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A Comparative Analysis of the Corporate Governance Legislative Frameworks in Australia and Jordan measured against the OECD Principles of Corporate Governance 2004 as an International Benchmark

A Major Thesis Completed in Satisfaction of the Requirement for the Degree of Doctor of Legal Science

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Dedication

This major thesis is dedicated to my parents who have supported and encouraged me throughout my life and in particular my studies, also to my home country, The Hashemite Kingdom of Jordan under the leadership of His Majesty King Abdullah II.

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SYNOPSIS

In recent years, countries across the globe have come to realise the importance of an official corporate governance regime, which provides a platform for market integrity and efficiency, as well as facilitating economic growth. Formulating effective corporate governance measures is a complex task for legislators. The purpose of this paper is to provide an in depth analysis and comparison of the corporate governance legislative frameworks in Australia and Jordan. In 2004, the Organisation for Economic Cooperation and Development (OECD), in conjunction with national and international governmental organisations, finalised a universal set of corporate governance principles. Although non-binding, the OECD Principles 2004 are a serious attempt to strengthen every aspect of corporate governance and, accordingly, have been utilised in this paper as an international benchmark.

The ultimate objective of this paper is to formulate a number of detailed and specific recommendations to the Jordanian Government. Jordan's legislative framework for corporations received a significant shake-up a decade ago when the Jordanian Government began the process of implementing a privatisation program under the guidance of the World Bank and the International Monetary Fund. Despite a number of positive developments since this program was initiated, the Jordanian Government has continually failed to recognise the importance of promoting good corporate governance. There can be no doubt that the Jordanian companies' legislation is in desperate need of reform. The vast majority of the provisions are ambiguous and lack the necessary detail to regulate the complex sphere of company law. In this writer's opinion, the relevant authorities in Jordan must act immediately to bring the country's legislative regime into line with internationally recognised standards and practices.

Chapter 1 of the paper sets out an introductory explanation of corporate governance and corporate structure. Chapter 2 provides a brief account of the history of company law in Jordan and a description of the different types of company structures permitted under the relevant Jordanian legislation. Chapter 3 provides a detailed discussion of the corporate governance principles formulated by the OECD. The process began in 1999 and was completed in 2004 after extensive revision and consultation. Chapter 4, the core part of the paper, presents a comparative analysis of the implementation of the OECD principles in Australia and Jordan. Chapter 5 provides an explanation and analysis of two important shareholders' remedies in the Australian companies' legislation that do not exist in Jordan. Finally, Chapter 6 provides a summary of analysis and sets out a list of recommendations to the Jordanian Government.

Declaration

In accordance with Bond University Regulations, I declare that this thesis has not been previously submitted for a degree or diploma at Bond University or any other institution. It is declared further that the content of this paper is entirely my own work and all research materials utilised have been properly referenced according to the Australian Guide to Legal Citation (2nd edition) published by the Melbourne University Law Review Association.

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INTRODUCTION

Corporate governance has become an issue of worldwide importance. The corporation has a vital role to play in promoting economic development and social progress. It is the engine of growth internationally and is increasingly responsible for providing employment, public and private sector services, goods and infrastructure.[1] The efficiency and accountability of the corporation is now a matter of both private and public interest, and corporate governance has thereby come to the head of the international private enterprise agenda.[2]

Corporate governance is concerned with the systems of law, regulations, and practices which promote enterprise and ensure accountability.[3] Ensuring transparency and probity in corporate affairs makes a major contribution to improving business standards.[4] A complex interplay of factors contributes to the proper functioning of a corporate governance system. There are important factors internal to the corporation, such as the board of directors, capital providers, stakeholders, and management. Likewise, there are important factors external to the corporation, such as laws and regulations, competitive markets, the media, and transparent external auditing measures. Governance failures or weaknesses can reflect aspects of both.[5]

The evolution and importance of corporate governance started to attract attention in Jordan in 1997 when the Jordanian Government began implementing a privatisation program under the guidance of the World Bank[6] and the International Monetary Fund.[7] The aim was to gradually privatise the public

[1] Mallin C, *Corporate Governance: An International Review* (2004).
[2] Center for International Private Enterprise, *Strengthening Corporate Governance* (2004).
[3] Ibid.
[4] Organisation for Economic Cooperation and Development (OECD), *Building Partnerships for Progress: Corporate Governance* (2005).
[5] Caruana J, *Basel II and Corporate Governance Issues* (Paper Presented at 2nd Financial Service Board Summit 2005), 2.
[6] The World Bank provides a vital source of financial and technical assistance to developing countries around the world. It is made up of two development institutions owned by 184 member countries – the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The IBRD focuses on middle income and creditworthy poor countries, whilst the IDA focuses on the poorest countries in the world. Together they provide low-interest loans, interest-free credit and grants to developing countries for education, health, infrastructure, communications and many other purposes. For more information see www.worldbank.org.

sector. The principal objectives of the privatisation program were to boost the economy and reduce government expenditures.[8] The fulfilment of these objectives would reduce the Jordanian Government's budget deficit and improve productivity and efficiency generally. These economic developments were intended to serve as a platform to allow Jordan to compete more effectively in the global market.[9]

Despite the adverse effects of the ongoing conflict in the Middle East, Jordan's economy has performed relatively well in recent years. It has been characterised by strong export-led growth, continued low inflation, and increased confidence in the Jordanian Dinar (JD).[10] Real gross domestic product grew by 3.9, 4.6, and 4.9 percent in 2000, 2001 and 2002 respectively.[11] The privatisation program in Jordan actually generated the equivalent of US$1 billion within its first five years of operation.[12] Significant recent developments that have assisted in Jordan's shift towards a global economy include membership in the World Trade Organisation in 2000,[13] a free-trade agreement with the United States in 2001, and an association agreement with the European Union in 2002.[14][15] These bilateral agreements have been a vehicle for improving corporate governance practices in Jordan.[16] Bassam Asfour, chairman of the Jordan Securities Commission, recently stated: 'Jordan's economy is becoming more and more interdependent on the world economy. Companies find themselves competing in a global environment

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[7] The International Monetary Fund is an organisation of 184 countries working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty. For more information see www.imf.org.

[8] Khoury R and Pasch P, *Privatisation Efforts in Jordan* (2002), 2. See also Kanaan T and Kardoosh M, *The Story of Economic Growth in Jordan 1950-2000* (2002), 13.

[9] Ramachandran S, *Jordan's Economic Development in the 1990s and World Bank Assistance* (2004), 10.

[10] Central Bank of Jordan, *Summary of Economic Development in 2004* (2005).

[11] For a general discussion see World Bank, *Report on the Observance of Standards and Codes (ROSC): Accounting and Auditing (Jordan)* (June 2004), 2.

[12] Ibid, 2.

[13] The World Trade Organisation's (WTO) General Council concluded negotiations with Jordan and approved the accession package on 17 December 1999. On 11 April 2000, Jordan became the 136th member of the WTO.

[14] The Euro-Mediterranean Association Agreement with Jordan was signed on November 24, 1997. It entered into force on May 1, 2002, and replaces the Co-operation Agreement of 1977. The Association Agreement is part of the bilateral track of the Euro-Mediterranean Partnership and provides a comprehensive framework for the economic, political and social dimensions to the EU-Jordan partnership. The main aim of the Association Agreement is to create a free trade area between the EU and Jordan over a period of 12 years, and help increase economic growth for the businesses community. The first EU-Jordan Association Council meeting was held in Luxembourg on June 10, 2002.

[15] The Jordan Free Trade Agreement (FTA) was signed on October 24, 2000. It took effect as the United States' third free trade agreement, and the first ever with an Arab state. The FTA is the capstone of growing U.S.-Jordanian collaboration in economic relations, which began with close bilateral cooperation on Jordan's accession to the World Trade Organization and was followed by the conclusion of a trade and investment framework agreement and a bilateral investment treaty. The Jordan FTA achieves significant and extensive liberalisation across a wide spectrum of trade issues. It eliminates all tariff and non-tariff barriers to bilateral trade in virtually all industrial goods and agricultural products within ten years.

[16] MENA Regional Corporate Governance Working Group, above n 16, 2.

and, as such, must be able to attract low cost capital whether from local, regional, or international sources'.[17]

The creation of the Amman Stock Exchange (ASE) in March 1999 also greatly assisted Jordan's integration into the world economy. The ASE, a private sector, non-profit organisation with legal and financial independence, is in charge of running the market. This significant development was the result of a general restructuring process that also involved the establishment of various other institutions in support of the ASE.[18] There is no doubt that this process fuelled the general improvement of corporate governance practices in Jordan to some extent. The dilemma is that, despite the positive developments in recent years, the Jordanian Government has continually failed to recognise the importance of promoting good corporate governance, which is fundamental to the success of newly-privatised enterprises in Jordan.

The Jordanian economy is dominated by family-owned businesses. This feature often defines the roles and responsibilities of those charged with making corporate decisions. In many ways, the fact that the majority of companies in Jordan are closely-held is a significant barrier to the proper implementation of corporate governance measures because the managers in such company structures lack the objectivity and flexibility necessary to properly monitor company activity and achieve company objectives.[19] The legal framework should not be an obstacle for the establishment and development of family-owned companies as they have been an integral part of the Jordanian economy for a long time. The point is that minority protection laws in Jordan must be clearly drafted and properly enforced to stop majority shareholders in such companies from abusing their power to the detriment of minority shareholders. It is clear that proper corporate governance implementation is the only way to effectively separate ownership and control. Owners can only feel secure when they are certain that managers are adhering to a certain standard of professionalism.

[17] Ibid, 59.
[18] Discussed further in Chapter 2 of this paper.
[19] MENA Regional Corporate Governance Working Group, above n 16, 21.

The lack of effective legal controls on managerial behaviour in newly-privatised enterprises tends to generate the very problems that privatisation is supposed to mitigate. Jordan's legal institutions also suffer from political interference and limited enforcement capabilities. Legal regulations pertaining to companies are vague and ill-defined. Furthermore, illiquidity and lack of investment incentives have made it difficult for companies to raise additional capital, for dissatisfied owners to liquidate their holdings at reasonable exit prices, and for outside takeover threats to acquire these inefficient firms.[20]

It is clear that there are many challenges to promoting the principles of corporate governance in the Arab world. It is an emerging discipline, and, as yet, there has been very little commentary on the debate from the perspective of developing and transition countries.[21] Worthy of note is that fact that there is no Arabic word of phrase equivalent to the term 'governance'. This issue is not just semantic. As there is no word to express the concept of governance, the concept itself seemingly does not exist in Jordan. Bringing the issue of corporate governance to the forefront of the reform agenda is clearly a difficult task against this backdrop. A representative from the ABC Bank of Jordan recently suggested that the most significant barrier to the implementation of effective corporate governance measures in Jordan is the fact that the majority of participants in the private sector simply do not take the issue seriously.[22] In his opinion, investment growth in the Jordanian economy is being stifled by a continual maintenance of outdated business culture centred heavily around personal relationships rather than financial information on corporate performance.[23]

Ensuring the implementation of effective corporate governance measures in the privatisation process is a vital, yet complex, task. In the absence of an adequate and enforceable corporate governance framework, the Jordanian market has found itself incapable of convincing potential local and foreign investors that the money they might invest in newly privatised enterprises will be handled responsibly by corporate managers and directors.[24] If increasing market confidence is on its agenda, then the Jordanian

[20] USAID Jordan, *USAID/Jordan Strategy 2004-2009* (2003), 2.
[21] Mallin, above n 1.
[22] MENA Regional Corporate Governance Working Group, above n 16, 50.
[23] Ibid.
[24] Kanaan and Kardoosh, above n 8, 16.

Government must consider instituting and raising corporate governance standards concurrently with privatisation.[25]

This paper serves to provide an analysis and comparison of the systems of corporate governance in Australia and Jordan measured against the principles of corporate governance recently formulated by the Organisation for Economic Cooperation and Development (OECD) as an international benchmark. The ultimate purpose of this analysis and comparison is to formulate a number of recommendations to the Jordanian Government in terms of corporate governance legislative reform.

Chapter 1 provides an introductory explanation of the foundations of corporate governance and corporate structure. Chapter 2 provides a brief account of the history of company law in Jordan and a description of the different types of companies operating in Jordan. Chapter 3 outlines the principles of corporate governance formulated by the OECD. A historical background is provided, as well as a detailed discussion of the core standards underlying the principles and an analysis of each individual principle. Chapter 4 presents a detailed comparative analysis of the implementation of the OECD principles in Australia and Jordan. Chapter 5 provides an explanation and analysis of two important shareholders' remedies in the Australian companies' legislation which do not exist in Jordan. Finally, Chapter 6 provides a summary of analysis and sets out a list of recommendations to the Jordanian Government in the sphere of corporate governance.

[25] Ramachandran, above n 9, 16.

CHAPTER 1

FOUNDATIONS OF CORPORATE GOVERNANCE AND CORPORATE STRUCTURE

1. A DEFINITION OF CORPORATE GOVERNANCE

Corporations are part of every society and are the livelihood of many communities. They mobilise and combine capital, raw material, labour, management expertise and intellectual property from a variety of sources to produce goods and services that are useful to members of society. Corporations purchase goods and services, generate jobs and income, distribute profits, pay taxes, and contribute to foreign exchange.[26] In general terms, corporate governance provides guidelines for all corporate participants as regards their rights, obligations and accountability, as well as processes for identifying and evaluating challenges encountered in the corporate sphere.[27] Considering the purposes that corporations serve on a community level and the impact that they can and do have in society, it makes sense to have strong regulations governing how they function financially, politically, and even ethically.[28]

Corporate governance is a fashionable, albeit ambiguous, concept.[29] There is no universally accepted definition of corporate governance. In general terms, it refers to 'a set of rules and incentives by which management of a company is directed and controlled'.[30] According to Professor John Farrar, corporate governance, in its narrow sense, refers to control of corporations and systems of accountability.[31] Accountability is encompassed not only in terms of legal restraints, but also in terms of self-regulation and the norms of so-called 'best practice'.[32] An important aspect of corporate governance is the

[26] Prentice D and Holand P, *Contemporary Issues in Corporate Governance* (1993), 8.
[27] Healy J, *Corporate Governance and Wealth Creation in New Zealand* (2003), 128.
[28] Cohen S and Boyd G, *Corporate Governance and Globalization: Long Range Planning Issues* (2000), 6.
[29] Farrar J, *Corporate Governance: Theories, Principles, and Practice* (2nd ed, 2005), 3.
[30] Du Plessis J *et alia*, *Principles of Contemporary Corporate Governance* (2005), 1.
[31] Farrar, above n 29, 3.
[32] Carlsson R, *Ownership and Value Creation: Strategic Corporate Governance in the New Economy* (2001), 22.

companies' legislation, but it also transcends the legal control of corporations to regulate de-facto control of corporations.[33]

Sheridan and Kendall[34] assert that achieving good corporate governance requires a system of structured operating and controlling to fulfil the following objectives:[35]

(a) achieving a long-term strategy of goals of the owner which may be maximising shareholder value or controlling market shares;

(b) securing the interests of employees all the time and ensuring that they are guaranteed a positive working atmosphere, further training courses, health coverage, and fair retirement packages;

(c) maintaining excellent long-term relations with customers and suppliers in terms of service, quality and financial settlement procedures; and

(d) complying with all of the relevant legal and regulatory requirements.

Sheridan and Kendall express the view that all of the above requirements are essential in maintaining a well-managed and structured organisation that can operate effectively and efficiently to satisfy the needs of all relevant interest groups.[36]

The importance of corporate governance lies in its contribution both to business prosperity and to accountability. According to Sir Adrian Cadbury, 'corporate governance is concerned with holding the balance between economic and social goals, and between individual and communal goals'.[37] The governance framework is there to encourage the efficient use of resources and, equally, to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.[38]

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[33] Ibid.
[34] Sherdan T and Kendall N, *Corporate Governance: An Action Plan for Profitability and Business Success* (1992), 12.
[35] See also Du Plessis *et alia*, above n 30, 7.
[36] Sherdan and Kendall, above n 34, 12.
[37] Cadbury A, *Corporate Governance and Chairmanship: A Personal View* (1st ed, 2002), 38.
[38] Millstein I, 'The Evolution of Corporate Governance in the United States', Remarks to the World Economic Forum, Davos, Switzerland (February 2, 1998).

In the Arab world the concept of corporate governance is not yet clearly understood.[39] Many directors and managers, even academics, struggle to differentiate between corporate governance issues and business management issues.[40] For the most part, they refer to the two issues as one. The management role is primarily perceived to be running the business operations efficiently and effectively. The business operations generally include the products, design, personnel, general management, production, marketing and finance functions. The governance role is not concerned with running the business of the company, but rather with directors giving overall direction to the enterprise. This is achieved by overseeing and controlling the executive actions of management and by satisfying legitimate expectations for accountability and regulation. If management concerns running the business, governance concerns seeing that it is run properly.[41]

Participants in the Arab business community regularly consider and debate changes in the company regulatory system. However, corporate governance is yet to make its way onto the discussion plate to any real extent. This apparent ignorance in the Arab world is partly due to the definition of the term in Arabic, or lack thereof. In fact, as mentioned in the preceding section, there is no specific translation of the term 'governance' in Arabic.[42] This dilemma of terminology is an ongoing difficulty in the discussion and implementation of corporate governance in Jordan. What is required is consensus on a precise translation that does not compromise the essence of the term. An accepted Arabic equivalent phrase would facilitate understanding of the topic and in-depth discussions could then be held without confusion. The issue should be moved to the forefront of the corporate governance movement in the Arab world because of its logical importance in ongoing economic debate in Arabic.

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[39] Boutros-Ghali Y, *Corporate Governance Practices in Egypt: The Road* Ahead, Paper presented at a Conference in Cairo sponsored by the Egyptian Capital Market Association and the Centre for International Private Enterprise, 2001, 1.
[40] Ibid.
[41] Saidi N, *Corporate Governance in the Arab Countries: Role of the Banking System in Ensuring Transparency and Disclosure*, Paper presented at the Forum on Corporate Governance in Banks and Financial Institutions in Line with International Standards and Practice (2005).
[42] Boutros-Ghali, above n 39, 1.

In summary, it is clear that corporate governance is an ambiguous concept.[43] There is no universal consensus on its definition despite the efforts of many scholars.[44] According to Professor John Farrar, corporate governance refers to control of corporations and the systems of accountability regulating those in control.[45] Sheridan and Kendall[46] believe that good corporate governance requires a system of structuring, operating and controlling to fulfil the company's long-term strategies and to comply with relevant laws and regulations in the best interests of employees. Moreover, Sir Adrian Cadbury[47] believes that corporate governance is concerned with maintaining a balance between economic and social goals, and between individual and communal goals. Whatever definition is preferred, it is clear that corporate governance is a term that holds increasing significance in the modern world, and it is essential that governments across the globe continue to strengthen the legislative and regulatory frameworks that underpin corporate governance in each of their respective jurisdictions.

2. FOUNDATIONS OF THE CORPORATE STRUCTURE

2.1 Defining a Corporation

A corporation is a simple, yet complex, entity. In Australia, a corporation is an incorporated association under the *Corporations Act 2001* (Cth). Upon incorporation, a company becomes a separate legal entity, distinct from its shareholders and directors, which remains in existence until it is deregistered.[48] It is made up of a consolidation of individuals that contribute to its operation in various ways.[49] These separate levels of contribution within a corporation allow individuals to participate in the running of the business with differing levels of responsibility and liability. Ambrose Bierce states, in his notorious *Devil's Dictionary*, that a corporation is 'an

[43] Ibid.
[44] Du Plessis *et alia*, above n 30, 1.
[45] Farrar, above n 29, 3.
[46] Sherdan and Kendall, above n 34, 12.
[47] Cadbury, above n 37, 38.
[48] Cassidy J, *Corporations Law: Text and Essential Cases* (2005), 29. See also Adams P, *Company Directors in Australia* (2nd ed, 1971), 34.
[49] Adams, above n 40, 34.

ingenious device for obtaining individual profit without individual responsibility'.[50] This statement reflects a corporation's foundational asset; the ability to draw on a large pool of resources without the need to change the persona or characteristics of the corporation.[51]

A corporation consists of five core characteristics: (1) separate legal personality; (2) limited liability; (3) transferable shares; (4) centralised management under a board structure; and (5) shared ownership by contributors of capital. In nearly all economically important jurisdictions there is a basic statute that provides for the formation of companies with all of these characteristics as a default. There are, however, sometimes provisions available for omitting one or more of them.[52]

2.2 History of the Corporate Structure

Prior to the 17th century, western governments generally controlled all commercial activity.[53] The need for corporations became more specific after the 17th century. For example, corporations were created to cater for developments such as the establishment of the American colonies and the settlement of India.[54] Corporate establishments that were publicly beneficial prospered and progressed. The characteristics of the corporate structure were of such importance to businessmen that legislators recognised that opposing the emergence of corporatism was futile and generally embraced the opportunity to permit their operation and tax their income.[55]

As society and culture evolved, so too did the nature of the corporate structure.[56] Due to economic growth and technological advances, it was becoming obvious by the late 19th century that there was a need for growth in companies that had been relatively minimal up until that

[50] As cited in Monks R and Minow N, *Corporate Governance* (2nd ed, 2001), 6.
[51] Monks and Minow, above note 50, 6.
[52] Kraakman R *et alia*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2004), 5.
[53] Adams, above n 40, 36.
[54] Gower L *et alia*, *The Principles of Modern Company Law* (4th ed, 1979), 39.
[55] Ibid 40.
[56] Adams, above n 40, 36.

point. Companies expanded rapidly and began employing people in the hundreds and then thousands. As the size of firms grew rapidly, so too did the need to use a more broad and diverse range of capital from sources other than wealthy individuals.[57] Naturally, as corporations expanded and evolved, legal regulation was required to govern their ever-changing development. Corporate governance is constantly being revised to serve the needs of such expansion and evolution as companies grow and change with society.[58]

2.3 Corporate Participants

In order to understand the legal framework surrounding corporations, it is necessary to examine the role of each participant in a company. Each individual participant has a unique role to play. For example, a manager within a corporation has a great deal of responsibility in the running of a company, but he or she does not have to provide anything financially. On the other hand, an investor who contributes financially can reap profits from such an investment without ever needing to take responsibility for the day-to-day management of the company.[59] Although the specific functioning of each individual company is unique, there are common participants within each company that assist in establishing guidelines for a basic regulatory framework.[60]

These five key participants in a corporation are:[61]

(a) shareholders;

(b) creditors;

(c) managers;

(d) directors; and

(e) employees.

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[57] Pennington R, *Company Law* (5th ed, 1985), 10.
[58] Monks and Minow, above n 50, 12.
[59] Monks and Minow, above n 50, 12.
[60] Davies P, *Introduction to Company Law* (2002), 5.
[61] Cheffins B, *Company Law: Theory Structure and Operation* (1997), 47.

The key features of each type of corporate participant will be discussed in turn.

(a) Shareholders

The role of a shareholder can vary depending on the distinct features of the particular company in which they have an interest. Most importantly, a shareholder's role is affected by the classification of the relevant company. The relevant distinction is between a 'closely-held company', which has a small number of shareholders, and a 'widely-held company', which has a large number of shareholders and is often listed for trading on the relevant stock exchange.[62] The members of a closely-held company often play more of a role in running the business, whereas the members of a widely-held (or public company) generally own smaller fractions of the company and have little or nothing to do with the running of the business.[63] Often allowances are made for the existing differences between closely-held and widely-held companies. However, these allowances are generally limited to the filing of financial information. This is because traditionally no distinctions were made regarding the rules which govern shareholder relations.[64]

Unlike managerial positions, there are no rules or stipulated guidelines outlining the duration of shareholdings. The patterns between closely-held corporations and widely-held public corporations are often different as the basis of share ownership varies.[65] A closely-held company will commonly have the majority of its shares owned by family members who have a more vested interest in the long-term performance of the company. Publicly and widely-held shares are more commonly acquired and disposed of frequently throughout the life span of the company.[66] Further, the process of disposing of the acquired shares in a closely-held company is more complicated than with a publicly-held

[62] Monks and Minow, above n 50, 80.
[63] Grantham R and Rickett C, *Corporate Personality in the 20th Century* (1998), 210.
[64] Cheffins, above n 61, 49.
[65] Davies, above n 60, 112.
[66] Cheffins B, *US Close Corporations Legislation: A Model Canada Should Not Follow* (1989), 163.

company. Often a shareholder in a closely-held company will be tied to the company until the company members buy out his or her shares. This is not a problem for shareholders in public companies as the shareholder is rarely linked to the company or its management, and shares can be disposed of more readily.[67]

Although the variable returns that are associated with shares can make equity seem like a risky investment, diversification can limit risk. That is, investment in many companies can avert unsystematic risks due to the variable rate of successful peaks in each individual company throughout the course of its existence. Markets will always fluctuate and cause variations in returns.[68] Profits gained by shareholdings are often directly related to the level of risk involved in the shares being purchased. High returns on shares often come only by way of substantially risky equity investments. Shareholders, especially those in listed public companies, need to be well informed and understand the dynamics of the stock market in order to understand the risks involved in the purchase of shares.[69]

Under Australian company law, shareholders in public companies retain the authority to select who sits on the board of directors. By determining the content of the company constitution, shareholders can choose to whom to allocate the responsibility of running the company.[70] Whilst shareholders have substantial control over corporate affairs, most matters of importance are usually left for management to deal with.[71] This passive approach by shareholders is commonly due to the belief that managerial issues are best left to those more qualified, the corporate executives.[72] Shareholders of closely-held companies, on the other hand, usually have a long-term interest in the success of the company and often have a significant amount of personal wealth invested. In order for

[67] Cheffins, above n 61, 54.
[68] Mayson S *et alia*, *Company Law* (16th ed, 1999), 189.
[69] Ibid 191.
[70] Cheffins, above n 61, 61.
[71] Pennington, above n 57, 690.
[72] Davies, above n 60, 113.

such shareholders to protect their own interests, it is often necessary for them to take part in corporate decision-making.[73]

Both closely-held and widely-held companies are open to possible conflicts of interest. Such risks are generally associated more with closely-held corporations stemming from family conflicts. These family conflicts may seem irrelevant to the company, but the on-flow of such conflicts can significantly disrupt company affairs.[74] Widely-held corporations are at risk of conflicts when dominant shareholders treat the company as their own with little or no regard for minority shareholders.[75] This is especially so if dominant shareholders are causing detriment to the company by diverting business elsewhere to enterprises either directly or indirectly owned by them.[76] There are, however, many options available to shareholders of both closely-held and widely-held companies for dispute resolution when conflicts arise within the corporate structure.[77]

(b) Creditors

Many individuals, as well as commercial entities, become creditors of companies. Three specific types of creditors, however, are more prevalent and of particular importance.[78] The first is trade creditors, who supply goods and services to companies without requiring immediate payment.[79] The second type is institutional lenders, the most important of which is banks.[80] Bank overdrafts are the principal method in this form of lending. The third type is composed of creditors whose right to payment is evidenced by a certificate a company has issued.[81] An important example of such an arrangement is the

[73] Morse G, *Company law* (15th ed, 1995), 241.
[74] Cheffins, above n 61, 60.
[75] Farrar, above n 29, 179.
[76] O'Neal F and Thompson R, *Oppression of Minority Shareholders* (2nd ed, 1985), 77.
[77] For a detailed discussion see Stedman G and Jones J, *Shareholders' Agreements* (2nd ed, 1990), 65.
[78] Davies, above n 60, 7.
[79] Kraakman *et alia*, above n 52, 71.
[80] Proctor G and Miles L, *Corporate Governance* (2002), 52.
[81] Cheffins, above n 61, 69.

debenture. The standard way in which a company borrows money by way of debentures is to arrange to have them issued to a substantial number of investors through the medium of a trustee under a single instrument.[82] Debt aggregated in this fashion is ordinarily referred to as 'loan stock'.[83]

Contracts regarding debt obligations invariably specify some form of repayment date, making it possible to determine the legal duration of a debt. These forms of repayments and the duration of repayments will vary according to the type of credit obtained. Overdraft bank accounts are often considered short-term finance, however, the flexibility of this type of credit often encourages a company to utilise this form of loan for long-term periods.[84] The return, or yield, a creditor earns is generally based on the period of time taken for the borrower to repay the principal credit and the interest.[85] Most often, returns for creditors are fixed over a period of time. Unlike shareholders, if a company does exceedingly well, it will have no impact on creditors' yield. On the other hand, if a company performs poorly, creditors will still receive their yield providing the company does not default or renegotiate.[86]

The possibility of a company failing to meet its debt obligations is referred to as 'default risk'. If a company encounters financial difficulties that result in liquidation, creditors have priority over shareholders in collecting monies owed, as a company must pay any outstanding debts before distribution of assets can occur.[87] One possible method a creditor can employ to reduce the associated risks is to exercise a certain measure of control over the business affairs of the debtor company.[88] Banks will often monitor developments at a company by checking the movements of the balance owing on an

[82] Jensen M, *A Theory of the Firm: Governance, Residual Claims, and Organizational Forms* (2000), 154.
[83] Pennington, above n 57, 498.
[84] Ibid.
[85] Cheffins, above n 61, 71.
[86] Ibid.
[87] Farrar, above n 29, 269.
[88] Proctor and Miles, above n 80, 52.

overdraft account, or even by requesting sales forecasts or monthly financial statements.[89] However, these courses of action are rare, as lenders generally find that involvement in corporate decision-making has little or no effect on their yield.[90]

(c) Managers

Managers of large corporations act as central organisers.[91] They are responsible for making the key administrative and strategic decisions pertaining to the present and future direction of the business.[92] Management teams are generally made up of professionally trained executives, many specialising in specific fields such as marketing or finance. These specialised managers usually operate under a chief coordinator and policy maker, the chief executive officer.[93] Managers must always carefully consider their choice of business ventures and objectively ascertain whether they are appropriate for the company. Accordingly, a thorough understanding of the company's position and priorities is vital.[94]

Managers are often locked into a contractual relationship with a specific period of employment.[95] Management positions are usually salary based and, depending on the nature of the business, often highly paid.[96] Managers are also often offered incentives to ensure they run the company to its peak performance and improve shareholder returns.[97] For instance, executive share options offer an attractive way of providing incentives to top executives.[98] Such schemes operate on the theory that a manager is motivated to think like a shareholder.[99]

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[89] Ibid.
[90] Easterbrook F and Fischel F, *Voting in Corporate Law* (1983), 403.
[91] Keasey K and Wright M, *Corporate Governance; Responsibilities, Risks and Remuneration* (1997), 60.
[92] Monks and Minow, above n 50, 216.
[93] Ibid.
[94] Keasey and Wright, above n 91, 63.
[95] Gullick J, *Company Law* (13th ed, 1987), 227.
[96] Mitchell P, *Directors' Duties and Insider Dealing* (1982), 19.
[97] Pennington, above n 57, 658.
[98] The David Hume Institute, *Corporate Governance*, Hume's Papers on Public Policy, Vol 3 (No 4), 1995.
[99] Keasey K *et alia*, *Corporate Governance: Economic and Financial Issues* (1997) 86.

Of course, with the high salary and incentives a manager receives, the position carries higher levels of risk than other positions within the company. The most notable risk is forced departure, which can result from a variety of circumstances. For example, situations such as financial difficulties in the company or even possible personality clashes within the company can lead to a management executive being forced out. In family owned companies, marital or domestic quarrels often lead to the removal of a management executive.[100]

The legal authority to control and direct company affairs is ordinarily vested in the board of directors, however, such boards often delegate a large portion of their legal powers to those in management. Managers quite often undertake the responsibility of determining basic long-term corporate objectives and coordinating key business operations. This control maintained by managers needs to be conducted with discretion, without outside or external constraints.[101] If a manager were to misuse his or her powers in this respect, the board of directors has the legal power to pursue disciplinary action.[102]

Managers must also strive to conduct company matters and business ventures in an ethical manner. Although fraudulent use of corporate funds is rare, it still occurs. More common is the inappropriate use of corporate funds for personal expenditures. This is often seen by behaviour such as excessive use of expense accounts or providing friends or family members with highly paid jobs. Such conduct reduces the profitability of a company, which has an impact on all persons related to the company.[103]

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[100] Cheffins, above n 61, 116.
[101] Lawriwsky M, *Corporate Structure and Performance: The Role of Owners, Managers and Markets* (1984), 9-10.
[102] Gullick, above n 95, 226.
[103] Cheffins, above n 61, 116

(d) Directors

The board of directors is generally vested with the power to manage companies. In turn, the board will generally delegate most day-to-day tasks and running of the company to the executive officers or managers.[104] In the case of closely-held companies, key investors are often directors of the company as well as full-time managers.[105] In contrast, the board of directors in a public company will ordinarily operate on a more formal and structured basis. In these types of companies, senior full-time executives are often joined on the board by various non-executive directors.[106] These non-executive directors provide support and assistance to the full-time executives, as well as monitoring executive decision-making.[107]

Non-executive directors are often referred to as either 'independent' or 'outside' directors, though each term is slightly, yet significantly, different. An independent director has no connection with the company apart from his or her seat on the board, and any possible shareholding. An outside director encompasses those directors who are not employed on a full-time basis by a company.[108] The number of non-executive directors present at a board meeting varies depending on the company. Research indicates that the ratio is often as high as 50 percent.[109]

Directors are ordinarily elected by shareholders. The term or duration of a director is usually specified once elected. Once that term is served, directors will be eligible for re-election, providing they are in good standing with the nominating committee.[110] An elected director can leave their office during their term by resigning their position. They

[104] Mitchell, above n 96, 20.
[105] Ibid 17.
[106] Proctor and Miles, above n 80, 26.
[107] Tricker R, *Corporate Governance: Practices, Procedures and Powers in British Companies and their Board of Directors* (1984), 177.
[108] Cadbury A, *Thoughts on Corporate Governance* (1993), 6.
[109] Bostock R, *Company Responses to Cadbury* (1995), 96.
[110] Cheffins, above n 61, 96.

can also be forcibly removed by shareholders.[111] Non-executive directors are usually paid a fee for attending meetings and carrying out related duties. The amount of the fee paid will vary depending on the size of the company and other variables.[112]

(e) Employees

The relationship between a company and its employees is unique. When employees agree to work for a company they do so on the understanding that they will be acting under the authority of the employer and that the day-to-day parameters will be determined by the company's administrative system.[113] The implication is that there is little or no room for employee 'bargaining'. From an economic perspective, employers ought to be aware of market conditions so that they are adequately informed on the terms that must be offered to hire and retain appropriately qualified staff.[114]

Employees occasionally work for a fixed term period, however, the relationship between an employee and his or her employer is more commonly based on the ground that the relationship will continue to operate until the employee resigns, retires or is dismissed.[115] Often an employee is obligated to give notification of a certain period of time prior to resigning, and likewise an employer usually has to notify the worker in advance before terminating his or her employment.[116]

The return an employee receives is more often than not in the form of a wage, with a set or prescribed sum paid per hour. Wages often fail to vary in accordance with an employee's contribution to a company. Accordingly, companies are often foregoing an

[111] Farrar, above n 29, 99.
[112] Ibid.
[113] Tricker, above n 107, 177.
[114] Cheffins, above n 61, 83.
[115] Proctor and Miles, above n 80, 56.
[116] Gullick, above n 95, 98.

opportunity to use employment remuneration as a motivational instrument.[117] Some corporations do have employment schemes in which an employee is paid in accordance with the profitability of the company; however, these employees are generally at more risk than the average salary or wage earner.[118]

Traditionally, employees have played only a minor role in the control of a corporation. There are, however, two circumstances in which an employee can take an active role in shaping managerial decisions. The first of these is when the employee is also an owner of the company. In these circumstances, the level of control of the company would relate to the level of accountability and risk, and would usually mean that the employee would receive returns that could vary according to their level of contribution.[119] The second circumstance in which an employee can take an active role in shaping managerial decisions is in companies where employee representatives have been nominated to negotiate with corporate executives. By listening to the concerns of the employees, executives can ward off possible dangers to the staff that may end up being costly, such as physical hazards.[120]

Conflict situations such as dismissal or wage reductions between employees and other corporate participants can often be addressed by bargaining. Bargaining can be used to address a vast range of issues and union representatives speaking on behalf of employees often assist this process. When agreements are made through such bargaining procedures, they are considered to be more intricate and specific than the conventional employment contract.[121]

[117] Cheffins, above n 61, 86.
[118] Proctor and Miles, above n 80, 18.
[119] Monks and Minow, above n 50, 235.
[120] Proctor and Miles, above n 80, 57.
[121] Cheffins, above n 61, 85

3. CORPORATE CHARACTERISTICS

Whilst company law varies greatly across jurisdictions, the basic structural foundations share common characteristics.[122] The four main characteristics that are essential to the vitality and appeal of the corporate form are:

(1) limited liability;

(2) legal personality;

(3) transferable shares; and

(4) centralised management.[123]

3.1 Limited Liability

Limited liability is the term used to express the separation of the liability of the corporation from the liability of its owners, employees and other individuals that make up the corporate entity.[124] Most importantly, in the case of bankruptcy, the individuals in a corporation are not held individually responsible for corporate debts.[125] The formation of a limited liability entity is used as a means of sharing the risks of transactions with the parties with whom a company contracts.[126] Another subtle, yet important, role that limited liability plays is in facilitating delegated management. By shifting downside risk from shareholders to creditors, limited liability enlists creditors as monitors of the company's managers, a role they are far more capable of tackling than shareholders with widely dispersed share ownership.[127] Historically, limited liability was not always associated with the corporate form. In recent years, however, it has become an almost universal feature of the company.[128]

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[122] Kraakman *et alia*, above n 52, 5.
[123] Clark R, *Corporate Law* (1986), 2.
[124] Davies, above n 60, 11.
[125] Grantham and Rickett, above n 63, 66.
[126] Davies, above n 60, 12.
[127] Monks and Minow, above n 50, 8.
[128] Kraakman *et alia*, above n 52, 10.

The concept of limited liability was first formulated and utilised in the 15th century by trade merchants, especially the Genoan, Venetian and Florentine traders. Whilst trade merchants of this time had the opportunity to reap large profits, they were also at high risk from the likes of piracy, ships sinking, and predatory competitors that monopolised certain markets. The idea was then formulated to spread investments over many ships instead of investing in just the one. The institution that was developed to resolve such problems was called the *Commenda*.[129] Under the *Commenda*, the organisers of a voyage would collect funds from a number of investors whose liability would be restricted to the money that they had invested. The promoter, however, would have unlimited liability. What this meant was that, in the case of a catastrophe, the investors would only be called upon for the share they had invested, whilst the promoter could be bankrupted to pay the relevant debts.[130] It was from this historical scheme that the modern day notion of limited liability developed.

