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**Abstract**
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**Keywords**
Qatar Commercial Companies Act No (5) of 2002; Qatar Exchange (QE) Corporate Governance (CG) Code 2009; OECD Principles on minority shareholders' protection; shareholders' rights and remedies in Qatar; shareholders' remedies in Australian Corporations Act 2001 (Cth).

**Disciplines**
Law

# MINORITY SHAREHOLDERS' REMEDIES IN PUBLIC SHAREHOLDING COMPANIES: COMPARING THE STATE OF QATAR AND AUSTRALIA

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The Qatari Commercial Companies Act No (5) of 2002 and the Qatar Exchange (QE) Corporate Governance (CG) Code 2009 partially reflect the OECD Principles on minority shareholders' protection. These shareholders' rights are still insufficient, given the importance of good corporate governance and reliable shareholders' remedies in promoting investment and prosperity. This article urges Qatar to adopt minority shareholders' remedies in similar terms to the successful provisions in the *Australian Corporations Act 2001* (Cth).

A 'minority shareholder' is an equity holder in a company who does not have voting control, that is who holds less than a 50% interest in a company. Minority shareholders can often suffer oppression and abuse in the face of dominant majority shareholders. Accordingly, minority shareholders' remedies are becoming increasingly important. The main objective of minority shareholders' remedies is to provide a mechanism for minority shareholders to protect and enforce their rights when they have reasonable grounds to believe that they have been violated by the directors or majority shareholders. One of the strongest remedies available is an action against management and board members for oppressive or unfairly prejudicial conduct – the oppression remedy.

The Australian legal system provides better protection for minority shareholders than the State of Qatar. For another example, in Australia, s 236 of the *Corporations Act 2001* (Cth) ('Corporations Act') entitles shareholders to bring proceedings on behalf of a company in a representative suit. For its part, the *Qatari Companies Law No 5 of 2002* does not address the rights of minority shareholders in any real depth. Empirical research shows the importance of shareholder remedies to investment and economic development.[1] The Qatari legislature needs to urgently address this important subject and introduce effective legal means to protect minority shareholders.

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1 The 'law matters' thesis was advanced by financial economists Rafael la Porta and his colleagues. They discovered that, especially in countries with small equity markets, there is continued investment and economic development where there is competent legal protection for minority shareholders. Their conclusions led to the statement that 'law matters' - shareholders' legal rights do matter – and they are an important component of good corporate governance. (See also Haggard, (1999) 93 *Northwestern ULR* 641.)

## PART 1: INTRODUCTION

Public shareholding companies (also called joint stock companies in Qatar) play a crucial role in promoting economic and social progress.[2] Generally, they are able to raise large amounts of capital by issuing shares, debentures and other types of securities.[3] The legal systems of many countries regulate fund raising by requiring public companies to comply with certain requirements.[4]

The two core components of most public companies are the board of directors and the shareholders in the general meeting.[5] The shareholders typically delegate to the board of directors the power to manage the company and, as a result, the board often enjoys wide authority for managing the overall direction of the company.[6] Executive Managers also have significant control over the management of the company and shareholders.[7]

When an investor (shareholder) buys a company's shares, he is hoping to make a profit in the form of dividends or capital gain from selling his shares at a good premium.[8] However, every investment is risky. This risk, coupled with the importance of capital raising for public shareholding firms, mean that companies must have strong management and shareholders' remedies to secure their shareholders' confidence in their investment. Such security might involve providing effective legal protection from misuse or misappropriation of funds by company managers, board members or oppressive majority shareholders.[9]

The World Bank's assessment of corporate governance revealed that expropriation of minority shareholders' funds continues to be a problem around the world.[10] However, policy makers in many countries are reforming their legal and regulatory frameworks to harmonise them with the Organization for Economic Co-operation and Development's ('OECD') Principles of Corporate Governance.[11] Despite being non-binding principles,

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2 Christine Mallin, *Corporate Governance* (2nd ed, 2007) 11.

