression claim when decisions made by the parent

company's controllers also affect the subsidiary. This is the case in Canada, where under the *Canada BCRA*, the term 'affairs' includes 'the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate', as previously stated.¹⁶⁷² Because the parent company holds significant control over the subsidiary, without proper protection, minority shareholders could be subject to decisions made by the parent company that may harm their interests. Therefore, it is important to recognise that minority shareholders in a subsidiary should also be aware that 'the affairs of a body corporate' include the director's actions towards the subsidiary and not only toward the company, in order to ensure protection of their rights. Accordingly, if the court in oppression cases makes an order regarding minority shareholders' oppression, this order should as well apply to the subsidiary.

II

AMENDMENT OF THE CORPORATIONS ACT 2001 - SECT 232

Grounds for Court order

The Court may make an order under section 233 if:

- (a) ~~the conduct of a~~ company's affairs; or
- (b) an actual or proposed act or omission by or on behalf of a company; or
- (c) a resolution, or a proposed resolution, of members or a class of members of a company;

~~is either~~ **are being or have been conducted in a manner that is:**

- (d) ~~contrary to the interests of the members as a whole;~~ **contrary to the interests of members generally or every member of the company;** or
- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

¹⁶⁷² *Canada Business Corporations Act* (RSC, 1985, c C-44) (Can) (n 8) s 2(1).

For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

For the purposes of this Part, oppressive to, unfairly prejudicial to, or unfairly discriminatory against refer to actions or behaviours by a member or members of the company that abuse the decision-making powers in company's affairs, with such conducts being deemed unreasonable according to the standard of a reasonable director.

Note 1: For *affairs*, see sections 53 and 53AAA.

Note 2: The effect of paragraph (d) is extended in relation to a sub – fund of a CCIV: see section 1227F.

- (1) Considering the approach adopted in s 994 of the *United Kingdom CMA*, this thesis argues that the words '**conduct of a company's affairs...**', '**...is either...**' in s 232 of the Australian *CPA*, should be replaced with '**company's affairs...**', '**...are being or have been conducted in a manner that is...**' This approach shifts the focus on how past or ongoing behaviours by controlling shareholders in companies may undermine the minority shareholder's interests. This is important to ensure that the law effectively addresses past, not only present, oppressive conduct and to enable timely judicial intervention when such conduct occurs. Accordingly, this proposed reform would provide better clarity for courts by reinforcing the need to consider how the past management of a company's affairs directly and currently affects minority shareholders in companies in the present. Therefore, replacing the words 'conduct of a company's affairs...' '**...is either...**' under s 232 of the Australian *CPA*, with more specific wording such as '**company's affairs...**', '**...are being or have been conducted in a manner that is...**', would clarify this provision, enabling the law to address the immediate effects of past and present directors' actions on minority shareholders' rights within company.

- (2) Furthermore, it is recommended in this thesis that the words in s 232(d) of the Australian *CPA* '**contrary to the interests of the members as a**

whole’ be amended with the words **‘contrary to the interests of members generally or every member of the company’**, similar to s 994 of the *United Kingdom CMA*. This is because, in Australia, company directors owe duties to the company, not its shareholders. Hence, directors at general meetings, when making decisions about the corporation’s business, consider the company’s interests and not those of individual shareholders. When controlling shareholders misuse their powers in order to oppress minority shareholders within companies, s 232(d) of the Australian *CPA* creates uncertainty as to whether the course of action for oppression ought to be contrary to all shareholders or members in company collectively or whether it will affect certain members in different ways. This weakens minority shareholders’ confidence, as s 232(d) of the Australian *CPA*, in its current form, appears in a number of respects to refer to the interests of the group as a whole, rather than to the interests of different classes of company’s members, such as minority or majority shareholders. Accordingly, minority shareholders may lack adequate protection under the current focus ‘to the interests of the members as a whole’ which, in practice, may allow actions by controlling shareholders who harm minority shareholders’ rights and interests, yet are not deemed contrary to the interests of the members as a whole. Having members of the company aware that the court may make an order under s 233 of the Australian *CPA* for oppressive conduct of affairs, if the conduct is ‘contrary to the interests of members generally or every member of the company’, rather than just being ‘contrary to the interests of the members as a whole’ is a significant step forward in protecting member’s individual rights and individual shareholders’ interests as it broadens the scope of protection.

- (3) Additionally, providing a clear definition in the Australian *CPA* of what constitute **‘oppressive to’, ‘unfairly prejudicial to’, or ‘unfairly discriminatory’** conduct is essential for ensuring consistency in the interpretation and clarity of these terms. This would promote legal certainty in protecting the interests of minority shareholders, resulting in more consistent outcomes. That being said, both Australia and the United Kingdom would benefit from statutory reforms that clearly define each

country's respective standards of oppressive conduct. Such reforms would offer a clearer guidance to the court and company shareholders, offering more effective protection of the rights of minority shareholders, while also encouraging more efficient corporate practices. Accordingly, this thesis proposes that the following definition be incorporated into s 232 of the Australian *CPA*:

For the purposes of this Part, oppressive to, unfairly prejudicial to, or unfairly discriminatory against refer to actions or behaviours by a member or members of the company that abuse the decision-making powers in the conduct of a company's affairs, with such conducts being deemed unreasonable according to the standard of a reasonable director.

III

AMENDMENT OF THE CORPORATIONS ACT 2001 - SECT 233

Orders the Court can make

- (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
- (a) that the company be wound up;
 - (b) that the company's existing constitution be modified or repealed;
 - (c) regulating the conduct of company affairs in the future;
 - (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
 - (e) for the purchase of any shares with an appropriate reduction of the company's share capital;
 - (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
 - (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute,

prosecute, defend or discontinue specified proceedings in the name and on behalf of the company.