3.2 Legal Personality

A corporation is considered, in legal terms, to be a single entity or 'person' that is separate from its contributing and participating members.[131] As an economic entity, a corporation is a collaboration of contracts, suppliers, products, services and activities that are usually unique from the next corporation. These features give the impression of having an actual personality.[132] Civil law refers to legal personality as 'separate patrimony', which is the firm's ability to own, sell and pledge assets that are distinct from the property of other persons such as investors.[133]

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129 Macmillan F, *International Corporate Law* (2002) Vol 2, 7.
130 Kraakman *et alia*, above n 52, 8. A Florentine statute of 1408 codified the conditions of public responsibility attached to a *Commenda*: 'Capitalists were freed of all public responsibility beyond their contributions, while the management contracted in their own names and were responsible for the debts of the business'. For a detailed discussion see Cooke C, *Corporation, Trust and Company: An Essay in Legal History* (1950), 46.
131 Grantham and Rickett, above n 63, 67.
132 Kraakman *et alia*, above n 52, 5.
133 Ibid.

3.3 Transferable Shares

Fully transferable shares are another characteristic that distinguishes the corporation from various standard-form legal entities such as partnerships.[134] Transferability is a function that gives the corporation the freedom to conduct business without interruption whilst owner identity constantly changes. Such transferability allows shareholders greater ability to diversify their shareholding portfolio due to the liquidity of their investments.[135] Shareholders who fear that their investments may be losing value are able to sell their stock almost immediately, which gives them greater control of personal investments.[136] Transferability also gives the corporation maximum flexibility in raising capital, and all jurisdictions provide for free transferability as the default regime for at least one class of corporations.[137] Most jurisdictions also provide for certain mechanisms that restrict transferability because completely free transferability can make it difficult to maintain negotiated control arrangements.[138]

3.4 Centralised Management

The power to determine the overall direction of a company is vested in the directors, whilst the power to control a company's day-to-day operations is delegated to the managers.[139] Delegation permits the centralisation of management that is necessary for maximum productivity. Centralised management gives specific decision-making powers to the appropriate personnel. This provides clarification to all members of a corporation as to those persons who have the authority to make binding agreements.[140] It is also another aspect of the limited authority given

[134] Ibid.
[135] Monks and Minow, above n 50, 81.
[136] Kraakman *et alia*, above n 52, 10.
[137] Monks and Minow, above n 50, 8.
[138] Kraakman *et alia*, above n 52, 10.
[139] Davies, above n 60, 112.
[140] Ibid.

to investors. That is, in order to maximise operational efficiency, shareholders give up the right to make decisions regarding anything other than general issues.[141]

[141] Monks and Minow, above n 50, 10.

CHAPTER 2

THE DEVELOPMENT OF COMPANY LAW IN JORDAN

1. HISTORICAL BACKGROUND

The land that became Jordan is part of the richly historical ‘Fertile Crescent’ region. Around 2000BC, Semitic Amorites settled around the Jordan River in an area called Canaan. Subsequent invaders and settlers included Hittites, Egyptians, Israelites, Assyrians, Babylonians, Persians, Greeks, Romans, Arab Muslims, Christian Crusaders, Mameluks, Ottoman Turks, and, finally, the British.[142]

Jordan was originally part of the Ottoman Empire.[143] In the latter course of the Ottoman rule in the early 19th century, a partially codified system of law was introduced to the urban areas of the Syrian territory of the Ottoman Empire which included Jordan. The most significant single code of law promulgated by the Ottomans was the famous *Ottaman Majellah 1877*.[144] The *Ottaman Majellah* was a codification of the prevailing Islamic Shari’ah (Islamic Law) representing the views of the Muslim jurists following the Hanafi school of the Sunni Islam.[145] The *Ottaman Majellah* dealt with select areas of private law. The most important and detailed part of the text concerned the law of obligations in civil transactions (especially sale, hire, guarantee, assignment, etc.). The other principal area of law covered by the *Ottaman Majellah* was the law of evidence.[146]

Jordan remained a part of the Ottoman Empire until the end of World War I, when the United Nations awarded the territory now comprising Israel, Jordan, the West Bank, Gaza, and Jerusalem to the United Kingdom. In 1922, the British divided the mandate by establishing the semi-autonomous Emirate of

[142] Hassan A, *Bedouin Customary Law* (1974), 5, [Arabic Text].
[143] Narjeeli W, *The Islamic Jurisdiction* (1973), 93, [Arabic Text].
[144] Hassan, above n 142, 7.
[145] One of denominations of Islam.
[146] Mousa T, *The Commercial Companies* (1973), 14, [Arabic Text].

Transjordan, ruled by the Hashemite Prince Abdullah I, while continuing the administration of Palestine under a British High Commissioner. In February 1928, the United Kingdom and Transjordan signed a treaty followed by an Organic Law (promulgated on 19 April 1928) which recognised Prince Abdullah I as the 'Head of State' with hereditary rights and declared Islam as the State religion.[147]

The *Organic Law of Transjordan 1928* provided that – except in so far as it may have been amended subsequent proclamations, rules, or laws – the Ottoman legal tradition retained its influence in Jordan. In 1929, many Ottoman laws (including the *Ottoman Law of Family Rights 1917*) were re-enacted with some alterations. The British mandate over Transjordan ended on May 22, 1946. Days later the country became the independent Hashemite Kingdom of Jordan.[148] The Kingdom promulgated a new constitution in February 1947, and legislation pertaining to 'family rights' was enacted soon after in 1951. The *Law of Family Rights 1951* was the first in a series of codifications of Islamic family law issued in the 1950s by the national legislatures of newly independent Arab states.[149] A new constitution was adopted in 1952, retaining the religious and communal basis of jurisdiction in personal status matters.[150] The 1952 Constitution declared Jordan to be a constitutional hereditary monarchy with representative government. The king, however, still retained considerable control over the executive, legislature and judiciary.

The *Civil Code* and *Civil Procedure Code* were enacted in 1952 and 1953 respectively, the former replacing the *Ottoman Majellah*.[151] The *Civil Code* was reenacted in 1976 and was largely drawn from Syrian legislation, which in turn was modeled on the *Egyptian Civil Code 1948*.[152] The *Civil Code 1976* remains the principal legislation governing areas of private law in general and the law of obligations in particular.[153] As the former *Ottoman Majellah* was by no means comprehensive, and sometimes not even comprehensible, there had been a strong push by Jordanian lawyers to have it repealed, which

[147] Denoeux B, *Legislative Politics in the Arab World* (1999), 136.
[148] Eid E, *Commercial Companies* (1969), 12, [Arabic Text].
[149] Denoeux, above n 147, 137.
[150] Khiat A, *Companies in the Islamic Shariáh and the Law* (1970), 12, [Arabic Text].
[151] Mousa, above n 146, 14.
[152] Shamri T, *The Law of Commercial Companies* (1999), 15, [Arabic Text].
[153] Khafif A, *Companies in the Islamic Jurisprudence* (1998), 97, [Arabic Text].

succeeded in 1976. Also in 1976, the *Jordanian Law of Personal Status* repealed the *Jordanian Law of Family Rights 1951* in a number of significant ways, providing for a more comprehensive code, while retaining reference to the classical Hanafi[154] rules in circumstances that were not specifically covered in the regulations.

2. COMMERCIAL LAW

Commercial matters in Transjordan were governed by the *Ottoman Commercial Code 1849-1850* until it was later replaced by the promulgation of several commercial laws. In 1964, the *Company Law* was enacted and applied to both the East and West Banks of Jordan. In 1966, the *Commercial Code* was enacted, including four separate parts: (i) trade and traders; (ii) commercial contracts; (iii) bills of exchange; and (iv) creditors and bankruptcy. To facilitate the implementation of the government's liberal economic policies, the 1964 and 1966 codes were supplemented by the *Encouragement of Investment Law 1972*, the *Registration of Foreign Companies Law 1975*, and the *Control of Foreign Business Activities Defense Regulations 1978*.

A new legal regime was introduced by the Jordanian Government in June 1997 to encourage much-needed investment into the business sector. The *Companies Law 1997* encompasses routine procedural matters, facilitates the process of company registration, and provides several options for those wishing to register a corporate entity. The principal registration options include: a general partnership company, a limited partnership company (with or without share capital), a limited liability company, a private shareholding company, a public shareholding company, a joint investment company, an offshore company, and a foreign operating company. A brief outline of each registration option is provided in the next section.

The enactment of the *Companies Law 1997* was followed by the establishment of the Amman Stock Exchange (ASE), a private and independent body, in March 1999. The ASE, Jordan's only stock

[154] One of denominations of Islam.

exchange, is governed by a seven-member board of directors. A chief executive officer oversees day-to-day responsibilities and reports to the board. The ASE is regulated by the *Securities Law 2002*,[155] ASE Listing Rules 2003, and other internal regulations. Whilst it has the power to issue fines and warnings, and suspend and delist issuers, the ASE has not played a significant role in regulating listed companies to date.[156]

The establishment of the ASE was complemented by the creation of two other institutions – the Securities Depository Centre (SDC)[157] and the Jordan Securities Commission (JSC).[158] The SDC, a non-profit private body, was established to ensure safe custody of ownership of securities and oversee the registration and transferral of ownership of securities traded on the ASE.[159] The JSC, a government body, is responsible for supervising the issuance of, and dealings in, securities, as well as regulating and monitoring the activities and operations of those organs falling under its supervision. The JSC also supervises the disclosure of information related to securities, issuers, insider trading and major shareholders. The Commission itself is appointed by the Council of Ministers and consists of a chairman, deputy chairman, and three commissioners. The JSC has approximately 100 staff and more than 10 enforcement officers.[160]

The JSC's powers and authority were increased significantly with the enactment of the *Securities Law 2002*.[161] The *Securities Law 2002* regulates the capital market and provides a legislative framework to supervise the activities of the ASE, JSC, SDC, and market intermediaries. The JSC has the power to draft regulations in support of the legislation. The legislation gives the JSC the power to suspend trading or delist issuers and to impose fines of up to JD50,000, pursuant to Article 22 of the *Securities Law*

[155] The relevant provisions are Articles 65-76 of the *Securities Law 2002* (JOR).
[156] World Bank, *Report on the Observance of Standards and Codes (ROSC): Corporate Governance Country Assessment (Jordan)* (June 2004), 2.
[157] For more information see www.sdc.com.jo.
[158] For more information see www.jsc.gov.jo.
[159] The SDC is regulated pursuant to Articles 76-89 of the *Securities Law 2002* (JOR).
[160] The JSC is regulated pursuant to Articles 25-46 of the *Securities Law 2002* (JOR).
[161] See Articles 8-15 of the *Securities Law 2002* (JOR) for a general outline of the main responsibilities and powers of the JSC.

2002.[162] The JSC has also been given quite significant investigative powers, including the power to subpoena parties to enforcement hearings and to obtain telephone records.[163] The Controller of Companies, operating under the Ministry of Industry and Trade, also plays a significant enforcement role. The Controller has wide investigative authority and recourse rights, including the right to dissolve the board or revoke the company's registration. The Controller does not, however, have the power to impose a fine or penalty.

3. TYPES OF COMPANIES IN JORDAN

3.1 General Partnership[164]

A general partnership is formed by at least two and not more than twenty partners who are jointly and severally liable for the partnership's debts.[165] All of the rights and obligations of the partners are determined by a partnership agreement.[166] A partner's interest may be transferred with the approval of all partners or in accordance with the partnership agreement. Further, with the consent of existing partners, new partners can be admitted throughout the course of the partnership.[167] The management of the partnership is vested with one or more managers.[168] Managers must act honestly and faithfully, and are personally liable for negligence that causes harm to the partnership.[169] Partners may withdraw from the partnership of their own will at any time.[170] If the partnership consists of only two partners, the withdrawal of one of the partners will not lead to the dissolution of the partnership. Instead, the remaining partner may seek to replace

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[162] Approximately AUD100,000.
[163] A board has been established to hear appeals from JSC decisions, whose decisions can be further appealed to the courts. For a general discussion see World Bank, above n 156, 2.
[164] *Companies Law 1997* (JOR), Articles 9-40.
[165] *Companies Law 1997* (JOR), Articles 9 and 26.
[166] *Companies Law 1997* (JOR), Article 16.
[167] *Companies Law 1997* (JOR), Article 29.
[168] *Companies Law 1997* (JOR), Article 17.
[169] *Companies Law 1997* (JOR), Article 18.
[170] *Companies Law 1997* (JOR), Article 28.

the absent partner.[171] Further, a partnership continues to exist in the event of the death of one partner.[172]

3.2 Limited Partnership[173]

Limited partnerships can be established with or without share capital.[174] Both types of arrangements are made up of general partners and limited partners.[175] General partners are responsible for the management of the partnership and are jointly and severally liable for all the partnership's debts and liabilities. Limited partners do not have the right to participate in management and liability is limited to their share in the capital of the partnership.[176] The minimum capital permitted in a limited partnership in shares is JD100,000.[177] Partnerships limited by shares are permitted to issue shares to the public through the ASE. Ordinary limited partnerships and general partners in partnerships limited by shares are subject to the provisions governing general partnerships in all matters not expressly covered.[178] Limited partnerships in shares are also governed by the provisions pertaining to public shareholding companies.[179]

3.3 Limited Liability Company[180]

A limited liability company is composed of two or more persons whose liability is limited to the value of their shareholding in the company.[181] The registration of a limited liability company

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[171] *Companies Law 1997* (JOR), Article 28(3)(c). Failure to do so within three months of the partner's withdrawal will result in the partnership's dissolution by virtue of law.
[172] *Companies Law 1997* (JOR), Article 30.
[173] *Companies Law 1997* (JOR), Articles 41-48 and 77-89.
[174] *Companies Law 1997* (JOR), Articles 41 and 77.
[175] *Companies Law 1997* (JOR), Articles 41 and 77. A limited partnership in shares must have at least two general partners and at least three limited partners (Article 77). There are no similar specifications for ordinary limited partnerships.
[176] *Companies Law 1997* (JOR), Articles 41 and 43. Whilst limited partners do not have the right to participate in management, they do have access to books, accounts and registers related to the decisions adopted in the course of management (Article 43(a)).
[177] Approximately AUD200,000. See *Companies Law 1997* (JOR), Article 78.
[178] *Companies Law 1997* (JOR), Articles 48 and 82.
[179] *Companies Law 1997* (JOR), Article 89.
[180] *Companies Law 1997* (JOR), Articles 53-76.
[181] *Companies Law 1997* (JOR), Article 53(a).

composed of one person only is permitted with the approval of the Controller of Companies in the Ministry of Industry and Trade.[182] The minimum required capital for limited liability companies is JD30,000,[183] 50 percent of which must be paid prior to official registration of the company.[184] A limited liability company is to be managed by one individual or by a board of directors consisting of no more than seven individuals.[185] The general assembly is composed of all the company shareholders and is required to hold annual meetings to discuss all relevant company matters.[186] Limited liability companies are subject to the provisions governing public shareholding companies in all matters not expressly covered.[187]

3.4 Private Shareholding Company[188]

A private shareholding company is composed of two or more persons whose liability is limited to the value of their shareholding in the company.[189] The registration of a private shareholding company composed of one person only is permitted with the approval of the Controller of Companies in the Ministry of Industry and Trade.[190] The minimum required capital for limited liability companies is JD50,000,[191] 50 percent of which must be paid prior to official registration of the company.[192] The company may issue various types and categories of shares which differ in their terms of nominal value, priority rights, transfer rights, voting force and method of profit and loss distribution.[193] A private shareholding company is to be managed by a board of directors.[194] The general assembly is composed of all the company shareholders and is required to hold

[182] *Companies Law 1997* (JOR), Article 53(b).
[183] Approximately AUD60,000.
[184] *Companies Law 1997* (JOR), Articles 54 and 59. The remaining amount must be paid within the following two years.
[185] *Companies Law 1997* (JOR), Article 60.
[186] *Companies Law 1997* (JOR), Articles 64-67.
[187] *Companies Law 1997* (JOR), Article 76.
[188] *Companies Law 1997* (JOR), Articles 65-89 *bis*.
[189] *Companies Law 1997* (JOR), Article 65(a) *bis*.
[190] *Companies Law 1997* (JOR), Article 65(a) *bis*.
[191] Approximately AUD100,000.
[192] *Companies Law 1997* (JOR), Articles 66 *bis* and 69 *bis*.
[193] *Companies Law 1997* (JOR), Article 68 *bis*.
[194] *Companies Law 1997* (JOR), Article 72 *bis*.

annual meetings to discuss all relevant company matters.[195] Private shareholding companies are subject to the provisions governing public shareholding companies in all matters not expressly covered in the legislation or the articles or memorandum of association.[196]

3.5 Public Shareholding Company[197]

A public shareholding company may be formed by two or more shareholders whose liability is limited to their respective share of the company's equity.[198] They are managed by a board of directors, whose members are elected by company shareholders.[199] The minimum authorised capital is set at JD500,000.[200] The subscribed capital must exceed JD100,000[201] or 20 percent of the authorised capital, whichever is greater.[202] Banks, financial institutions and insurance companies may only be incorporated as public shareholding companies.[203] Further, holding companies must be incorporated in this form.[204] Public shareholding companies are permitted to issue shares to the public through the ASE.[205]

3.6 Joint Investment Company[206]

A joint investment company (mutual fund company) must be established as a public shareholding company. Its objectives are restricted to investing funds on behalf of others by way of securities.[207] This entity may take the form of a company with variable capital, which issues redeemable shares, the value of which is determined by the value of the company's assets. It may

195 *Companies Law 1997* (JOR), Articles 76-80 *bis*.
196 *Companies Law 1997* (JOR), Article 89 *bis*.
197 *Companies Law 1997* (JOR), Articles 90-191.
198 *Companies Law 1997* (JOR), Articles 90(a) and 91.
199 *Companies Law 1997* (JOR), Article 132.
200 Approximately AUD1,000,000.
201 Approximately AUD200,000.
202 *Companies Law 1997* (JOR), Article 95.
203 *Companies Law 1997* (JOR), Article 93.
204 *Companies Law 1997* (JOR), Article 204.
205 *Companies Law 1997* (JOR), Article 90(a).
206 *Companies Law 1997* (JOR), Articles 209-210.
207 *Companies Law 1997* (JOR), Article 209(a).

also take the form of a company with fixed capital whose shares are not redeemable and are traded on the stock exchange.[208] Joint investment companies are subject to the provisions governing public shareholding companies in all matters not expressly covered.[209]

3.7 Offshore Company[210]

An offshore (or exempt) company is a public shareholding company, private shareholding company, limited liability company or partnership limited by shares, that is registered in Jordan but conducts its business outside of Jordan.[211] This company form was introduced in Jordan to attract foreign investment. This entity may not offer its shares for public subscription in Jordan, and Jordanians are prohibited from subscribing to its capital.[212] Where the offshore company is engaged in insurance, banking, finance or joint investments, its capital must be at least JD1,000,000.[213]

3.8 Foreign Operating Company[214]

This business structure is open to foreign companies wishing to engage in business ventures in Jordan. A foreign company that has been awarded a contract in Jordan requiring execution of work therein must register a branch with the Controller of Companies in the Ministry of Industry and Trade. Such a company is registered as a foreign operating company for the purpose of the contract and for the relevant duration. If the company obtains other contracts in Jordan, then the same registration can be extended to cover such new contacts. If no new contracts are obtained

[208] *Companies Law 1997* (JOR), Article 210.
[209] *Companies Law 1997* (JOR), Article 209(b).
[210] *Companies Law 1997* (JOR), Articles 211-214.
[211] *Companies Law 1997* (JOR), Article 211(a).
[212] *Companies Law 1997* (JOR), Article 211(b).
[213] Approximately AUD2,000,000. See *Companies Law 1997* (JOR), Article 212.
[214] *Companies Law 1997* (JOR), Articles 240-244.

by the company, then the branch office is closed and liquidated upon the completion of the contract in respect of which the registration was affected.[215]

3.9 Foreign Non-operating Company[216]

A foreign non-operating company is a foreign company or entity which takes Jordan as a base for its operations conducted outside Jordan, for the purpose of using the base as a representative office for directing and coordinating its operations with the foreign head office.[217] Non-operating foreign companies are prohibited from carrying out any commercial activities within Jordan. However, it is still permissible for such companies to provide support services, including technical and scientific services. [218]

3.10 Joint Venture

A joint venture need not be registered in Jordan and, hence, is not governed by the *Companies Law 1997*. A joint venture is typically regulated by a contractual agreement between the joint venture parties.

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215 *Companies Law 1997* (JOR), Article 240(a).
216 *Companies Law 1997* (JOR), Articles 245-251.
217 *Companies Law 1997* (JOR), Article 245(a).
218 *Companies Law 1997* (JOR), Articles 245(b)-(c).

CHAPTER 3

THE OECD PRINCIPLES OF CORPORATE GOVERNANCE

1. HISTORICAL BACKGROUND

In recent years, countries around the world have come to realise the importance of an official corporate governance regime, which underpins market confidence, integrity and efficiency, as well as assisting in the strengthening of economic growth.[219] After a wave of financial crises and a series of corporate scandals and failures that began in East Asia and rapidly spread to Russia,[220] investors watched helplessly as their investments crashed due to systematic failures of investor protection mechanisms, combined with weak capital market regulation.[221] These financial crises and corporate scandals raised serious concerns about the stability of the international financial market and further focussed the minds of governments, regulators, companies, investors and the public on weaknesses in corporate governance systems.[222]

In 1998, policy makers within the Organisation for Economic Cooperation and Development (OECD)[223] began a push for the OECD to develop, in conjunction with national and international governmental organisations, and the private sector, a universal set of corporate governance principles.[224] As a result, the OECD developed an ad-hoc taskforce to consider the views of OECD member and non-member

[219] Chee L, *Corporate Governance: An Asia-Pacific Critique* (2002), 55. See also Kirkpatrick G, *Improving Corporate Governance Standards: The Work of the OECD and the Principles* (2005).
[220] Gregary H, *The Globalisation of Corporate Governance (*2000), 2.
[221] Jesover F and Kirkpatrick G, *The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries* (2004), 2.
[222] Ibid.
[223] OECD, *Survey of Corporate Governance Development in OECD Countries* (2004).
[224] Trade Union Advisory Committee (TUAC) to the OECD, *The OECD Principles of Corporate Governance: An Evaluation of the 2004 Review by the TUAC Secretariat*, (2004), 4.

countries and develop non-binding principles to evaluate and improve the legal, institutional, and regulatory framework for corporate governance.[225]

In May 1999, a number of key principles were agreed upon and adopted by the OECD Ministerial Council. The principles became known as the OECD Principles of Corporate Governance 1999 (OECD Principles 1999). They were the first international standard in this area, providing guidance and benchmarks for regulators and participants in financial markets across the globe. The OECD Principles 1999 were non-binding because their implementation was intended to be adapted to different legal, economic and cultural circumstances. Furthermore, the OECD Principles 1999 did not adopt any single model of corporate governance. Rather, the drafters attempted to strike a balance between various international models, and focussed on basic principles which enable private sector corporations in different countries to be sufficiently attractive to the global investment community. [226]

The OECD Principles 1999 provided the landscape for the establishment of regional corporate governance roundtables in cooperation with the World Bank and the International Monetary Fund.[227] In fact, the International Monetary Fund adopted the OECD Principles 1999 as a benchmark instrument for their member countries and surveillance procedures.[228] Moreover, they were endorsed by the Financial Stability Forum[229] as one of its twelve key standards for financial stability. Although not binding in any respect, the OECD Principles 1999 were too valuable to be ignored and far too beneficial not to embrace.

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[225] Gregary, above n 220, 3.
[226] TUAC, above n 224. 4.
[227] Chee, above n 219, 18. See also Jesover and Kirkpatrick, above n 204, 3; and TUAC, above n 224.
[228] Ibid.
[229] The Financial Stability Forum was established in 1999 to promote international financial stability through information exchange and international cooperation in financial supervision and surveillance. The Forum brings together, on a regular basis, national authorities responsible for financial stability in significant international financial centres, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts. The Forum seeks to coordinate the efforts of these various bodies in order to promote international financial stability, improve the functioning of markets, and reduce systematic risk. For more information see www.fsforum.org.

2. FRAMEWORK OF THE OECD PRINCIPLES 1999

As will be explained in the next section, the OECD Principles 1999 were revised and replaced in 2004. Whilst the 2004 revision process implemented a number of significant amendments which will be discussed in the next section of this chapter, the general content and underlying rationale of the principles remained the same.

2.1 General Content

The five chapters of the OECD Principles 1999 were each headed by a single statement of principle followed by a number of supporting recommendations. A second part to the document supplemented the recommendations with annotations that contained commentary on each principle. The first two chapters addressed the 'Rights of Shareholders' and the 'Equitable Treatment of Shareholders', respectively. The third chapter addressed the 'Role of Stakeholders in Corporate Governance'. The last two chapters focused on the board of directors and were headed 'Disclosure and Transparency' and 'Responsibilities of the Board'.

There is no single model of effective corporate governance. The job of the drafters of the OECD Principles was to identify common elements from the systems in both OECD and non-OECD countries that underlie good corporate governance. The Principles do not provide detailed prescriptions for the implementation of national legislative frameworks. Rather, they seek to outline a series of general governance objectives and recommended means of achieving those objectives effectively. The role of corporate participants and their interaction with each other vary significantly between jurisdictions. The OECD Principles were developed to serve as a reference point for the policy makers within these jurisdictions to draft regulatory frameworks that reflect their respective economic, legal, social and cultural circumstances.

2.2 Core Standards

The OECD Principles 1999 were built on four core standards: fairness, transparency, accountability, and responsibility.[230]

(a) Fairness

Principles 1 and 2 of the OECD Principles 1999 reflected the concept of fairness. Principle 1 provided that the corporate governance framework should protect shareholders' rights. It was recognised that equity investors (shareholders) are property owners and, as owners of a legally recognised and divisible share of a company, they have the right to hold or convey their interest in the company. The Principle also recognised the protection of basic rights, such as the right to secure share ownership, to obtain a share in the profits, to gain access to relevant information on a timely basis, and to participate in general shareholder meetings, the election of directors, and the approval of mergers and acquisitions. The underlying rationale of Principle 1 was that effective corporate governance depends on the enforcement of common practices that ensure and protect the property rights of shareholders, and provide for secure methods of ownership, registration and transferability of shares.

Principle 2 recognised that it is necessary to have a legal framework that protects the rights of minority shareholders against misappropriation of assets or self-dealing by controlling shareholders, managers, and directors. It provided that all shareholders of the same class must be treated equally and that the grievances of minority shareholders must receive the same attention and degree of urgency as those of majority shareholders. Principle 2 prohibited insider trading and abusive self-dealing and provided that all

[230] Chee, above n 219, 80.

material matters related the company should be disclosed by the board to the shareholders.

(b) Transparency

A corporate governance framework should ensure timely disclosure of adequate information on financial performance and other important aspects of the corporation. It is expected that management give investors a clear and current representation of company affairs, including the financial position, performance, ownership and governance of the company. Principle 4 recognised that shareholders and investors need information from the company regarding financial and operating results to evaluate the performance of the company. It provided that, in order to prepare this information, a high quality standard of accounting and auditing must be maintained and an annual audit should be performed by an independent auditor to inform the shareholders and investors about corporate objectives, foreseeable risk factors and other relevant matters.

(c) Accountability

A corporate governance framework should ensure clarity in governance roles and responsibilities, effective monitoring of management to ensure alignment with shareholders' interests, and accountability of the board of directors to shareholders. Principle 5 reflected the concept of accountability. As elected representatives of the shareholders, the board is answerable to them. The board is also responsible for the monitoring of management because they are in a fiduciary relationship with the shareholders and the company.[231] The board should be independent from management to enable them to properly evaluate the performance of management. Directors have duties

[231] Directors are generally charged with the following responsibilities: hire, compensate, monitor and, when necessary, replace senior management; advise management on corporate strategies, plans and major decisions; provide strategic oversight; ensure compliance with laws and regulations; ensure the integrity of accounting and financial reporting; consider the relationship of the corporation with stakeholders and society at large; and organise board structure and process.

of loyalty and care which require that they avoid self-interest in their decisions and act in good faith on a fully informed basis.

(d) Responsibility

The corporate governance framework should recognise the rights of stakeholders as established by law. Principle 3 reflected the concept of responsibility by recognising that a corporate governance framework should acknowledge the important role that stakeholders play in a company's existence. Stakeholders should be given access to relevant information necessary for them to fulfil their particular role in the corporate governance process. Importantly, they should also have access to effective redress when their rights are violated. The underlying rationale of Principle 3 is that corporations should be encouraged to cooperate and act responsibly, in a manner that considers the interests of stakeholders in creating wealth and employment.

3. REVISION OF THE OECD PRINCIPLES 1999

Immediately following their establishment, the OECD Principles 1999 were utilised by member and non-member governments to evaluate and improve institutional and regulatory frameworks for corporate governance in their respective jurisdictions.[232] Review committees were established and, in some countries, significant policy initiatives were set in motion. Further, the OECD implementation process continued in developing and transition countries. However, systemic corporate failures and scandals[233] continued to occur and undermine confidence in the integrity of corporations, financial institutions and the market generally. Accordingly, the OECD Ministerial Council formally launched a review process in 2002 which resulted in the call for a reassessment of the OECD Principles 1999 by 2004.[234] The assessment was carried out under the responsibility of the OECD Steering Group on Corporate

[232] Jesover and Kirkpatrick, above n 204, 6.
[233] For example, the collapse of Enron, Tyco and Worldcom in the United Sates, Maxwell and BCCI in the United Kingdom; Ansett Airlines, One Tel, and HIH in Australia; Parmalat, Ahold, and Vivendi in Europe.
[234] TUAC, above n 224, 6.

Governance which agreed to prepare an extensive report detailing major developments and issues in corporate governance.[235]

The first major step in the OECD's review process was the circulation of a detailed survey to member countries which highlighted the key features of corporate governance arrangements and requested comments on some significant issues that had not been addressed in the OECD Principles 1999.[236] Between March 2003 and January 2004, seven successive draft revisions were submitted by the OECD Secretariat to the Steering Group. As part of this process there was active participation by key international institutions, including the International Monetary Fund,[237] World Bank,[238] Financial Stability Forum,[239] International Organisation of Securities Commissions,[240] and the Basel Committee on Banking Supervision.[241] There was also some participation of leading business and labour representatives, including the OECD's Business Industry Advisory Committee[242] and Trade Union Advisory Committee.[243]

In January 2004, a draft of the revised principles was made publicly accessible on the internet seeking comments from interested parties. This proved to be a successful endeavour. A large number of public responses were received which aided the formulation of new principles that could be adapted to the needs of diverse legal, economic and cultural circumstances. The revised principles, which drew on the experiences of both OECD member and non-member countries, were agreed upon by the OECD in April

[235] Ibid.
[236] Kirkpatrick, above n 202, 2.
[237] For information on the International Monetary Fund see above n 7.
[238] For information on the World Bank see above n 6.
[239] For information on the Financial Stability Forum see above n 229.
[240] The International Organisation of Securities Commissions is the world's most important international cooperative forum for securities regulatory agencies. The Organisation's wide membership regulates more than 90 percent of the world's securities markets. For more information see www.iosoc.org.
[241] The Basel Committee on Banking Supervision operates under the Bank for International Settlements. The Committee provides an international forum for regular cooperation on banking supervisory matters. The Committee encourages contacts and cooperation between its members and other banking supervisory authorities. It circulates both published and unpublished papers to supervisors throughout the world providing guidance on banking supervisory matters. For more information see www.bis.org/bcbs /index.htm.
[242] The Business Industry Advisory Committee to the OECD is an independent organisation officially recognised by the OECD as being representative of the OECD business community. Its members are the major industrial and employers' organisations in the 30 OECD member countries. The principal objective of the Committee is to ensure that business and industry needs are adequately addressed in OECD policy instruments.
[243] The Trade Union Advisory Committee to the OECD is an interface for labour unions with the OECD. It is an international trade union organisation which has consultative status with the OECD and its various committees.

2004. The revision process had provided the opportunity for industrialised countries to re-establish a public leadership role in implementing effective corporate governance systems and continue the building of a solid relationship between the internal governance mechanisms of corporations and their accountability to all relevant corporate constituents.

4. AN EVALUATION AND ANALYSIS OF THE OECD PRINCIPLES 2004

4.1 Foundations of the Revised Principles

Although non-binding, the OECD Principles of Corporate Governance 2004 (OECD Principles 2004) are a serious attempt to strengthen every aspect of corporate governance. They provide solutions to governance problems that stem from the separation of ownership and control, and suggest methods of dealing with complex issues relating to shareholders, employees, boards, management, and decision-making. Responding to experiences in OECD member and non-member countries, the drafters of the revised principles recognised the need for flexibility, to ensure adaptation to different legal systems, as well as diverse economic and cultural circumstances. The flexibility of the OECD Principles 2004 allows corporate governance participants to evolve and adapt to constant change, and to develop strategies to keep up with the pace of the competitive business world.

The OECD Principles 2004 utilised the same basic framework as the OECD Principles 1999. Chapter 1, a new chapter, calls on governments to put in place effective institutional and legal frameworks to support good corporate governance practice. Chapter 2 sets out the framework for a corporate governance system that protects and facilitates the exercise of shareholders' rights.[244] Chapter 3 sets out measures to ensure the equal treatment of all shareholders, including minority and foreign shareholders.[245] Chapter 4 details the important role of stakeholders in corporate

[244] Equivalent to Chapter 1 of the OECD Principles 1999.
[245] Equivalent to Chapter 2 of the OECD Principles 1999.

governance.[246] Chapter 5 outlines the importance of timely, accurate and transparent disclosure mechanisms.[247] Finally, Chapter 6 deals with board structure, responsibilities and procedures.[248]

4.2 Content of the Revised Principles

In light of the discussion of the content of the OECD Principles 1999 earlier in this chapter, the following section concentrates primarily on the amendments that were made in the 2004 revised principles, as well as the comments and recommendations made by interested parties in the review process.

(a) Chapter 1: Implementation

Chapter 1 is a new chapter that outlines general methods for the implementation, supervision, regulation and enforcement of the principles. To ensure an effective corporate governance framework, it is important to improve the enforcement of existing laws and regulations. Improved law enforcement requires broad reform to improve the performance of the judiciary and to properly empower securities regulators, whilst at the same time increasing the effective use of self-regulation. Reinforcing the importance of proper implementation and effective enforcement was a critical issue for the drafters of the 2004 revised principles.

Chapter 1 calls on policy makers to give the regulatory authorities within each country the power and resources necessary for effective implementation and enforcement of corporate governance initiatives. Moreover, policy makers are encouraged to regularly examine the different factors and elements of corporate governance to ensure the continuance of good and transparent practice. Governments are advised to outline the

[246] Equivalent to Chapter 3 of the OECD Principles 1999.
[247] Equivalent to Chapter 4 of the OECD Principles 1999.
[248] Equivalent to Chapter 5 of the OECD Principles 1999.

process used to review their corporate governance framework and ensure that it embraces the needs of the unique cultural and social circumstances of their particular country.

(b) Chapter 2: Rights of Shareholders

Chapter 2 is equivalent to Chapter 1 of the OECD Principles 1999 with some significant amendments. It is generally aimed at protecting basic shareholder rights such as the right to secure methods of ownership, the right to attend and participate in general shareholder meetings, and the right to elect the board of directors.[249] In addition, rights have been introduced that allow shareholders to remove the board of directors, to ask questions of the board of directors at the general shareholder meeting relating to the annual external audit, and to propose resolutions.[250] Moreover, Chapter 2 introduced a new requirement that shareholders have the right to have their views heard in relation to the remuneration policy for board members and key executives, and that the equity component of compensation schemes for board members and employees be subject to shareholder approval.[251]

Important amendments were made pertaining to ownership rights for all shareholders, including institutional investors. Under the original OECD Principles 1999, there was no mention of the need to facilitate the exercise of ownership rights by institutional investors. The revised Chapter 2 encourages authorities to allow institutional investors to cooperate and consult with each other on issues of corporate governance.[252] It is a significant improvement to include a provision calling for an active ownership policy by institutional investors. The chapter also recommends that institutional investors maintain a good practice of disclosing information to the market.[253] This has been said to be

[249] OECD Principles 2004, Chapter 2, Principle A.
[250] Ibid.
[251] OECD Principles 2004, Chapter 2, Principle C3.
[252] OECD Principles 2004, Chapter 2, Principle G.
[253] OECD Principles 2004, Chapter 2, Principle F.

particularly important for trade unions in pre-funded retirement systems, collective investment schemes and some activities of insurance companies.[254]

Despite these positive aspects of Chapter 2, it has been subject to some criticism. Union Network International[255] commented that the title of the chapter would be more accurate if it referred to the 'rights and responsibilities of shareholders'.[256] It has also been argued that, although the chapter calls for shareholders' effective participation in the nomination of directors, it does not explain or introduce the means by which shareholders can effectively access the nomination process, specifically, the company proxy material.[257] According to George Loladze,[258] Chapter 2 should have been amended with a more specific and detailed requirement that shareholders have the opportunity to effectively buy or sell shares.[259]

Another criticism of Chapter 2 is that it does not go far enough to meet the needs of institutional investors who are seeking to exercise responsible stewardship over the companies in which they invested workers' retirement income or savings.[260] Moreover, Chapter 2 does not help pension fund trustees who hold equity in certain companies and would like to see a more active and efficient role from their investment manager to oversee the activities of these companies.[261] Furthermore, the Australian Stock Exchange (ASX) asserted that the principle which states that fiduciary institutional investors must set aside appropriate human and financial resources to disclose corporate governance policy requires strengthening.[262]

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[254] TUAC, above n 224, 13.
[255] Union Network International represents 15 million members in over 140 countries in more than 900 unions worldwide. For more information see www.union-network.org.
[256] OECD, *Comments Received from Web consultations, Union Network International (UNI)* (2004).
[257] Ibid.
[258] George Loladze is the Chairman of the Supervisory Board of the Georgian Stock Exchange.
[259] OECD, *Comments Received from Web consultations, George Loladze, Chair, Supervisory Board, Georgian Stock Exchange* (2003).
[260] OECD, *Comments Received from Web consultations, Union Network International (UNI)* (2004).
[261] Ibid.
[262] OECD, *Comments Received from Web consultations, Australian Stock Exchange (ASX)* (2003).