3 Phillip Lipton and Abe Herzberg, *Understanding Company Law* (13th ed, 2006) 70.

4 Ibid.

5 Woodward, Bird and Sievers, *Corporations Law* (5th ed, 2001) 83.

6 JF Corkery and Bruce Welling, *Principles of Corporation Law in Australia* (1st ed, 2008) 139.

7 Lukas Hengartner, *Explaining Executive Pay: The Role of Managerial Power and Complexity* (1st ed, 2006) 79.

8 Janet Dine, *Company Law* (6th ed, 2007) 11.

9 Diane Denis and John McConnel (eds), *Governance: An International Perspective* (1st ed, 2005) 22.

10 The World Bank Group, Private Sector and Infrastructure (2003) Networkhttp://rru.worldbank.org/documents/publicpolicyjournal/265Capau-082003.pdf> at 1 May 2010

11 Donald J. Johnston, *Building Trust*, Organisation for Economic Cooperation and Development (OECD)

they provide a universal standard against which a country's performance can be measured.[12]

The need for stronger corporate governance in relation to the protection of minority shareholders has been recognized in the Gulf Co-operation Council ('GCC') countries, yet approaches to the issue have been inconsistent due to the differing complexities of each country's financial sector.[13]

Neither the current Qatari *Commercial Companies Act No (5) of 2002*, nor the Qatar Exchange (QE) Corporate Governance (CG) Code 2009 provide effective means of redress to protect the rights of minority shareholders. The Qatari *Commercial Companies Act*, however, has established two means by which the interests of minority shareholders might be better protected in large public shareholding companies:[14]

1 entitlement to commence an action on behalf of the company against the board of directors; and

2 entitlement to commence a personal action against the directors.

This paper serves to provide an analysis and comparison of the remedies available for minority shareholders in public shareholdings companies in Australia and Qatar, with a view to ultimately formulating a number of recommendations to the Qatari Government in relation to minority shareholders' remedies.

## THE DEVELOPMENT OF QATAR COMPANY LAW

### Historical background

The State of Qatar is a hereditary Emirate.[15] It has a unique dual legal system and applies Islamic Sharia Law to aspects of family law, inheritance, and to a limited number of criminal acts.[16]

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<http://www.oecdobserver.org/news/fullstory.php/aid/1151/Building_trust.html> at 1 May 2010.

12 For example, the Preamble of Qatar Exchange (QE) Corporate Governance (CG) Code 2009 stated that the Principles have been drafted taking into account the OECD Principles of Corporate Governance.

13 For example, the current QE CG Code addresses a number of specific issues related to shareholders, such as, applying the 'one-share, one-vote' principle, requiring shareholders' approval of capital changes, ie takeovers, mergers, buyouts, and capital increase; access to information; shareholders' right regarding shareholders' meeting, shareholders' right regarding board members' election; and shareholders' right regarding dividend distribution.

14 *Companies Act 2002* (QTR), Articles 114 and 115.

15 *Constitution Act 2004* (QTR), Article 8.

16 HS Shaaban, 'Commercial Transaction in the Middle East: What Law Govern' Fall (1999) *Law and Policy in International Business* 2. <http://findarticles.com/p/articles/mi_qa3791/is_199910/ai_n8855279/pg_2/?tag=content;col

Since its independence in 1973, the Qatari legislature has adopted many laws, such as the penal, civil and commercial codes. Generally, Qatar's legislation has been modeled on Kuwaiti commercial legislation, Egyptian Law of Commerce and ultimately the French Commercial Code.[17] The Egyptian and French commercial codes have been the foundations for many Arabic commercial codes, including those of Egypt, Jordan, Iraq and Syria.[18]

Since Prince/Sheikh Hamad Bin Khalifa Al Thani, the current ruler, came to power in 1995, there has been a steady move to modernize Qatar's laws.[19]