- (h) appointing a receiver or a receiver and manager of any or all of the company's property;
- (i) restraining a person from engaging in specified conduct or from doing a specified act;
- (j) requiring a person to do a specific act;
- (k) compensating an aggrieved person.**

Note: If the company is a CCIV, there are modifications for paragraphs (1)(a) and (h) (see section 1227G and Part 8B.6).

Order that the company be wound up

- (2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
 - (a) as if the order were made under section 461; and
 - (b) with such changes as are necessary.

Order altering constitution

- (3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
 - (a) the order states that the company does have the power to make such a change or repeal; or
 - (b) the company first obtains the leave of the Court.

Note: If the company is a CCIV the reference to section 136 is modified (see subsection 1227G(2)).

This thesis recommends amending the oppression remedies under s 233 of the Australian *CPA* by adding a new provision, s 233(k), to include the following words '**compensating an aggrieved person**' similar to the provision in s 241(3)(j) of the *Canada BCPA*. The inclusion of compensation as an additional remedy for oppression would provide aggrieved minority shareholders in Australian companies with a standalone avenue for relief, especially given that such a remedy is not explicitly included in s 233 of Australian *CPA*. Shareholders invest in the company and, by doing so, they should have confidence that their personal rights and not only the company's rights are protected, especially when they suffer personal harm from abusive actions in companies. This remedy would address the gap in the Australian *CPA* by providing a direct avenue for compensation in certain circumstances, as courts currently tend to order non-compensatory remedies, such as buy-outs or winding up of a company, as demonstrated in this thesis. Therefore, the introduction of a compensatory remedy could achieve more equitable outcomes, improve shareholders relations within companies, and contribute to a more stable and efficient corporate environment.

IV

AMENDMENT OF THE CORPORATIONS ACT 2001 - SECT 234

Who can apply for order

An application for an order under section 233 in relation to a company may be made by:

- (a) ~~a member of the company~~ **members or every member of the company**, even if the application relates to an act or omission that is against:
 - (i) the member in a capacity other than as a member; or
 - (ii) another member in their capacity as a member; or
- (b) a person who has been removed from the register of members because of a selective reduction; or
- (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or

- (d) a person to whom a share in the company has been transmitted by will or by operation of law; or
- (e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
 - (i) the company's affairs; or
 - (ii) matters connected with the company's affairs.

Note 1: If an application is made under this section, in certain cases the Court may order that the company be wound up in insolvency (see section 459B).

Note 2: For *selective reduction*, see subsection 256B(2).

In light of the recommendations for amendment to s 233 regarding 'a member of the company', it is recommended that s 233(a) of the Australian CPA be revised to align with the previous section.

V

AMENDMENT OF THE CORPORATIONS ACT 2001 - SECT 235

Requirement for person to lodge order

- (1) If an order is made under section 233, the applicant must lodge a copy of the order with ASIC within 14 days after it is made.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

It is proposed that this section remain unchanged.

VI

Further Proposed Law Reforms

Consistent with the foregoing analysis, Australia could benefit from the following reforms to the oppression provisions within the Australian CPA:

- **adopting the ‘entire fairness’ doctrine as developed under Delaware corporate law**, which would provide additional protection for minority shareholders in Australian companies by requiring courts in oppression proceedings to assess both the ‘fairness of the transactions’ and the ‘fairness of the price’ offered for shares. In Australia, the ‘entire fairness’ doctrine could improve the transparency of decision-making processes and strengthen the accountability of both the company’s directors and its majority shareholders. This is because this doctrine would hold directors and majority shareholders to a higher standard by imposing stricter expectations on their conduct, especially when their actions impact minority shareholders in companies. Accordingly, by requiring company directors to justify the ‘fairness’ of their decisions, the doctrine would be particularly useful in preventing the abuse of decision-making powers for personal gain. Instead, it would ensure that company controllers act in the company’s best interests;
- **adopting mechanisms such as ‘withdrawal’ and ‘expulsion,’ as found under German oppression laws**, to provide minority shareholders with exit rights without the need for court intervention. By introducing these mechanisms, Australian oppression remedies would provide a more direct way for minority shareholders to exit the company if oppression occurs, avoiding the necessity of court proceedings. This would prevent minority shareholders from being forced to remain in a company if they are subject to ongoing oppression without court action. By incorporating these concepts from German oppression laws, Australia would make its oppression laws more cost-effective, while also promoting better corporate governance practices. These changes could also create a more attractive investment environment, in which investors feel more secure for having a non-litigation option when facing oppression. However, as Germany operates under a civil law system, this thesis also suggests that if these mechanisms were introduced into common law jurisdictions such as Australia, careful consideration must be given to their implementation, which requires further analysis.

Moreover, regarding the protection of minority shareholders, this study derived little insight from the practices in Singapore and India. However, a comparison of Australia's minority shareholder oppression laws with those of Singapore and India reveals that Singapore provides more practical solutions to shareholders' disputes in companies, emphasising alternative dispute resolution practices that prioritise fairness in the management of company's affairs.

On the other hand, India's approach to oppression remedies highlights the potential benefits of the NCL Tribunal in resolving shareholders' oppression claims. Drawing from India's model, Australia could strengthen its minority shareholders' oppression laws by adopting the concepts of specialised courts, as this would offer more cost-effective and efficient relief to oppressed minority shareholders within companies. Although both approaches have the potential to straighten Australian oppression laws, their application would require additional analysis.

Finally, ongoing reforms to Australia's oppression laws, aligned with those of the countries under comparison, will strengthen minority protection in Australia by clarifying the course of action for oppression claims and holding companies' controllers accountable for their behaviours, as discussed above.

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