The draft Chapter 2 included a provision requiring institutional investors to disclose voting records to the market on an annual basis. The provision was deleted from the final draft which only requires satisfactory disclosure.[263] The Association of British Insurers[264] supported omitting the obligation that the voting record of the institutional investors be disclosed to the market on an annual basis.[265] The Life Insurance Association of Japan (LIAJ) took a similar position to the Association of British Insurers. The reasoning of the LIAJ was that institutional investors, who are acting in a fiduciary capacity, often hold a wide variety of domestic and foreign stocks and the disclosure of voting records for all kinds of stocks would be very costly.[266] The LIAJ also asserted that institutional investors acting in a fiduciary capacity should act in the interests of the beneficiaries, not for the shareholders of the company in which the institutional investors exercise their voting rights.[267]

(c) Chapter 3: Equitable Treatment of Shareholders

Chapter 3 is equivalent to Chapter 2 of the OECD Principles 1999 with some relatively minor amendments and clarifications. Conflicts of interest between controlling shareholders and minority shareholders are a major issue in all jurisdictions. Chapter 3 was amended to place more emphasis on the need to protect minority shareholders from abusive actions by controlling shareholders.[268] The provision pertaining to disclosure of

[263] OECD Principles 2004, Chapter 2, Principle F.
[264] Members of the Association of British Insurers are actively involved in institutional investment, both because of the need to invest life and other premiums and because of their role in managing third party funds. Assets under management exceed £1,000bn, including extensive equity investments in the United Kingdom and overseas market.
[265] OECD, *Comments Received from Web consultations, The Association of British Insurers* (2003). In contrast, the Association of Superannuation Funds of Australia supported the inclusion of the annual disclosure requirement. The organisation asserted that institutional investors should disclose their voting records on important issues where the value of the investment has been affected or where the board of directors' recommendation has been voted against by the fund. For more information see OECD, *Comments Received from Web consultations, Association of Superannuation Funds of Australia Ltd*, (2003).
[266] OECD, *Comments Received from Web consultations, The Life Insurance Association of Japan (LIAJ)*.
[267] Ibid.
[268] OECD Principles 2004, Chapter 3, Principle A2.

related party transactions was also strengthened.[269] The final noteworthy amendment to Chapter 3 was the inclusion of a clause providing that impediments to cross-border voting should be eliminated.[270]

One criticism of Chapter 3 was that the requirement for board members and key executives to disclose to the board whether they have a material interest in transactions affecting the corporation should be extended to require disclosure to shareholders as well.[271] The rationale is that shareholders must be aware of potential conflicts when voting with regards to board membership or strategic company decisions.[272]

According to Hermes Investment Management,[273] the annotation to Principle A1, which pertains to capital structures, should have been amended to include the requirement that all companies shall monitor regularly (at least once every two years) the impact that their capital structure has on the cost of capital.[274] Hermes suggested that independent external experts be appointed to assess the advantages and disadvantages of any departure from the 'one share one vote' rule. The independent external experts' reports should be made publicly available and, subject to the approval of shareholders, the board of directors should use the report as a guideline to assist in determining the capital structure of the company.[275]

The annotation to Principle A2, in the context of minority shareholders obtaining effective redress for violation of their rights, provides that derivative and class action law suits are a means of improving minority shareholders' rights. The Japanese Business

[269] OECD Principles 2004, Chapter 3, Principle C.
[270] OECD Principles 2004, Chapter 3, Principle A4.
[271] OECD, *Comments Received from Web consultations, The International Corporate Governance Network (ICGN)* (2003).
[272] Ibid.
[273] Hermes Investment Management is owned by, and is the principal fund manager for, the British Telecom Pension Fund Scheme, the UK's largest pension fund scheme. Hermes also manages portfolios for Royal Mail Pension Plan and approximately 200 clients including many major pension schemes.
[274] OECD, *Comments Received from Web consultations, Hermes Investment Management* (2003).
[275] Ibid.

Federation[276] submitted, however, that this perception is flawed and that derivative lawsuits are not a means to improve minority shareholders' rights, but rather, they are intended as a system for the recovery of damage a company has sustained. Whilst this submission is seemingly pedantic, it stems from a noteworthy concern, that is, the potential for shareholder suits to lead to excessive and frivolous litigation. The Federation recommended, albeit unsuccessfully, that the annotation should be amended with an expression relating to litigation on behalf of shareholders' common interest, rather than referring to class action suits.[277]

Another noteworthy criticism was directed at the annotation to Principle A3, which provides, in the context of custodial or nominee voting, that '[i]t is sufficient to disclose to the shareholders that, if no instruction to the contrary is received, the custodian will vote the shares in the way it deems consistent with shareholder interest'. The ASX recommended that the annotation should go further to provide that shareholders should be clearly informed on how the custodian intends to vote undirected proxies on each resolution.[278]

(d) Chapter 4: The Role of Stakeholders in Corporate Governance

Chapter 4 is equivalent to Chapter 3 of the OECD Principles 1999 with some significant amendments. Chapter 4 recognises the importance of respecting the rights of stakeholders, not only those rights established by law, but also those established through mutual agreements.[279] Moreover, the revised amendment to Principle C strengthens the language in relation to performance enhancing mechanisms for employee participation.[280] It seeks to allow such performance mechanisms to develop, especially in countries where

[276] The Japanese Business Federation comprises 1,541 major Japanese business firms and industrial associations.
[277] OECD, *Comments Received from Web consultations, The Japanese Business Federation* (2003).
[278] OECD, *Comments Received from Web consultations, Australian Stock Exchange (ASX)* (2003).
[279] OECD Principles 2004, Chapter 4, Principle A.
[280] OECD Principles 2004, Chapter 4, Principle C.

they have no effective mechanisms to ensure and encourage employees to participate in the corporate governance of the company.

Other significant amendments were made to Chapter 4 in relation to protecting the rights of whistleblowers and creditors. The new principle pertaining to whistleblowers calls for the protection of employees, and employee representative bodies, who wish to express their concerns about illegal or unethical practices to the board.[281] The principle provides that such persons or bodies should be able to do so in full confidence that their complaints will be treated confidentially and without fear of punishment. The new principle pertaining to creditors addresses the importance of establishing a regulatory framework to ensure the existence and proper functioning of an effective and efficient insolvency framework that protects and enforces the rights of creditors.[282] This is an important amendment as poorly defined and ineffective protection of creditors' rights has caused significant corporate governance failures in many jurisdictions across the globe.

Chapter 4 has been criticised for not including a definition of stakeholders. According to the International Federation for Human Rights (FIDH),[283] the term 'stakeholders' includes stockholders, other owners, workers and their representatives, and any other individuals who are either directly or indirectly affected by the activities and transactions of the corporation.[284] Accordingly, the FIDH recommended the inclusion of a definition of stakeholders in Chapter 4 in these terms.[285] The FIDH also directed a sweeping criticism of Chapter 4 in terms that it falls far short of an effective mechanism to ensure stakeholder participation because the wording is vague and lacks precision. This criticism was particularly targeted at Principles B1, C, and D. It was contended that these

[281] OECD Principles 2004, Chapter 4, Principle E.
[282] OECD Principles 2004, Chapter 4, Principle F.
[283] The International Federation for Human Rights (FIDH) is an international human rights non-governmental organisation representing 115 member organisations in over 100 countries.
[284] OECD, *Comments Received from Web consultations, International Federation for Human Rights (FIDH)* (2003).
[285] Ibid. The recommended definition of stakeholders came from a report adopted by the FIDH in August 2003 titled: 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights', adopted by the Sub-Commission on human rights in August 2003 (E/CN.4/Sub.2/2003/12/Rev.2).

provisions allow a wide margin of discretion to managers with respect to the information they agree to make public and they do not go far enough to ensuring access to judicial recourses for affected stakeholders. [286]

Chapter 4 was also criticised by Union Network International[287] and the Pensions and Investment Research Consultants Ltd[288] for treating employees as an ordinary group of stakeholders.[289] It was contended that employees should be more clearly recognised as valuable participants in the corporation. This requires the facilitation of internal procedures to allow them to play a role in the management and accountability systems of the company, as well as having adequate representation on the board. Moreover, in the opinion of Union Network International, Chapter 4 reflected a conceptual misunderstanding as it does not distinguish between performance enhancing mechanisms, such as employee share ownership schemes, and representation of stakeholders, such as employee participation at board level.[290] None of the principles in Chapter 4 explicitly address and encompass the need for employee representation in the corporate governance framework.

(e) Chapter 5: Disclosure and Transparency

Chapter 5 is equivalent to Chapter 4 of the OECD Principles 1999 with a number of important amendments. The revised content has significantly improved standards for disclosure and auditing procedures. Disclosure requirements for board members and key executives has been broadened to include their qualifications, their selection process, their membership of other boards, whether they are regarded as independent by the board,

[286] OECD, *Comments Received from Web consultations, International Federation for Human Rights (FIDH)* (2003).
[287] For information see above n 255.
[288] Pensions and Investment Research Consultants Ltd (PIRC) is an UK-based independent adviser to institutional investors on issues of corporate governance and corporate responsibility. PIRC's clients have combined assets of approximately £400bn and include some of the largest pension funds, investment management companies and insurance companies in the UK and overseas.
[289] OECD, *Comments Received from Web consultations, Union Network International (UNI)* (2003); *Comments Received from Web consultations, Pensions and Investment Research Consultant Ltd (PIRC)* (2003).
[290] OECD, *Comments Received from Web consultations, Union Network International (UNI)* (2003).

and related party transactions.[291] The wording of the principle pertaining to the requirement for an annual external audit has also been significantly strengthened and a new principle has been introduced providing that external auditors should be accountable to shareholders and owe a duty to the company to exercise due professional care.[292] Further, a new principle has been introduced providing that the corporate governance framework should include an effective approach to ensure the integrity of those professions that serve as conduits of analysis and advice to the market, such as brokers, analysts, and rating agencies.[293]

Despite these amendments, Chapter 5 has still been subject to criticism, particularly for the limited scope of the disclosure requirements. For instance, the FIDH[294] recommended that the disclosure obligations of a company should include the company's policies regarding human rights, social and environmental responsibilities, as well as the actual impact of its activities on such issues.[295] MVC Associates International suggested that companies should disclose their goals and activities in three domains of leadership accountability and governance, namely:

- Operational domain – focussed on financial and other results from current business operations.
- Business development domain – focussed on development of future products, services and possible new business models, as a basis for assessing the level of innovation and risk in the enterprise on behalf of the shareholders.

[291] OECD Principles 2004, Chapter 5, Principle A.
[292] OECD Principles 2004, Chapter 5, Principles C and D.
[293] OECD Principles 2004, Chapter 5, Principle F.
[294] For information see above n 283.
[295] OECD, *Comments Received from Web consultations, International Federation for Human Rights (FIDH)* (2003).

- Global industry domain – focussed on the role of the enterprise in society and goals and objectives related to corporate citizenship, shareholder value and sustainable development.[296]

The Association of British Insurers[297] suggested that the disclosure of material risk factors should include reference to social and environmental factors that have an impact on the company's performance.[298] Moreover, Union Network International[299] recommended that Chapter 5 should be amended to require disclosure by board members and key executives of any stock options which must not be traded while they are under obligations to the company.[300] Accordingly, the organisation submitted, albeit unsuccessfully, that Chapter 5 should be further extended to prohibit the abuse of stock options by members of the board and key executives.[301]

(f) Chapter 6: Responsibility of the Board

Chapter 6 is equivalent to Chapter 5 of the OECD Principles 1999 with relatively minor amendments. An independent and responsible board of directors is an essential foundation for an effective internal corporate governance structure. It is the duty of the board to meet often and to set long-term business strategies, rather than be responsible for the day-to-day operation of the company. The board is responsible for monitoring the company's management and ensuring the company's compliance with relevant laws and regulations. Moreover, to prevent conflicts of interest and to balance competing demands on the company, the board must be independent from managers rather than simply operating as a rubber stamp. The board should consider the interests of all stakeholders in the company, treat them fairly, and provide them with access to information.

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[296] OECD, *Comments Received from Web consultations, MVC Associates International* (2003).
[297] For information see above n 264.
[298] OECD, *Comments Received from Web consultations, The Association of British Insurers* (2003).
[299] For information see above n 255.
[300] OECD, *Comments Received from Web consultations, Union Network International (UNI)* (2003).
[301] Ibid.

Chapter 6 has been subject to extensive criticism. The FIDH[302] contended that the term 'ethical standards' in Principle C does not constitute an internationally consistent norm, and that the principle falls short of calling on boards to respect the United Nations' Declaration of Human Rights and other human rights instruments.[303] Moreover, the FIDH was concerned to see 'ethical standards' and the 'interests of stakeholders' lumped into one provision, a combination which will possibly cause confusion.[304]

Another commentator[305] suggested including a section which more explicitly reinforces the responsibilities of management. The rationale is that a clear and specific statement pertaining to the duties and responsibilities of managers would assist in better serving shareholders' and stakeholders' interests.[306] Further, the Association of British Insurers[307] criticised Principle E1 by asserting that it is insufficient to call on boards to 'consider' assigning independent directors to tasks where there is potential for conflicts of interest and that, accordingly, the word 'consider' should be deleted from the provision.[308]

Principle B provides that 'where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly'. Hermes Investment Management[309] suggested that the annotation to this principle needs to make mention of the situation in which controlling shareholders *de facto* appoint a large proportion of members to the board, and the directors have a conflict of interest with one of the shareholders in a specific transaction.[310] It was recommended that the annotations should

[302] For more information see above n 283.
[303] OECD, *Comments Received from Web consultations, International Federation for Human Rights (FIDH)* (2003).
[304] Ibid.
[305] Wendy Lane, Chairman of Lane Holdings Inc, Needham, Ma, USA.
[306] OECD, *Comments Received from Web consultations, Wendy Lane, Chairman of Lane Holdings Inc* (2003).
[307] For information see above n 264.
[308] OECD, *Comments Received from Web consultations, The Association of British Insurers* (2003).
[309] For information see above n 273.
[310] OECD, *Comments Received from Web consultations, Hermes Investment Management* (2003).

stipulate that when directors are involved in this kind of conflict, they should disclose their conflict and abstain from voting.[311]

Moreover, Hermes submitted that the annotation to Principle E, concerned with objectivity of boards, should also deal with the issue of cross-directorship and suggested the inclusion of an example in the following terms: ‘A typical case of cross-directorship is to have an executive director of company [A] as a member of the board of company [B], and conversely an executive director of company [B] to be a member of the board of company [A]. This situation can lead to inappropriate “mutual support” between directors of different companies and conflicts of interest that could be detrimental to the interests of the company as a whole, including shareholders’.[312]

The PIRC[313] suggested that the annotation to Principle D4, which deals with board remuneration, should include a statement reinforcing the importance of independent remuneration committees as a means of avoiding conflicts of interest.[314] Moreover, the PIRC contended that the annotation to Principle D5, pertaining to transparency in the nomination process, should include a recommendation for the appointment of a fully independent nomination committee.[315] The PIRC also suggested that Principle E, which deals with board independence, should more clearly support the presence of a significant number of independent directors, and the enhancement of requirements for extensive disclosure to shareholders on the background details of directors to assist shareholders in forming their own view on the issue of independence.[316]

[311] Ibid.
[312] Ibid
[313] For information see above n 288.
[314] OECD, *Comments Received from Web consultations, Pensions and Investment Research Consultant Ltd (PIRC)* (2003).
[315] Ibid.
[316] Ibid

CHAPTER 4

IMPLEMENTATION OF THE OECD PRINCIPLES 2004 IN AUSTRALIA AND JORDAN

1. A COMPARATIVE ANALYSIS

1.1 Framework of Analysis

This chapter serves to provide a comparative analysis of the implementation of the OECD Principles 2004 in Australia and Jordan. Each principle is discussed separately, except where two or more principles are closely related. In each section, the content of the principle is set out together with a summary of the annotation to the principle. This is followed by a detailed discussion of the relevant legal framework in Jordan and Australia. Where necessary, recommendations are proposed at the end of the section. The focus of the OECD Principles 2004, and therefore this comparative analysis, is publicly traded companies. However, to the extent they are deemed relevant, the Principles may provide a useful tool to improve corporate governance in non-listed companies, for example privately owned and government enterprises. The comparative analysis begins at Chapter 2 of the OECD Principles 2004. Chapter 1 of the OECD Principles 2004 has not been used as the basis for a comparative analysis because of the very general nature of its content.[317]

1.2 Jordan: Background Information

Jordan operates under a civil law scheme. Accordingly, any obligations, responsibilities or rights must be supported by legislation in order to be enforceable. Jordanian corporations are regulated

[317] A general discussion of the content of Chapter 1 of the OECD Principles 2004 has been included Chapter 3, Section 4.2(a), of this paper.

pursuant to the Jordanian *Companies Law 1997* (*Companies Law*). The provisions referred to in this chapter will be those relating to public shareholding companies listed on the Amman Stock Exchange (ASE). As explained in Chapter 2, Section 3, of this paper, the provisions regulating public companies also apply to the other types of companies in Jordan in areas not specifically covered in the chapters of the legislation governing those other types of companies. Other relevant rules and regulations include the ASE Listing Rules, banking law,[318] privatisation law,[319] insurance supervision law,[320] and securities law.[321]

In October 2003, just prior to the OECD's review of its 1999 Principles, the Global Corporate Governance Forum[322] and the Centre for International Private Enterprise (CIPE)[323] sponsored a large-scale initiative to assess the state of corporate governance in a number of Middle Eastern and North African (MENA) countries, including Jordan.[324] Local discussion roundtables were held in Jordan and were attended by a number of representatives from both the public and private sectors. The recommendations from these meetings were presented in Cairo on September 7, 2003 at the MENA Corporate Governance Workshop.[325] These recommendations, albeit only stated in very general terms, were a positive step forward as they identified the key areas of the Jordanian corporate governance landscape requiring reform.

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318 *Banking Law 2000* (JOR).

319 *Privatisation Law 2000* (JOR).

320 *Insurance Regulatory Act 1999* (JOR).

321 *Securities Law 2002* (JOR).

322 The Global Corporate Governance Forum is a multi-donor trust fund co-founded by the World Bank Group and the OECD to promote global, regional, and local initiatives that aim to improve the institutional framework and practices of corporate governance. Located in the joint IFC/World Bank Corporate Governance Department, the Forum's activities aim at promoting sustainable economic growth and poverty reduction within the framework of agreed international development targets. For more information see www.gcgf.org.

323 The Center for International Private Enterprise is a non-profit affiliate of the U.S. Chamber of Commerce and one of the four core institutes of the National Endowment for Democracy. CIPE has supported more than 900 local initiatives in over 100 developing countries, involving the private sector in policy advocacy and institutional reform, improving governance, and building understanding of market-based democratic systems. CIPE provides management assistance, practical experience, and financial support to local organisations to strengthen their capacity to implement democratic and economic reforms. CIPE programs are also supported by the United States Agency for International Development. For more information see www.cipe.org.

324 CIPE Executive Director, John Sullivan, summed up the purpose of the initiative: 'Weak corporate governance practices discourage new investment and hold back development. We hope that conference participants will be able to develop strong corporate governance standards which reflect the particular business culture of the Middle East but also meet OECD Principles of Corporate Governance'.

325 MENA Regional Corporate Governance Working Group, above n 16, 8.

In June 2004, a report assessing Jordan's observance of corporate governance procedures was completed as part of the joint program of Reports on the Observance of Standards and Codes (ROSC) sponsored by the World Bank and the IMF.[326] The Jordan Securities Commission (JSC) cleared the report for publication in February 2005. Whilst the initiative had the potential to provide a solid platform for a detailed reform agenda for the Jordanian Government, the content of the report was, like the recommendations formulated for the MENA workshop, relatively general and brief. Nevertheless, the reform proposals contained in the report provide a solid foundation for policymakers in Jordan.

A significant recent development was the establishment of the Jordanian Corporate Governance Association (JCGA) in 2005. The JCGA was set up to operate as an independent, non-profit membership organisation responsible for working with investors, companies and regulators in the implementation of effective corporate governance practices throughout Jordan.[327] The first major task for the JCGA was to represent Jordan at two meetings of the OECD-MENA Working Group on Corporate Governance in 2005. The Working Group is a regional forum for policy dialogue which has built on the 2003 regional corporate governance roundtables sponsored by the Global Corporate Governance Forum and the CIPE, discussed above. At the first meeting, held in Jordan on 14 February 2005, the Working Group agreed to develop a regional corporate governance paper. The meeting was reconvened in Morocco six months later and a draft paper was completed. The purpose of the paper was to provide an overview of the main issues and developments in the MENA region and establish benchmarks for measuring success.[328] As yet, the final version of the paper has not been released.

JCGA also represented Jordan at a MENA-sponsored corporate governance technical assistance workshop held in Cairo, Egypt on March 14 and 15, 2006. The workshop was attended by regional participants from 7 countries, including Jordan, and mainly focused on the rationale and

[326] World Bank, above n 156.
[327] For more information see www.cipe.org/programs/global/partners/dispPartner.php?id=231.
[328] For a copy of the draft paper see www.oecd.org/dataoecd/37/46/36086926.pdf#search=%22Middle%20East%20and%20North%20Africa%20Corporate%20Governance%20Working%20Group%22.

process of developing corporate governance codes.[329] The second workshop is scheduled to be held in Amman, Jordan on 12-13 December, 2006. Its focus will be on drafting the code's content and consulting stakeholders.[330] The third and final workshop, to be held in Beirut in April 2007, will focus on strategies to implement and monitor the code.[331]

1.3 Australia: Background Information

Australian corporations are regulated pursuant to the Australian *Corporations Act 2001* (*Corporations Act*). Other relevant rules and regulations include the Australian Stock Exchange (ASX) Listing Rules, the ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (ASX Principles of Corporate Governance 2003), accounting standards which have the force of law,[332] guidelines issued by private sector bodies,[333] and voluntary self-regulatory codes of practice.

The Australian Government's Corporate Law Economic Reform Program (CLERP) was announced in 1997 as an initiative to improve the regulation of companies operating in Australia. The CLERP is an ongoing program which seeks to ensure that Australia's business regulation is consistent with international best practice and provides an appropriately secure environment for investment in Australia. The program is specifically aimed at enhancing the transparency of financial information and the accountability of market participants by modernising the regulation of fundraising, takeovers, directors' duties, corporate governance, financial reporting, financial markets and investment products. The policy frameworks that have been developed under the

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[329] The main issues discussed included (i) why codes are useful; (ii) the objectives of a code; (iii) initiating and leading the process; (iv) setting-up an action plan; and (v) managing difficulties.

[330] More specifically, this workshop is to discuss the following issues: (i) assessing the country's existing corporate governance and company law frameworks, and identifying gaps; (ii) identifying specific corporate governance issues to be addressed in the MENA context; (iii) consulting with stakeholders; and (iv) drafting the code.

[331] For more information on the MENA workshops see www.gcgf.org/ifcext/cgf.nsf/Content/SupportingDevelopment_MENA.

[332] The Australian Auditing Standards issued by the Australian Auditing and Assurance Standards Board (AUASB) are legally enforceable, and apply for financial periods commencing 1 July 2006. They apply to audits under the *Corporations Act 2001* (Cth) and audits of a financial report for any other purpose.

[333] For example, the *Guide for Investment Managers and Corporations* produced by the Australian Investment Managers' Association and the *Best Practice Guidelines for Research Integrity* produced by the Australian Institute of Company Directors.

CLERP since 1997 have prompted the enactment of legislation in all these key areas of company regulation.[334]

The ASX Corporate Governance Council was established in August 2002 as a collaborative, industry-based body set up to develop corporate governance recommendations for listed entities which reflect international standards. It includes representatives from more than 20 business, shareholder and industry groups from disparate business backgrounds, each offering valuable guidance and information specific to their constituencies and industry.[335] On 1 January 2003, the ASX introduced a number of significant amendments to the ASX Listing Rules to enhance compliance with corporate governance best practice. Three months later the ASX Principles of Corporate Governance were released, which represent the most comprehensive statement of best practice in Australia.[336] The adoption of this framework represented a major evolution in corporate governance practice in Australia. A full version of the Principles including commentary and guidance on each principle is provided to all listed companies.

The ASX Principles of Corporate Governance 2003 are guidelines, not prescriptions. ASX Listing Rule 4.10.3 provides that a company must include in its annual report a statement disclosing the extent to which the entity has complied with the ASX Principles of Corporate Governance 2003 during the reporting period. If the company has not followed any one of the recommendations then it must identify that recommendation and provide reasons for not following it. This process is most commonly referred to as an ‘if not, why not’ policy. It is considered to be an effective approach because it allows listed companies a degree of flexibility to consider a range of means to address corporate governance issues and avoid particular recommendations if they are inappropriate for the company’s particular circumstances. ASX

[334] For more information see www.treasury.gov.au/content/business_law.asp?ContentID=321&titl=Business%20Law%20%26%20Regulation.

[335] More information on the Council representatives can be located at www.asx.com.au/supervision/governance/corporate_governance_council.htm

[336] For a copy of the ASX Principles of Corporate Governance 2003 see www.asx.com.au/about/pdf/ASXRecommendations.pdf.

Guidance Notes 9 and 9A were published to assist listed companies in the preparation of the compliance statement required under ASX Listing Rule 4.10.3.

On 6 March 2006, the ASX Corporate Governance Council released the results from a user survey, issued in November 2005, aimed at understanding the relevance of corporate governance disclosure to the investment and analyst community.[337] The results revealed that the vast majority of respondents, private investors and organisations/professionals,[338] do rely on corporate governance compliance information in assessing their potential and current investments.[339] The key areas of interest were financial reporting, board structure and responsibilities, and board remuneration. Private investors expressed a need to know where to find corporate governance information and to be provided with clearer simpler explanations. Private investors cited the media as their principal source of information, whereas organisations/professionals rely more heavily on information disclosed in annual reports and financial statements. The ASX survey also prompted a formal review[340] of the ASX Principles of Corporate Governance 2003 and changes to the current recommendations will become effective on 1 July 2007.

On 22 May 2006, the ASX released a detailed report documenting its most recent analysis of corporate governance practice disclosure. The report revealed listed companies are continuing to improve their corporate governance reporting. The aggregate of adoption of recommended practices and of 'if not, why not' exception reporting were significantly higher in 2005 than in the previous year. The overall reporting level (being the aggregate of actual adoption of the

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[337] For a copy of the survey results see www.asx.com.au/supervision/pdf/MR20060306_corp_gov_council_ user_survey.pdf.
[338] In total, there were 729 respondents. Of the total, 355 (49 percent) answered as private investors (all part of the Australian Shareholder's Association) while 374 (51 percent) answered as organisations/professionals.
[339] In total, 80 percent of private investors and 75 percent of organisations/professionals surveyed use corporate governance information in assessing and reviewing their investments.
[340] The Council's review takes into account recent legislative amendments, reporting trends to date, the need for any additional guidance, and recent developments in non-financial risk reporting. The Council will seek the views of the general public as part of the review, which it intends to complete by the end of 2006.

Recommendations and the 'if not, why not' exception reporting) increased to 88 percent from 84 percent in 2004. There were also strong improvements in most other areas.[341]

1.4 The Importance of Effective Enforcement Measures

Although Chapter 1 is not being used as the basis for a comparative analysis in this paper for reasons stated above, the principles within that chapter which highlight the importance of effective enforcement measures are worthy of brief discussion. Chapter 1, Principles C and D reinforce that the division of responsibilities between different enforcement authorities within a jurisdiction should be clearly articulated, and those authorities should be provided with the necessary power and resources to fulfil their duties effectively. A perfectly drafted all-encompassing corporate governance regulatory framework is of no worth if it is not properly enforced. As well as promoting the use of effective self-regulation measures, improved enforcement requires broad reform to improve the performance of the judiciary and to provide securities regulators with effective means to enforce relevant laws and regulations.

In Jordan, enforcement of corporate governance measures is still very much in the development stage. In many instances there is a significant gap between what a Jordanian law states and what is actually practiced. The judiciary in Jordan is not sufficiently developed to be able to cope with the arduous task of enforcing corporate governance standards.[342] Other bodies responsible for enforcement include the JSC,[343] the Controller of Companies,[344] the Central Bank of Jordan (CBJ), and the Insurance Commission. Accordingly, there are significant overlaps in enforcement jurisdiction. This is particularly so because of the separate disclosure statements

[341] For a copy of the report see www.asx.com.au/about/pdf/corporate_governance_2005_disclosure.pdf.
[342] There is ordinarily a great deal of secrecy surrounding corporate investigations and court cases can drag out for many years. For a detailed discussion see MENA Regional Corporate Governance Working Group, above n 16, 52.
[343] The JSC's powers and authority increased significantly with the enactment of the *Securities Law 2002* (JOR). It now has the power to impose significant fines and even delist issuers. The JSC also has investigative powers, including powers to subpoena non-registrants and obtain phone records.
[344] The Controller of Companies in Jordan, operating under the Minister of Industry and Trade, has wide information and recourse rights, can attend general shareholder meetings, and can dissolve a company's board or revoke its registration. The department of the Controller of Companies does not have the power to impose fines and must use the courts to enforce its findings.

that each of these bodies require of listed companies, which is discussed in detail in Chapter 4, Section 16, of this paper. The problem is that the regulatory function in Jordan is simply too fragmented and not adequately coordinated. The Jordanian authorities need to review the enforcement roles of all these bodies and organise them into a more coordinated and consistent scheme.

In Australia, the body responsible for overseeing the matrix of corporate governance regulation is an independent statutory authority, the Australian Securities and Investments Commission (ASIC). ASIC is granted wide powers of investigation by the *ASIC Act 1989* (Cth).[345] ASIC also has a general power to do 'whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions'.[346] Separately, provisions in the *Corporations Act* confer further investigative powers on ASIC. At the conclusion of an investigation, if ASIC believes that an offence may have been committed, it can commence prosecution itself or refer the matter to the Commonwealth Director of Public Prosecutions (DPP).[347]

ASIC deals with both civil and criminal matters.[348] ASIC's enforcement actions are best classified as either civil (restitutionary in nature) or penal (punitive in nature). The most frequently occurring civil actions are: (i) applications to the court to restrain the payment or transfer of money or property where there has been a breach of the law;[349] (ii) applications to the court for injunctions to restrain breaches of the law;[350] and (iii) applications to the court to wind up companies.[351]

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[345] Section 13 of the *ASIC Act 1989* (Cth) grants ASIC the power to 'make such investigation as it thinks expedient for the due administration of the corporations legislation … where it has reason to suspect that [a contravention] may have been committed'.
[346] *ASIC Act 1989* (Cth), s 14.
[347] *ASIC Act 1989* (Cth), s 49. In practice, the DPP handles indictable criminal offences, while ASIC prosecutes the bulk of minor summary matters itself.
[348] For a detailed discussion of ASIC's enforcement functions see Bird H *et alia*, *ASIC Enforcement Patterns* (2003), Research Report, Centre for Corporate Law and Securities Regulation (University of Melbourne), 44-52
[349] *Corporations Act 2001* (Cth), s 1323.
[350] *Corporations Act 2001* (Cth), s 1324.
[351] *Corporations Act 2001* (Cth), s 461.

ASIC penal sanctions can be separated into two separate categories: (i) wrongdoing for which the penalty is specified in the particular section, or s 1311; or (ii) wrongdoing under a civil penalty provision. Section 1311 is a general penalty provision which provides that when a provision in the *Corporations Act* provides a penalty for a certain offence, then that penalty will apply. Where there is no prescribed penalty, s 1311 prescribes other penalties. Civil penalty provisions are either civil or criminal. Civil penalties prescribe an order prohibiting a person from managing a corporation for an unspecified period and/or a fine of up to AUD200,000.[352] Criminal penalties apply when a person contravenes a civil penalty provision knowingly, intentionally or recklessly with dishonest intent. Criminal penalties include a fine of up to AUD200,000 and/or five years imprisonment.[353]

In addition to enforcing relevant provisions of the *Corporations Act 2001*, ASIC sets standards, issues best practice guidelines, and (together with the ASX) has a key role in disseminating information to the market. It should be noted that disciplinary action may also be taken by the ASX against companies in breach of its Listing Rules, including suspension of an entity's securities from quotation or, ultimately, de-listing. Enforcement of the *Corporations Act 2001* may also be undertaken by private action in the courts.[354]

2. THE GENERAL RIGHTS OF SHAREHOLDERS

2.1 Content of the OECD Principles

Chapter 2: The Rights of Shareholders and Key Ownership Functions

The corporate governance framework should protect and facilitate the exercise of shareholders' rights.

[352] *Corporations Act 2001* (Cth), Part 9.4B (ss 1317DA-1317S).
[353] *Corporations Act 2001* (Cth), ss 1311(2), and (3), and Schedule 3.
[354] This is discussed in more detail in Chapter 5 of this paper.

A. Basic shareholders' rights should include the right to: (1) secure methods of ownership registration; (2) convey or transfer shares; (3) obtain relevant information on the corporation on a timely and regular basis; (4) participate and vote in general shareholder meetings; (5) elect and remove members of the board; and (6) share in the profits of the corporation.

2.2 Comparative Analysis

Shareholders have a number of property rights that should be protected by law. The right of shareholders in public companies to buy, sell and transfer shares is fundamental. In addition to this fundamental right, there are numerous other important rights possessed by equity investors, for example, the right to share in the profits of the corporation and the right to vote on important issues regarding the company's affairs. Management of a company, however, is left in the hands of a board of directors and management team. Chapter 2, Principle A, is a statement of the most basic rights of shareholders that are recognised in legal regimes of almost all developed countries.

(a) Secure Methods of Ownership Registration

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding shareholders' right to secure methods of ownership registration.

In Jordan, the *Companies Law* clearly identifies the right of shareholders to secure ownership registration in Article 98, which provides that a public shareholding company is required to keep a register which records the names of all shareholders and all other relevant information in relation to their shareholding. Registration with the company's shareholder register provides formal legal proof of ownership for public shareholding companies. Further, the *Securities Law 2002* specifies the responsibilities of the Securities Depository Centre (SDC) to include maintenance of a central registry and depository of authenticated shareholders along with a central settlement process. This ensures that the registers of all public shareholding companies are held and maintained at the SDC in electronic form. All listed companies are required to register with the SDC.[355]

Similarly, in Australia, ss 168 and 169 of the *Corporations Act* outline the requirement for a detailed register of members. Further, s 231 provides that a person is a member of a company if they: (a) are a member of the company upon its registration; or (b) agree to become a member of the company after its registration and their name is entered on the register of members; or (c) become a member of the company under s 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares).[356]

(b) Convey or Transfer Shares

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding shareholders' right to convey or transfer shares.

In Jordan, Article 98(c) of the *Companies Law* provides that a public shareholding company shall list its shares and shall follow the rules and procedures provided for in the laws, regulations and instructions that regulate the negotiability of securities. Accordingly, virtually all shares listed on the ASE are freely transferable pursuant the ASE Listing Rules. The only exception is found in Article 100 of the *Companies Law*, which provides that founders' shares in public shareholding companies are non-

[355] *Securities Law 2002* (JOR), Articles 81 and 82.
[356] For a general discussion see Fisher S *et alia*, *Corporations Law* (2nd ed, 2001), 57.

transferable for two years.[357] Clearing and settlement is handled by the SDC and all shares must be 'authenticated' before they can be traded.[358]

In Australia, pursuant to s 1085 of the *Corporations Act*, shares are transferable in the manner provided by the company constitution, or, if the company is a listed company, the ASX Listing Rules.[359] All ordinary shares listed on the ASX are traded and freely transferable, however, directors, senior managers, employees and related parties cannot trade in the company's securities while in possession of unpublished price sensitive information.[360] Directors and employees should ensure that all transactions in the company's securities comply with relevant laws and regulations. In particular, compliance must be ensured with the insider trading provisions in s 1043A and all of the relevant provisions in the ASX Listing Rules, especially the continuous disclosure requirement in Listing Rule 3.1.[361]

(c) Obtain Relevant Information on the Corporation on a Timely and Regular Basis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding shareholders' right to obtain relevant information on the corporation on a regular basis. A timely and balanced disclosure is necessary to allow shareholders to exercise their ownership rights based on the information provided. Proper disclosure is very important to attract local and foreign investment and to maintain confidence in the capital market. On the other hand, poor disclosure can contribute to a loss in market integrity. Shareholders should have the right to access regular information

[357] There is an exception to this general restriction in Article 100(b). Excluded from the restriction is the transfer of founders' shares to heirs and between spouses, ancestors and descendents, as well as transfers among the founders themselves. Also permitted is the transfer of founders' shares to third parties under a judicial decision.
[358] Authentication is essentially just a process of identification.
[359] For a general discussion see Tomasic R *et alia*, *Corporations Law in Australia* (2nd ed, 2002), 293.
[360] Ford H *et alia*, *Ford's Principles of Corporations Law* (10th ed, 2001), 415.
[361] For a general discussion see Tunstall I, *Corporations Act Compliance Guide* (2nd ed, 2003), 213.

so that they can assess management performance and make vital decisions based on this information.[362]

In Jordan, Article 140 of the *Companies Law* states that the board must prepare and present to the general assembly, on an annual basis, the balance sheet of the company, its profit and loss statement, and cash flow statements accompanied with their clarifications compared with those of the previous fiscal year. The board must also present an annual report on the company activities and forecasts for the following year.[363] Article 142 provides that the board of a public shareholding company must also prepare a separate financial report every six months that includes the financial position of the company, the results of its operations, a profit and loss account, a cash flow list and the clarifications related to the financial statements certified by the company auditors. Moreover, Article 143 provides that the board of a public shareholding company shall provide the general assembly with a detailed annual report disclosing all relevant information pertaining to the expenses, remunerations and privileges of the chairman and the board of directors.[364]

Also relevant in the context of shareholders obtaining relevant information is instructions issued by the JSC in 2004 which require listed companies to make public any 'material fact' as soon as possible after its occurrence.[365] 'Material fact' is defined as 'any event or datum that might affect a person's decision to buy, hold, sell or dispose of a security'.[366] It is also required that the relevant company submit a report of the event to the JSC

[362] For more information see OECD Principles 2004, Annotation to Chapter 2, Principle A3.
[363] Copies of all documents must be sent to the Controller of Companies in accordance with Article 140(b) of the *Companies Law 1997* (JOR). Further, Article 141 provides that the board must publish the company balance sheet, its profit and loss account, a detailed summary of the annual board report, and the auditors' report, within a period not exceeding 30 days from the date of the general assembly meeting.
[364] Article 143 lists the following items requiring disclosure: (1) All amounts received from the company during the fiscal year by the chairman and members of the board, in the form of wages, fees, salaries, bonuses, remuneration and others; (2) Benefits that the chairman and members of the board enjoy such as free accommodation, cars etc; (3) Amounts that have been paid to the chairman and members of the board of directors during the fiscal year such as travel and transport allowances; (4) A detailed account of the donations paid by the company during the fiscal year, and the entities that received them; (5) A list of the names of the board of directors, the number of shares owned by each of them and the duration of their membership.
[365] *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004*, Article 8.
[366] Article 8 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides a list of the types of events that may constitute a material fact.

within a week of its occurrence, as well as issuing a public statement to confirm, deny or correct any news item about the event which is published in the media.[367] See also Article 43 of the *Securities Law 2002*, which provides that every issuer must make public, and file with the JSC, the detail of any material events.