**The Qatari *Commercial Companies Act***

In 1961, the Qatari legislature enacted Law No (3) of 1961 which was designed to regulate only joint stock companies. However, in 1981, the *Commercial Companies Act* was issued by the Amiri Decree No (11) of 1981 to regulate the structure and governance of companies in Qatar. Despite this enactment, there remain too many uncertainties and gaps in Qatar's company law.[20]

Over the past few years, Qatar has experienced a significant boom in its economy.[21] As the nation has developed, the need for modernized company legislation has been noted by the Qatari legislature as a mechanism for attracting foreign investment.[22] To facilitate the implementation of various new government investment policies, the Foreign Investment Act No (13) of 2000 was introduced by the Qatari legislature. The purpose of this legislation was to encourage and permit foreign nationals to invest in all sectors of the economy and in all types of companies (excluding commercial agencies and real estate trade that are wholly owned by Qatari nationals).[23] Note that a foreigner must obtain a special permit from the Council of Ministers in order to invest in Qatari banking and insurance sectors.[24]

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1> at 5 May 2010; A Nizar Hamzeh, 'Qatar: The Duality of the Legal System' (1994) 1 Middle Eastern Studies 79 <http://ddc.aub.edu.lb/projects/pspa/qatar.html> at 1 May 2010.

17 Ibid.

18 Mosleh At'tarawneh, *Principles of Commercial Law* (1st ed, 2007)32.

19 The Ministry of Foreign Affairs < http://english.mofa.gov.qa/details.cfm?id=80> at 1 May 2010

20 Mosleh At'tarawneh, *Introduction to Law of Commercial Companies in the State of Qatar* (1st ed, 2010) 7.

21 According to the Qatar Statistics Authority, the economy of Qatar has achieved a remarkable growth during the second quarter, April/June 2008 in various economic activities. Estimates indicate the 'GDP' reached QR 96,169 Billion, compared with QR 59,820 Billion during the corresponding quarter, April/June 2007 with a growth rate of 60.76%.

22 Qatar Investment Promotion Department < http://www.investinqatar.com.qa/yqatar/incentives.php> at 5 May 2010.

23 *Foreign Investment Act 2000* (QTR), Article 13.

24 At'taraneh, above n 18, 18.

New corporations legislation, called the *Commercial Companies Act No (5) of 2002*, was introduced in 2002 which abolished and superseded the 1981 *Companies Act*.[25] The purpose was to more efficiently and effectively govern and regulate the registration process for companies and entities wishing to register as a corporate entity. Article (4) of the *Commercial Companies Act* requires that all commercial companies registered in Qatar to take one of the following forms:

- a general partnership;
- a limited partnership;
- an ordinary partnership;
- a joint stock company;
- a partnership limited by shares;
- a limited liability company;
- a single person company; or
- a holding company.[26]

In 2006 the *Commercial Companies Act No (5) of 2002* was amended by Law No (16) of 2006. The new amendments involved the provision of a legislative framework for single person companies for the first time in Qatar.

In 2009 the Qatar Exchange ('QE'), an independent legal entity, was established as the successor of the Doha Securities Market international exchange.[27] It was supported by the New York Stock Exchange and provided state of the art technology and business services.[28] The purpose was to attract high caliber companies from both within Qatar and around the world.[29]

The establishment of the QE also saw the introduction of the Qatar Financial Markets Authority.[30] The purpose of the Authority was to protect securities

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25 Ibid.

26 *Companies Act 2002* (QTR), Article 4.

27 Qatar Exchange (Doha Securities Market, formerly) was established in accordance with the Decree Law (14) for the Year 1995.

28 A strategic partnership was concluded between QE and NYSE Euronext whereas the latter takes a 20% stake of QE on 19 June 2009.