In Australia, the *Corporations Act* also has various provisions protecting shareholders' right to obtain relevant information. For example, s 292 requires disclosing entities, public companies, large proprietary companies, and registered schemes to prepare and disclose a financial report and a directors' report for each financial year. These reports incorporate extensive disclosure requirements as specified in Part 2M.3 (ss 292-323).[368]

Section 674 details a continuous disclosure requirement, which is intended to ensure that material price-sensitive information is made available to the market in a regular and timely fashion.[369] These measures are necessary to avoid reliance solely on half-year or annual disclosure, or other informal methods of dissemination. Section 674(2) of the *Corporations Act* provides that a listed entity must provide information to the market operator if the entity has information that is not generally available and a reasonable person would expect that, if it were generally available, it would have a material effect on the price or value of the securities of the entity.

Also relevant in this context is ASX Listing Rule 3.1 which provides that once an entity becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately disclose that information to the ASX.[370] Such material information is not

[367] *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004*, Article 9.
[368] All of the relevant provisions of the *Corporations Act 2001* (Cth) in this respect are explained in detail in Chapter 4, Section 16, of this paper.
[369] Section 674 of the *Corporations Act* 2001 (Cth) provides that listed entities are required to comply with disclosure requirements in market listing rules, which effectively gives statutory force to the disclosure obligations in ASX Listing Rule 3.1. For a general discussion see Cassidy, above n 48, 213.
[370] The Rule sets out a detailed list of the types of information requiring disclosure.

confined to information that is relevant because of its monetary value, and can extend to strategic and operational matters likely to influence investor decisions.[371]

Also relevant is Principle 5 of the ASX Principles of Corporate Governance 2003 which supports timely disclosure of all material information regarding the company, including the financial situation, performance, ownership and governance of the company. Recommendation 5.1 requires companies to disclose their policies and establish proper governance structures and written corporate policies and procedures to ensure compliance with ASX Listing Rule disclosure requirements, and to ensure accountability at senior management levels.

(d) Participate and Vote in General Shareholder Meetings

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding shareholders' right to participate and vote in general shareholder meetings.

In Jordan, Article 178 of the *Companies Law* provides that every shareholder in a public shareholding company who was registered in the company register three days prior to the date set for any meeting of the general assembly shall have the right to participate in the meeting. This participation includes discussing issues presented thereto and voting on the decisions adopted by the assembly regarding these issues. Shareholders in Jordanian companies have the right to give a proxy to another shareholder or third party[372] to attend the meeting on their behalf and to participate in discussing issues and voting.[373]

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[371] For more information see *Guidance Note 8 – Continuous Disclosure: Listing Rule 3.1*, ASX, January 2003. Section 677 of the *Corporations Act* defines 'material effect on price or value' in similar terms to ASX Listing Rule 3.1. That is, the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.
[372] By virtue of a judicial power of attorney. See *Companies Law 1997* (JOR), Article 179(a).
[373] *Companies Law 1997* (JOR), Article 179.

In Australia there is a similar provision which clearly identifies the right of shareholders to participate and vote in general meetings. According to s 250E(1) of the *Corporations Act*, if a company does not specify the voting rights attaching to shares in the company constitution, each shareholder, whether they hold preference or ordinary shares, has equal voting rights.[374] Shareholders in Australian companies also are entitled to appoint a person as their proxy to attend and vote at the meeting.[375] Principle 6, Recommendation 6.1, of the ASX Principles of Corporate Governance 2003 provides that companies should design and disclose a communications strategy to promote effective communication with shareholders and encourage effective participation at general meetings.

(e) Elect and Remove Members of the Board

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply generally with the OECD principle regarding shareholders' right to elect and remove members of the board.

In Jordan, shareholders have the right to elect members of the board by secret ballot.[376] There is one instance, however, where board representation arises from appointment rather than election. Article 135(a) of the *Companies Law* provides that the government or any official public corporation or any public corporate body is entitled to have board representation that is proportional to their shareholding. It is difficult for shareholders to remove directors from the board. According to Article 165, removing directors from the board requires a signed request of shareholders holding at least 30 percent of the company's share capital. The request must be submitted to the board, who must then call

[374] [Replaceable Rule]. For a general discussion see Tomasic R *et alia*, *Corporations Law: Principles, Policy and Process* (4th ed, 2002), 582.
[375] *Corporations Act 2001* (Cth), s 249X [Replaceable Rule for Proprietary Companies and Mandatory Rule for Public Companies].
[376] *Companies Law 1997* (JOR), Article 132.

an extraordinary meeting of the general assembly within 10 days of the request. The general assembly must then vote on the request by secret ballot.[377] There is an exception in that directors appointed by proportional representation pursuant to Article 135(a), discussed above, cannot be removed by the general assembly.

In Australia, the provisions in the *Corporations Act* dealing with the appointment and election of directors are in Part 2D.3 (ss 201A-201M). Many of these provisions are replaceable rules, meaning that they can be modified or excluded by the company's own constitution. Section 201G provides that shareholders of the company appoint the company's first director or directors in a general meeting.[378] Moreover, s 250R provides that the business of an annual general meeting (AGM) may include the election of directors. Principle 2, Recommendation 2.4, of the ASX Principles of Corporate Governance 2003 provides that the board should establish a nomination committee, which should consist of a minimum of 3 members, the majority being independent directors. The commentary to Recommendation 2.4 provides that the nomination committee should have a charter that clearly sets out its responsibilities, composition, structure and membership requirements.

Pursuant to s 203D of the *Corporations Act*, directors of public companies may be removed by an ordinary resolution regardless of what is stated in the constitution.[379] Compared to the relevant provisions in the Jordanian *Companies Law*, the Australian provisions are more flexible and offer better protection for the right of shareholders to remove members of the board without interference. Accordingly, the Australian *Corporations Act* complies more closely with the OECD principle regarding the right of shareholders to remove members of the board.

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[377] Presumably the dismissal request requires at least a majority share of the votes to be accepted, although this is not specified in the *Companies Law*.
[378] [Replaceable Rule].
[379] For a general discussion see Ffrench H, *Guide to Corporations Law* (4th ed, 1994), 137.

(f) Share in the Profit of the Corporation

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding shareholders' right to share in the profit of the corporation.

In Jordan, Article 191 of the *Companies Law* provides that the annual general meeting is to approve dividend distribution. Dividends are paid 45 days after the meeting, or thereafter within six months with interest.[380] In Australia, s 254T of the *Corporations Act* states that a dividend may only be paid out of profits of the company. General rules governing the payment of dividends to the shareholders can be found in Part 2H.5.[381]

2.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* generally comply with Chapter 2, Principle A, of the OECD Principles 2004. However, in Jordan, a simpler procedure is required for shareholders to remove members of the board. The Jordanian authorities should take steps to ensure that the right of shareholders to remove directors without any exceptions is protected by legislation.

3. THE SHAREHOLDERS' RIGHT TO PARTICIPATE IN GENERAL MEETINGS

3.1 Content of the OECD Principles

Chapter 2: The Rights of Shareholders and Key Ownership Functions

B. Shareholders have the right to participate in, and be sufficiently informed on, decisions concerning fundamental corporate changes such as: (1) amendments to statutes, or

[380] *Companies Law 1997 (JOR)*, Article 191(c).
[381] *Corporations Act 2001* (Cth), ss 254T-254W [Replaceable Rules].

articles of incorporation or similar governing documents of the company; (2) the authorisation of additional shares; and (3) extraordinary transactions, including the transfer of all or substantially all assets, that in effect result in the sale of the company.

C. Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings.

(1) Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.

(2) Shareholders should have the opportunity to ask questions to the board, including questions relating to the annual external audit, to place items on the agenda of general meetings, and to propose resolutions, subject to reasonable limitations.

(3) Effective shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated. Shareholders should be able to make their views known on the remuneration policy for board members and key executives. The equity component of compensation schemes for board members and employees should be subject to shareholder approval.

(4) Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or absentia.

3.2 Comparative Analysis

In general terms, both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principles regarding shareholders' rights to participate in general shareholder meetings and to be sufficiently informed on decisions concerning fundamental corporate changes.

Chapter 2, Principle B, recognises the importance of having an appropriate check on boards when making decisions that alter the fundamental structure of their companies. This is necessary because of the high potential for abuse in such circumstances. Principle C sets out the important rights of shareholders in relation to general meetings. It is necessary for companies to have clear guidelines established which include simple and effective means for shareholders to place items on the agenda and to submit questions to management and the board. It is justifiable for companies to have rules in place to prevent abuse of these rights, so long as the rights of minority shareholders are respected. Principle C also recognises the fundamental right of shareholders to nominate and elect board members, and to be properly informed in relation to board remuneration. The annotation provides that it is particularly important for shareholders to be informed of the specific link between remuneration and company performance. Also noted is the right of shareholders to vote *in absentia*. The annotation also encourages companies to facilitate the use of secure information technology methods for voting *in absentia*.[382]

In Jordan, Article 144 of the *Companies Law* provides that the board of a public shareholding company shall direct an invitation to each shareholder to attend the general assembly meeting to be sent via ordinary mail at least 14 days prior to the date set for the meeting. The agenda of the meeting must be enclosed in the invitation and must include the board of directors' report, its annual balance sheet, and the auditors' report and explanatory statement.[383] The date and time must also be published in two local papers, and must be advertised on the radio or television at least three days prior to the relevant date.[384] The quorum of an ordinary general assembly meeting requires shareholders representing more than one half of the company's subscribed

[382] For more information see OECD Principles 2004, Annotation to Chapter 2, Principles B and C.
[383] *Companies Law 1997* (JOR), Article 144(b).
[384] *Companies Law 1997* (JOR), Article 145.

shares.[385] The shareholders have the right at an ordinary general assembly meeting to elect members of the board and to propose matters to be included in the agenda.[386] Shareholders also have the right to appoint a proxy to attend and vote at the meeting on their behalf.[387]

In relation to the principle that shareholders should be sufficiently informed on decisions concerning fundamental corporate changes, Article 175 provides that an 'extraordinary general meeting' can be called in which members can discuss, consider and make appropriate decisions regarding issues such as amending the articles of association, approving mergers, selling all company assets, complying with liquidation procedures, increases or decreases in authorised capital, buy-backs and convertible bonds. Decisions on these issues require the approval of 75 percent of present shareholders at the extraordinary general meeting.[388] An extraordinary general meeting is initiated upon an invitation of the board or upon a written request submitted to the board from shareholders (holding not less than one-quarter of the subscribed shares), the company's auditors, or the Controller of Companies (should shareholders holding not less than 15 percent of the company's subscribed shares request such a meeting).[389]

Remuneration policy for company boards in Jordan is not subject to the approval of shareholders. According to Article 162, remuneration paid to the board and chairman shall be determined at a rate of 10 percent of the net profit which can be distributed as dividends to shareholders, and after deducting all taxes and reserves. Remuneration is distributed amongst the directors in proportion to their level of attendance at meetings.[390] Further, the remuneration paid for each director must not exceed 5,000 Jordanian Dinars (JD5,000)[391] annually.[392] If the

[385] *Companies Law 1997* (JOR), Article 170.
[386] *Companies Law 1997* (JOR), Article 171.
[387] *Companies Law 1997* (JOR), Article 179.
[388] *Companies Law 1997* (JOR), Article 175(b).
[389] *Companies Law 1997* (JOR), Article 172. As discussed above in the comparative analysis of Principle A3, relating to the right of shareholders to obtain relevant and material information, listed companies are also required to make public any 'material fact' as soon as possible after its occurrence pursuant to instructions issued by the JSC in 2004. The definition of 'material fact' may include the events listed in Principle B. For more information see the analysis above in Chapter 4, Section 2.2(c), of this paper.
[390] *Companies Law 1997* (JOR), Article 162(a). A meeting not attended for a justifiable cause approved by the board is considered to have been attended by the member.
[391] Approximately AUD10,000.

company is still in the founding stages and has not realised any profits then remuneration is limited to 1,000 Jordanian Dinars (JD1,000) annually.[393]

In Australia, ss 249H(1) and 249H(2) of the *Corporations Act* provide that shareholders must be given 21 days notice for a general meeting unless the requisite majority agree to shorter notice. However, if the company is listed, then 28 days notice must be given.[394] The notice must set out the place, date and time for the meeting and state the general nature of the meeting business.[395] The quorum is two members who must be present at all times during the meeting, unless the company constitution provides otherwise.[396] According to s 249D, directors must arrange a general meeting on the request of members with at least five percent of the votes or at least 100 members. Further, s 249F allows shareholders with at least five percent of the votes to call and arrange a general meeting. The shareholders who call for the meeting must pay the expenses of calling and holding the meeting. Shareholders in Australian companies are entitled to appoint a person as their proxy to attend and vote at meetings.[397]

Remuneration of directors and key executives in Australian companies is governed by internal rules that ordinarily give shareholders to the right to fix remuneration. Section 202A(1), a replaceable rule, states that the directors of a company are to be paid the remuneration that the company determines by resolution. In respect of the directors of public companies, Chapter 2E (ss 208-230) requires shareholder consent for any financial benefits given to directors or their related parties, although there are various exceptions.

Other important matters concerning fundamental corporate changes often require a special resolution, that is, 75 percent of the votes cast by members entitled to vote on the resolution. If a

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[392] *Companies Law 1997* (JOR), Article 162.
[393] Approximately AUD2,000.
[394] *Corporations Act 2001* (Cth), s 249HA(1).
[395] *Corporations Act 2001* (Cth), s 249L.
[396] *Corporations Act 2001* (Cth), s 249T [Replaceable Rule].
[397] *Corporations Act 2001* (Cth), s 249X [Replaceable Rule for Proprietary Companies and Mandatory Rule for Public Companies].

special resolution is to be proposed at the meeting then the notice should include an intention to propose the special resolution.[398] Matters that are required to be decided by special resolution include adoption or alteration of a company constitution, selective capital reduction, and winding up. Moreover, the shareholders may propose either an ordinary or special resolution at any general meeting of the company. Section 249N(1) provides that, to enable shareholders to put forward resolutions at any general meeting, a minimum of 100 members must consent or the members must control at least five percent of the votes, unless a different number has been prescribed by regulation under s 249N(1A).

3.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply generally with Chapter 2, Principles B and C. However, it is clear that the Australian provisions comply more closely with the relevant principles. They are more flexible, comprehensive and offer better protection to the right of shareholders to participate and vote on decisions concerning fundamental corporate changes. Accordingly, it is recommended that the Jordanian authorities revise the rights of shareholders to include the right to discuss any issue and to vote and approve any large transactions that the company is involved in. Moreover, the Jordanian provision regarding the procedure for an 'extraordinary' general meeting should be clarified and simplified in line with the Australian provisions, and the percentage share capital requirement for shareholders to call an extraordinary general meeting should be lowered to five percent. Finally, the remuneration limitations on directors are extraordinary and should be removed. It is recommended that the Jordanian authorities amend the *Companies Law* so that shareholders are responsible for determining and approving the remuneration of the board of directors.

[398] *Corporations Act 2001* (Cth), s 249L(1)(c).

4. DISCLOSURE REGARDING CAPITAL STRUCTURE

4.1 Content of the OECD Principles

Chapter 2: The Rights of Shareholders and Key Ownership Functions

D. Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.

4.2 Comparative Analysis

The Australian *Corporations Act* complies with the OECD Principle regarding the disclosure of capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership. In Jordan, public shareholding companies issue only one class of shares, ordinary shares.[399]

Pyramid structures, cross shareholdings and mechanisms which provide shares with limited or expanded voting rights can be utilised to limit the power of non-controlling shareholders to affect corporate change. The annotation to Chapter 2, Principle D, also raises the issue of shareholder agreements and their ability to significantly affect control within a company. Common features of shareholder agreements include preferential share purchase rights for parties to the agreement, limitations on the transfer rights of parties to the agreement, and various voting restrictions, which often include the stipulation that parties to the agreement must vote as a 'block'. The annotation points out that many jurisdictions have been forced to establish strict guidelines to monitor these types of agreements and to limit their duration. Given the significant impact that

[399] The provisions pertaining to shareholding are Articles 95-98 of the *Companies Law 1997* (JOR).

these arrangements and other capital structure mechanisms can have on the landscape of control within a corporation, it is important that clear disclosure obligations are put in place.[400]

In Australia, a company may issue ordinary and preference shares.[401] According to s 254B of the *Corporations Act*, a company may determine the terms on which the shares are issued and the rights and restrictions attaching to them.[402] The most common type of company shares are ordinary shares. The *Corporations Act* does not define ordinary shares, however, s 254A provides that preference shares have special rights attaching to them. Accordingly, shares with no special rights or restrictions attached to them are called ordinary shares. Section 117(2)(k) provides that a company must lodge an application with ASIC at the time of registration, which must include information on the initial share capital of the company. The application must state, for a public shareholding company, the number and class of shares each member agrees in writing to take up and the amount each member agrees in writing to pay for each share.[403]

A public shareholding company in Australia may raise capital by offering shares or other securities for the public to invest in. To carry out these offers, the company must prepare a disclosure document, unless exempt.[404] According to s 709, if an offer of securities requires disclosure to investors, a prospectus must be prepared for the offer, unless an offer information statement can be used instead.[405] Section 710 provides that a prospectus for a body's securities must contain all information that investors and their professional advisers would reasonably require to make an informed assessment of a number of matters listed in the legislation, including the rights and liabilities attaching to the securities offered. If a prospectus is required, s 712 provides that a company may simply refer to material lodged with ASIC rather than setting it out in full.

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[400] For more information see OECD Principles 2004, Annotation to Chapter 2, Principle D.
[401] *Corporations Act 2001* (Cth), s 254A.
[402] For a general discussion see Tunstall, above n 361, 55.
[403] For a general discussion see Tomasic, above n 374, 212.
[404] *Corporations Act 2001* (Cth), ss 706-708. For a general discussion see Adams M, *Essential Corporate Law* (2002), 52.
[405] Section 709(4) of the *Corporations Act 2001* (Cth) provides that an offer information statement can be used instead of a prospectus when the money being raised, when added to all amounts previously raised by issuing securities under an offer information statement, does not exceed AUD5,000,000.

4.3 Conclusion and Recommendations

The Australian *Corporations Act* complies with Chapter 2, Principles B and C. The *Corporations Act* requires companies to disclose information on the initial share capital to ASIC at the time of registration. Companies wishing to raise funds by issuing shares must prepare a disclosure document, which may take many forms, and must include information about the rights and liabilities attached to the shares offered.

5. MARKETS FOR CORPORATE CONTROL

5.1 Content of the OECD Principles

Chapter 2: The Rights of Shareholders and Key Ownership Functions

E. Markets for corporate control should be allowed to function in an efficient and transparent manner.

(1) The rules and procedures governing the acquisition of corporate control in the capital markets and extraordinary transactions such as mergers and sales of substantial portions of corporate assets should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class.

(2) Anti-takeover devices should not be used to shield management and the board from accountability.

5.2 Comparative Analysis

The Australian *Corporations Act* complies with the OECD principles regarding acquisition rules and procedures governing corporate control in the capital market. The Jordanian *Companies Law*, however, lacks clearly detailed provisions in this area.

The annotation to Chapter 2, Principle E, makes it clear that both investors and stock exchanges have expressed significant concern over the increased use of anti-takeover devices and the effect that such devices have on the functioning of the market for corporate control. Takeover defences are often used as a means of shielding directors or managers from shareholder monitoring. The annotation reinforces that, in corporate control transactions such as mergers and takeovers, the directors' fiduciary duty to their company must always remain paramount.[406]

Part 11 (Articles 222-239) of the Jordanian *Companies Law* sets out the procedures and rules that companies have to follow in order to merge. Article 226 states that the boards of merging companies must notify the Controller of Companies, the JSC, the Market, and the SDC within 10 days of the date of issuing the merge decision. Articles 227, 228, and 229 set out the relevant procedures for a merger. According to Article 230, the Minister shall form an executive committee from the chairmen, board members, managers and auditors of the merging companies, in order to carry out the executive procedures for the merge. An important part of this process is inviting the shareholders' extraordinary general assembly of each of the merging companies to approve the merger, providing that decisions are made with a majority of 75 percent of the shares represented for each company separately.[407]

Whilst the provisions pertaining to mergers are quite detailed, the *Companies Law* falls short of establishing a clear set of rules for important acquisition activities such as takeovers. In terms of Principle E2, general directors' duties outlined in the *Companies* Law would cover a situation in

[406] For more information see OECD Principles 2004, Annotation to Chapter 2, Principle E.
[407] *Companies Law 1997* (JOR), Article 230(c).

which anti-takeover devices were used to shield management and the board from accountability. Article 157 provides that the chairman and members of the board shall be held responsible to shareholders and others for every violation of the law committed by any of them or all of them.[408] Also relevant is Article 159, which provides that the chairman and members of the board shall be held responsible for any default or negligence in the management of the company. In terms of remedies, shareholders can seek redress with the Controller of Companies who has wide investigative authority and recourse rights, including the right to dissolve the board or revoke the company's registration.

In Australia, takeover bids are regulated by Chapter 6 (ss 602-659C) of the *Corporations Act*.[409] Section 606 sets out the rule that a person is prohibited from acquiring a 'relevant interest'[410] in voting shares above the threshold limit of 20 percent if the company is a listed company or an unlisted company with more than 50 members. There are a number of exceptions under s 611. The most important exception to the prohibition is an acquisition that results from the acceptance of an offer under a takeover bid.[411] The bidder in a takeover bid is under an obligation to provide a significant amount of information to the shareholders of the target company including the identity of the bidder, details of shareholding held by bidder, and any arrangement under which cash will be provided by another person.[412] Section 661A provides that a bidder in a takeover bid may compulsorily acquire any securities in the bid class following the takeover bid if the bidder has a relevant interest in 90 percent of the shares, and the bidder has acquired at least 75 percent of the shares that the bidder offered to acquire.[413]

[408] Such violations include any infringements of the relevant laws and regulations in force or the memorandum of association, and also for 'errors' in the management of the company.
[409] According to s 602, the purpose of Chapter 6 is to ensure that takeovers take place in an efficient and competitive market, and that all shareholders have the right to access relevant information and equal rights to sell their shares according to their class.
[410] Section 608 provides that a person has a 'relevant interest' in securities if they are the holder of the securities, or they have the power to exercise the voting rights attached to the securities or to dispose of the securities.
[411] *Corporations Act 2001* (Cth), 611. Other significant exceptions include an acquisition of no more than three percent every six months [Exception 9], and an acquisition which gains approval from the general meeting [Exception 7]. For a general discussion of the exceptions see Ffrench, above n 379, 264.
[412] *Corporations Act 2001* (Cth), s 636.
[413] For a discussion of s 661A of the *Corporations Act 2001* (Cth) see Ford, above n 360, 1107.

Any action taken by any directors of a target company in response to an actual bid to delay or outwit a takeover bid is considered to be defensive conduct, and such behaviour may constitute a breach of duty. Sections 180-184 of the *Corporations Act* provide that directors owe duties of loyalty and good faith because they are in a fiduciary relationship with the company. Section 180 provides that directors and other officers[414] of the corporation must exercise their powers with a reasonable degree of care and diligence. Section 181 provides that a director or other officer must exercise their powers in good faith in the best interests of the corporation and for a proper purpose. Sections 182 and 183 stipulate that directors, other officers, and employees must not improperly use their position, or information they obtained in their position, to gain advantage for themselves or cause detriment to the corporation. Importantly, s 184 imposes criminal penalties for breaches of ss 181-183 committed recklessly or with dishonest intent. Because of their fiduciary relationship with the company, directors must avoid actual or significant conflicts of interest.

The *Corporations Act* and the general law provide for the courts to make orders against directors who have breached their duties. Directors who breach their duties can be sued by the company, a liquidator, a creditor, a shareholder, or ASIC. There are two kinds of sanction:

(1) Remedies: A director can be sued under the general law and/or the *Corporations Act* for general civil remedies. The precise remedy given will depend on whether the duty breached derives from common law or from equitable principles.

(2) Penalties: There are two kinds of penalties which can be imposed against directors for a breach of their duties; civil and criminal penalties. Civil penalties can only be brought by ASIC against directors who breach their duties. Criminal penalties can be brought by the Director of Public Prosecutions against directors who breach s 184.

[414] 'Officer' is defined in s 9 of the *Corporations Act 2001* (Cth) to include any person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or the entity; or a person who has the capacity to significantly affect the entity's financial standing.

5.3 Conclusion and Recommendations

From the analysis above it can be seen that the Australian *Corporations Act* complies with Chapter 2, Principle E. The Jordanian *Companies Law*, however, only partially complies with the principle. The Australian provisions are far more comprehensive in terms of acquisition rules and procedures governing corporate control in the capital market. The Jordanian *Companies Law* lacks clearly detailed provisions in this area, such as those necessary to regulate takeover bids. It is recommended that the Jordanian authorities take steps to address this issue in similar terms to the Australian *Corporations Act*.

6. EXERCISE OF OWNERSHIP RIGHTS BY ALL SHAREHOLDERS

6.1 Content of the OECD Principles

Chapter 2: The Rights of Shareholders and Key Ownership Functions

F. The exercise of ownership rights by all shareholders, including institutional investors, should be facilitated.

(1) Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights.

(2) Institutional investors acting in a fiduciary capacity should disclose how they manage material conflicts of interest that may affect the exercise of key ownership rights regarding their investments.

G. *Shareholders, including institutional shareholders, should be allowed to consult with each other on issues concerning their basic shareholder rights as defined in the Principles, subject to exceptions to prevent abuse.*

6.2 Comparative Analysis

Neither the Australian *Corporations Act* nor the Jordanian *Companies Law* comply fully with the OECD principle regarding facilitating the exercise of ownership rights by all shareholders, including institutional investors.

In most jurisdictions it is becoming increasingly common for shares in large public companies to be held by institutional investors. The voting rights of such investors are often viewed as an important part of the value of the investment to the investor's client. The annotation to Chapter 2, Principle F, stipulates that when institutional investors are in a fiduciary relationship with their client, it is important that they disclose their voting policies and practices, including the human and financial resources that have been set aside to pursue such policies. Also important is open disclosure about any conflicts of interests that may affect the client's investment.

In terms of shareholders, including institutional investors, consulting with each other on issues concerning their rights, the annotation to Principle G provides that such action should be permitted and encouraged, without the requirement for mandatory compliance with the formalities of proxy solicitation. It is noted, however, that such activity can be used to manipulate markets and corporate control, and also to avoid competition law. The annotation provides that any mandatory disclosure of such cooperation among investors to prevent abuse may also have to be accompanied by regulations that prevent trading for a period.[415]

[415] For more information see OECD Principles 2004, Annotation to Chapter 2, Principles F and G.

In general terms, the legislation in both jurisdictions facilitates the exercise of ownership rights by general shareholders. In Australia, the rules and regulations governing shareholders' rights are comprehensive and well structured. In Jordan, shareholders' rights to secure ownership registration and to vote and participate in general shareholders' meetings (as well as the right to be involved in decisions that concern fundamental corporate change) are all provided for in the *Companies Law*.[416] There is no regulatory or legislative scheme in Australia or Jordan, however, that specifically deals with institutional investors and their disclosure obligations in relation to policies on corporate governance, conflicts of interest, and voting.

In Australia, the level of institutional shareholdings in listed companies has increased dramatically in recent years, currently resting at somewhere close to 50 percent.[417] The various institutions commonly take different approaches to corporate governance issues. A recent study indicated that a relatively large percentage of the institutions do not exercise their voting rights on 'routine' motions and prefer to vote only on significant or contentious issues.[418] Whether an institution will intervene when dissatisfied with the performance or corporate governance of an investee company most often depends on a range factors related to the share price of the company.[419]

Despite the fact that their significant percentage shareholdings put them in an excellent position to drive corporate responsibility, institutional investors in Australia have always been, and seemingly remain, hesitant to involve themselves in the corporate governance of investee

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[416] See Chapter 4, Section 2, of this paper for a discussion on shareholders' rights in Australia and Jordan.
[417] This is primarily due to compulsory superannuation and the strong performance of equities markets compared to bonds. Lessing J, 'Institutional Investors: Will We See Greater Cooperation Between Them Regarding Corporate Governance' (1998), 10 *Bond Law Review* 376.
[418] Ramsay I *et alia*, 'Institutional Investors Views on Corporate Governance' (2000), 18 *Company and Securities Law Journal* 2, 1. This article is the result of an interview study conducted in late 1997 and early 1998. Representatives of large Australian institutional investors were interviewed about their role in corporate governance. The article reports on their views on a range of key corporate governance issues such as board structure and composition, exercise of voting rights, activism, and barriers to institutional investor involvement.
[419] Often the size of the institution's shareholding will make it difficult to dispose of its entire shareholding at a reasonable price. Further, the investee company's shares might be trading below the net tangible asset value, which eliminates selling the shares as a viable option. For a general discussion see Ramsay, above n 418.

companies. It should be noted that the provisions of the *Corporations Act* are at least partly responsible for this reluctance, particularly those relating to shadow directorship, insider trading, and takeovers.[420] Whilst there has been a recent attempt by ASIC to relax the application of the takeover provisions to institutional investors,[421] more needs to be done to avoid the unintended consequence of provisions of the *Corporations Act* acting as a barrier to shareholder involvement and activism.[422]

6.3 Conclusions and Recommendations

From the analysis above it can be seen that neither the Australian *Corporations Act* nor the Jordanian *Companies Law* wholly comply with Chapter 2, Principles F and G. Accordingly, the relevant authorities in both jurisdictions should legislate to encourage institutional investors acting in a fiduciary capacity to disclose their corporate governance policies (including how they manage conflicts of interest) and their voting records on important issues where the value of the investment has been affected or where the board's recommendation has been voted against by the fund. Furthermore, institutional investors should be encouraged to consult with each other on issues of corporate governance.

7. EQUITABLE TREATMENT OF SHAREHOLDERS

7.1 Content of the OECD Principles

Chapter 3: The Equitable Treatment of Shareholders

[420] For a detailed discussion see Lessing, above n 417.
[421] For a detailed discussion see Lessing, above n 417, 380-388. In short, the reason why some institutional investors have been hesitant to liaise with each other on issues of corporate governance is a fear that such action will activate the relevant takeover provisions in the *Corporations Act 2001* (Cth).
[422] For a recent and detailed discussion of the role and duties of institutional investors in Australia see Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (June, 2006), at Chapter 5.

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

A. All shareholders of the same series of a class should be treated equally.

(1) Within any series of a class, all shares should carry the same rights. All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase. Any changes in voting rights should be subject to approval by those classes of shares which are negatively affected.

(2) Minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress.

(3) Votes should be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares.

(4) Impediments to cross border voting should be eliminated.

(5) Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cast votes.

7.2 Comparative Analysis

The Australian *Corporations Act* generally complies with the OECD principles regarding the equitable treatment of shareholders. The Jordanian *Companies Law,* however, lacks adequate provisions in this area.

A core aspect of effective capital markets is investor confidence in boards and managers behaving responsibly and in the best interests of their companies. Directors, managers and controlling shareholders sometimes act in their own best interests at the expense of non-controlling shareholders. It is clear that the most effective deterrent to such activity is a legal regime that provides relatively simple and inexpensive methods of redress for shareholders whose rights have been violated. The annotation to Chapter 3, Principle A, notes the concerns of excessive litigation and encourages the enactment of measures to protect management and boards against frivolous lawsuits. It is necessary for legislators to formulate an appropriate balance. The annotation notes that many jurisdictions have established alternative adjudication procedures organised by securities regulators or other regulatory bodies.[423]

In Jordan, public shareholding companies issue only one class of shares (ordinary shares). Accordingly, shareholders in these companies have equal rights. According to Article 178, shareholders in a public company who were registered in the company register three days prior to the date set for any general assembly meeting shall have the right to participate in the discussion and voting of issues in the meeting. There are no provisions in the *Companies Law* that deal with the issues surrounding voting by custodians or nominees. There is also no mention of any procedures pertaining to cross border voting.

Directors of Jordanian companies owe certain duties to shareholders and are held responsible for breaches of those duties. Article 157 provides that the chairman and members of the board shall be held responsible to shareholders and others for every violation of the law committed by any of them or all of them. Such violations include any infringements of the relevant laws and regulations in force or the memorandum of association, and also for 'errors' in the management of the company. Also relevant is Article 159, which provides that the chairman and members of the board shall be held responsible for any default or negligence in the management of the company.[424] Finally, the fact that the general assembly of Jordanian companies can, by consent,

[423] For more information see OECD Principles 2004, Annotation to Chapter 3, Principle A.
[424] Article 159 provides further that a court has the right to hold any such person liable for the debts of the company in the event of the company being unable to meet its financial obligations in liquidation.

absolve the board from responsibility for violations, does not prevent the option of legal recourse against the chairman and the board.[425]

In terms of remedies, shareholders can seek redress with the Controller of Companies who has wide investigative authority and recourse rights, including the right to dissolve the board or revoke the company's registration.[426] The Controller does not, however, have the power to impose a fine or penalty. Alternatively, shareholders, either together or independently, can bring a direct legal action against directors, managers, and other shareholders.[427] Jordanian courts are still relatively inexperienced in commercial matters and cases ordinarily last between two and three years.[428] Notwithstanding the right of shareholders to seek the assistance of the Controller and the courts in certain circumstances, the Jordanian *Companies Law* does not directly protect the rights of minority shareholders nor introduce effective means of redress. There is no definition or concept for derivative or class action suits in the Jordanian *Companies Law*.[429]

In Australia, a public company may issue ordinary and preference shares.[430] According to s 254B, a company may determine the terms on which the shares are issued and the rights and restrictions attaching to them.[431] Section 250E(1) of the *Corporations Act* provides that if a company does not specify the voting rights attaching to preference shares, all shareholders, whether preference or ordinary, have equal voting rights. Like its Jordanian counterpart, there are no provisions in the *Corporations Act* that deal specifically with the issues surrounding voting by custodians or cross border voting.

[425] *Companies Law 1997* (JOR), Article 157.
[426] Article 275 of the *Companies Law 1997* (JOR) provides that shareholders holding 15 percent of capital can request the Controller to audit the company.
[427] *Companies Law 1997 (JOR),* Article 160. See also Articles 234 and 237 which provide that shareholders have a direct action against directors, the general manager and the auditors in the case of acquisition claims.
[428] World Bank, above n 156, 8. It should be noted that Article 284 of the *Companies Law 1997* (JOR) allows claimants to request expeditious status.
[429] The issue of minority shareholder protection is covered in Chapter 5 of this paper.
[430] *Corporations Act 2001* (Cth), s 254A.
[431] For a general discussion see Tunstall, above n 361, 55.

Minority shareholders' rights are protected in Australia both by the general law and the *Corporations Act*. Shareholders can bring legal proceedings before a court to challenge a company's action or decision, and to obtain remedies against the company, management and members.[432] Remedies were introduced to protect minority shareholders from the abusive action of boards and controlling shareholders who have control of the general meeting through their voting power.[433] According to s 236, a member has a statutory right to bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party.[434] Such action under s 236 is subject to a court granting leave under s 237.[435] Pursuant to s 232, shareholders also have the right to bring an action for oppressive or unfairly prejudicial conduct. An extensive list of remedies open for the court to order in such circumstances is listed in s 233.[436]

7.3 Conclusion and Recommendations

From the analysis above it can be seen that the Australian *Corporations Act* complies generally with Chapter 3, Principle A. The Jordanian *Companies Law*, however, only partially complies with the principle. Minority shareholders are afforded much better and clearer protection under the Australian legislation. The Jordanian *Companies Law* does not address the rights of minority shareholders in any real depth. There are currently 161 companies listed on the ASE. The listed sector is dominated by banks and insurance companies, which together comprise over 55 percent of market capitalisation.[437] Research carried out in 2004 indicated that the average control position for the top 48 listed companies was approximately 30 percent of shares.[438] It is estimated that almost 50% of listed companies are 'supermajority owned', that is, minority shareholder consent is not required for fundamental corporate decisions.[439] The Jordanian authorities need to be alerted to this important subject so that appropriate legal provisions can be

[432] For a detailed discussion see Adams, above n 404, 78.
[433] Ffrench, above n 379, 248.
[434] Cassidy, above n 48, 284.
[435] Statutory derivative actions are discussed in detail in Chapter 5, Section 2, of this paper.
[436] The oppression remedy is discussed in detail in Chapter 5, Section 2, of this paper.

drafted and enforced to protect the rights of minority shareholders. Also, both jurisdictions should take steps to draft appropriate provisions that deal with the issues surrounding voting by custodians or nominees, and that remove any impediments to cross border voting.

8. INSIDER TRADING AND ABUSIVE SELF-DEALING

8.1 Content of the OECD Principles

Chapter 3: The Equitable Treatment of Shareholders

B. Insider trading and abusive self-dealing should be prohibited.

8.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding the prohibition of insider trading and abusive self-dealing.

Insider trading, which entails manipulation of capital markets, is prohibited by company law and/or criminal law in most developed countries, but unfortunately not all. The annotation to Chapter 3, Principle B, provides that in jurisdictions where such abuses are not specifically forbidden by legislation or where enforcement is not effective, it is important for legislators to take immediate steps to fill any such gaps.[440]

In Jordan, insider trading and self-dealing are clearly prohibited. Article 158 of the *Companies Law* provides that the company's directors, managers, and employees are prohibited from disclosing to any shareholder in the company or to another person, any confidential information

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[437] World Bank, above n 156, 1
[438] Research conducted by Professor Ghassan Omet, University of Jordan; as cited in World Bank, above n 156, 1.
[439] Estimate calculated by HSBC; as cited in World Bank, above n 156, 1.
[440] For more information see OECD Principles 2004, Annotation to Chapter 3, Principle B.

related to the company that was acquired in their official capacity in the company, or as a result of undertaking any business related to the company. Furthermore, Article 166 provides that the company's board, chairman, managers and employees are prohibited from dealing directly or indirectly in the shares of the company on the basis of information which may have been acquired as a result of their position in the company. It is also prohibited to reveal any information to any person with the aim of affecting the share price of the company or any other affiliated company. Directors, managers or employees who undertake such dealings will be held liable for the damage incurred by the company, its shareholders or any other persons, and may also be subject to a fine.[441]

Also relevant is Article 108 of the *Securities Law* 2002 which provides that it is an offence for any person to trade in securities or influence others to trade in securities on the basis of inside information.[442] It also provides that it is prohibited to use inside or confidential information to attain material gains. Article 110(A) provides that the penalty for such action is a fine of not more than JD100,000, in addition to a fine not less than twice the amount, but not more than five times the amount, of profit made or loss avoided by committing the violation.[443] Article 110(B) provides further that a person committing the violation can also receive an imprisonment term of up to three years, at the discretion of the court. The JSC is responsible for monitoring insider trading and in 2003 it publicly identified and imposed fines on 23 violators of the insider trading rules.[444]

In Australia, as previously discussed, directors owe duties of good faith and loyalty because they are in a fiduciary relationship with the company. Therefore, if a director who possesses price-sensitive information uses that information to make a profit when dealing in securities, then such

[441] *Companies Law 1997* (JOR), Articles 166 and 282. Also relevant is Article 203 which provides that auditors are prohibited from speculating in the company shares.
[442] Article 2 of the *Securities Law 2002* (JOR) defines 'inside information' as information relating to one or several issuers or to one or several securities which has not been made public and which, if it were made public, would likely affect the price of any such security. This does not include inferences drawn on the basis of economic and financial studies, research and analysis.
[443] Approximately AUD200,000.
[444] Jordan Securities Commission, 2003 Annual Report (Table 1); as cited in World Bank, above n 156, 8.

activity may give rise to a breach of his or her fiduciary duties.[445] The relevant insider trading provisions are extensive and detailed, and are located in ss 1042A-1045A. The central provision prohibiting the conduct is s 1043A which provides that where a person possesses information that is not generally available but, if it were generally available, a reasonable person would expect it to have a material effect on the value of securities of a company, then such a person must not subscribe for, purchase or sell any such securities, or procure any other person to do so.

8.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 3, Principle B. Both jurisdictions prohibit any person from disclosing information that is not available to the public and which affects the price of the company's securities.

9. DISCLOSURE OF MATERIAL INTERESTS

9.1 Content of the OECD Principles

Chapter 3: The Equitable Treatment of Shareholders

C. Members of the board and key executives should be required to disclose to the board whether they, directly, indirectly or on behalf of third parties, have a material interest in any transaction or matter directly affecting the corporation.

[445] For a general discussion see Tomasic, above n 374, 472. See also Tomasic, above n 359, 348; and Fisher, above n 356, 144.

9.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding the disclosure requirement for board members and key executives who have material interests in company transactions.

Related party transactions have always been a central issue of concern in terms of the protection of shareholders' rights. Directors and other key executives must inform the board where they have a business, family or other special relationship that could possibly affect their judgment in a company transaction. Where there is any doubt as to the whether the outside interest is 'material', the relevant person should always lean in favour of caution and disclose the interest so that the board can collectively form a view on the nature of the interest. The annotation to Chapter 3, Principle C, provides that where a material interest has been declared, it is usually best practice for the director to be disqualified from the decision making process in the relevant transaction.[446]

In Jordan, Article 138 of the *Companies Law* provides that the chairman, members of the board, and managers shall provide to the board at the first board meeting a written statement of the shares owned by each one of them, their wives, and their children. In addition, the name of other companies in which the director and his or her immediate family own shares must be disclosed, but only if the public shareholding company also owns shares in the same company. Any change which occurs in this respect must be notified to the board within 15 days from the date of the change. Article 148 prohibits related party transactions by directors, managers, employees, and the company, including indirect participation. Article 148(b) provides that the board members and general manager of a company are prohibited from joining the board of another company that carries out similar business activities, has identical objectives, or is a competitor of the company. Article 148(c) provides that the company board, its members, its general manager, and

[446] For more information see OECD Principles 2004, Annotation to Chapter 3, Principle C.

its employees must not have a direct or indirect interest in the business contracts of the company. The penalty for such action is discharge from the company.[447] In practice, related party transactions between affiliated firms owned by the same family are frequent and simply require board approval.[448]

In Australia, s 191 of the *Corporations Act* provides that directors of both public and proprietary companies are required to disclose any material personal interest in any matter relating to the affairs of the company. There are various circumstances in which disclosure is not required which are listed in s 191(2)(a)-(d).[449] Section 194 provides that if the director of a proprietary company discloses the nature and extent of their interest to the other directors then the director will be able to vote on matters that relate to the interest. Section 195 provides that if the director of a public company discloses the nature and extent of their interest then he or she will be able to vote, but only if a resolution is passed to that effect by the other directors. ASIC can also provide similar approval for participation under s 195(4).

Related party transactions in public companies are regulated by Chapter 2E (ss 207-230). Section 207 provides that the rules in Chapter 2E are designed to protect the interests of a public company's members as a whole, by requiring members' approval for giving financial benefits to related parties that could endanger those interests. According to s 208, a public company, or an entity controlled by a public company, must not give a financial benefit to a related party unless the procedure set out in ss 217-227 is strictly adhered to.[450] Section 229 provides that 'financial benefits' for the purposes of Chapter 2E include giving a financial benefit indirectly, giving a financial benefit by making an informal, oral or non-binding agreement, or giving a financial benefit that does not involve the payment of money. Section 228 defines 'related parties' in broad terms to include controlling entities, directors of the company and their spouses, relatives

[447] *Companies Law 1997* (JOR), Article 148(e).
[448] World Bank, above n 156, 9.
[449] Directors are also able to provide a 'standing notice' of their interest in accordance with s 192 of the *Corporations Act 2001* (Cth).
[450] For a general discussion see Ffrench, above n 379, 158.

of directors and their spouses, entities controlled by related parties, entities that ceased to be related parties less than six months prior to the transaction, entities that will become related parties in the future, and entities that are acting in concert with a related party.

9.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 3, Principle C. However, the Jordanian authorities should be encouraged to clarify and define related party transactions more broadly. Rather than simply prohibiting related party transactions, the relevant policymakers should draft provisions that more clearly define the relevant procedures in line with the Australian provisions.

10. THE ROLE OF STAKEHOLDERS IN CORPORATE GOVERNANCE

10.1 Content of the OECD Principles

Chapter 4: The Role of Stakeholders in Corporate Governance

The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active cooperation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

A. *The rights of stakeholders that are established by law or through mutual agreements are to be respected.*

10.2 Comparative Analysis

Neither the Jordanian *Companies Law* nor the Australian *Corporations Act* complies fully with the OECD principle requiring the rights of stakeholders to be respected. The legislation in both jurisdictions neglects to define stakeholders and give them the requisite attention and protection that they are afforded in many other countries. The ASX Principles of Corporate Governance 2003 do provide recommendations relating to the duty of companies to recognise their obligations to legitimate stakeholders.

A good corporate governance regime will encourage effective cooperation between companies and the stakeholders that contribute to the effective maintenance and sustainability of the companies. These stakeholders generally include investors, creditors, employees and suppliers. The annotation to Chapter 4 reinforces that corporations must acknowledge the interests of these stakeholders and properly recognise the contribution that they make to the long-term successful operation of its business. The annotation to Principle A notes that there are many other legislative arenas that have an impact on this area; for example, labour, business, commercial and insolvency laws. Also important in this area is contractual relations.[451] It is not within the scope of this paper to provide a detailed analysis of how these legal factors affect the rights of stakeholders.

In Jordan, employees' rights have priority over creditors' rights in a bankruptcy situation. According to Article 256 of the *Companies Law*, a liquidator shall settle the company's debts after deducting liquidation expenses and paying the amounts due to the company's employees. The liquidator must also pay any amount due to the Public Treasury and the owners of any real estate leased to the company before reimbursing creditors.

[451] For more information see OECD Principles 2004, Annotation to Chapter 4, Principle A.

Article 115, which requires creditor approval for the reduction of a company's capital, is the only provision in the *Companies Law* that deals directly with the legal rights of creditors. Article 115(a) provides that the board of a company wishing to reduce its subscribed capital must submit an application to the Controller of Companies, which must include a list of the names of all the company's creditors.[452] Pursuant to Article 115(b), the Controller must notify the relevant creditors of any decision of the company general assembly regarding the reduction of its subscribed capital. Creditors may submit a written objection within 30 days from the date of the publication of the reduction notice in two local daily newspapers. If the Controller fails in settling the objection, the creditors have the right to bring their case before a court.[453]

In Australia, legislative protection for stakeholders is also mostly limited to the sphere of bankruptcy. Section 459P of the *Corporations Act* lists the entities that can apply to the court to have the company wound up because of insolvency. Included is the company itself, creditors, liquidators and provisional liquidators, shareholders, and ASIC. A liquidator must distribute all assets (subject to the provisions of s 556) firstly to secured creditors, secondly to preferential creditors, and finally to general unsecured creditors in equal shares.[454] Employees' rights have priority over unsecured creditors in a bankruptcy situation. Section 556 of the *Corporations Act* gives priority to the employees' wages and superannuation contributions payable by the company over all other unsecured debts and claims.[455] Moreover, s 596AB prohibits transactions that are entered into with the intention of defeating the recovery of employee entitlements.[456] The remainder of the assets after all other liabilities are met is distributed to shareholders according to the company's constitution. If the constitution is silent, the assets are distributed equally.[457] Moreover, s 256B(1)(b) requires that capital reduction must not materially prejudice the company's ability to pay its creditors.

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[452] It should also be noted that, pursuant to Articles 115A of the *Companies Law 1997* (JOR), a reduction in subscribed capital requires the approval of at least 75 percent of the company shareholders.
[453] *Companies Law 1997* (JOR), Article 115(b).
[454] For a more detailed discussion see Tomasic, above n 374, 1125.
[455] *Corporations Act 2001* (Cth), s 556(e). For a general discussion see Tomasic, above n 359, 820.
[456] For a general discussion see Cassidy, above n 48, 247.
[457] *Corporations Act 2001* (Cth), s 501.

Principle 10 of the ASX Principles of Corporate Governance provides that companies should recognise their legal and other obligations to all stakeholders. Recommendation 10.1 suggests that a company establish and disclose a code of conduct to guide compliance with legal and other obligations to legitimate stakeholders. The commentary to Recommendation 10.1 provides detailed guidelines for the content of such a code. The commentary also provides that the company should have a system for ensuring compliance with the code and for dealing with complaints.

10.3 Conclusion and Recommendations

Neither the Jordanian *Companies Law* nor the Australian *Corporations Act* provides a definition of stakeholders. Furthermore, neither Act properly reinforces the role of the stakeholders, particularly with regard to the position of the employee in the corporate governance framework. As noted above, it is not within the scope of this paper to discuss the role and effect of other specific legislative regimes that affect the rights of stakeholders, such as labour and insolvency laws.[458] It is recommended that the relevant authorities in both countries develop a functional definition of stakeholders and create a legislative framework that gives appropriate recognition to the interests of stakeholders and their contribution to the long-term success of the corporation.

[458] For example, the rights and obligations of Jordanian employees are governed primarily by the *Labour Law 1996* (JOR). Employees have the right to join unions, but unions are generally not very active in Jordan.

11. STAKEHOLDERS' RIGHT TO REDRESS FOR VIOLATION OF THEIR RIGHTS

11.1 Content of the OECD Principles

Chapter 4: The Role of Stakeholders in Corporate Governance

B. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.

11.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* generally comply with the OECD principle regarding effective redress for stakeholders whose rights have been violated.

In Jordan, Article 234 of the *Companies Law* provides that, in the context of a merger, corporate bond holders, creditors of merging companies and any shareholders may object to the relevant Minister within 30 days of the merger notice being given. The Minister must refer the objection to the Controller of Companies, and if the Controller cannot settle the dispute, then the objector has the right to bring the matter before a court. According to Article 157, the chairman and board of directors are responsible to 'the company, shareholders and others' for every violation of the company's internal rules and any other relevant laws, as well as general errors in management. The consent of the general assembly for absolving the board from responsibility does not prevent the option of legal recourse against the chairman and the board. In light of that fact, theoretically every stakeholder has the right to file a legal action against directors for violation of the law. Unfortunately, the Jordanian *Companies Law* does not specifically provide effective mechanisms for employees to obtain redress for violation of their rights.

In Australia, a director may be liable to compensate the company and others for any losses the company suffers from a breach of any one of the general directors' duties outlined in ss 180-184 of the *Corporations Act*. These sections are civil penalty provisions and a director who breaches the provisions can be held personally liable to compensate the company or others for any loss or damage they suffer.[459] Further, creditors have some limited statutory rights against directors for breaches of s 588G, which establishes the duty to prevent insolvent trading. Section 588G(3) provides that a defaulting director who is acting dishonestly commits an offence and, if convicted, will be liable to criminal penalties. Recovery of compensation for losses resulting from insolvent trading is covered under s 588M. Section 588M(3), in conjunction with s 588R(1), provides that a creditor can sue the directors with the liquidator's consent. Employees also have a legal right under s 596AF to begin proceedings, with the liquidator's consent, for any wrongful act in relation to their employee entitlements.[460]

11.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply generally with Chapter 4, Principle B. In general terms, both the Jordanian and Australian legislation protect the rights of stakeholders and introduce reasonably effective redress for violation of their rights. However, the Jordanian *Companies Law* does not introduce effective mechanisms for employees to obtain redress for violation of their rights. Accordingly, the Jordanian authorities should develop appropriate statutory provisions to protect the rights of employees in a more effective way and introduce new mechanisms for employees to seek redress for violations of their rights.

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[459] For a more detailed discussion see Cassidy, above n 48, 240. Section 1317H of the *Corporations Act 2001* (Cth) outlines the process for compensation orders and civil penalties. For a general discussion see Tunstall, above n 361, 7.

[460] The relevant offence is established in s 596AB of the *Corporations Act 2001* (Cth). For a general discussion see Tomasic, above n 374, 1126.

12. PERFORMANCE ENHANCING MECHANISIMS FOR EMPLOYEES

12.1 Content of the OECD Principles

Chapter 4: The Role of Stakeholders in Corporate Governance

C. Performance-enhancing mechanisms for employee participation should be permitted to develop.

12.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding performance-enhancing mechanisms for employees.

The implementation of performance-enhancing mechanisms for employee participation can provide a significant benefit to companies for obvious reasons. The annotation to Chapter 4, Principle C, lists a number of examples of mechanisms for employee participation, including employee representation on boards, establishing work councils that consider the viewpoints of employees on certain issues, and employee stock ownership plans or other profit sharing mechanisms.[461]

In Jordan, Article 190 of the *Companies Law* provides that a company may set up a saving fund for its employees, which shall enjoy an independent corporate identity. Moreover, Article 95(e) states that a general assembly can decide to allocate a part of the un-subscribed capital as an incentive to the company employees. In Australia, employee share scheme buy-backs are facilitated under the *Corporations Act* as a performance enhancing mechanism.[462] These are

[461] For more information see OECD Principles 2004, Annotation to Chapter 4, Principle C.
[462] For a more detailed discussion see Ford, above n 360, 1175.

arrangements in which the company buys shares held by, or on behalf of, employees, and it is approved at a general meeting.[463]

12.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* support performance-enhancing mechanisms for employees in compliance with Chapter 4, Principle C.

13. STAKEHOLDERS' RIGHT TO ACCESS INFORMATION

13.1 Content of the OECD Principles

Chapter 4: The Role of Stakeholders in Corporate Governance

D. Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient, and reliable information on a timely and regular basis.

13.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* partially comply with the OECD principle regarding the right of stakeholders to access relevant and sufficient information.

In Jordan, the *Companies Law* specifies limited rights for stakeholders to access information, however, they have no specific right to participate in the corporate decision-making process. Bondholders are granted explicit legal rights as they are a traditional example of stakeholders in

[463] Definition provided in s 9 of the *Corporations Act 2001* (Cth). Share buy-backs are regulated by Part 2J.1, Division 2 (ss 257A-257J).

Jordan, but they have no voting power at the company's general assembly meetings.[464] Despite not being involved in the voting process, they are permitted to form a bondholders' assembly which holds regular meetings and maintains responsibility for protecting the interests of bond holders.[465] Article 129 provides that the borrowing company shall invite the issue trustee, who represents the corporate bonds owners' assembly,[466] to the company's general meetings to represent the interests of the bondholders, without having the right to vote on the decisions of the general assembly. There are no other specific provisions in the legislation that allow stakeholders access to information.

In Australia, the only relevant provisions allowing stakeholders access to information are those in Chapter 5 of the *Corporations Act* that set out the guidelines for creditors obtaining access to information in the context of external administration.[467] Section 412 requires that a company under administration provide it creditors with all relevant information in relation to proposed compromises or arrangements. In particular, the company must explain the effect of the proposed compromise or arrangement to its creditors and state any material interest of the directors and the effect of those interests on the compromise or arrangement.[468] Part 5.3A, Division 2 (ss 436A-436G), requires an administrator to convene a meeting of creditors and ascertain whether a committee of creditors should be established. If a committee is established, then certain measures are outlined in s 436F that require the administrator to keep the committee informed throughout the course of the administration process. Section 439C provides that the creditors are to decide the company's future 21 days after the administration begins, with some exceptions. Creditors may resolve that the company execute a deed of company arrangement, the administration be finished, or the company be wound up. There are numerous other provisions in Chapter 5 that outline the role of creditors in all forms of winding up and their right to access information in such circumstances.

[464] Bondholders are regulated by Chapter 7, Articles 116-131, of the *Companies Law 1997* (JOR).
[465] *Companies Law 1997* (JOR), Articles 126-130.
[466] Pursuant to Article 126(b) of the *Companies Law 1997* (JOR) the corporate bond owners' assembly has the right to appoint an 'issue trustee' at the expense of the company.
[467] Tomasic, above n 359, 715.
[468] For a more detailed discussion see Ford, above n 360, 1132.

13.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply generally with Chapter 4, Principle D. The most significant discrepancy is that both jurisdictions provide for only very limited circumstances in which stakeholders' can participate in corporate governance decision-making.

14. COMMUNICATION OF CONCERNS ABOUT ILLEGAL OR UNETHICAL PRACTICE

14.1 Content of the OECD Principles

Chapter 4: The Role of Stakeholders in Corporate Governance

E. Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practice to the board and their rights should not be compromised for doing this.

14.2 Comparative Analysis

The Australian *Corporations Act* complies partially with the OECD principle regarding the right of stakeholders to freely communicate their concerns about illegal and unethical practice to the board of directors. In Jordan, neither the *Companies Law* nor the Jordanian Constitution recognises the right of whistleblowers to freely communicate their concerns about illegal and unethical practice.

Unethical and illegal activity carried out by directors and other key executives that violates the rights of stakeholders will almost always also have a detrimental effect on the company and its shareholders. Accordingly, effective procedures and safe-harbours for individuals, either personally or through a representative body, to make complaints are therefore a very important aspect of a corporate governance regime. The annotation to Chapter 4, Principle E, notes that in many countries the board is encouraged to protect whistleblowers and to give them confidential and direct access to an independent board member. Also quite common is the establishment of an internal ethics committee or ombudsman-like figure to receive allegations and deal with complaints. The annotation also encourages the establishment of confidential phone and email facilities to receive allegations.[469]

In Australia, whistleblower legislation has historically only been provided for the public sector. The insertion of Part 9.4AAA (ss 1317AA-1317AE) of the *Corporations Act* on 1 July 2004 introduced a certain degree of protection for whistleblowers in the private sector. These protections were designed to encourage persons within companies, or with a special connection to companies, to alert and report illegal behaviour to ASIC and other relevant authorities. Employees and officers of the company who report a suspected breach of the law must act in good faith and upon reasonable grounds. The report must be submitted to ASIC, the company auditor or member of the auditor team, a director, or another person authorised by the company to receive whistleblower disclosure. Anyone who makes a 'protected disclosure' is given immunity from civil and criminal liability for making the disclosure. Moreover, the ASX Principles of Corporate Governance 2003 recommend that companies establish a code of conduct for directors and senior executives. The recommendations include fostering and encouraging whistleblower behaviour by staff.

14.3 Conclusion and Recommendations

The Australian *Corporations Act* complies with Chapter 4, Principle E. Unfortunately, the rights of whistleblowers in Jordan are not recognised and protected by the law. The Jordanian

[469] For more information see OECD Principles 2004, Annotation to Chapter 4, Principle E.

authorities must act to draft appropriate provisions to protect the rights of whistleblowers to freely communicate their concerns about illegal and unethical practice within companies.

15. EFFECTIVE AND EFFICIENT INSOLVENCY FRAMEWORK

15.1 Content of the OECD Principles

Chapter 4: The Role of Stakeholders in Corporate Governance

F. The corporate governance framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights.

15.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle regarding the establishment of effective and efficient insolvency frameworks and effective enforcement measures for creditors' rights.

A key aspect of a corporation's initial and continued success is ensuring the flow of external capital in the form of credit. The annotation to Chapter 4, Principle F, provides that, especially in emerging markets, the amount and type of credit that a company is able to obtain depends on the level of protection offered to creditors in the relevant jurisdiction. Corporate insolvency frameworks vary significantly between jurisdictions. The annotation discusses a common aspect of legislative frameworks that imposes a duty on directors to act in the interests of creditors when their company is nearing insolvency. In these circumstances creditors might play a significant role in the governance of the company. The annotation also encourages the implementation of mechanisms that require directors to reveal timely information regarding the financial difficulties of the company so that appropriate consultation can be carried out between the company and its creditors.[470]

In Jordan, the general rules for liquidation are set out in Part 13 of the *Companies Law*, Articles 252-272. These provisions are reasonably detailed and comprehensive. According to Article 256 of the *Companies Law*, a liquidator shall settle the company's debts with creditors after deducting liquidation expenses and paying the amounts due to the company's employees. The liquidator must also pay any amount due to the Public Treasury and the owners of any real estate leased to the company before reimbursing creditors. Article 257(b) provides that if any of the operations of the company and its members during the liquidation were accomplished with the intention of defrauding its creditors, then the instigators of such activity will be held personally liable for any losses suffered by the relevant creditors. Also relevant in terms of enforcement rights for creditors is Article 159, which provides that if a deficiency in the company's assets is found upon liquidation as a result of the mismanagement or negligence of a board member, manager, or auditor, a court has the right to hold the relevant person/s responsible for all or part of the deficiencies.

In Australia, s 95A of the *Corporations Act* provides that a company is insolvent if it is unable to pay all its debts as and when they fall due. Sections 459A-489 set out the process for the compulsory winding up of a company in insolvency.[471] Section 459P lists the people who can apply to the court to have the company wound up because of insolvency and s 459Q sets out the application procedure. Sections 490-512 set out the process for the voluntary winding up of a company.[472] Sections 588D-588Z set out mechanisms that enable liquidators to improve returns for creditors in a winding up. Pursuant to s 588E, liquidators may take action against directors who allow the company to trade when it is insolvent.[473] Whilst most insolvent trading claims are

[470] For more information see OECD Principles 2004, Annotation to Chapter 4, Principle F.
[471] For a general discussion see Tunstall, above n 361, 186 and Fisher, above n 356, 438.
[472] Ffrench, above n 379, 332.
[473] For a more detailed discussion see Ford, above n 360, 1315.

brought by liquidators, ss 588R-588U provide creditors the right to bring claims in certain circumstances, subject to the consent of the liquidator or leave of the court.[474]

15.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 4, Principle F.

16. GENERAL DISCLOSURE REQUIREMENTS

16.1 Content of the OECD Principles

Chapter 5: Disclosure and Transparency

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

A. Disclosure should include but is not limited to, material information on:

(1) The financial and operating results of the company.

(2) Company objectives.

(3) Major share ownership and voting rights.

(4) Remuneration policy for members of the board and key executives, and information about board members, including their qualifications, the selection process, other company directorships, and whether they are regarded as independent by the board.

[474] For a more detailed discussion see Tomasic, above n 374, 1125.

(5) *Related party transactions.*

(6) *Foreseeable risk factors.*

(7) *Issues regarding employees and other stakeholders.*

(8) *Governance structures and policies, in particular, the content of any corporate governance code or policy and the process by which it is implemented.*

16.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply generally with the OECD principle regarding timely and accurate disclosure and transparency on all material matters regarding the corporation.

An effective disclosure regime is central to the effectiveness of market-based monitoring of companies and the protection of shareholders' right to exercise their ownership rights on an informed basis. The annotation to Chapter 5 provides that a strong disclosure regime assists the ability of companies to attract capital and the maintenance of confidence in capital markets. Companies often make voluntary disclosure over and above the minimum legal requirements in response to market demand. Conversely, a weak disclosure regime contributes to unethical behaviour and a loss of market integrity. This not only costs shareholders, but the economy as a whole. The annotation points out that disclosure requirements are not expected to place unreasonable administrative and financial burdens on companies, or unnecessarily endanger their competitive position. The core concept is *materiality*, which the annotation defines as 'information whose omission or misstatement could influence the economic decisions taken by users of information'.[475]

As mentioned in the introduction to this chapter, an assessment report was completed in Jordan in June 2004 as part of the joint program of Reports on the Observance of Standards and Codes

[475] For more information see OECD Principles 2004, Annotation to Chapter 5, Principle A.

(ROSC) sponsored by the World Bank and the IMF.[476] The purpose of the report was essentially to assess Jordan's observance of corporate governance procedures from an international perspective. At the same time, a report specifically pertaining to accounting and auditing was completed as part of the same initiative.[477] The report was based on findings from a diagnostic review carried out in Jordan between December 2003 and April 2004. Soon after the release of the report, the JSC issued *Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004*.[478]

Article 140 of the *Companies Law* states that the board must prepare and present to the general assembly, within a maximum period of three months from the end of the fiscal year, the annual balance sheet of the company, its profit and loss statement, and cash flow statements accompanied by their clarifications compared with those of the previous fiscal year. Article 43(a)(1) of the *Securities Law 2002* requires the annual report to also be filed with the JSC within three months of the end of the fiscal year. The company's auditors must duly certify all documents. The board must also present an annual report on the company's activities and forecasts for the following year.[479] Article 4 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides a detailed list of the requirements for the annual board report.

Article 141 of the *Companies Law* provides that the board must publish the company balance sheet, its profit and loss account, a detailed summary of the annual board report, and the auditors' report, within a period not exceeding 30 days from the date of the general assembly meeting. Further, Article 142 provides that the board must also prepare a separate financial report every six months that includes the financial position of the company, the results of its operations, a profit and loss account, a cash flow list and the clarifications related to the financial

[476] World Bank, above n 156.
[477] World Bank, above n 11, 2.
[478] The JSC is given the power to issue binding instructions pursuant to Article 16 of the *Securities Law 2002* (JOR).
[479] Copies of all documents must be also be copied and sent to the Controller of Companies in accordance with Article 140(b) of the *Companies Law 1997* (JOR).

statements certified by the company auditors. The Controller of Companies must be provided with a copy of the report within 60 days from the expiry of the period. Article 43(a)(2) of the *Securities Law 2002* also requires the semi-annual report to be filed with the JSC within 30 days of the end of the biannual fiscal year.[480]

Article 3 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* requires further that listed companies publish their preliminary business results[481] within 45 days of the end of the fiscal year, and provide the JSC with a copy of the results. There is some evidence that this practice might actually have a negative impact on the audit process. The difficulty is that if earnings are reported before the completion of the audit, auditors may be subject to increased pressure from the company not to make adjustments that would result in profit figures that are lower than those previously released in the unaudited financial statement. A further issue in this context is that any significant difference between the figures released in the preliminary report and those reported in the audited annual report has the potential to mislead investors.[482]

Article 8 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides that all public shareholding companies must make public, and notify the JSC of, any 'material fact' as soon as is reasonably practicable after its occurrence. 'Material fact' is defined in Article 2 as 'any event or datum that might affect a person's decision to buy, hold, sell or dispose of a security'. Article 8 provides a non-exhaustive list of the types of events that may constitute a material fact, although, in practice, what amounts to a material fact is usually a very narrow set of major events.[483] Article 9 requires the relevant company to submit a detailed report of the event to the JSC within a week of its occurrence, as well as issuing a public

[480] See also Article 6 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies*, which outlines the required content for the semi-annual report.
[481] The preliminary results include: (1) the net revenues; (2) the expected net profit before tax; (3) the amount allocated for income tax on expected profit; (4) minority interest in the profits; (5) net profit of the company's shareholders after deduction of the allocated tax and of minority interest; (6) comparative figures with the preceding fiscal year for the items from (1-5) above; (7) a summary of the company's activities during the fiscal year.
[482] World Bank, above n 11, 5.
[483] World Bank, above n 156, 11.

statement to confirm, deny or correct any news item about the event which is published in the media. The JSC must also be provided with a copy of the statement.[484]

In relation to disclosure of remuneration policies, Article 143 of the *Companies Law* provides that the board of a public shareholding company must, on an annual basis, provide the general assembly with a detailed report disclosing all relevant information pertaining to the expenses, remunerations and privileges of the chairman and the board of directors.[485] The same requirement is provided in Article 4(B)(18) of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004*. Recent research indicates that, in practice, a lot of companies only disclose the aggregate compensation of the board.[486] The chairman and the board of directors are held responsible to shareholders for the accuracy of the submitted statements.[487]

The JSC is the body principally responsible for disclosure enforcement and began taking administrative action, such as the imposition of fines, against violators in 2003.[488] This shift towards enforcement was seemingly driven by political will and increased support for the independence of the JSC and the immunity of its members.[489] To illustrate the increased enforcement activity of the JSC in this period it is worthy to note the following statistics collated for the year of 2003, all of which were a significant improvement upon previous years:

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484 See also *Securities Law 2002* (JOR), Article 43, which provides that every issuer must make public, and file with the JSC, any material facts upon recognising such.

485 Article 143 lists the following items requiring disclosure: (1) All amounts received from the company during the fiscal year by the chairman and members of the board, in the form of wages, fees, salaries, bonuses, remuneration and others; (2) Benefits that the chairman and members of the board enjoy such as free accommodation, cars etc; (3) Amounts that have been paid to the chairman and members of the board of directors during the fiscal year such as travel and transport allowances; (4) A detailed account of the donations paid by the company during the fiscal year, and the entities that received them; (5) A list of the names of the board of directors, the number of shares owned by each of them and the duration of the membership of each member.

486 World Bank, above n 156, 11.

487 *Companies Law 1997* (JOR), Article 143(b).

488 Section 17 of the *Securities Law 2002* (JOR) provides that the JSC can conduct any investigation or auditing to determine if any person or company has violated or taken preparatory steps to violate any provision in the legislation.

489 Saidi N, *Corporate Governance in MENA Countries: Improving Transparency and Disclosure*, Paper presented at the Second Middle East and North Africa Regional Corporate Governance Forum (2004), 79.

(a) 17 of the 190 companies registered with the JSC were deemed not to be transparent enough, and were requested to disclose further information;

(b) 16 companies were penalised due to inaccuracies in their published annual financial reports;

(c) 5 companies were fined for failure to disclose material information;

(d) 18 companies were penalised for not having presented a preliminary report;

(e) 24 companies were reproached because they did not submit an annual report, and 26 for not presenting a semi-annual report.[490]

Most importantly, all of these violations were made public so that market participants were made aware of the sanctions that they would face in the event of non-compliance.[491] This process and the JSC's increased cooperation with the ASE resulted in higher compliance rates in 2004 and 2005.[492] There is no doubt, however, that the JSC could go much further in its monitoring function.[493] The major difficulty, however, is that the JSC is not the only body responsible for fulfilling this role. In fact, the function is significantly fragmented and not effectively coordinated.[494] The function is effectively shared between the Controller of Companies,[495] the CBJ,[496] the JSC,[497] and the Insurance Commission.[498] The relevant Jordanian authorities need to review the disclosure requirements from all these sources and organise them into a single scheme

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[490] Ibid, 80.

[491] Article 20 of the *Securities Law 2002* (JOR) provides that violations of the legislation can be publicised to forewarn investors to avert any resultant consequences. See also Article 21(a)(1) which gives the JSC Board the power to publish the findings of its investigations.

[492] Saidi N, above n 489, 80.

[493] Evidence suggests that the JSC reviewers concentrate primarily on the form rather than the substance of disclosure documents. The JSC reviewers use a checklist with basic disclosure requirements to determine non-compliance in financial statements. For a general discussion see World Bank, above n 11, 8.

[494] For a general discussion see World Bank, above n 11.

[495] Pursuant to the *Companies Law 1997* (JOR).

[496] Pursuant to the *Banking Law 2000* (JOR), Articles 60-71. The legislation requires all banks to keep records, maintain books of account, and prepare financial statements in accordance with recognised accounting principles. It is further required that a bank's financial statements be prepared in accordance with the instructions issued by the CBJ. The auditors of banks' financial statements are required to be pre-approved by the CBJ in accordance with Article 63(a). A list of acceptable auditors is published by the CBJ each year.

[497] Pursuant to the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004*.

[498] Pursuant to the *Insurance Regulatory Act 1999* (JOR). The Insurance Commission, established under this legislation, has issued instructions (pursuant to Article 23 of the Act) pertaining to compliance with reporting standards in the insurance sector. In addition to filing annual audited financial statements, the Commission requires insurance companies to submit quarterly unaudited financial statements.

so as to make compliance with the requirements less of an administrative burden for companies. Further, there needs to be an increased effort in Jordan to educate the media about the corporate governance legislative framework to enable them to whistleblow and publish the names of violators.

In Australia, Chapter 2M (ss 285-344) of the *Corporations Act* regulates the disclosure of financial information. Section 292 requires disclosing entities, public companies, large proprietary companies, and registered schemes to prepare a financial report each financial year. The content of the annual financial report must include the financial statements for the year, supporting notes to the financial statement, and the director's declaration about the statement and notes.[499] Section 296(1) provides that the financial reports must comply with accounting standards set by the Australian Accounting Standards Board.[500] Section 301 provides that the financial report must be audited in accordance with the procedures set out in ss 307-311 and an auditor's report must be obtained.[501]

Section 292 also requires the preparation of an annual directors' report. The report must include general components pursuant to s 299 such as a review of the company's operations during the year and the results of those operations. Section 299 provides that the report must also include details of any significant changes in the entity's state of affairs during the year, the entity's principal activities during the year and any significant changes in the nature of those activities, and any other matter that has arisen during the year that has significantly affected the entity's operations.[502] Section 300 provides a more specific list of items that must be included in the directors' report such as the dividends paid to members, the name and term of every director, the

[499] *Corporations Act 2001* (Cth), s 295. Further information as to what each one of the three mentioned items requires is provided in subsections (2), (3) and (4).
[500] For more information regarding the Australian Accounting Standards Board's power to set accounting and auditing standards see Part 2M.5 (ss 334-339) of the *Corporations Act 2001* (Cth).
[501] *Corporations Act 2001* (Cth), s 301. For a general discussion see Tunstall, above n 361, 107.
[502] See also ASX Listing Rule 4.10.17 which provides that a listed company's annual report must include a review of its operations and activities for the reporting period.

name of all company officers and auditors, information pertaining to options granted throughout the year, and various other items.

The directors' report for a listed public company requires additional information. Section 299A provides that such reports must also contain information that members of the company would reasonably require to make an informed assessment of the operations, financial position, and business strategies of the listed entity, as well as its prospects for future years. Section 300(10) requires that the directors' report of public companies also include each director's experience, qualifications and responsibilities, and the number of board meetings held during the year and each director's record of attendance. Section 300(11) requires further that directors of listed companies include details of, among other things, their interest in the shares of the company or of a related body corporate, other relevant interests (including contractual) in any related body corporate, and all directorships of other listed companies held in the past 3 years.[503]

Principle 4 of the ASX Principles of Corporate Governance 2003 requires companies to have appropriate systems in place to verify and safeguard the integrity of the company's financial reporting. Recommendation 4.1 provides that the chief executive officer (or equivalent) and the chief financial officer (or equivalent) should state in writing to the board of directors that the company's financial reports present a true and fair view, in all material respects, of the company's financial condition, in accordance with relevant accounting standards. Principle 5 of the ASX Principles of Corporate Governance 2003 promotes timely and balanced disclosure of material matters concerning the company. Recommendation 5.1 requires companies to establish a proper governance structure with written corporate policies and procedures to ensure compliance with ASX Listing Rule disclosure requirements, and to ensure accountability at senior management levels.

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[503] For more detailed information see Tomasic, above n 359, 142.

ASX Listing Rule 3.1 provides that once an entity becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities, the entity must immediately disclose that information to the ASX. The Listing Rule sets out a detailed list of the types of information requiring disclosure. Such material information is not confined to information that is relevant because of its monetary value, and can extend to strategic and operational matters likely to influence investor decisions.[504] Section 674 of the *Corporations Act*, a civil penalty provision, gives statutory force to Listing Rule 3.1 by mandating that companies must comply with disclosure requirements provided in market listing rules.[505]

In relation to disclosure of remuneration policies, s 300A of the *Corporations Act* sets out detailed provisions requiring directors of listed companies to include information regarding all aspects[506] of their, and other key executives', remuneration in the annual directors' report. Principle 9 of the ASX Principles of Corporate Governance 2003 provides that companies must ensure that the level and composition of remuneration is sufficient and reasonable and that its relationship to corporate and individual performance is defined. Recommendation 9.1 suggests companies provide disclosure in relation to the company's remuneration policies to enable investors to understand (i) the costs and benefits of those policies and (ii) the link between remuneration paid to directors and key executives, and corporate performance. Recommendation 9.2 suggests the establishment of a remuneration committee consisting of a minimum of three members, the majority being independent directors.[507]

[504] For more information see *Guidance Note 8 – Continuous Disclosure: Listing Rule 3.1*, ASX, January 2003.
[505] Section 674(2) of the *Corporations Act 2001* (Cth) provides that a listed entity must provide information to the market operator if the entity has information that is not generally available and a reasonable person would expect that, if it were generally available, it would have a material effect on the price or value of the securities of the entity. Section 677 defines material effect on price or value in similar terms to ASX Listing Rule 3.1. That is, the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.
[506] The disclosure would include, for example, salary, fees, non-cash benefits, bonuses, profit share payments, superannuation contributions, termination and retirement payments, and sign-on payments.
[507] Recommendation 9.2 also outlines a detailed framework for determining appropriate remuneration packages.