29 The market has entered into a stage when Law No 33 for the Year 2005 was issued. The new phase resulted in transforming the Doha Securities Market (DSM) into a shareholding company named Qatar Exchange (QE). The creation of QE was completed on 19 June 2009 and aimed at creating an innovative shift in the market's infrastructure that would transform it into a world-class exchange operating under the most sophisticated and state-of-the-art technology systems.

30 On 14 September 2005, Law No (33) for the Year 2002 was issued relevant to the establishment of Qatar Financial Markets Authority (QFMA) and the Doha Securities Market Company (DSMC). QFMA was established as an independent and an empowered regulatory authority for the Capital Markets in Qatar with the primary mission to

owners and ensure stability in the securities market by providing regulation and supervision of securities issues and dealings.[31] In addition, the Authority conducted market research and authorized and supervised brokers and other financial markets experts.[32]

**Background analysis**

Qatari joint stock companies are managed by boards of directors who are elected by the company's general meeting, except for the first board who are appointed by the founders of the company.[33] The company's articles of association will identify the methods for selecting the board of directors, the number of directors required and the period of membership in the board.[34] Generally, the board of directors exercises their powers, including those that may affect the legal rights of shareholders, in a collaborative manner at board meetings.[35]

According to Article 76, the founders of a joint stock company must underwrite between 20% and 60% of the shares that represent the capital of the company.[36] There are no legal prohibitions to appoint or elect the founders to be a member of the board of directors. From a practical point of view, most of the members of the board of directors will be the founders, who represent the majority shareholders in the company. In this case, theoretically and practically, the board of directors would have the power to increase or amend their remuneration for obtaining personal benefits at the expense of minority shareholders.

According to the Qatari *Companies Act*, the articles of association of any company will provide the manner under which the remuneration of the directors is to be determined.[37] However, Article 118, which is a 'permissible rule' (called a 'replaceable rule' in Australia), allows the remuneration of the board to be a fixed part of the company profit provided it does not exceed 10% of the company's net profit.[38] However, in the event that the company does not achieve a sufficient profit for the financial year, the articles permit board members' remuneration to be a fixed amount. Note that the proposed remuneration should still be approved by the general meeting. Nevertheless,

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implement a modern and a robust regulatory framework for the securities markets in addition to conducting effective and responsible market oversight and supervision.

31 Law No 33 of 2005 as amended by Decree Law No 14 of 2007 and Law No 10 of 2009.

32 Qatar Financial Markets Authority < http://www.visionwmg.com/qfma/website/index.html>.

33 *Companies Act 2002* (QTR), Articles 94 and 95.

34 Article 96.

35 Article 103.

36 *Companies Act 2002* (QTR), Article 76.

37 Article 96.

38 Article 118.

if the directors are also majority shareholders, they could use their dominance to isolate and overrule the minority shareholders to obtain higher remuneration to the detriment of the shareholders. Such behavior may be seen as unjust and would definitely disappoint the minority shareholders who may seek protection of their rights through an appropriate course of action and other legal measures.

A company's role in protecting minority shareholders is very limited in Qatar in relation to legal remedies. There are only two mechanisms available to shareholders to protect their rights under the Qatari *Companies Act*:

1 Article 114 - Majority shareholders commencing legal action on behalf of the company:

> This statutory action allows majority shareholders in the general meeting to pass an ordinary resolution to appoint a representative and sue the board of directors for their wrongdoings that caused damage to the company. The action must be commenced within five years of the wrongdoing. If the company is in liquidation at the time, the liquidator will be the company representative and undertake to commence the legal proceedings based on a decision made by the shareholders in the ordinary general meeting.[39]

2 Article 115 - Individual shareholder's entitlement to commence a personal action:

> This action allows individuals to pursue the company independently of other shareholders if they believe that they have suffered personal damage as a result of the directors' wrongdoing and the shareholders have failed to commence legal action under article 114. In commencing such an action, the shareholder must inform the company of his/her intention to file the case. Finally, Article 115 provides that any provision in the company's constitution contrary to this article will be null and void.[40]

**Statutory remedies in Australia**

In Australia, there are several statutory rights that provide relief to aggrieved shareholders when the directors unfairly misuse their positions of powers or breached their duties.[41] There are two important mechanisms under the *Corporations Act* that protect shareholders' rights against a misbehaving board of directors:[42]

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39 Article 114.

40 *Companies Act 2002* (QTR), Articles 115.

41 Woodward, Bird and Sievers, *Corporations Law* (5th ed, 2001) 241.

42 Phillip Lipton and Abe Herzberg, *Understanding Company Law* (13th ed, 2006) 472.

1 Part 2 F.1 deals with the statutory rights of shareholders where the affairs of the company are conducted contrary to the interest of the company and, are as a whole, oppressive, unfairly prejudicial or unfairly discriminatory;[43] and,

2 Part 2F.1A allows shareholders to bring proceedings on behalf of a company, or to intervene in proceedings to which the company is a party dealing with statutory action.[44]

The Qatari legislature needs to be alerted to these important remedies and consider adopting similar protection provisions.

## PART 2: THE STATUTORY DERIVATIVE ACTION

A derivative action is one commenced by a company's shareholder(s), on behalf of the company itself, when the shareholder(s) believes the company is not adequately protecting its legal rights and interests.[45]

Derivative actions are generally brought against the directors or officers of a company for wrongdoings such as negligence, fraud, breach of fiduciary duties or an abuse of power.[46]

### Pre-statutory derivative action - the Rule in *Foss v Harbottle*

A leading case discussing the ability of minority shareholders to enforce their rights was *Foss v Harbottle*.[47] This case involved two minority shareholders initiating legal proceedings against the directors of the company, on behalf of all shareholders, claiming that the company's assets had been fraudulently misappropriated by the directors and seeking compensation for losses.[48] In dismissing the claim, the Court established two important rules that effectively barred minority shareholders from initiating proceedings where the alleged misconduct was capable of being ratified by the majority of shareholders.

The first rule, known as the 'proper plaintiff' rule, provided that only the company could commence proceedings against directors for their alleged wrongdoings. Wigram VC established the following in his judgment:

> The action did not lie at the suit of shareholders. The injury was to the company as a whole, not to the plaintiffs exclusively. There is no general right for any individual members of a corporation to assure to themselves the right of suing in the name of the corporation. In law, the corporation and the

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43 *Corporation Act 2001* (Cth), Part 2 F.1.

44 *Corporation Act 2001* (Cth), Part 2 F.1A.

45 Roman Tomasic et alia, *Corporation Law in Australia* (2nd ed, 2002) 422.

46 Christopher Nicholls, *Corporate Law* (1st ed, 2005) 389.

47 *Foss v Harbottle* (1843) 67 ER 189.

48 Tomasic et alia, above n 45, 424.

> aggregate members of the corporation are not the same thing for purposes like this.

The second rule, known as the 'internal management rule', provided that if the alleged wrongdoing could be ratified by the majority shareholder(s) the Court could not interfere. This is demonstrated by the following extract from the judgment of Lord Davey in *Burland v Earle*:[49]

> There is the principle that the courts will not interfere in the internal dispute of partnerships, joint stock companies, or the modern corporation, the precept that the court seeks to avoid a multiplicity of actions, the principle that equity will not act in vain and that it would do so if the court were to rule on a matter that was within the competence of a majority of the shareholders, and finally, the principle that for a wrong done to a company, the company is the proper plaintiff in an action to seek redress. [50]

**Exceptions to the Proper Plaintiff Rule**

The proper plaintiff rule in *Foss v Harbottle* could be overlooked where the court's interference was necessary to protect basic minority shareholders' rights.[51]

The Court in *Foss v Harbottle* recognized that majority shareholders are capable of manifesting unjust intentions toward the minority. Accordingly, this exception applied in circumstances where the following grounds were satisfied:

- an act of fraud;
- was effected on the minority shareholders of the company; and
- the wrong doer was controlling the mind of the company and was able to ensure that an action could not be brought by the company.