16.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply generally with Chapter 5, Principle A. There is, however, as is so often the case, scope for the relevant Jordanian provisions to be clarified and expanded in this very important aspect of corporate governance. Firstly, the requirement in Article 3 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* for listed companies to publish their preliminary business results within 45 days of the end of the fiscal year should be removed for the reasons stated above. Secondly, the financial reporting compliance monitoring function in Jordan is too fragmented and not effectively coordinated. The Jordanian authorities need to review the disclosure requirement frameworks operating under the Controller of Companies, the CBJ, the JSC, and the Insurance Commission and organise them into a single scheme. This process would require the relevant laws that establish the monitoring function of each of these bodies[508] to be amended to make them compatible with the new monitoring and enforcement legislative platform. Finally, the Jordanian media need to be educated about the corporate governance legislative framework to enable them to whistleblow and publish the names of violators.

[508] *Companies Law 1997* (JOR); *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* (JOR); *Banking Law2000* (JOR); *Insurance Regulatory Act 1999* (JOR).

17. HIGH QUALITY PREPARATION AND DISCLOSURE METHODS

17.1 Content of the OECD Principles

Chapter 5: Disclosure and Transparency

B. Information should be prepared and disclosed in accordance with high quality standards of accounting and financial and non-financial disclosure.

17.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle requiring information to be prepared and disclosed in accordance with high quality standards.

High quality standards of preparation and disclosure provide increased reliability and comparability of reporting for investors. The annotation to Chapter 5, Principle B, supports the use of high quality international accounting standards as benchmarks. Such standards should be formulated through public processes involving members of the private sector and other interested parties such as professional associations and independent experts.[509]

In Jordan, Article 184 of the *Companies Law* provides that a public shareholding company must organise its accounts and keep its registers and books in accordance with recognised international accounting standards. Article 14 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides that the international accounting standards issued by the International Accounting Standards Board are adopted as the

[509] For more information see OECD Principles 2004, Annotation to Chapter 5, Principle B.

international benchmark.[510] Article 195 of the *Companies Law* provides that the auditor's report of a public shareholding company is subject to the auditing profession law in force, and any other laws or regulations related to the profession. It provides further that the auditor's report must verify that the company maintains organised accounts, registers and documents, and also that all financial statements are prepared in accordance with internationally recognised accounting and auditing procedures. One significant problem in terms of adherence to international standards for financial disclosure in Jordan is that translations of the documents are not widely available so a lot of firms and auditors have difficulty interpreting the standards.[511] Also, there is no consultative process in place to inform the relevant persons and bodies of any changes or developments in the international standards.

In Australia, s 296(1) of the *Corporations Act* provides that the financial reports of a company must comply with relevant accounting standards. Section 334 provides that accounting standards are to be set by the Australian Accounting Standards Board.[512]

17.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 5, Principle B. The problem in Jordan, however, is that adherence to internationally recognised accounting and auditing procedures is made difficult by the fact that translated versions of the standards are not widely available. This situation needs to be remedied immediately by the establishment of a body responsible for maintaining and distributing accurately translated versions of the international standards. Further,

[510] The International Accounting Standards (IAS) are a set of accounting standards issued by the International Accounting Standards Board (IASB). IASs were issued between 1973 and 2001 by the Board of International Accounting Standards Committee (IASC). In April 2001, the IASB adopted all IASs and continued the development, calling the new standards International Financial Reporting Standards (IFRSs). The International Accounting Standards Board is an independent, privately-funded accounting standard-setter based in London, United Kingdom. The IASB is responsible for developing global accounting standards that require transparent and comparable information in general purpose financial statements. In addition, the IASB co-operates with national accounting standard-setters to achieve convergence in accounting standards around the world. For more information see www.iasb.rg.
[511] For a general discussion see World Bank, above n 11, 12.
[512] For a copy of the accounting standards issued by the Australian Accounting Standards Board see www.aasb.com.au.

as discussed in more detail in Chapter 4, Section 18, of this paper, a regulatory body should be established with the responsibility of issuing instructions to listed companies, accountants and auditors on the practical application of international standards. It would also be necessary for the body to sponsor regular consultative sessions to inform all relevant parties of any relevant developments in the international standards.

18. THE ANNUAL AUDIT

18.1 Content of the OECD Principles

Chapter 5: Disclosure and Transparency

C. An annual audit should be conducted by an independent, competent, and qualified auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the company in all material respects.

D. External auditors should be accountable to the shareholders and owe a duty to the company to exercise due professional care in the conduct of the audit.

18.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle requiring an annual audit to be conducted by an independent, competent, and qualified auditor who is accountable to the shareholders.

The annotation to Chapter 5, Principle C, provides that, in addition to assessing the accuracy of the relevant financial reports, auditors should also provide comments and advice on the methods that have been employed to prepare and present the reports. Auditors are often appointed by an internal board committee that is also responsible for continual monitoring of the relationship between the company and its auditors. Auditor independence has become an issue of increasing importance in recent years. Accordingly, a number of jurisdictions have established auditor oversight bodies that are independent of the audit profession. The annotation provides that it is desirable for such bodies to have an appropriate membership who operate in the public interest and adequate funding unassociated with the auditing profession.

A significant problem in many jurisdictions is regulating the provision of non-audit services by external auditors. The acceptance of financial payments for non-audit services can significantly impair the independence of auditors. The annotation provides a number of examples of ways to improve auditor independence, including requiring detailed disclosure of, and the imposition of limitations on, the provision of non-audit services. Another common method is requiring mandatory rotation of auditors. The annotation also points to the need for ensuring the competency of the audit profession. A strict registration process needs to be supported by ongoing training and monitoring to ensure a requisite degree of competence.[513]

In Jordan, external auditing is a legal requirement for all financial statements.[514] Pursuant to Article 192 of the *Companies Law*, the general assembly of a public shareholding company shall elect one or more independent[515] licensed auditor/s for one renewable year, and shall determine their remuneration or authorise the board to determine such remuneration.[516] Article 15 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides that the board of all listed companies must form an auditing committee consisting of at

[513] For more information see OECD Principles 2004, Annotation to Chapter 5, Principles C and D.
[514] The relevant part of the *Companies Law 1997* (JOR) relating to auditors is Part 7, Articles 192-203.
[515] Article 197 of the *Companies Law 1997* (JOR) lists the general requirements for auditor independence. It provides that an auditor is not entitled to participate in the founding of a company whose accounts he or she audits, to be a member of its board, to work permanently in any technical, administrative or consultancy work therein, or to be a partner or employee of any board member.
[516] *Companies Law 1997* (JOR), Article 171(A)(6). Auditor fees must be disclosed in the annual report: *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004*, Article 4(B)(16).

least three non-executive board members, and notify the JSC of the same.[517] The functions, authorities, and terms of service of the auditing committee are specified by instructions issued by the board.[518] The committee is required to meet at least four times a year and report to the board.[519] In practice, roughly 80 percent of listed firms comply with the requirement of establishing and maintaining an audit committee.[520]

Pursuant to Article 193 of the *Companies Law*, auditors are required to monitor the company's operations and to audit its accounts in accordance with recognised auditing profession rules and principles, and appropriate scientific and technical standards. Their other duties under Article 193 include revising the financial and administrative by-laws of the company and its internal financial control measures, verifying the company's assets, ascertaining the legality and correctness of the company's obligations, assessing the board of directors' decisions and instructions issued by the company, and fulfilling any other relevant duties in accordance with the *Companies Law*, the auditing profession laws and other relevant regulations.

Article 182 of the *Companies Law 1997 (JOR)* provides that the board must invite the company auditors to the meeting of the general assembly at least 15 days prior to the date set for the meeting. The auditors must attend or nominate another person to attend in their absence. Article 193(g) requires auditors to prepare a written report and recite the same at the general assembly meeting. Article 195 outlines all of the specific content required in an auditor's report. Article 199(a) provides that auditors shall be the representatives of the shareholders within the limits of the powers vested in them. During or after the recital of the auditor's report at the general meeting, shareholders may request a clarification from the auditor and may discuss the issue with

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[517] The same requirement is provided in Article 46 of the *Securities Law 2002* (JOR). The *Banking Law 2000* (JOR) also mandates audit committees for banks, with the same size and composition requirements as those for regular listed companies (Articles 32 and 33).

[518] Article 15(D) of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides a detailed outline of the rights and responsibilities of the audit committee but leaves it open to the board of directors to stipulate any other rules regarding the operation of the committee.

[519] *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004*, Article 15(C).

[520] JSC data; as cited in World Bank, above n 156, 13.

the auditor.[521] Article 18(D) of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides that the audit report must include an affirmation that the audit procedures are consistent with the audit standards issued by the International Federation of Accountants (IFAC).[522]

Article 200 provides that if auditors become aware of a violation by the company of the *Companies Law* or the company's memorandum of association, or any important financial issues which may affect the financial or administrative position of the company, the auditor shall immediately notify, in writing, the chairman, the Controller of Companies, and the JSC. Moreover, Articles 168(a) and 201 make it clear that an auditor is liable to compensate the company and its shareholders for any breaches of his or duties as outlined in the *Companies Law* or other relevant accounting laws, as well as those duties demanded by internationally recognised auditing standards. Seemingly, these liability provisions are yet to be tested in the courts. It is also worthy of note, in this context, that auditors in Jordan are not covered by a professional indemnity insurance scheme.[523]

The enactment of the *Accountancy Profession Law 2003* in Jordan introduced a number of developments, the most of important of which were the establishment of a High Council for Accounting and Auditing, and the creation of a new and improved Jordan Association of Certified Public Accountants (JACPA). While its introduction was a positive step forward, the legislation's primary focus is regulating the JACPA and it fails to properly deal with other important issues that are crucial to strengthening the auditing regulatory framework in Jordan. For instance, there are no provisions dealing with auditor independence or enforcement mechanisms for ensuring compliance with relevant laws.[524] Whilst Jordanian auditors are

[521] *Companies Law 1997* (JOR), Article 199B.
[522] The IFAC is the global organisation for the accountancy profession. It works with its 163 member organisations in 120 countries to protect the public interest by encouraging high quality practices by the world's accountants. IFAC members represent 2.5 million accountants employed in public practice, industry and commerce, government, and academia. For more information see www.ifac.org.
[523] World Bank, above n 156, 12.
[524] For a general discussion see World Bank, above n 11, 3.

licensed by the Higher Auditing Commission,[525] neither the licensing body nor the JACPA has any real enforcement powers.

The *Accountancy Profession Law 2003* needs to be amended to include the establishment of a peer monitoring system of some kind.[526] The most logical step would be to empower the High Council to monitor and enforce auditing standards. Membership of the Council should not be dominated by professional accountants and auditors, and should include representatives from the office of the Controller of Companies, the JSC, the CBJ and the Insurance Commission.[527] Additionally, it is important than any such regulatory body also takes preemptive action to ensure compliance by issuing instructions on the practical application of international standards.[528]

Current research indicates that the quality of professional education in Jordan in the fields of accounting and auditing is a serious problem.[529] Public universities in Jordan suffer from a lack of qualified academics and modern accounting curriculum. The educational background of teachers varies significantly and most undergraduate accounting degrees concentrate almost solely on elementary topics without any substantive attention being given to international accounting standards and practices.[530] An appropriate body needs to be established to review and update the accounting curriculum to bring it into line with the *International Education Standards for Professional Accountants*[531] issued by the IFAC. There also needs to be a stronger focus on the ethical dimensions of accounting and auditing in the undergraduate programs, utilising the IFAC-issued *Code of Ethics for Professional Accountants* [532] as a benchmark.[533]

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[525] Article 17 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides that auditors must hold a valid licence and must be members of the Jordanian Chartered Accountants Association.
[526] World Bank, above n 156, 12.
[527] As discussed above in Chapter 4, Section 16, of this paper, each of these bodies has a monitoring function of some kind established under different legislation. Legislators would need to avoid any overlap.
[528] For a general discussion see World Bank, above n 11, 14-16.
[529] For a detailed discussion see World Bank, above n 11, 7-8.
[530] World Bank, above n 11, 16-17.
[531] The full text of this document is located at www.ifac.org.
[532] The full text of this document is located at www.ifac.org.
[533] World Bank, above n 11, 16-17.

Another problem in terms of education is that, contrary to best practice internationally, practicing auditors in Jordan are not required to participate in any form of continuing professional education.[534] Requirements for continuing education should be established in line with the *Continuing Professional Education and Development*[535] standard developed by the IFAC. An appropriate mechanism for monitoring and enforcing the requirements would also need to be developed. Further, it is essential that professional accountants have sufficient practical training under the direct supervision of an experienced audit practitioner before receiving an audit practice certificate. Again contrary to best practice internationally, there are no such requirements in Jordan.[536]

In Australia, there are extensive provisions in Chapter 2M of the *Corporations Act* pertaining to auditors.[537] Sections 301 and 302 provide that a company must have its annual and half-yearly financial reports audited and an auditor's report must be obtained. Section 307 outlines the information that must be included in the auditor's report and s 307A provides that the audit must be conducted in accordance with the relevant auditing standards, which are set by the Australian Auditing and Assurance Standards Board (AUASB).[538] Sections 325-327A provide that, both in proprietary and public companies, an auditor must be appointed in a general meeting, or alternatively by the board of directors. Sections 324BA-324BC provide that all auditors must be registered with ASIC.[539] Sections 324CA-324CC set out the general requirements for auditor independence and ss 324CD-324CK outline, in extensive detail, the relevant tests for independence.[540]

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[534] World Bank, above n 11, 7-8.
[535] The full text of this document is located at www.ifac.org.
[536] World Bank, above n 11, 17.
[537] The relevant part of the *Corporations Act 2001* (Cth) relating to auditors is Chapter 2M, ss 301-313 (Audit and Auditor's Report), ss 324-331AE (Appointment and Removal of Auditors), ss 334-399 (Accounting and Auditing Standards), ss 340-344 (Exemptions and Modifications).
[538] *Corporations Act 2001* (Cth), ss 336. For a general discussion see Fisher, above n 356, 119.
[539] There is an exception to the auditor registration requirement for proprietary companies operating in remote areas in s 324BD of the *Corporations Act 2001* (Cth).
[540] For a detailed discussion of auditor independence in Australia see Ramsay I, *Independence of Australian Company Auditors: Review of Current Australian Requirements and Proposals for Reform* (October, 2001), Report to the Minister for Financial Services and Regulation.

Auditors are accountable to shareholders under the *Corporations Act*. Section 249K(1)(a) provides that a company must invite its auditor to the annual general meeting. Section 250T requires that if the company's auditor (or their representative) attends the annual general meeting, then the chairperson must allow a reasonable opportunity for members to ask questions of the auditor concerning the conduct of the audit and the preparation and content of the auditor's report.[541] Section 308(1) provides that an auditor who audits the financial reports of a company must report to the members on whether the financial report is in accordance with the *Corporations Act*. If an auditor is of the opinion that the financial report does not comply with an accounting standard, the auditor's report must, to the extent it is practicable to do so, quantify the effect that non-compliance has on the financial report. If it is not practicable to quantify the effect fully, the report must explain why.[542] Auditors have relatively broad powers to obtain information[543] and are under a strict requirement to report any contraventions of the *Corporations Act* to ASIC.[544] In essence, auditors are regarded as a watchdog for both shareholders and ASIC.[545]

Australia significantly enhanced its regulatory requirements for auditors with the Corporate *Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (CLERP9). The legislation is based on the reform proposals contained in the CLERP 9 discussion paper, *Corporation Disclosure - Strengthening the Financial Reporting Framework,* which was released by the Australian government in September 2002. CLERP9 established the Financial Reporting Council (FRC) to oversee standard setting for audit and accounting.[546] The

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[541] Principle 6, Recommendation 6.2, of the ASX Principles of Corporate Governance 2003 similarly provides that a company should request the external auditor to attend the annual general meeting and to be available to answer shareholder questions about the conduct of the audit and the preparation and content of the auditor's report.

[542] *Corporations Act 2001* (Cth), ss 308(2). For a more detailed discussion see Tomasic, above n 374, 645.

[543] *Corporations Act 2001* (Cth), ss 310.

[544] *Corporations Act 2001* (Cth), ss 311. Furthermore, auditors must report any contraventions to the trustee for debenture holders where the company is a borrower or a guarantor in accordance with s 313(2) of the *Corporations Act 2001* (Cth).

[545] For more detailed information on the relationship between auditors and shareholders see AUASB Guidance Note, *Improving Communication between Auditors and Shareholders*, which can be located at www.auasb.gov.au/docs/ Guidance _Note _Audit_Reports_07-03.pdf.

[546] For more information see www.frc.gov.au.

FRC is also responsible for monitoring and assessing the auditor independence requirements in the *Corporations Act* in cooperation with the ASX.[547] The legislation also established the Shareholders and Investors Advisory Council to provide a forum for the consideration of retail investors' concerns.[548]

A significant enhancement provided by CLERP9 was to give auditing standards the force of law. A new set of Australian Auditing Standards was recently issued by the AUASB. The standards apply for financial periods commencing 1 July 2006. They apply to audits under the *Corporations Act* and audits of a financial report for any other purpose. The new standards are aimed at improving the quality and credibility of audited financial reports in Australia and investor confidence in them. The standards were completed after extensive public consultation and provide Australia with a set of standards consistent with the international standards on auditing.

ASX Listing Rule 12.7 provides that an entity included in the S & P All Ordinaries Index[549] at the beginning of its financial year must have an audit committee. If the entity was in the top 300 of that Index at the beginning of its financial year then it must also comply with the best practice recommendations in the ASX Principles of Corporate Governance in relation to composition, operation and responsibility of the committee.[550] Principle 4, Recommendation 4.3, provides that the audit committee should consist only of non-executive directors, a majority of independent directors, an independent chairperson, and at least three members. Recommendation 4.4 provides that the audit committee should have a formal charter that sets out the audit committee's responsibilities, composition, structure and membership requirements.

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[547] For more information see Memorandum of Understanding between the ASX and the FRC, located at www.asx.com.au/about/pdf/MOU_FRC_and_ASX_280504.pdf.
[548] For more information see www.treasurer.gov.au/rac/content/pressreleases/2004/021.asp.
[549] The top 500 listed entities.
[550] Principle 4, Recommendation 4.2, of the ASX Principles of Corporate Governance 2003 suggests that the board establish an audit committee.

18.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 5, Principles C and D. It is recommended, however, that *Accountancy Profession Law 2003* be amended to make the High Council for Accounting and Auditing a peer monitoring body with real enforcement powers. Representatives from the office of the Controller of Companies, the JSC, the CBJ and the Insurance Commission should be included on the board of the High Commission. Secondly, the High Council should be made responsible for issuing formal instructions on the practical application of international standards and holding regular consultative sessions to brief all relevant parties on international developments related to improving the standard and transparency of financial reporting. Thirdly, the general requirements for auditor independence listed in Article 197 of the *Companies Law* must be considerably expanded and effectively enforced. Fourthly, the quality of public university education in Jordan in accounting and auditing courses requires improvement, and legislative measures need to be introduced that require practicing auditors to take regular training under a continuing professional education scheme. Finally, an appropriate supervision scheme needs to be established so professional accountants have sufficient practical training under the supervision of an experienced audit practitioner before receiving an audit practice certificate.

19. EFFECTIVE CHANNELS FOR DISEMINATING INFORMATION

19.1 Content of the OECD Principles

Chapter 5: Disclosure and Transparency

E. Channels for disseminating information should provide for equal, timely and cost-efficient access to relevant information by users.

19.2 Comparative Analysis

The methods utilised for disseminating company information are almost as important as the information itself. Accessing information through ineffective channels can be a costly and burdensome process. Over the past decade there has been a significant increase in the use of electronic filing and data retrieval systems. The annotation to Chapter 5, Principle E, encourages the use of such methods and also notes the widespread use of the Internet as an effective means of filing and retrieving information.[551]

In Australia, all company information is stored and disseminated via electronic means. Securities may be exchanged or traded online using the Internet, which helps drive down transaction costs, facilitate cross-border transactions and avoid the need to conduct trades using intermediaries. ASIC permits the issue of electronic prospectuses and Electronic Company Registration (ECR) enables the registration of Australian companies to be made electronically, linked to an electronic payment facility. Company details can be viewed and updated online. ASIC's online lodgement service is provided pursuant to the *ASIC Electronic Lodgement Protocol*. ASIC monitor and make improvements to their electronic lodgement services on an ongoing basis and maintain a up-to-date register of all relevant changes which can be viewed on their user-friendly website. Further, all application forms can be completed and submitted online.

Unfortunately, Internet use and electronic filing is not yet widespread in Jordan. Article 274 of the *Companies Law* provides that each shareholder has the right to examine any published information and documents related to the company which are kept with the Controller of Companies, and to obtain a certified copy of the same (with the Controller's approval).[552] The difficulty is that the viewing of such information must be done manually because it is not available electronically. Article 98(D) provides that any shareholder may have access to the

[551] For more information see OECD Principles 2004, Annotation to Chapter 5, Principle E.
[552] Moreover, each shareholder has the right to examine any unpublished statement by way of a court order: *Companies Law 1997 (JOR)*, Article 274A.

shareholders' register in connection with his or her shareholding for any reason, and to the entire register for any reasonable cause. Further, Article 38 of the *Securities Law* 2002 provides that all periodic and material disclosure made to the JSC is available to be viewed by any member of the public. But again, the viewing of these documents must be carried out manually. Summaries of all listed companies' annual report information are available on CD-ROM, issued by the ASE.[553]

19.3 Conclusion and Recommendations

From the analysis above it can be seen that ASIC's system of electronic filing and information dissemination comply with Chapter 5, Principle E. The development of similar internet-based electronic filing and data retrieval systems would significantly improve company information dissemination in Jordan. Further, the websites of relevant bodies such as the JSC, SDC and ASE contain only very limited information.

20. PROVISION OF ANALYSIS AND ADVICE BY EXTERNAL EXPERTS

20.1 Content of the OECD Principles

Chapter 5: Disclosure and Transparency

F. The corporate governance framework should be complemented by an effective approach that addresses and promotes the provision of analysis or advice by analysts, brokers, rating agencies and others, that is relevant to decisions by investors, free from material conflicts of interest that might compromise the integrity of their analysis or advice.

[553] For more information see www.ase.com.jo.

20.2 Comparative Analysis

There is a regulatory framework in existence in both Australia and Jordan that complies with the OECD principle requiring an effective approach that addresses and promotes the provision of analysis or advice by analysts, brokers, rating agencies and others.

There has recently been an increased awareness in many jurisdictions of the high level of conflicts of interests amongst market analysts and advisors, and the effect that such conflicts can have on their judgment. Conflicts usually arise when the relevant body or person is providing more than one service to the company, or when they actually have a material interest in the company. The annotation to Chapter 5, Principle F, states that the preferred approach is to require full disclosure of conflicts and how the relevant body manages such conflicts. Also highly relevant is disclosure of information regarding how the body structures any employee incentive programs. This type of disclosure allows an investor to make an informed decision as to whether the analysis or advice provided by the body is tainted by any form of bias.[554] The underlying rationale of this principle is that, if such persons and bodies are seen to be honest and free from conflicts, they can play an important role in ensuring boards comply with good corporate governance procedures.

In 2003, the International Organisation of Securities Commissions (IOSCO)[555] developed detailed statements relating to market analysts and rating agencies: *IOSCO Statement of Principles for Addressing Sell-side Securities Analyst Conflicts of Interest*;[556] and *IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies*.[557] These documents provide clear and detailed principles pertaining to the activities of market analysts and rating

[554] For more information see OECD Principles 2004, Annotation to Chapter 5, Principle F.
[555] The IOSCO is the international standard setter for securities markets. The Organisation's wide membership regulates more than 90 percent of the world's securities markets and IOSCO is the world's most important international cooperative forum for securities regulatory agencies. IOSCO members regulate more than one hundred jurisdictions.
[556] International Organisation of Securities Commissions, *IOSCO Statement of Principles for Addressing Sell-side Securities Analyst Conflicts of Interest* (25 September 2003).
[557]International Organisation of Securities Commissions, *IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies* (25 September 2003).

agencies and are a useful tool for securities regulators and others seeking to improve how such bodies operate and how their opinions are used by market participants. Mechanisms for implementing the principles may take the form of any combination of legislation, regulations imposed by non-government statutory regulators, industry codes, and internal rating agency policies and procedures.

In Jordan, financial brokers and advisors must be licensed pursuant to Article 47 of the *Securities Law 2002*.[558] Article 56 provides that a licensee violates the *Securities Law 2002* if it carries out any of the following: (i) misappropriates client funds; (ii) practices deception[559] or misrepresentation;[560] (iii) adversely affects competition by manipulating the service fees charged to clients or the types of services provided; and (iv) affects or attempts to affect the capital market adversely. Article 57 provides that licensees must act with loyalty and dedication so as to maximise their clients' interests and investment objectives. It provides further that licensees must refrain from discriminating between clients, charging them excessive service fees, or guaranteeing them definite profits, or otherwise engaging in fraudulent and deceptive practices. Section 60 provides that a breach of the *Securities Law 2002* entitles the JSC to deny, suspend or revoke the license of the licensee.

In Australia, the regulation of conflicts of interest amongst market analysts occurs under three main heads: (i) s 912A(1)(a),(aa) of the *Corporations Act*,[561] (ii) ASIC's Policy Statement 181, *Licensing: Managing Conflicts of Interest*, and (iii) ASIC's supplement to that policy statement, *Managing Conflicts of Interest: An ASIC Guide for Research Report Providers*. The Securities

[558] Article 2 of the *Securities Law 2002* (JOR) defines 'financial broker' as any person engaged in the business of buying and selling securities for the account of others; and 'financial advisor' as any person engaged in the business of providing advice with respect to securities investment to others for a fee, charge or commission.
[559] Article 2 of the *Securities Law 2002* (JOR) defines 'deception' as any act, scheme, device, practice or course of conduct likely to have the effect of misleading others.
[560] Article 2 of the *Securities Law 2002* (JOR) defines 'misrepresentation' as any untrue statement of a material fact, or any omission or concealment of a material fact or any other datum required to ensure that a statement made is true and accurate.
[561] Section 912A(1)(a) of the *Corporations Act 2001* (Cth) provides that a financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly. Subsection (aa) provides further that a licensee must have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee.

and Derivatives Industry Association also released the *Best Practice Guidelines for Research Integrity* in 2001, which have received the support of ASIC. The role of the ASX in regulating market analysts is only limited.[562] There are two primary obligations on market analysts in Australia. Firstly, it is required that they have in place adequate systems to prevent conflicts of interest. This is a disclosure requirement only, that is, there are no specific types of conflict that are absolutely prohibited. Secondly, they are required to do everything necessary to carry out their services efficiently, fairly and honestly.

Tony D'Aloisio, former Chief Executive Officer and Managing Director of the ASX, recently presented a paper pertaining to conflicts of interest amongst market analysts.[563] In his opinion, significant market reputation pressures on market analysts serve to ensure the credibility and independence of the research they undertake and the recommendations they provide. Australia is a relatively small market for analysts compared to other international markets. In this highly competitive environment, D'Aloisio asserts that analysts are unlikely to take risks that could affect their reputation. He admits, however, that the issue of conflicts among market analysts should remain an area of public policy for surveillance and intervention and not just be left to market forces.[564] The current regulatory scheme operated under ASIC is, in D'Aloisio's opinion, a very good model for other jurisdictions.

In relation to brokers, the Investigations and Enforcement Department of the ASX investigates any potential breaches of the ASX Market Rules and ASTC[565] Settlement Rules by brokers. The Investigations and Enforcement Department works closely with the ASX Surveillance and Participant Services Department, and with ASIC, to examine matters warranting investigation. In the course of an investigation, ASX officers may interview brokers, inspect their records and

[562] An important point is that ASIC's regulatory wingspan covers all market analysts, whereas the ASX can effectively only regulate those analysts who are employed by ASX market participants. ASX Market Rule 4.14 provides that all market participants must comply with the *Corporations Act 2001* (Cth) and the conditions of their financial services licence.
[563] D'Aloisio T, *Conflicts of Interests for Analysts*, Paper presented at the Corporate Law Teachers Association Conference, Sydney, February 2005.
[564] Ibid.
[565] ASX Settlement and Transfer Association.

examine the behaviour of brokers and their compliance with the rules. In instances where it appears that a broker or broking firm may have breached the rules, the matter may be referred to the Disciplinary Tribunal[566] for adjudication. If a breach is found to have occurred by the Disciplinary Tribunal, penalties can be imposed.[567] If it appears that a broker or broking firm may have breached the *Corporations Act*, ASIC is notified and may conduct further investigations.

20.3 Conclusion and Recommendations

From the analysis above it can be seen that the Australian and Jordanian regulatory frameworks discussed is consistent with Chapter 5, Principle F.

21. THE RESPONSIBILITIES OF THE BOARD

21.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

[566] The Disciplinary Tribunal adjudicates on suspected breaches of ASX's Market Rules and allegations of unprofessional conduct by brokers or broking firms, and applies penalties when contraventions are proven. It similarly determines disciplinary matters under the Australian Clearing House (ACH) Clearing Rules and ASTC Settlement Rules. There is also an Appeal Tribunal to hear appeals – by either ASX or the broker - against Disciplinary Tribunal decisions. Both the Disciplinary and Appeal Tribunals comprise a panel of industry professionals nominated by ASX. They operate independently of ASX executive management and are supported by an ASX legal counsel. For more information see www.asx.com.au/about/disciplinary_ tribunal/index.htm.

[567] If a suspected breach is proved, the Tribunal can impose a range of penalties including censure, suspension, an undertaking to complete education and compliance programs, and fines of up to AUD250,000.

A. *Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the company and the shareholders.*

21.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle requiring board members to act in good faith and in the best interests of the company.

The structure of boards varies significantly. A lot of companies these days employ a split board structure allocating the supervisory function to non-executive directors and the managerial function entirely to executives. Most companies, however, maintain a unitary structure that brings together executive and non-executive directors. The annotation to Chapter 6 provides that the principles within the chapter are sufficiently broad to encompass all variations in board structure. The annotation to Principle A outlines the two key elements of the fiduciary duty of board members - the duty of care and the duty of loyalty. The 'reasonable person' test is the standard measure for the duty of care. In most jurisdictions the duty does not extend to errors of 'business judgment' so long as there is no evidence of gross negligence and the relevant decision was made in good faith. The duty of loyalty underpins the other principles in Chapter 6 relating to, for example, fair treatment of shareholders, monitoring related party transactions, and aligning key executive and board remuneration with the long-term interests of the company and its shareholders.[568]

In Jordan, Article 132 of the *Companies Law* provides that the management of a public shareholding company is entrusted to the board of directors, whose members are elected by the general assembly. The term for a director is four years. Article 133 stipulates that directors must own a certain number of shares in the company for the period of their directorship in accordance with the company's memorandum of association. Article 134 provides that a person cannot be

[568] For more information see OECD Principles 2004, Annotation to Chapter 6, Principle A.

nominated as a director if they have been convicted of a crime or misdemeanor involving honor.[569] Further to these general rules, there are a number of provisions dealing directly with the duties of directors. For instance, Article 138 provides that directors and managers must disclose at the first board meeting their, and their immediate family's, shareholding in the company, and also in other related companies. Article 143 requires directors to disclose all relevant information pertaining to their remuneration. Article 148 prohibits related party transactions by directors, managers, employees, and the company, including indirect participation.

Despite the numerous provisions outlining the duties of directors, the *Companies Law* does not explicitly impose an obligation on directors to act in good faith, with due diligence and care, and in the best interests of the company. Some would argue, however, that such an obligation is implicit, especially in the context of provisions such as Article 157, which provides that the board shall be held responsible towards the company, shareholders and others for every violation committed by any of them of the laws and regulations in force and the memorandum of association. Moreover, Article 159 provides that the board shall be jointly and severally responsible towards shareholders for any default or negligence in the management of the company. Evidence suggests, however, that lawsuits against directors are rare at best.[570]

In Australia, ss 180-184 of the *Corporations Act* provide that directors owe duties of loyalty and good faith because they are in a fiduciary relationship with the company. Section 180 provides that directors and other officers[571] of the corporation must exercise their powers with a reasonable degree of care and diligence. Section 181 provides that a director or other officer must exercise their powers in good faith in the best interests of the corporation and for a proper purpose. Sections 182 and 183 stipulate that directors, other officers, and employees must not improperly use their position, or information they obtained in their position, to gain advantage

[569] The examples given are bribery, embezzlement, theft, forgery, abuse of confidence, false testimony, any crime against public manners and morals, and bankruptcy (unless rehabilitated).
[570] World Bank, above n 156, 14.
[571] 'Officer' is defined in s 9 of the *Corporations Act 2001* (Cth) to include any person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or the entity; or a person who has the capacity to affect significantly the entity's financial standing.

for themselves or cause detriment to the corporation. Importantly, s 184 imposes criminal penalties for breaches of ss 181-183 involving recklessness or dishonest intent. Also relevant in this context is s 191 which requires disclosure of material personal interests in company matters, and s 588G which imposes an obligation on directors to prevent insolvent trading. Further, a director may be liable to compensate the company for any losses the company suffers as the result of a breach of certain duties owed to the company.[572]

Principle 1 of the ASX Principles of Corporate Governance 2003 provides a general framework which companies should consider when they review their corporate governance policies and practices. Recommendation 1.1 provides that a company should formalise and disclose the functions reserved to the board and those delegated to management. Company directors have a wide range of duties that they are required to fulfill in accordance with the *Corporations Act*, general law, and other relevant legislation. The board is responsible for determining and monitoring the objectives and strategic direction of the company. Management, on the other hand, is responsible for the efficient and effective operation of the company in accordance with the objectives and strategies determined by the board.

21.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 6, Principle A. However, the Jordanian authorities should consider drafting the duties of directors in more explicit terms, similar to the Australian provisions. Further, it is recommended that the Jordanian restriction requiring directors to possess a certain number of shares to be eligible for board membership should be removed. This move would encourage independent professional and technical expertise on boards rather than the current situation of boards being dominated by the controlling family.

[572] *Corporations Act 2001* (Cth), s 1317H. For a detailed discussion see Tomasic, above n 359, 326.

22. FAIR TREATMENT OF ALL SHAREHOLDERS

22.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

B. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.

22.2 Comparative Analysis

Whilst directors are often individually nominated and elected by certain shareholders, it is important that boards do not develop into a body of individual representatives for various shareholder groups. The annotation to Chapter 6, Principle B, reinforces that this principle of fair and even-handed treatment is particularly important in circumstances where there are controlling shareholders that *de facto* may be able to select all board members.[573]

In Jordan, shareholders have equal rights because there is only one class of shares issued (ordinary shares). In Australia, a company may issue ordinary and preference shares.[574] According to s 254B of the *Corporations Act*, a company may determine the terms on which the shares are issued and the rights and restrictions attaching to them.[575] Section 250E(1), a replaceable rule, provides that if a company does not specify the voting rights attaching to preference shares, all shareholders, whether preference or ordinary, have equal voting rights. In all circumstances, directors must, pursuant to s 181, exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose. Therefore,

[573] For more information see OECD Principles 2004, Annotation to Chapter 6, Principle B.
[574] *Corporations Act 2001* (Cth), s 254A.
[575] For general discussion see Tunstall, above n 361, 55.

directors must act fairly and in good faith whenever their decisions affect different shareholder groups differently.[576]

If a certain class of shareholders is treated unfairly as a result of a board decision, there is scope to bring legal proceedings before a court to challenge a company's action or decision, and to obtain remedies against the company, management and members. According to s 236, a member has a statutory right to bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party. Such action under s 236 is subject to a court granting leave under s 237.[577] Pursuant to s 232, shareholders also have the right to bring an action for oppressive or unfairly prejudicial conduct. An extensive list of remedies open for the court to order in such circumstances is listed in s 233.[578]

23. APPLICATION OF HIGH ETHICAL STANDARDS

23.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

C. The board should apply high ethical standards. It should take into account the interests of stakeholders.

23.2 Comparative Analysis

Refer to Sections 10-14 of this Chapter for an extensive discussion of the role of stakeholders in corporate governance and the relevant provisions in the Jordanian and Australian legislation that serve to protect the rights of stakeholders. In terms of the application of high ethical standards,

[576] See the decision of the High Court in *Mills v Mills* (1938) 60 CLR 150 for discussion on this point.
[577] Statutory derivative actions are discussed in detail in Chapter 5, Section 2, of this paper.
[578] The oppression remedy is discussed in detail in Chapter 5, Section 2, of this paper.

the ASX Principles of Corporate Governance 2003 comply with this principle. Unfortunately, the Jordanian *Companies Law* does not consider this important matter.

A key role of the board is setting and constantly reinforcing the ethical tone of the company. In Australia, Principle 3 of the ASX Principles of Corporate Governance 2003 provides that companies should promote ethical and responsible decision-making. Recommendation 3.1 encourages companies to adopt a code of ethics to help maintain high standards of behaviour, enhance the company's reputation, and give employees a clear idea of the company's values. Such a code of conduct should set the framework for the objectives of the board and detail measures taken to achieve certain key functions to maintain confidence in the company's integrity.

23.3 Conclusion and Recommendations

From the analysis above it can be seen that Principle 3 of the ASX Principles of Corporate Governance 2003 complies with Chapter 6, Principle C. However, the relevant Jordanian laws do not cover this area and the Jordanian authorities should consider filling the gap by drafting appropriate provisions to address the issue of board's applying high ethical standards.

24. REVIEW, GUIDE AND MONITOR EFFECTIVENESS OF CORPORATE STRATEGY

24.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

D. The board should fulfil certain key functions, including:

(1) *Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.*

(2) *Monitoring the effectiveness of the company's governance practices and making changes as needed.*

24.2 Comparative Analysis

The Australian *Corporations Act*, in conjunction with the ASX Listing Rules and the ASX Principles of Corporate Governance 2003, complies with the OECD principle requiring the board to take certain measures to review and guide corporate strategy, and to monitor the effectiveness of corporate governance practices. Whilst the Jordanian *Companies Law* sets outs various guidelines regarding the powers and responsibilities of directors, it does not explicitly require the board to review and guide corporate strategy or monitor the effectiveness of corporate governance practices.

The annotation to Chapter 6, Principles D1 and D2, gives particular attention to two key board functions – formulating risk policy and monitoring governance policy. Formulating risk policy is an area of increasing importance, which involves specifying the types and degree of risk that a company is willing to accept in pursuit of its corporate goals. This is a delicate process that requires continual reassessment. Monitoring governance policy requires boards to periodically review the internal structure of the company to ascertain that all systems of accountability are functioning effectively. The annotation points out that a number of jurisdictions have introduced measures to require, or at least encourage, self-assessment by boards of their performance, both individually and collectively.[579]

[579] For more information see OECD Principles 2004, Annotation to Chapter 6, Principles D1 and 2.

In Jordan, Article 132 of the *Companies Law* provides that the management of a public shareholding company is entrusted to the board of directors, whose members are elected by the general assembly. Article 156(a) provides that the board of directors or general manager shall enjoy complete powers in managing the company within the limits set out in the company's memorandum of association. Articles 140-142 set out the principal obligations of the board in terms of preparing the company's half-yearly and annual budgets and financial reports.[580] Article 151 requires the board to prepare special by-laws to govern the company's financial, accounting, and administrative systems, as well as clarify the board's rights and obligations regarding such issues. Article 151 provides further that the by-laws must not contradict the *Companies Law* or any other relevant law, and a copy must be provided to the Controller of Companies. Moreover, the Minister is entitled to make amendments to the by-laws.

Other than the reporting obligations in Articles 140-142 and the requirement to prepare by-laws pursuant to Article 151, there are no provisions in the *Companies Law* that specifically require boards to fulfill any of the key functions listed in Chapter 6, Principle D1. Further, there is no specific requirement for boards to monitor the effectiveness of corporate governance practices.

In Australia, the *Corporations Act* and the company's constitution (if any) determine the authority and power of the board of directors.[581] Section 198(1), a replaceable rule, provides that the directors may exercise all the powers of the company except any powers that the Act or the company's constitution require the company to exercise in a general meeting. Sections 292 and 295 require public companies to prepare a financial report and a directors' report for each

[580] Article 140 of the *Companies Law 1997 (JOR)* states that the board must prepare and present to the general assembly, within a maximum period of three months from the end of the fiscal year, the annual balance sheet of the company, its profit and loss statement, and cash flow statements accompanied with their clarifications compared with those of the previous fiscal year, and all documents must be duly certified by the company auditors. The board must also present an annual report on the company activities and forecasts for the following year. Article 142 provides that the board of a public shareholding company must also prepare a separate financial report every six months that includes the financial position of the company, the results of its operations, a profit and loss account, a cash flow list and the clarifications related to the financial statements certified by the company auditors.
[581] Ffrench, above n 379, 136.

financial year. Section 299 provides that the directors' report must review the operations of the company during the year, explain any significant changes in the company's state of affairs during the year, and provide details of any circumstances that have arisen during the year that have significantly affected the entity's operations or will do so in the future. The report must also refer to developments in the entity's operations in future financial years and the expected result of those operations, and also the company's performance in relation to any relevant environmental regulations.[582]

In relation to monitoring the effectiveness of corporate governance practices, ASX Listing Rule 4.10.3 provides that a company must include in its annual report a statement disclosing the extent to which the entity has complied with the ASX Principles of Corporate Governance 2003 during the reporting period.[583] If the company has not followed any of the recommendations then it must identify that recommendation and provide reasons for not following it.[584] ASX Guidance Notes 9 and 9A were published to assist listed companies in the preparation of the compliance statement required under Listing Rule 4.10.3.

In relation to reviewing and guiding risk policy, Principle 7 of the ASX Principles of Corporate Governance 2003 requires companies to establish a sound system of risk oversight and management, and internal control. Recommendation 7.2 requires a company's chief executive officer and chief financial officer to provide written assurance that the company's financial report presents a true and fair view based on a system of risk management and internal compliance and control that has been operating effectively during the previous year. In addition to the commentary surrounding Principle 7, the ASX Corporate Governance Council has provided supplementary guidance on its implementation.[585]

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[582] For more information see Chapter 4, Section 16, of this paper.
[583] ASX Listing Rule 4.10.3 is also discussed in Chapter 4, Section 1.3, of this paper.
[584] This process is often referred to as an 'if not, why not' policy. It is considered to be an effective approach because it allows listed companies a degree of flexibility to consider a range of means to address corporate governance issues and avoid particular recommendations if they are inappropriate for the company's particular circumstances.
[585] The ASX *Supplementary Guidance to Principle 7* is located at www.asx.com.au/supervision/governance/principles_good_corporate_governance.htm.

24.3 Conclusion and Recommendations

From the analysis above it can be seen that the Australian *Corporations Act*, in conjunction with the ASX Listing Rules and the ASX Principles of Corporate Governance 2003, complies with Chapter 6, Principles D1 and D2. The Jordanian *Companies Law*, however, lacks detailed provisions in this area. It is recommended that the Jordanian authorities consider drafting more explicit and extensive provisions requiring the board to take measures to review and guide corporate strategy, risk policy, and the effectiveness of corporate governance practices.

25. MONITOR KEY EXECUTIVES AND OVERSEE SUCCESSION PLANNING

25.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

D. The board should fulfil certain key functions, including:

(3) Selecting, compensating, monitoring, and, where necessary, replacing key executives and overseeing succession planning.

25.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle requiring the board to undertake certain responsibilities in relation to key executives and succession planning.

In Jordan, Article 153 of the *Companies Law* provides that the board is authorised to appoint a general manager who either is a member of the board or an external candidate. The board is responsible for setting the manager's powers and responsibilities, as well as his or her salary.[586] The board also has the right to extend or terminate the manager's contract, and must inform the Controller of Companies about any such appointment or termination as soon as the decision is made. Pursuant to Article 154, the board is also responsible for appointing (from amongst the company's employees), and determining the salary of, a secretary of the board who is responsible for arranging board meetings and preparing the agendas thereof.

In Australia, a company's constitution determines the rules and conditions pertaining to the appointment of a general manager or managing director. The *Corporations Act* sets out a replaceable rule in s 201J which provides that the directors of a company may appoint any one or more of themselves to the office of managing director of the company for a period, and on terms (including as to remuneration) as the board sees fit. Section 198C, also a replaceable rule, provides that the directors may confer on a managing director any of the powers that the directors themselves can exercise. Pursuant to s 204A(2), every public company is required to have at least one secretary, and one of those appointed must ordinarily reside in Australia. The board is responsible for appointing the secretary[587] and for establishing the terms and conditions of their office, including their salary.[588] The position of company secretary in public companies comes with important responsibilities and powers. However, the nature of a secretary's responsibilities will vary from one company to another depending on the size and nature of the business.[589]

[586] *Companies Law 1997* (JOR), Article 153.
[587] *Corporations Act 2001* (Cth), s 204D [Replaceable Rule].
[588] *Corporations Act 2001* (Cth), s 204F [Replaceable Rule].
[589] Adams, above n 404, 34.

25.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 6, Principle D3.

26. KEY EXECUTIVE AND BOARD REMUNERATION

26.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

D. The board should fulfil certain key functions, including:

(4) Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.

26.2 Comparative Analysis

The Australian *Corporations Act* and the ASX Principles of Corporate Governance 2003 comply with the OECD principle requiring the board to align key executive and board remuneration with the long-term interests of the company and its shareholders. The Jordanian *Companies Law*, however, sets the remuneration of directors as a specific percentage of the company's annual net profit.

In most jurisdictions it is regarded as good practice for boards to develop and disclose a remuneration policy statement that outlines all of the relevant information pertaining to the remuneration of directors and other key executives. The annotation to Chapter 6, Principle D4, outlines the standard content of such policy statements, which includes specifying the relationship between remuneration and performance, with a general view to long rather than short-term interests of the company. The statements also usually include any necessary information about payments for extra activities carried out by directors, such as consulting. The annotation notes that it is becoming increasingly common for these types of remuneration policy statements to be developed by a special board committee consisting mostly of independent directors to avoid conflicts of interest.[590]

Remuneration policy for company boards in Jordan is not subject to the approval of shareholders. According to Article 162 of the *Companies Law*, remuneration paid to the board and chairman shall be determined at a rate of 10 percent of the net profit that can be distributed as dividends to shareholders, and after deducting all taxes and reserves. Remuneration is distributed amongst the directors in proportion to their level of attendance at meetings.[591] Further, the remuneration paid to each director should not exceed 5,000 Jordanian Dinars (JD5,000)[592] annually.[593] If the company is still in the founding stages and has not realised any profits then remuneration is limited to 1,000 Jordanian Dinars (JD1,000).[594]

In Australia, the internal rules of a company ordinarily provide shareholders with the power to fix the remuneration of directors. Section 202A, a replaceable rule, provides that the directors of a company are to be paid the remuneration that the company determines by resolution.[595] Moreover, Principle 9 of the ASX Principles of Corporate Governance 2003 aims to ensure proper alignment between remuneration policy and performance. In accordance with this principle, the board has to provide clearly detailed information about remuneration schemes in order to avoid surprises for shareholders. Recommendation 9.1 requires companies to disclose information on the remuneration of board members and key executives to enable shareholders to

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590 For more information see OECD Principles 2004, Annotation to Chapter 6, Principle D(4).
591 *Companies Law 1997* (JOR), Article 162(a). A meeting not attended for a justifiable cause approved by the board is considered to have been attended by the director.
592 Approximately AUD10,000.
593 *Companies Law 1997* (JOR), Article 162.
594 Approximately AUD2,000.
595 For further discussion see Tomasic, above n 359, 264.

understand the link between remuneration and company performance. Moreover, Recommendation 9.2 requires the board to establish a remuneration committee to handle remuneration policy and employment contracts for board members and key executives.

26.3 Conclusion and Recommendations

From the analysis above it can be seen that the Australian *Corporations Act* complies with Chapter 6, Principle D4. Allowing shareholders to determine the remuneration of directors is an appropriate method of ensuring that key executive and board remuneration is aligned with the long-term interests of the company and its shareholders. Whilst simple in administrative terms, the Jordanian method of setting the remuneration of directors as a percentage of the company's annual net profit will not always be effective in ensuring that appropriate salaries are paid to directors in line with the best interests of company. Accordingly, the *Companies Law* should be amended to allow shareholders to determine the remuneration of directors.

27. TRANSPARENT BOARD NOMINATION

27.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

D. The board should fulfil certain key functions, including:

(5) Ensuring a formal and transparent board nomination and selection process.

27.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with the OECD principle requiring the board to ensure a formal and transparent board nomination and selection process.

Whilst board nomination procedures vary significantly among different jurisdictions, directors always have a special responsibility to ascertain that the process is transparent and effective. The annotation to Chapter 6, Principle D5, provides that directors also have a key role in identifying potential board members because of their 'insider knowledge' regarding the competencies and expertise that are needed to complement the existing skills of the board.[596]

In Jordan, Article 132 of the *Companies Law* discusses board selection procedures and stipulates that the number of board members in public shareholding companies must not be less than three and must not exceed thirteen. Directors are elected through a confidential voting process in the general assembly and are assigned for a four year term from the date of election. Article 133 stipulates that directors must own a certain number of shares in the company for the period of their directorship in accordance with the company's memorandum of association. Article 134 provides that a person cannot be nominated as a director if they have been convicted of a crime or misdemeanor involving honor.[597]

In Australia, s 201G of the *Corporations Act*, a replaceable rule, states that a company may appoint a person as a director by resolution passed in a general meeting. Section 201H, also a replaceable rule, provides that the directors may also appoint a person as a director in certain circumstances. Section 201A prescribes the minimum number of directors that a proprietary

[596] For more information see OECD Principles 2004, Annotation to Chapter 6, Principle D(5).
[597] The examples given are bribery, embezzlement, theft, forgery, abuse of confidence, false testimony, any crime against public manners and morals, and bankruptcy (unless rehabilitated).

company must have is one, whilst the minimum for a public company is three.[598] Unlike the Jordanian equivalent, the Australian legislation does not provide a certain number of shares that the member of the board must own to qualify him or for membership. Section 201E, a replaceable rule, provides a special rule for the appointment of public company directors and states that a resolution passed at a general meeting appointing or confirming the appointment of two or more directors is void unless the meeting has resolved that the appointment or confirmation can be voted on together and no votes were cast against the resolution.[599]

Principle 2, Recommendation 2.4, of the ASX Principles of Corporate Governance 2003 provides that the board should establish a nomination committee, which should consist of a minimum of three members, the majority being independent directors. The commentary to Recommendation 2.4 provides that the nomination committee should have a charter that clearly sets out its responsibilities, composition, structure and membership requirements.

27.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply with Chapter 6, Principle D5.

[598] Section 201A also stipulates that a proprietary company must have at least one director, and a public company must have at least two directors, who ordinarily reside in Australia.
[599] For further discussion see Tomasic, above n 359, 364.

28. MONITORING CONFLICTS, ACCOUNTING SYSTEMS AND DISCLOSURE PROCESSES

28.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

D. The board should fulfil certain key functions, including:

(6) Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.

(7) Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.

(8) Overseeing the process of disclosure and communications.

28.2 Comparative Analysis

Both the Jordanian *Companies Law* and the Australian *Corporations Act* comply generally with the OECD principles requiring the board of directors to monitor and manage conflicts of interest, ensure the integrity of the corporation's accounting and financial reporting systems, ensure that appropriate systems of control are in place, and oversee the process of disclosure and communications.

The function of overseeing internal control systems covering areas such as financial reporting, the use of corporate assets, related party transactions, compliance with relevant laws, and the process of disclosure and communications are most often carried out by an internal auditor or audit committee. The annotation to Chapter 5, Principles D6, 7 and 8, provides that it is important for such persons to maintain regular and direct access to the board, as well as having strict reporting requirements. The responsibilities of an internal oversight committee should be closely aligned with a published company code of ethics. The annotation maintains that, in order to be effective, the incentive structure of a business needs to be linked with a clear set of ethical and professional standards so that breaches of such standards are met with dissuasive consequences or penalties.[600]

In Jordan, there are various provisions pertaining to conflicts of interest. For instance, Article 138 of the *Companies Law* sets out an ongoing shareholding disclosure requirement for all directors.[601] Further, Article 148 prohibits related party transactions by directors, managers, employees, and the company, including indirect participation.[602] However, there are no provisions in the *Companies Law* that explicitly state that the board is responsible for monitoring and managing conflicts. Moreover, there are numerous provisions, which have already been discussed in detail in this paper, pertaining to the financial and accounting systems of a company, as well as the requirements for disclosure and communications. Similarly, however, there are no provisions that explicitly require directors to oversee and ensure the integrity of such procedures.

[600] For more information see OECD Principles 2004, Annotation to Chapter 6, Principle D(6), (7) and (8).
[601] Article 138 of the *Companies Law 1997* (JOR) provides that the chairman, members of the board, and managers shall provide to the board at the first board meeting a written statement of the shares owned by each one of them, and their immediate family. In addition, the name of other companies in which the director and his or her immediate family own shares must be disclosed, but only if the public shareholding company also owns shares in the same company. Any change which occurs in this respect must be notified to the board within 15 days from the date of the change.
[602] Article 148(b) of the *Companies Law 1997* (JOR) provides that the directors and general manager of a company are prohibited from joining the board of another company that carries out similar business activities, has identical objectives, or is a competitor of the company. Article 148(c) provides that the company board, its members, its general manager, and its employees must not have a direct or indirect interest in the business contracts of the company. Article 148(e) provides that the penalty for such action is discharge from the company. Moreover, Article 157 confirms that the chairman and members of the board shall be held responsible to shareholders and others for every violation of these provisions by any of them or all of them.

Article 151 does provide a general platform for requiring directors to provide a certain measure of oversight and guidance over important internal company procedures. The provision requires the board of directors to prepare special by-laws to govern the company's financial, accounting, and administrative systems, as well as clarify the board's rights and obligations regarding such issues. Accordingly, directors should use such by-laws to establish effective internal control measures to manage and monitor conflicts, the company's accounting and financial systems, internal systems of control, and the company's process of disclosure. Ordinarily, the best method of fulfilling these control oversight responsibilities is to establish a number of internal committees, such as an internal audit committee, within the company who are responsible for reporting to the board any noteworthy information related to their specified area.

Auditors in Jordan also have some responsibility for monitoring conflicts, financial systems, internal control measures, and disclosure requirements. Article 193 sets out the general duties of auditors. These duties include such things as monitoring the company's operations, revising the financial and administrative by-laws of the company and its internal financial controls, and ascertaining the legality and correctness of company obligations. Article 195(a) provides that the auditor's report must include, amongst other things, any violations of the *Companies Law* or the memorandum of association which have had a material effect on the results of the company's operations and its financial position. Unfortunately, it is difficult for other stakeholders to disclose information about conflicts as neither the *Companies Law* nor the Jordanian Constitution recognises the right of whistleblowers to freely communicate their concerns about illegal and unethical practice to the board of directors.

In Australia, there are also a number of provisions in the *Corporations Act* that have already been discussed in previous sections of this chapter related to conflicts of interest, the company's accounting and financial systems, internal systems of control, and disclosure obligations. However, like its Jordanian counterpart, the *Corporations Act* does not explicitly provide that directors are responsible for the monitoring and management of conflicts of interest. Accordingly, it is necessary for the board to establish effective internal control measures, in the company constitution or otherwise, to fulfil its control oversight responsibilities. Auditors of Australian companies, like those in Jordan, also have an important role to play in identifying and reporting any conflicts of interest.[603] Moreover, there is a certain degree of protection afforded to other stakeholders who wish to report suspected conflicts pursuant to Part 9.4AAA of the *Corporations Act*.[604]

Also relevant in this context is Principle 4 of the ASX Principles of Corporate Governance 2003, which provides that the chief executive officer (or equivalent) and chief financial officer (or equivalent) must state in writing to the board that the company's financial reports present a true and fair view, in all material respects, of the company's financial condition, and are in accordance with relevant accounting standards. Principle 5 requires companies to disclose their policies and establish proper governance structure and written corporate policies and procedure to ensure compliance with ASX Listing Rule disclosure requirements, and to ensure accountability at senior management levels. It should be noted that companies are required to disclose in the annual report the extent of compliance with Recommendation 5.1. Moreover, Principle 7 requires companies to establish a sound system of risk oversight and management and internal control.

28.3 Comparative Analysis

From the analysis above it can be seen that neither the Jordanian *Companies Law* nor the Australian *Corporations Act* explicitly comply with Chapter 6, Principles D6, 7 and 8. It is

[603] For more information on the requirement for auditors to report contraventions to ASIC see s 311 of the *Corporations Act 2001* (Cth).
[604] Part 9.4AAA of the *Corporations Act* 2001 (Cth) was introduced on 1 July 2004. The provisions were designed to encourage persons within companies, or with a special connection to companies, to alert and report illegal behaviour to ASIC and other relevant authorities. Employees and officers of the company who report a suspected breach of the law must act in a good faith and upon reasonable grounds. The report must be submitted to ASIC, the company auditor or member of the auditor team, a director, or another person authorised by the company to receive whistleblower disclosure. Anyone who makes a 'protected disclosure' is given immunity from civil and criminal liability for making the disclosure.

recommended that the relevant authorities in both jurisdictions should enact legislative provisions that clearly and explicitly provide for the role of the board of directors in monitoring and managing conflicts of interest, ensuring the integrity of the corporation's accounting and financial reporting systems, and overseeing the process of disclosure and communications.

29. EXERCISING OBJECTIVE AND INDEPENDENT JUDGEMENT

29.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

E. The board should be able to exercise objective, independent judgement on corporate affairs.

(1) Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflicts of interest. Examples of such key responsibilities are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, nomination of board members and key executives, and board remuneration.

(2) When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.

(3) Board members should be able to commit themselves effectively to their responsibilities.

29.2 Comparative Analysis

The Jordanian *Companies Law* and the Australian *Corporations Act* comply only partially with the OECD principle requiring the board to exercise objective, independent judgement on corporate affairs.

The annotation to Chapter 6, Principle E, provides that the wide variation in board structures and ownership patterns across jurisdictions will require different approaches to the issue of board objectivity. Board independence in areas where there is a potential for conflicting interests usually requires that there is a sufficient number of directors that are independent of management. Utilising committees of independent non-executive directors to oversee delicate areas such as financial reporting, remuneration and nomination provides additional assurance to market participants. The annotation provides that, in order to avoid any questions being raised about the collective responsibility of the board in such circumstances, it is important that the composition and duties of such committees are properly disclosed and clearly explained.[605]

In Jordan, the *Companies Law* does not specifically require the assignment of any specific number of non-executive members to the board. However, Article 15 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* provides that the board of all listed companies must form an auditing committee consisting of at least three 'non-executive' board members, and notify the JSC of the same.[606] There is no other explanation of, or discussion about, the role of non-executive directors. There is also no mention of a requirement for, or the monitoring of, board committees in the legislation other than the audit committee. Recent research suggests that, except among a handful of companies, board committees other than the audit committee are rare.[607]

[605] For more information see OECD Principles 2004, Annotation to Chapter 6, Principle E.
[606] The same requirement is provided in Article 46 of the *Securities Law 2002* (JOR). The *Banking Law 2000* (JOR) also mandates audit committees for banks, with the same size and composition requirements as those for regular listed companies (Articles 32 and 33).
[607] World Bank, above n 156, 15.

As discussed in the previous section of this chapter, Article 151 requires the board of directors to prepare special by-laws to govern the company's financial, accounting, and administrative systems, as well as clarify the board's rights and obligations regarding such issues. Accordingly, directors should use such by-laws to establish effective internal control measures that require the appointment of independent directors to tasks where there is a potential for conflicts of interest. It is also necessary for the internal control measures to sufficiently define the role and responsibilities of any board committees that are established within the company.

In Australian listed companies, senior full-time executives are often joined on the board by various non-executive directors. These non-executive directors provide support and assistance to the full-time executives, as well as monitoring executive decision-making.[608] Non-executive directors are ordinarily referred to as 'independent' directors. The number of non-executive directors present at a board meeting varies depending on the company, and the ratio is sometimes as high as 50 percent.[609] Non-executive directors are usually paid a fee for attending meetings and carrying out related duties.

Principle 2 of the ASX Principles of Corporate Governance 2003 is relevant in this context. Recommendation 2.1 provides that the majority of the board should be 'independent' and sets out a list of factors that disqualify a director from being independent. According to the commentary to Recommendation 2.1, a director will not be independent if he or she:

- is a substantial shareholder of the company or is directly associated with a substantial shareholder;
- has been employed by the company in an executive capacity in the last three years, or has been a director after ceasing to hold such employment;
- has been a principal of a material advisor or consultant to the company in the last three years, or an employer materially associated with the service provided;

[608] Proctor and Miles, above n 80, 26. See also Tricker, above n 107, 177.
[609] Bostock R, above n 109, 96.

- has been a material supplier or customer of the company, or has been directly or indirectly associated with a material supplier or customer;
- has a material contractual relationship with the company other than as a director of the company;
- has served on the board for a period which could be reasonably perceived as materially affecting the director's ability to act in the best interests of the company; or
- has an interest or relationship which could be reasonably perceived as materially interfering with the directors' ability to act in the best interests of the company.

Recommendation 2.2 provides that the chairperson should be an independent director, and Recommendation 2.3 provides that the role of chairperson and chief executive officer should not be exercised by the same individual. The *Corporations Act* itself does not include any provisions dealing with non-executive directors. There is also no mention of a requirement for the monitoring of board committees in the legislation. Like its Jordanian counterpart, the Australian legislation leaves such matters to the internal control measures set by the board of directors.

In relation to board members being able to commit themselves effectively to their responsibilities, Principle 8 of the ASX Principles of Corporate Governance 2003 provides that boards should fairly review and actively encourage enhanced board and management effectiveness. Recommendation 8.1 suggests that the board disclose the process for performance evaluation of the board, its committees and individual directors, and key executives. It is further provided that the board nomination committee should take responsibility for evaluating the board's performance.

29.3 Conclusion and Recommendations

From the analysis above it can be seen that both the Jordanian *Companies Law* and the Australian *Corporations Act* comply only partially with Chapter 6, Principle D7. The legislation in both jurisdictions should require, in explicit terms, the appointment of independent directors to tasks where there is a potential for conflicts of interest. The relevant Jordanian authorities must introduce the concept of independent non-executive directors to the *Companies Law* or through a code of corporate governance similar to the ASX Principles of Corporate Governance 2003.

30. ACCESS TO INFORMATION

30.1 Content of the OECD Principles

Chapter 6: The Responsibilities of the Board

F. In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.

30.2 Comparative Analysis

The Australian *Corporations Act* complies with the OECD principle requiring the board to access to accurate, relevant and timely information. The Jordanian *Companies Law*, however, does not comply with the relevant principle.

In Australia, s 290(1) of the *Corporations Act* provides that directors are entitled access to the company's financial records at all reasonable times. The commentary to Principle 8 of the ASX Principles of Corporate Governance 2003 provides that management should supply the board with information in a form, timeframe and quality that enables to board to effectively discharge its duties. It provides further that directors should be entitled to request additional information where they consider that the information supplied by management is insufficient for any reason. The Jordanian *Companies Law* does not specifically recognise this important issue. The relevant Jordanian authorities must enact provisions that emphasise and clearly provide for the statutory right of directors to have full access to relevant information on a timely and regular basis.

CHAPTER 5

MEMBERS' REMEDIES

1. AN ANALYSIS OF SHAREHOLDER REMEDIES

Chapter 3, Principle A2, of the OECD Principles provides that 'minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress'. As stated in the analysis of this principle in Chapter 4, Section 7, of this paper, the Jordanian *Companies Law* does not directly protect the rights of minority shareholders nor introduce effective means of redress.

In general terms, shareholder participation in Jordan is weak.[610] This could be attributed to various factors, including ingrained culture, poor awareness among small investors, and the speculative nature of stock trading. The consequence of this lack of involvement is that power is dominated by controlling shareholders. Controlling shareholders have strong incentives to monitor their company's performance and its management, and consequently can have a very positive impact on the governance of a company. The interests of controlling shareholders, however, often conflict with those of minority shareholders. Recent research indicated that the average control position for the top 48 listed companies in Jordan was approximately 30 percent of shares.[611] Further, approximately half of the listed companies in Jordan are 'supermajority owned', which essentially means that minority shareholder involvement or consent is not required for fundamental corporate decisions.[612]

In Australia, there are legislative measures to protect minority shareholders from the abusive action of boards and controlling shareholders. Pursuant to s 232, shareholders have the right to bring an action for

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[610] MENA Regional Corporate Governance Working Group, above n 16, 28.
[611] Research conducted by Professor Ghassan Omet, University of Jordan; as cited in World Bank, above n 156, 1.
[612] Estimate calculated by HSBC; as cited in World Bank, above n 156, 1.

oppressive or unfairly prejudicial conduct. An extensive list of remedies open for the court to order in such circumstances is listed in s 233. According to s 236, a member also has a statutory right to bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party. A detailed analysis of these two important minority shareholder remedies is provided below. The Jordanian authorities need to be alerted to this important subject so that appropriate legal provisions, in similar terms to those in the *Corporations Act*, can be drafted and enforced.

2. THE OPPRESSION REMEDY

2.1 Historical Background

The origins of the oppression remedy stem back to 1947 in the United Kingdom when a British Board of Trade Committee known as the Cohen Committee made recommendations to the British Government to give the courts broad discretionary powers to make orders against companies in which minority shareholders were being oppressed.[613] Following is an extract from the 1947 Committee Report:[614]

> *A step in the right direction would be to enlarge the powers of the courts to make a winding-up order by providing that the power shall be exercisable notwithstanding the existence of an alternative remedy. In many cases, however, the winding-up of the company will not benefit the minority shareholders, since the break-up value of the assets may be small, or the only available purchaser may be that very majority whose oppression has driven the minority to seek redress. … The Court should have, in addition, the power to impose upon the parties to a dispute whatever settlement the Court considers just and equitable.*[615]

[613] Tomasic, above note 314, 410.
[614] Cohen Committee, *Report of the Committee on Company Law Amendment* (Cmd 6659), 1945.
[615] Ibid, paragraph 60.

These recommendations resulted in the enactment of s 210 of the *Companies Act 1948* (UK), which is now embodied in ss 459-461 of the *Companies Act 1985* (UK).

In Australia, similar provisions were adopted by the state governments in the mid 1950's, and were soon after translated into s 186 of the *Uniform Companies Act 1961* (Cth). The section was amended substantially in s 320 of the *Companies Act 1981*, which later became s 260 of the *Corporations Law 1989* (Cth). After further revision pursuant to the *Company Law Review Act 1998* (Cth), s 260 was replaced by s 246AA of the *Corporations Law 1989* on 1 July 1998. According to the *Corporate Law Economic Reform Program Act 1999* (Cth), the most recent amendment to the oppression remedy replaced s 246AA with Part 2F.1 of the *Corporations Law 1989* on 13 March 2000, which is now Part 2F.1 of the *Corporations Act 2001* (Cth), ss 232-234.[616]

The key provision pertaining to the oppression remedy is s 232 of the *Corporations Act*. The full text of the section is as follows:

> *The Courts 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 proposed resolution, of members or class of members of a company;*
>
> *is either:*
>
> *(d) contrary to the interest of the members as a whole; or*

[616] Tomasic, above note 314, 410.

(e) *oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.*

2.2 Oppression Defined

The term 'oppressive' is not defined in the *Corporations Act*. According to Professor John Farrar, no clear definition of oppression, unfairly prejudicial, or unfairly discriminatory conduct has been provided because of the fear that such a definition might lead to narrow restrictions being placed on the courts' power to intervene.[617] Initially, the courts' approach to the relevant provision was to require a high level of oppression to be proven before a minority shareholder could be entitled to a remedy. For instance, the House of Lords in *Scottish Cooperative Wholesale Society v Meyer*[618] held that the idea of oppression denoted behaviour which was 'burdensome, harsh and wrongful' to one or more members of the corporation, and also lacked probity and fair dealing. In Australia, a similar position was adopted in *Re Tivoli Freeholds Ltd*.[619] However, in 1983 amendments were made to the legislation in Australia which included the addition of the term 'unfairly prejudicial or unfairly discriminatory' to the oppression provision. The intention of the legislature was to expand the restrictive interpretation that had been given to term 'oppressive', and provide the courts with greater flexibility to provide the appropriate relief.

The judicial consensus in Australia has been that the amended provision prescribes a single test rather than three alternative tests. This notion was first formulated in *Thomas v HW Thomas Ltd*.[620] In that case, the New Zealand Court of Appeal considered s 209 of the *Companies Act 1955* (NZ) which, like its Australian counterpart, referred to conduct that is 'oppressive, unfairly discriminatory, or unfairly prejudicial'. The court decided that these words were not distinct alternatives and the three words overlap each other in a sense that each term helps explain the

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[617] Farrar J, *Corporate Governance in Australia and New Zealand* (2nd ed, 2002), 182.
[618] *Scottish Co-operation Wholesale Society Ltd v Meyer* [1959] AC 324 at 342.
[619] *Re Tivoli Freeholds Ltd* [1972] VR 445 at 468.
[620] *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686.

others. The decision in *Thomas* was adopted by the New South Wales Court of Appeal in *New South Wales Rugby League Ltd v Wade*.[621] In that decision, the Court of Appeal settled that the minimum content of the term 'oppression' in s 232 was the concept of fairness. Moreover, in *Re Norvabron Pty Ltd*,[622] the court held that it is not necessary for a member to demonstrate both oppression and unfair prejudice, but rather it is sufficient for only one of those grounds to be made out.

The following matters can be characterised as typical oppression scenarios:

- An issue of shares by directors to dilute the voting power of minority shareholders: *Wallington v Kokotovich Constructions Pty Ltd*.[623]
- Diversion of the corporation's business by a director to another corporation in which the director has an interest: *Re Spargos Mining NL*.[624]
- Low dividend payments resulting from excessive remuneration to directors in the form of directors' fees or bonuses: *Sanford v Sanford Courier Service Pty Ltd*.[625]
- Failure to give notice of meetings: *Foody v Horewood*.[626]
- A breach of fiduciary duty by a director such as failure to disclose, failure to review the company's dividend policy to improve the company's cash position, or failure to prosecute an action on behalf of the company: *Overton Holdings Pty Ltd*.[627]
- Unfair removal of a director for an improper purpose or reasons that are not in the best interests of the company: *John Starr (Real Estate) Pty Ltd v Robert Andrew (Australasia) Pty Ltd*.[628]
- The use of improper tactics at either the board or general meeting to deprive minority shareholders from the right to participate in these meetings: *John Starr (Real Estate) Pty Ltd v Robert Andrew (Australasia) Pty Ltd*.[629]

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[621] *Wayde v New South Wales Rugby League Ltd* (1985) 3 ACLC 799.
[622] *Re Norvabron Pty Ltd* (1987) 11 ACLR 279.
[623] *Wallington v Kokotovich Constructions Pty Ltd* (1993) 11 ACSR 759.
[624] *Re Spargos Mining NL* (1991) 3 ACSR 1.
[625] *Sanford v Sanford Courier Service Pty Ltd* (1986) 10 ACLR 549.
[626] *Foody v Horewood* .(2003) VSC 347.
[627] *Overton Holdings Pty Ltd* (1984) 9 ACLR 225.
[628] *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd* (1991) 9 ACLC 1372.

2.3 The Concept of Company's Affairs

Another important element in the application of s 232 is the interpretation of the term 'affairs' in subparagraph (a). Section 53 of the *Corporations Act* defines the 'affairs' of a company in extremely broad terms to include, amongst other things:

- conduct in relation to promotion, formation, membership, control, business, trading, transactions, liquidation and dealings of the company;
- internal management and proceedings of the company;
- conduct in relation to share ownership, voting rights and disposal rights in the company; and
- the audit of the company.

Accordingly, this statutory definition of 'affairs' is broad enough to cover both the external business and internal management of the company. In the Federal Court decision of *ASC v Lucas*[630] Drummond J observed that 'the concept of affairs of a corporation is a very wide one indeed'.

There are a number of other features of s 232 that should be noted.[631] Firstly, the section is not confined to positive acts. Under s 232(b), an omission that has the prescribed impact may trigger an application. For example, in *Scottish Cooperative Wholesale Society v Meyer*,[632] the House of Lords held that adopting a passive policy in order to starve the company of materials it needed to conduct its business was oppressive. Secondly, the section applies even if the conduct was isolated or even if it occurred in the past before the affected person became a member.[633] Thirdly, it is not necessary that the conduct be ultra vires or illegal, or that it involve a want of

[629] Ibid.
[630] *ASC v Lucas* (1992) 36 FCR 165 at 184.
[631] For a general discussion of all these features see Tomasic, above n 374, 413; Ford, above n 307, 603.
[632] *Scottish Co-operation Wholesale Society Ltd v Meyer* [1959] AC 324 at 342.
[633] *Re Spargos Mining NL* (1991) 3 ACSR 1 at 6.

probity.[634] Fourthly, the section does not require that the conduct be carried out by any certain category of persons.[635] Finally, the inclusion of the phrase 'contrary to the interest of the members as a whole' in s 232(d) allows the courts to order relief where all members are equally prejudiced by the conduct.[636]

2.4 Who Can Apply for Orders

Section 234 specifies who may apply for an order under s 233. The list includes:

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

The member must generally be registered at the time of the relevant conduct.[637] However, the provision lacks clear guidelines in this respect. In *Re Independent Quarries Pty Ltd*[638] a share certificate had been duly sealed by the company but the holder's name had not been entered in the members' register of the company because the register was in the control of a rival shareholder. The court held the applicant was a member even though his membership was not noted on the register.

[634] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.
[635] *Re Harmer Ltd* [1958] 3 A11 ER 689.
[636] *Re Spargos Mining NL* (1991) 3 ACSR 1 at 6.
[637] Ibid.
[638] *Re Independent Quarries Pty Ltd* (1994) 12 ACSR 188.

2.5 The Court's Power to Make Orders

There are a wide range of orders that the court can make enabling it to intervene in corporate affairs if the grounds under s 232 are established. Section 233 sets out a non-exhaustive list of orders that the court may make individually or in combination, which include:

- That the company be wound up;
- That the company's constitution be modified or repealed;
- That the affairs of the company be regulated;[639]
- That the shares of a member or a person to whom the shares are transmitted by will or under operation of law be purchased by another member;[640]
- That the shares to be purchased by the company and its share capital be correspondingly reduced;
- That proceedings be instituted, prosecuted, defended or discontinued by the company;
- That proceedings be instituted, defended or discontinued in the name of the company and on its behalf by a member or a person to whom the shares are transmitted by will or under operation of the law;
- That a receiver or manager of property be appointed;
- Restraining a person from engaging in specified conduct or doing a specified thing; or
- Requiring a person or the company to do a specific act.

2.6 Analysis

Whilst the oppression remedy is a very powerful remedial tool for minority shareholders, there are several difficulties which are inherent in its application. The principal difficulties include:

[639] An example of this type of order can be found in the English decision of *Re Harmer Ltd* [1958] 3 A11 ER 689. The court order in this case involved a sweeping reorganisation of the company's management structure.

[640] An example of this type of order can be found in English decision of *Scottish Cooperative Wholesale Society v Myer* [1959] AC 324. The House of Lords in this case ordered the majority shareholder to purchase the minority shareholders' interests at the price at which they stood before the oppressive conduct which rendered the shares valueless.

- The phrase 'affairs of the company' may not encompass the acts of a nominee director towards a subsidiary.[641]
- The phrase 'contrary to the interest of the members as a whole" is ambiguous. It is questionable whether, in the context of this phrase, the relevant action must be contrary to the interests of each and every member.
- Part 2F.1 does not deal explicitly with costs.
- The standard of proof for shareholders is onerous.

Despite these shortcomings, the oppression remedy is the most widely-used corporate law remedy available to shareholders of Australian companies.[642] According to an empirical study carried out by Professor Ian Ramsay in 1999 regarding the use of the remedy in Australia, there has been a significant rise in the use of the remedy since its introduction.[643] In the decade of the 1960s, there were only four oppression judgments in Australia. In the 1980s, the number of judgments increased to 25, and from 1990 to 1997, there were more than 50.[644]

Professor Ramsay's research indicates that the oppression remedy is more often used by small closely-held companies, in circumstances where a domestic or family dispute arises, rather than by large public companies.[645] Shareholders in closely held companies often have more at risk than simply the share capital they have invested. According to the results of Professor Ramsay's research, almost 75 percent of the oppression judgments in Australia have involved a private company. Moreover, in almost 55 percent of those judgments, the number of shareholders in the company concerned was ten or fewer.[646] It is well recognised that shareholders in these small private companies ordinarily do not have the same protection available to them as shareholders in larger public companies. Minority shareholders in a listed public company can readily sell

[641] See for example *Re Norvabron Pty Ltd* (1987) 11 ACLR 279; *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLT 692.
[642] Ramsay I, 'An Empirical Study of the use of the Oppression Remedy' (1999), 27 *Australian Business Law Review*, 23.
[643] Ibid.
[644] Ibid, 26.
[645] Ibid, 27.
[646] Ibid, 28.

their shares, however, minority shareholders in a private company often have restrictions on their right of disposal. It was noted by one commentator that within the intimate relationship that is a small private company, 'the corporate norms of centralised control and majority rule can easily become an instrument of oppression'.[647]

According to Professor Ramsay, in the majority of the oppression cases to date, the plaintiff has been a minority shareholder. In a further 10 percent of the cases, the plaintiff has been a 50 percent shareholder.[648] The most commonly pleaded allegation in oppression actions has been the exclusion of shareholders from management. In fact, almost 50 percent of oppression actions in Australia have been pleaded in these terms. The other most common allegations include lack of information provided to shareholders (29.5 percent), breach of fiduciary duties (26.1 percent), misappropriation of company assets (20.5 percent), and insufficient remuneration or dividends being received by shareholders (12.5 percent).[649] Another interesting finding was that the courts are reluctant to wind up companies. In fact, in the 33 cases to date in which plaintiffs have sought the remedy of winding up, the courts have only granted the remedy five times.[650]

2.7 Conclusion

The oppression remedy in Part 2F.1 of the *Corporations Act* is a modified and improved version of its progenitor, s 210 of *Companies Act 1948* (UK). Since its inception into Australia in the 1950s, the scope of the remedy has been significantly broadened and it has become a valuable weapon for members, particularly minority shareholders, in their dealings with companies. The legislative regime provides shareholders with a wide range of possible reliefs, including many alternatives to the commonly sought remedy of winding up. It is recommended that the Jordanian

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[647] Thompson R, 'Corporate Dissolution and Shareholders' Reasonable Expectations' (1988), 66 *Washington University Law Quarterly*, 193.