When s 236 of the *Corporations Act* established the statutory derivative action, several general law principles were abolished including exceptions relating to the invasion of individual rights and ultra vires and illegal acts. Section 236 (3) abolished the right at general law to bring proceedings on behalf of the company – so the *Foss v Harbottle* Rule and its exceptions were no longer applicable. But they do give insights into the former reluctance of courts to allow shareholders to initiate actions, and the very limited grounds on which such actions were allowed. Permission to bring a statutory derivative suit is much more liberally granted.

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49 *Burland v Earle* [1902] AC 83.

50 Bob Baxt, *Duties and Responsibilities of Directors and Officers* (18th ed, 2005) 151.

51 John Farrar, *Corporate Governance in Australia and New Zealand* (2nd ed, 2002) 68.

**Who may bring a statutory derivative action?**[52]

Under s 236(1)(a), s 237(1) and s 238(1) of the *Corporations Act*, an application for leave to bring, or interfere in proceedings on behalf of the company, may be brought by:[53]

- a member of the company or a related body corporate;
- a former member of the company or a related body corporate;
- a person entitled to be registered as a member of the company or a related body corporate;
- an officer of the company;
- a form officer of the company; or

**Criteria for granting leave**

Under s 236 (1)(b) of the *Corporations Act*, a person seeking to commence a derivative action must obtain leave of the court pursuant to s 237(2).[54] The court will only grant leave if the following conditions are satisfied:[55]

1 It is probable that the company will not itself bring the proceedings, or properly take responsibility for them. Generally, the board of directors would respond to any notice of intention to apply for a grant to leave by providing and preparing evidence to this claim.

2 The applicant is acting in good faith. The court is required to examine and review the motives of the applicant who is seeking to commence a derivative action. The court is expected to examine the underlying intentions of the applicant and determine whether they are bona fide. In *Chapman v E-Sports Club World Wide Ltd*, the court rejected a shareholder's application because it appeared that the plaintiff was trying to use the proceedings to put pressure on other parties in the company to buy him out.[56]

3 It is in the best interests of the company that the applicant be granted leave. The court will determine whether the purpose of the derivative action is within the best interests of the company as a whole, rather than those of the applicant, the directors or shareholders alone.

4 There is a serious question to be tried to which the plaintiff has a real chance of succeeding. The serious question test is used regularly by Australian courts in determining whether to grant interim injunctions. If doing so, the court should consider if the balance of convenience favors granting leave.

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52 Corkery and Welling, above n 6, 322.

53 Nicholls, above n 46, 394.

54 Lipton and Herzberg, above n 42, 486.

55 Baxt, above n 50, 150.

56 *Chapman v E-Sports Club World Wide Ltd* (2001) 19 ACLC 213.

5 Whether the applicant has notified the company at least 14 days before making the application. The applicant must give written notice to the company stating his or her intention to apply for leave and the reasons for applying.

The court must grant an application if it is satisfied that these criteria are met.

**Courts orders and powers**

Under s 240, if the court grants leave to an applicant to commence a statutory action, then the courts proceedings cannot be later discontinued, compromised or settled without the leave of the court. This ensures that a successful applicant does not solely benefit himself and put his own interests before those of the company.[57]

**Analysis**

In Qatar, minority shareholders unfortunately do not have effective legal means of redress to protect their interests from abusive action or wrongdoing to the company by the board of directors. The Qatari laws lack adequate provisions in this area of shareholders' litigation. There are only two articles in the Qatari Companies Act that deal with shareholders litigation.

As mentioned earlier, the first is article 114 which allows shareholders to commence action on behalf of the company, and the second is article 115 that entitles shareholders to pursue an action personally.