[648] Ramsay, above n 469. Professor Ramsay asserts further that it is reasonable to assume that the percentage of cases brought by minority shareholders is actually higher than his research indicates due to the fact that in a significant number of the judgments it was not possible to clearly identify whether the shareholder was a minority shareholder.

[649] Ramsay, above n 469, 28.

[650] Ibid, 28.

Companies Law be amended to include an equivalent to the Australian oppression remedy in Part 2F.1 of the *Corporations Act*.

3. THE STATUTORY DERIVATIVE ACTION

3.1 Historical Background

At common law, the person who has the cause of action at law is normally the individual who should institute legal proceedings to obtain a remedy. In *Hurley v BGH Nominees Pty Ltd*,[651] King CJ noted that it is a fundamental principle of the law that, except in specified circumstances prescribed by law, C has no standing to bring an action against A for a breach of A's duty to B. The ability of a shareholder to initiate proceedings against offending directors or majority shareholders is limited by the 'proper plaintiff rule', which confines the ability to commence proceedings for a breach of duty owed to the company to the company itself. However, circumstances often arise where an individual has his or her rights infringed but is unable to commence legal proceedings to vindicate those rights because the necessary machinery to do so cannot be activated. This is particularly so in the field of company law because of the fact that companies are artificial legal persons. The traditional common law position has gradually been eroded away by judicial exceptions to the 'proper plaintiff' rule and, in particular, the exception found in the statutory derivative action contained in Part 2F.1A of the *Corporations Act*.

The statutory derivative action is an action brought by a shareholder or director of a company in the name, and on behalf of, the company against whom the relevant wrongs have been committed, in circumstances where the company itself is unwilling to prosecute those wrongs via legal proceedings. Such an action is 'derivative' in the sense that the right to sue belongs not to the party actually bringing the action, but is derived from the company's right of action. Ordinarily, the decision to take action on the company's behalf lies with the directors, as they

[651] *Hurley v BGH Nominees Pty Ltd* (1982) 6 ACLR 793.

generally have the responsibility of managing the company. However, in some cases it is necessary that the shareholders be given the right to commence action on the company's behalf, usually because some or all of the board members are themselves responsible for the wrong that has been committed.

The foundations for the statutory derivative action were laid in a report prepared by the Corporations and Securities Law Review Committee (CSLRC) in 1990.[652] This report highlighted the need for amendments to the *Companies Act 1981* (Cth) that relaxed the rules pertaining to derivative actions so that members and creditors were empowered to obtain the leave of the courts to institute proceedings. The statutory derivative action proposed in the report was subsequently reviewed by the Legal Committee of the Companies and Securities Advisory Committee which confirmed the need for such provisions.[653] In its report of July 1993, the Companies and Securities Advisory Committee stated that for many years there has been widespread discontent with the obstacles that confront shareholders in instituting proceedings. The three relevant obstacles referred to in the 1993 report were the rule in *Foss v Harbottle*,[654] the expense of litigation, and the difficulties that shareholders frequently face in obtaining information from the company.

After six more years of consultation and revision, the *Corporate Law Economic Reform Program Act 1999* (Cth) introduced Part 2F.1A (ss 236-242) into the *Corporations Law 1989* (Cth) which provided for a statutory derivative action. The Parliament prevented overlap with the common law derivative action (known as the fraud on the minority) by abolishing the general law to bring proceedings on behalf of the company in s 236(3). The provisions in Part 2F.1A give a person the right, with the leave of the court, to institute legal proceedings on behalf of the relevant company, in the company's name, and against anyone who may have caused loss to the company, in circumstances where the company is prevented from doing, or is unable to do, so

[652] Corporations and Securities Law Review Committee (CSLRC), *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action*, November 1990.
[653] Fisher, above n 356, 386.
[654] *Foss v Harbottle* (1843) 67 ER 189.

for itself. Accordingly, unless leave to bring a derivative action is granted under s 237, the company continues to be the proper plaintiff in proceedings for wrongs committed against it.

3.2 The Rule in *Foss v Harbottle* and its Exceptions

In the case of *Foss v Harbottle*,[655] two shareholders brought an action against the five directors of the relevant company on behalf of all shareholders excluding the directors. The plaintiffs claimed that the company's assets had been fraudulently misappropriated by the directors. Wigram VC held however, that the action could not be brought by the two shareholders. The grounds upon which this decision was made have become known as 'the rule in *Foss v Harbottle*', which has since become one of the most notorious principles in company law. The rule has two aspects to it. The first aspect, or 'proper plaintiff' rule, was described in the following terms by Wigram VC in *Foss v Harbottle*:

> *The action did not lie at the suit of the 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 assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this….*[656]

The second aspect, or 'internal management' rule, was described in the following terms by Lord Davey in *Burland v Earle*:[657]

> *There is the principle that the courts will not interfere in the internal disputes of partnerships, joint stock companies or the modern corporation, the precept that the courts seek to avoid a multiplicity of actions, the principle that equity will not act in vain*

[655] Ibid.
[656] *Foss v Harbottle* (1843) 67 ER 189.
[657] *Burland v Earle* [1902] AC 83.

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.[658]

3.3 Exceptions to the Proper Plaintiff Rule

The courts recognised that in certain cases justice required that minority shareholders be able to avoid the application of the rule in *Foss v Harbottle* to allow them to initiate proceedings. As such, five broad common law exceptions to the rule in *Foss v Harbottle* developed which became known as minority protections. Importantly, it must be noted that the commencement of the statutory derivative action under s 236 of the *Corporations Act* has removed the right to apply the general law. Accordingly, the following discussion is provided for historical purposes only.

(a) Fraud on the Minority

In *Foss v Harbottle*, the court recognised the potential for majority shareholders to be manifestly unfair to the minority shareholders. This exception applied in circumstances where the following elements were satisfied:[659]

- Fraud;[660]
- Effected on the company or minority shareholders;[661] and
- The wrongdoers had such control of the company that they were able to ensure that an action could not be brought by the company.[662]

[658] Ibid, 93.
[659] For a detailed discussion see *Atwool v Merryweather* (1867) LR 5 Eq 464 where it was recognised that, without this exception, the majority would be able to 'to defraud the minority with impunity'.
[660] See *Daniels v Daniels* [1978] Ch 406.
[661] See *Ruralcorp Consulting Pty Ltd v Pynery Pty Ltd* (1996) 21 ACSR 161 at 166.
[662] *Eromanga Hydrocarbons NL v Australia Mining NL* (1988) 6 ACLC 906 at 911.

(b) Special Resolution

This exception applied in circumstances where the company passed an ordinary resolution when the subject matter of the resolution actually required a higher majority.[663]

(c) Illegal Acts or Ultra Vires

This exception applied in circumstances where the actions for which a remedy was sought were illegal or ultra vires.[664]

(d) Personal Rights

This exception applied in circumstances where a personal right of a member had been infringed and the irregularity was not one that could be condoned by the company in a general meeting.[665] Personal rights are particular 'membership' rights that may accrue in individuals by reason of rights attached to their shares, provisions in a separate contract or pursuant to the company's constitution.

(e) Interests of Justice

This exception, the most general of all the exceptions, applied in circumstances where the interests of justice required that minority shareholders be given standing to sue on behalf of the company.[666] This exception was a matter of much controversy.[667]

[663] See *Edwards v Halliwell* [1950] 2 All ER 1064.
[664] See *Atherton v Plane Creek Central Mill Co Ltd* [1914] St R Qd 73 at 93.
[665] See *Residues Treatment and Trading Co Ltd v Southern Resources* Ltd (No 4) (1988) 14 ACLR 569 at 571 per King CJ (Matheson and Bollen JJ concurring): 'Where the actions for which a remedy is sought amount to an infringement of personal rights, a shareholder has *locus standi* to enforce those personal rights'.
[666] See *Scarel v Pty Ltd v City Loan and Credit Corporation Pty Ltd* (1988) 12 ACLR 730 at 635; *Dempster v Biala Pty Ltd* (1989) 15 ACLR 191 at 194; *Biala Pty Ltd v Mallina Holings Ltd* (No 4) (1993) 13 WAR 11.
[667] For a detailed discussion see Cassidy, above note 48, 282-283.

3.4 Who May Bring a Statutory Derivative Action?

Pursuant to ss 236(1)(a), 237(1) and 238(1), an application for leave to bring, or intervene in, proceedings on behalf of a company or to be substituted for a person to whom leave has been granted, may be brought by:

- 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; or
- a former officer of the company.

The inclusion of company officers as eligible applicants gives the statutory derivative action much wider scope than the common law action, which restricted the bringing of an action to members. Moreover, the inclusion of ‘former members’ as eligible applicants gives the statutory derivative action a broader scope than the oppression provisions in Part 2F.1 which, as previously discussed, can only be utilised by a former member in limited circumstances.[668] It should also be noted that s 236(1) does not give ASIC standing to bring an application for a derivative action. According to the *Explanatory Memorandum* to the *Corporate Law Economic Reform Program Act 1999* (Cth), the statutory action is 'not intended to be regulatory in nature, but to facilitate private parties to enforce existing rights attaching to the company’ – effectively, the action is designed to be a self-help measure.

[668] See *Corporations Act 2001* (Cth), s 234.

3.5 Criteria for Granting Leave

Pursuant to s 236(1)(b), a person seeking to commence a derivative action must obtain leave of the court in accordance with s 237. The court must grant leave if it is satisfied that the following conditions are satisfied:

1. *It is probable that the company will not bring the proceedings or take proper responsibility for such proceedings*.[669] As a practical matter, the board of directors' response to any notice of intention to apply for a grant of leave which the applicant may have served on the company would provide evidence relevant to this criterion.[670]

2. *The applicant is acting in good faith*.[671] The court is required to review the motives of the applicant. The Corporations Law Simplification Task Force has set the measures to assess whether an applicant is acting in good faith. First, the court is expected to examine whether there is any complicity by the applicant in the matters complained of. Second, the court is expected to examine whether the applicant's real goal is pursuit of a personal, rather than a corporate remedy. In *Chapman v E-sports Club Worldwide Ltd*,[672] the court refused to grant an application because, amongst other things, it appeared that the plaintiff was attempting to use the proceedings to put pressure on other parties in the company to buy him out.

3. *It is in the best interests of the company that the applicant be granted leave*.[673] This criterion recognises that the purpose of the derivative action is in line with the company's interests rather than those of the applicant or any group of directors or shareholders. However, it is not left to the company alone (through either the board of directors or the

[669] *Corporations Act 2001* (Cth), s 237(2)(a).
[670] Tomasic, above n 374, 423.
[671] *Corporations Act 2001* (Cth), s 237(2)(b).
[672] *Chapman v E-Sports Club Worldwide Ltd* (2001) 19 ACLC 213.
[673] *Corporations Act 2001* (Cth), s 237(2)(c).

general meeting of shareholders) to decide what is in the company's best interests. Ascertaining the company's best interests is a matter for judicial determination. For example, even if the company has suffered a wrong which could be the subject of a derivative suit, if the costs of bringing proceedings significantly outweigh any benefit to the company, then the court may refuse to grant leave.[674]

4. *There is a serious question to be tried*.[675] The serious question test is a familiar and accepted test used regularly by Australian courts in determining interim injunction applications. The applicant is simply required to show that the claim is not frivolous or vexatious and it has real prospects of succeeding. It must also be proved that the balance of convenience favours granting leave.[676]

5. *Whether the applicant has notified the company of the application.*[677] At least 14 days before the application, the applicant must give the company written notice of his or her intention to apply for leave and the reasons for doing so (unless the court believes that an order granting leave is appropriate despite no such notice being given).[678] This notice provides the board of directors an opportunity to consider the matter and perhaps decide to litigate without the need for a derivative action.

If these criteria are met, then the court must grant the applicant leave to bring, or to intervene in, the proceedings by way of a statutory derivative action. Accordingly, the court does not have an open-ended discretion in such matters. Importantly, s 237(3) provides that a rebuttable presumption that granting leave is not in the best interest of the company arises if it is established that:

[674] Tomasic, above n 374, 423.
[675] *Corporations Act 2001* (Cth), s 237(2)(d).
[676] Tomasic, above n 374, 423.
[677] *Corporations Act 2001* (Cth), s 237(2)(e).
[678] *Corporations Act 2001* (Cth), s 237(2)(e)(ii).

(a) *the proceedings are:*

(1) by the company against a third party; or

(2) by a third party against the company; and

(b) *the company has decided:*

(1) not to bring the proceedings; or

(2) not to defend the proceedings; or

(3) to discontinue, settle or compromise the proceedings; and

(c) *all of the directors who participated in that decision:*

(1) acted in good faith for a proper purpose; and

(2) did not have a material personal interest in the decision; and

(3) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(4) rationally believed that the decision was in the best interests of the company.

3.6 Court Orders and Powers

Section 240 provides that if a court grants leave to commence or intervene in proceedings then those proceedings cannot be later be discontinued, compromised or settled without the leave of the court. This case management requirement is designed to ensure that a successful applicant does not settle proceedings so as to benefit himself/herself, rather than acting in the company's best interests.[679] Pursuant to s 241, the court may make any orders or directions it considers appropriate in relation to an application for leave or the proceedings brought pursuant to a successful application. Directions may be given by the court regarding the conduct of the proceedings, including an order requiring mediation[680] or directing the company, or an officer of the company, to do or not do any act.[681] Moreover, the court is empowered to appoint an independent person to investigate and report to the court on the company's financial position, the

[679] Cassidy, above n 48, 287.
[680] *Corporations Act 2001* (Cth), s 241(b).
[681] *Corporations Act 2001* (Cth), s 241(c).

acts and circumstances giving rise to the cause of action, and the costs involved in the proceedings.[682] Section 242 deals with costs orders in derivative proceedings, essentially providing the court discretion to make an order at any time about the costs of any party to the proceedings.[683]

3.7 Analysis

There are a number of shortcomings that have been identified in the application of the statutory derivative action. As previously mentioned, s 236(1) provides that the persons who are eligible to apply for a statutory derivative action include a member, a former member, a person entitled to be registered as a member of the company or a related body corporate, and an officer of the company. According to one commentator, the term 'entitled to be registered' is ambiguous and needs to be explained in clearer terms.[684] For example, it is questionable whether the term would include a transfer upon which stamp duty had not been paid or a transfer the registration of which had been refused by the directors under the rights or pre-emption provisions in the company constitution. There is also uncertainty as to whether it would be necessary for such a party to firstly prove to the court that he or she is 'entitled to be registered'.[685]

Questions have also been raised as to why a shareholder of a related body corporate should have the right to make an application in respect of a company in which the shareholder has no interest.[686] It is also worth noting that the definition of 'officer' in s 9 provides a very wide category of persons including persons who, in some cases, act with total control of the company and therefore could sue in the name of the company. Such a person would be a liquidator.

[682] *Corporations Act 2001* (Cth), s 241(d).
[683] These broad powers in relation to costs enable the court to protect a *bona fide* applicant from the costs involved in a derivative action.
[684] McDonough D, 'Proposed New Statutory Derivative Action – Does It Go Far Enough?' (1996) 8 *Bond Law Review* 47, 57.
[685] Ibid, 57-58.
[686] Ibid.

Seemingly, the legislation will give such persons a right to apply after they have relinquished their positions.[687]

In the view of Ramsay, 'the main impediment to shareholders contemplating litigation is not deficiencies in the common law concerning standing but a lack of incentives to commence litigation deriving from a number of factors including the cost of litigation and the fact that if the action is successful any recovery accrues to the company and not the plaintiff shareholder'.[688] According to another commentator, litigation costs are the primary deterrent for potential applicants.[689] The suggestion was made that s 242 should be amended to make the company pay the litigation fees rather than the applicant.[690]

3.8 Conclusion

The rule in *Foss v Harbottle* was initially a significant hurdle for a minority shareholder wishing to remedy a corporate wrong. Early emphasis on the rights of managers to conduct the affairs of companies without external interference, and assumptions as to the appropriateness of the majority rule principle in all cases resulted in the courts building up complex procedural rules, often only tenuously linked to the central issues of the company's interests in having an action brought, and its ability to do so for itself. The introduction of Part 2F.1A (ss 236-242) into the *Corporations Act* has, for the most part, smoothed out these complex procedural rules. In Farrar's view, the new statutory derivative action procedures are welcomed as they clarify and reform the law and increase *locus standi*.[691] It is recommended that the Jordanian *Companies Law* be amended to include an equivalent to the Australian oppression remedy in Part 2F.1A of the *Corporations Act*.

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[687] Ibid, 59-60.
[688] Ramsay I, 'Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action' (1992), 15 *University of New South Wales Law Journal* 149, 150.
[689] McConvill, 'Part 2F.1A of the Corporations Act: Insert a New Section 242(2) or Give it the Boot?' (2002), 30 *Australian Business Law Review* 309.
[690] Ibid, 310.
[691] Farrar, above n 617, 201

CHAPTER 6

SUMMARY OF ANALYSIS AND RECOMMENDATIONS

1. SUMMARY OF ANALYSIS

1.1 The Role of Corporate Governance

Corporations are constantly evolving to meet the needs of a changing society. They have developed to become such a pervasive part of our society that they even determine the quality of our food and the air that we breathe. Human beings developed the corporation as part of a social structure amongst other things, which nowadays almost everyone can participate in to some degree. Corporations enable people to get things done, and enable a small idea or concept to develop into a vast and successful business. A corporation is timeless in the sense that it can, and often does, live beyond the years of its founders. Also, it can be operated internationally from one corner of the world.

As corporations are constantly evolving, so are the corporate laws which govern them. The evolution of the corporate form ensures that corporate governance laws must continue to be re-examined. Corporate governance is primarily concerned with the relationships between a corporation's managers and shareholders, based on the foundation that the board of directors is the shareholders' agent to ensure that the corporation in managed in the shareholders' best interests. This paradigm has been simplified into the phrase, 'managers accountable to boards and boards accountable to shareholders'.[692]

[692] Millstein I, above n 38.

1.2 The OECD Principles

Soon after their original drafting in 1999, the OECD Principles of Corporate Governance were tested and implemented in OECD member and non-member countries to improve their legal systems and regulatory frameworks, and review their company law regimes. However, continued corporate governance failures in the years that followed prompted a review of the original principles. In 2002, the OECD called for an assessment of the OECD Principles by 2004. The assessment process was carried out by the OECD Steering Group which prepared a synthesis paper covering major issues in corporate governance. In support of the work of the Steering Group, the OECD circulated a detailed questionnaire to member counties. Between March 2003 and January 2004, seven successive draft revisions of the principles were submitted by the Steering Group, until a final draft was agreed upon in April 2004.

Chapter 4 of this paper provided a detailed examination of the systems of corporate governance in Australia and Jordan, in the form comparative analysis of the implementation of the OECD Principles 2004 in each jurisdiction. The importance of establishing effective and enforceable legislative frameworks for corporate governance cannot be overstated. From the corporation's perspective, the emerging consensus is that the purpose of high standards of governance is to increase the firm's value, subject to meeting the corporation's financial and legal obligations. From a public policy perspective, the purpose of corporate governance is to nurture the spirit of enterprise whilst ensuring accountability. This was the aim of the OECD Principles 2004. Hopefully, in time, all governments across the globe will fully embrace and implement the Principles.

2. RECOMMENDATIONS

In general terms, the provisions of the Australian *Corporations Act 2001* are, for the most part, consistent with the OECD Principles 2004. The ASX Listing Rules and Principles of Corporate

Governance 2003 are also compliant in almost all important respects. The Jordanian *Companies Law 1997*, however, complies only partially with the OECD Principles 2004 and is in drastic need of reform to bring it into line with internationally recognised standards of corporate governance. On the basis of the comparative analysis and examination detailed in Chapter 4 of this paper, a list of recommendations to the Jordanian Government is set out below. The central purpose of this paper was to formulate recommendations pertaining to the Jordanian *Companies Law*. Accordingly, the deficiencies in the Australian legislative regime that were noted in Chapter 4 have not been repeated.

2.1 General Recommendations

(a) There is no specific translation of the phrase 'governance' in Arabic. This dilemma of terminology is an ongoing difficulty in the discussion and implementation of corporate governance measures in Jordan. If increasing the strength of corporate governance foundations in Jordan is on its agenda, then the Jordanian Government must reach a consensus on a precise translation. Such action would facilitate understanding of the topic and constructive discussions could then be held without confusion. The issue should be moved to the forefront of the corporate governance movement in Jordan because of its logical importance.

(b) There are countless spelling and grammatical errors in the formal English translation of the legislation. Complications regarding the translation process must be resolved so that the legislation can be properly and precisely compared with the corporate governance legislative regimes of other countries.

(c) Policymakers in Jordan must draft and implement a non-binding code of corporate governance in line with the ASX Principles of Corporate Governance 2003. This task should be undertaken by a multidisciplinary working group consisting of stakeholders, regulators and international experts. The establishment of such a code is particularly important for properly defining the role and duties of the board, and effectively protecting the rights of minority shareholders. The founding of the Jordanian Corporate Governance Association and its involvement in the recent MENA-sponsored corporate governance technical assistance workshop[693] are positive steps forward. The second workshop, which is scheduled to be held in Jordan later this year, will provide the perfect landscape to begin the drafting of a code.

(d) To ensure an effective corporate governance framework, it is important to improve the enforcement of existing laws and regulations. Chapter 1 of the OECD Principles 2004 calls on policy makers to give the regulatory authorities within each country the power and resources necessary for effective enforcement of corporate governance initiatives. The enforcement function in Jordan is too fragmented. The most significant difficulties arise because of the separate disclosure statements that each of these bodies require of listed companies. The Jordanian authorities need to review the roles of the Controller of Companies, the CBJ, the JSC, and the Insurance Commission and organise them into a more coordinated and consistent scheme.

2.2 Shareholder Protection

(a) It is too difficult for shareholders to remove directors from the board. According to Article 165 of the *Companies Law*, removing directors from the board requires a signed request of shareholders holding at least 30 percent of the company's share capital. The request must be submitted to the board, who must then call an extraordinary meeting of the general assembly within 10 days of the request. The general assembly must then vote on the request by secret ballot.[694] A simpler procedure is required. The Jordanian

[693] As discussed in the introduction to Chapter 4 of this paper.
[694] Presumably the dismissal request requires at least a majority share of the votes to be accepted, although this is not specified in the *Companies Law*.

authorities should take steps to ensure that the right of shareholders to remove the board of directors without any exceptions is protected by legislation.[695]

(b) Article 175 of the *Companies Law*, regarding the procedure for an ‘extraordinary’ general meeting, should be clarified and simplified in line with the relevant Australian provisions, and the percentage share capital requirement for shareholders to call an extraordinary general meeting should be lowered to 5 percent. Further, the Jordanian authorities should remove the remuneration limitations on directors and amend the legislation so that shareholders are responsible for determining and approving their remuneration.[696]

(c) The *Companies Law* lacks clearly detailed provisions in the area of regulating markets for corporate control, such as those necessary to regulate takeover bids. It is recommended that the Jordanian authorities take steps to address this issue in similar terms to the Australian *Corporations Act*.[697]

(d) A legislative regime should be introduced into the *Companies Law* to encourage institutional investors acting in a fiduciary capacity to disclose their corporate governance policies (including how they manage conflicts of interest) and their voting records on important issues where the value of the investment has been affected or where the board’s recommendation has been voted against by the fund. Furthermore, institutional investors should be encouraged to consult with each other on issues of corporate governance.[698]

(e) The *Companies Law* does not address the rights of minority shareholders in any real depth. Appropriate legal provisions, in line with those in the Australian *Corporations Act*, should be drafted and enforced. This recommendation is discussed in detail in Chapter 5 of this paper. Also, steps should be taken to draft appropriate provisions that deal with the

[695] For more detail see Chapter 4, Section 2.
[696] For more detail see Chapter 4, Section 3.
[697] For more detail see Chapter 4, Section 5.
[698] For more detail see Chapter 4, Section 6.

issues surrounding voting by custodians or nominees, and that remove any impediments to cross border voting.[699]

(f) The Jordanian authorities should draft appropriate amendments to the *Companies Law* that clarify and define related party transactions more broadly, and more clearly define the relevant procedures in line with the relevant Australian provisions.[700]

2.3 Stakeholder Protection

(a) The *Companies Law* does not provide a definition of stakeholders. Further, it does not properly reinforce the role of the stakeholders, particularly with regard to the position of the employee in the corporate governance framework. The Jordanian authorities need to provide a functional definition of stakeholders and create a legislative framework that gives appropriate recognition to the interests of stakeholders and their contribution to the long-term success of the corporation.[701]

(b) The *Companies Law* does not introduce effective mechanisms for employees to obtain redress for violation of their rights. Accordingly, the Jordanian authorities should develop appropriate statutory provisions to protect the rights of employees in a more effective way and introduce new mechanisms for employees to seek redress for violations of their rights.[702]

(c) The rights of whistleblowers in Jordan are not recognised and protected by the law. The Jordanian authorities must act to draft appropriate provisions to protect the rights of

[699] For more detail see Chapter 4, Section 7.
[700] For more detail see Chapter 4, Section 9.
[701] For more detail see Chapter 4, Section 10.
[702] For more detail see Chapter 4, Section 11.

whistleblowers to freely communicate their concerns about illegal and unethical practice within companies.[703]

2.4 Disclosure and Transparency

(a) The disclosure procedures outlined in Articles 140-143 of the *Companies Law* must be more detailed, in line with the relevant Australian provisions.[704]

(b) The requirement in Article 3 of the *JSC Instructions for Disclosure, Accounting and Auditing Standards of Issuing Companies 2004* for a listed company to publish its preliminary business results within 45 days of the end of its fiscal year should be removed. The reason for this is that if earnings are reported before the completion of the audit, auditors may be subject to increased pressure from the company not to make adjustments that would result in profit figures that are lower than those previously released in the unaudited financial statement. Further, any significant difference between the figures released in the preliminary report and those reported in the audited annual report has the potential to mislead investors.[705]

(c) Monitoring compliance with financial reporting standards in Jordan is a difficult issue because the monitoring function is too fragmented and not effectively coordinated. The function is effectively shared between the Controller of Companies, the CBJ, the JSC, and the Insurance Commission. The relevant Jordanian authorities need to review the disclosure requirements from all these sources and organise them into a single scheme so as to make compliance with the requirements less of an administrative burden for companies. This process would require the relevant laws that establish the monitoring function of each of

[703] For more detail see Chapter 4, Section 14.
[704] For more detail see Chapter 4, Section 16.
[705] For more detail see Chapter 4, Section 16.

these bodies to be amended to make them compatible with the new monitoring and enforcement legislative platform.[706]

(d) There needs to be an increased effort in Jordan to educate the media about the corporate governance legislative framework to enable them to whistleblow and publish the names of violators. The current trend of simply relying on company-supplied press releases must stop.[707]

(e) A significant problem in terms of adherence to international standards in Jordan is that translations of the relevant documents issued by the International Accounting Standards Board are not widely available. Accordingly, a lot of firms and auditors have difficulty interpreting the standards. This situation needs to be remedied immediately by the establishment of a body responsible for maintaining and distributing accurately translated versions of the international standards. In conjunction with this development, a regular consultative process must be introduced and maintained to keep the relevant persons and bodies informed in relation to any changes or developments in the international standards.[708]

(f) The *Accountancy Profession Law 2003* should be amended to make the High Council for Accounting and Auditing responsible for monitoring and enforcing accounting and auditing standards. Membership of the Council should not be dominated by professional accountants and auditors and should include representatives from the office of the Controller of Companies, the JSC, the CBJ and the Insurance Commission.[709]

(g) The High Council for Accounting and Auditing should be made responsible for issuing formal instructions on the practical application of international standards and holding regular

[706] For more detail see Chapter 4, Section 16.
[707] For more detail see Chapter 4, Section 16.
[708] For more detail see Chapter 4, Section 17.
[709] For more detail see Chapter 4, Section 18.

consultative sessions to brief all relevant parties on international developments related to improving the standard and transparency of financial reporting.[710]

(h) The general requirements for auditor independence listed in Article 197 of the *Companies Law* must be considerably expanded and effectively enforced.

(i) The quality of public university education in Jordan in accounting and auditing courses requires significant improvement.[711]

(j) Legislative measures need to be introduced that require practicing auditors to take regular training under a continuing professional education scheme.[712]

(k) An appropriate supervision scheme needs to be established so professional accountants have sufficient practical training under the supervision of an experienced audit practitioner before receiving an audit practice certificate.[713]

(l) The development of an internet-based electronic filing and data retrieval system would significantly improve company information dissemination in Jordan. This should be a top priority.[714]

2.5 Responsibilities of the Board

(a) The Jordanian authorities should consider drafting the duties of directors in more explicit terms, similar to the Australian provisions. Further, it is recommended that the restriction requiring directors to possess a certain number of shares to be eligible for board

[710] For more detail see Chapter 4, Section 18.
[711] For more detail see Chapter 4, Section 18.
[712] For more detail see Chapter 4, Section 18.
[713] For more detail see Chapter 4, Section 18.
[714] For more detail see Chapter 4, Section 18.

membership should be removed.[715] This move would encourage independent and technical expertise on boards rather than the current situation of boards being dominated by the controlling family.

(b) The Jordanian authorities should consider drafting appropriate provisions to address the issue of boards applying high ethical standards.[716]

(c) The Jordanian authorities should consider drafting more explicit and detailed provisions requiring the board to take measures to review and guide corporate strategy, and to monitor the effectiveness of corporate governance practices.[717]

(d) Whilst simple in administrative terms, the Jordanian method of setting the remuneration of directors as a percentage of the company's annual net profit will not always be effective in ensuring that appropriate salaries are paid to directors in line with the best interests of company. Accordingly, the *Companies Law* should be amended to allow shareholders to determine the remuneration of directors.[718]

(e) The Jordanian authorities should enact legislative provisions that clearly and explicitly provide for the role of the board of directors in monitoring and managing conflicts of interest, ensuring the integrity of the corporation's accounting and financial reporting systems, and overseeing the process of disclosure and communications.[719]

(f) The *Companies Law* should require, in explicit terms, the appointment of independent directors to tasks where there is a potential for conflicts of interest. Accordingly, the Jordanian authorities must introduce the concept of independent non-executive directors

[715] For more detail see Chapter 4, Section 21.
[716] For more detail see Chapter 4, Section 23.
[717] For more detail see Chapter 4, Section 24.
[718] For more detail see Chapter 4, Section 26.
[719] For more detail see Chapter 4, Section 28.

to the *Companies Law* or through a code of corporate governance similar to the ASX Principles of Corporate Governance 2003.[720]

(g) The Jordanian authorities must enact provisions that emphasise and clearly provide for the statutory right of directors to have full access to relevant information on a timely and regular basis.[721]

3. FINAL REMARKS

The comparative analysis outlined in this paper has served to reinforce that the Jordanian *Companies Law 1997* is in desperate need of a complete overhaul. The vast majority of the provisions, of which there are less than 300 in total, are drafted in very broad terms and lack the necessary detail to deal with the complex area of corporate law. Whilst the specific recommendations outlined in the section above identify the 'main' deficiencies in the legislation, the reality is that almost every provision requires expansion and clarification. If the Jordanian Government is serious about strengthening its corporate governance framework, and it should be, then it is necessary to put all of its weight behind the recently-established Jordanian Corporate Governance Association to bring the legislative reform process into action.

Company law in Jordan has already undergone significant changes in recent years. The implementation of the privatisation program under the guidance of the World Bank and the International Monetary Fund prompted the creation of the ASE, the JSC and the SDC, and there can no doubt that these institutions have fuelled the general improvement of corporate governance practices in Jordan to some extent. But these changes have merely scratched the surface of necessary reform. The time has come for the relevant authorities in Jordan to establish extensive and detailed legislative measures to ensure that the systems of corporate governance in Jordan are in line with internationally recognised standards and practices such as those evidenced in the OECD Principles 2004.

[720] For more detail see Chapter 4, Section 29.
[721] For more detail see Chapter 4, Section 30.

APPENDIX

OECD PRINCIPLES OF CORPORATE GOVERNANCE 2004

Chapter 1: Ensuring the Basis for an Effective Corporate Governance Framework

The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.

A. *The corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets.*

B. *The legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be consistent with the rule of law, transparent and enforceable.*

C. *The division of responsibilities among different authorities in a jurisdiction should be clearly articulated and ensure that the public interest is served.*

D. *Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner. Moreover, their rulings should be timely, transparent and fully explained.*

Chapter 2: The Rights of Shareholders and Key Ownership Functions

The corporate governance framework should protect and facilitate the exercise of shareholders' rights.

A. *Basic shareholders' rights should include the right to: (1) secure methods of ownership registration; (2) convey or transfer shares; (3) obtain relevant information on the corporation on a timely and regular basis; (4) participate and vote in general shareholder meetings; (5) elect and remove members of the board; and (6) share in the profits of the corporation.*

B. *Shareholders have the right to participate in, and be sufficiently informed on, decisions concerning fundamental corporate changes such as: (1) amendments to statutes, or articles of incorporation or similar governing documents of the company; (2) the authorisation of additional shares; and (3) extraordinary transactions, including the transfer of all or substantially all assets, that in effect result in the sale of the company.*

C. *Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings.*

(1) *Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.*

(2) *Shareholders should have the opportunity to ask questions to the board, including questions relating to the annual external audit, to place items on the agenda of general meetings, and to propose resolutions, subject to reasonable limitations.*

(3) Effective shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated. Shareholders should be able to make their views known on the remuneration policy for board members and key executives. The equity component of compensation schemes for board members and employees should be subject to shareholder approval.

(4) Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or absentia.

D. Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.

E. Markets for corporate control should be allowed to function in an efficient and transparent manner.

(1) The rules and procedures governing the acquisition of corporate control in the capital markets and extraordinary transactions such as mergers and sales of substantial portions of corporate assets should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class.

(2) Anti-takeover devices should not be used to shield management and the board from accountability.

F. The exercise of ownership rights by all shareholders, including institutional investors, should be facilitated.

(1) *Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights.*

(2) *Institutional investors acting in a fiduciary capacity should disclose how they manage material conflicts of interest that may affect the exercise of key ownership rights regarding their investments.*

G. *Shareholders, including institutional shareholders, should be allowed to consult with each other on issues concerning their basic shareholder rights as defined in the Principles, subject to exceptions to prevent abuse.*

Chapter 3: The Equitable Treatment of Shareholders

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

A. *All shareholders of the same series of a class should be treated equally.*

(1) *Within any series of a class, all shares should carry the same rights. All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase. Any changes in voting rights should be subject to approval by those classes of shares which are negatively affected.*

(2) *Minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress.*

(3) Votes should be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares.

(4) Impediments to cross border voting should be eliminated.

(5) Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cast votes.

B. Insider trading and abusive self-dealing should be prohibited.

C. Members of the board and key executives should be required to disclose to the board whether they, directly, indirectly or on behalf of third parties, have a material interest in any transaction or matter directly affecting the corporation.

Chapter 4: The Role of Stakeholders in Corporate Governance

The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active cooperation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

A. The rights of stakeholders that are established by law or through mutual agreements are to be respected.

B. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.

C. Performance-enhancing mechanisms for employee participation should be permitted to develop.

D. *Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient, and reliable information on a timely and regular basis.*

E. *Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practice to the board and their rights should not be compromised for doing this.*

F. *The corporate governance framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights.*

Chapter 5: Disclosure and Transparency

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

A. *Disclosure should include but is not limited to, material information on:*

(1) *The financial and operating results of the company.*

(2) *Company objectives.*

(3) *Major share ownership and voting rights.*

(4) *Remuneration policy for members of the board and key executives, and information about board members, including their qualifications, the selection process, other company directorships, and whether they are regarded as independent by the board.*

(5) *Related party transactions.*

(6) *Foreseeable risk factors.*

(7) *Issues regarding employees and other stakeholders.*

(8) *Governance structures and policies, in particular, the content of any corporate governance code or policy and the process by which it is implemented.*

B. *Information should be prepared and disclosed in accordance with high quality standards of accounting and financial and non-financial disclosure.*

C. *An annual audit should be conducted by an independent, competent, and qualified auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the company in all material respects.*

D. *External auditors should be accountable to the shareholders and owe a duty to the company to exercise due professional care in the conduct of the audit.*

E. *Channels for disseminating information should provide for equal, timely and cost-efficient access to relevant information by users.*

F. *The corporate governance framework should be complemented by an effective approach that addresses and promotes the provision of analysis or advice by analysts, brokers, rating agencies and others, that is relevant to decisions by investors, free from material conflicts of interest that might compromise the integrity of their analysis or advice.*

Chapter 6: The Responsibilities of the Board

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the company and the shareholders.

B. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.

C. The board should apply high ethical standards. It should take into account the interests of stakeholders.

D. The board should fulfil certain key functions, including:

(1) Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.

(2) Monitoring the effectiveness of the company's governance practices and making changes as needed.

(3) Selecting, compensating, monitoring, and, where necessary, replacing key executives and overseeing succession planning.

(4) Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.

(5) Ensuring a formal and transparent board nomination and selection process.

(6) Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.

(7) Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.

(8) Overseeing the process of disclosure and communications.

E. The board should be able to exercise objective, independent judgement on corporate affairs.

(1) Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflicts of interest. Examples of such key responsibilities are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, nomination of board members and key executives, and board remuneration.

(2) When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.

(3) Board members should be able to commit themselves effectively to their responsibilities.

F. In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.

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