On the other hand, the Australian *Corporations Act* has introduced effective means of redress to protect the rights of minority shareholders. As previously mentioned, proceedings under s 236 can be brought by:

- a member, former member or person entitled to be registered as a member of the company or of a relation body corporate; or
- present or former director or officer of the company.

However section 236 has been criticized for the phrase 'entitled to be registered' as it is vague and requires further illustration. For example, it is unclear whether the term 'entitled to be registered' includes the case of a transfer upon which stamp duty had not been paid or a transfer that had been refused by the directors under the pre-emptive rights in the company's constitution.

However, generally speaking, the introduction of part 2F.1A (ss 236 to 242) has strengthened shareholders' rights and provided effective mechanisms for

[57] Woodward et alia, above n 5, 246.

protecting minority shareholders from abuse, wrongdoings or mistakes committed by the board of directors.[58]

### Conclusion

Part 2F.1A of the Australian *Corporations Act* clearly provides protection to shareholders. Legal remedies are broad and are generally only denied in the case of vexatious litigants.

In Qatar, however, there are no similar concepts for derivative actions or class actions. Accordingly, minority shareholders in Qatar require much better and clearer protection. The Qatari legislature should consider the Australian approach and adopt similar measures to protect the rights of minority shareholders.

## PART 3: THE OPPRESSION REMEDY

An oppression remedy is a statutory right available under ss 232 to 235 of the Australian *Corporations Act* that enables an individual shareholder to bring a legal action when the conduct of the company has an oppressive or unfairly prejudicial effect on him or her, or unfairly disregards his or her interests.[59]

The term 'oppressive' is not defined in the *Corporations Act*, however, the intention of the legislature is that the term should be given a wide interpretation to provide the courts with greater flexibility to provide the appropriate relief.[60]

### Historical background

The origins of the oppression remedy stem back to the recommendations of the United Kingdom Cohen Board of Trade Committee in 1945. The Cohen Committee argued that minority shareholders in proprietary companies faced considerable difficulties in obtaining appropriate remedies.[61] The Cohen Committee's recommendations resulted in the inclusion of an oppression provision in the United Kingdom Corporation's legislation in 1948.[62]

The Australian States adopted similar provisions in the mid-1950s, which were then translated into s 186 of the *Uniform Companies Act 1961*(Cth).

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58 Melissa Hofmann, 'The Statutory Derivative Action in Australia: An Empirical Review of its Use and Electiveness in Australia in Comparison to the United States, Canada and Singapore' (2005) *Corporate Governance eJournal* <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1012&context=cgej> at 1 May 2010.

59 John Farrar, *Corporate Governance in Australia and New Zealand* (2nd ed, 2002) 182.

60 Lipton and Herzberg, above n 42, 473.

61 Corkery and Welling, above n 6, 327.

62 Tomasic, above n 45, 410ff.

The oppression remedy is now found in part 2F.1 of the *Corporations Act*.[63] Section 232 provides that the courts may determine that:[64]

a. the conduct of a company's affairs;

b. an actual or proposed act or omission by or on behalf of a company; or

c. a resolution, or proposed resolution, of members or class of members of a company;

is either,

a. contrary to the interests of the members as a whole; or

b. oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

**Who can apply for orders?**

While it is unclear whether a member must be registered at the time of the relevant conduct in order to obtain an oppression order, the *Corporations Act* nonetheless entitles the following persons to make an application:[65]

- a member of the company;
- a person who has been removed from the register of members because of a selective reduction under s 256 B(2);
- a former member of the company; and
- any person who is considered to be appropriate by ASIC.

**Remedies**

The court is entitled to grant a wide range of orders if it is satisfied that the company's conduct is contrary to the interests of the members as a whole. These are set out under s 233(1) as follows:

- the company be wound up;
- the company's constitution be modified or repealed;
- the affairs of the company be regulated;
- the shares of a member or a person to whom shares are transmitted by will or under operation of law be purchased by another member;
- the company institute or defined legal proceedings or authorize a member to institute or defend legal proceedings in the name of the company;

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63 Peter Almond, *Members' Rights & Remedies for Oppressive or Unfair Conduct Under Part 2F.1 of the Corporations Act* (2005) < http://new.vicbar.com.au/pdf/CLE_Seminar18052005Updated.pdf> at 1 May 2010.

64 Tomasic et alia, above n 45, 411.

65 Ibid.

- a receiver or manager of property be appointed;
- a restraint be imposed preventing a person from engaging in specified conduct or from doing a specified act; and
- a requirement that a person to do a specified act;

Note that these orders may be made either individually or in conjunction with another order under this provision.

**Examples of oppressive and unfair conduct**

The following are leading case law examples of oppressive or unfair conduct:

- diversion of a corporate opportunity by the majority shareholders to themselves or their associates *(Cook v Deeks)*;[66]
- a breach of fiduciary duty by directors such as issuing shares for improper purposes (*Wallington v Kokotovich Constructions Pty Ltd*);[67]
- unfair exclusion of a director for an improper purpose or reason that is not in the best interest of the company (*John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd*)[68];
- low dividend payments due to excessive remigration to directors in the formed of director's fees or business (*Sanford v Sanford Courier Service Pty Ltd*); [69] and
- failure to give proper notice of meeting (*Foody v Horewood*). [70]

**Analysis**

The oppression remedy is another powerful remedial tool for minority shareholders. It is the most widely-used remedy for two main reasons:

1 the minority shareholder is not required to apply for leave of the court; and

2 the shareholder will personally receive the benefit if the action is successful.

An empirical study of oppression cases carried out by Professor Ian Ramsay has found that the remedy is more often used by shareholders of closely held proprietary companies. This is because minority shareholders in a public listed company have the opportunity to sell their shares in a relatively liquid market; however, minority shareholders in a closely held company do not. In

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66 *Cook v Deeks* [1961] AC 554.

67 *Wallington v Kokotovich Constructions Pty Ltd* (1993) 11 ACSR 759.

68 *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty* Ltd (1991) 9 ACLA 1372.

69 *Sanford v Sanford Courier Service Pty Ltd* (1986) 10 ACLR 549.

70 *Foody v Horewood* (2003) VSC 347.

most cases, the market for such shareholders is illiquid or shareholders are under tight restrictions on their right of disposal.[71]

Note that the remedy is not restricted to any particular type of company (*ASC v The Multiple Sclerosis Society of Tasmania*).[72] However, there is some uncertainty as to whether Part 2F.1 applies to a company which is trustee of a trust.

**Conclusion**

The introduction of Part 2F.1 into the *Corporations Act* has strengthened the legal means to protect minority shareholders. The oppression remedy allows the court to grant a remedy where the board of directors or management have abused their power or acted oppressively towards shareholders.

In Qatar, there is no equivalent to the oppression remedy. It is an important remedy for minority shareholders, and enables them to invest with greater confidence in firms, and thereby encourages economic activity. The Qatari legislature should consider amending the law to include remedies equivalent to Part 2F.1A of the Australian *Corporations Act*.

**PART 4: RECOMMENDATION**

As previously mentioned, the Qatari *Commercial Companies Act No (5) of 2002* and the Qatar Exchange (QE) Corporate Governance (CG) Code 2009 partially reflect the OECD Principles in relation to minority shareholders' protection.

However, protective legal remedies are far from sufficient. Qatari policymakers and authorities should take urgent steps to draft appropriate provisions to protect minority shareholders in similar terms to those in the Australian *Corporations Act 2001* (Cth).

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71 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 26. The Study is based on reported and unreported decisions handed down by the High Court of Australia, Federal Court and State Supreme Courts between 1984 and December 1997.

72 (1993) 10 ACSR 489.