CHAPTER ONE

GENERAL INTRODUCTION

1.1.BACKGROUND OF THE STUDY

The idea of corporate governance is not a new concept in Nigeria and in global corporate practice. Its history and practice have been well documented. Corporate governance is a concept which mixes a number of sociological and legal principles in the management of a company and how it relates to the society. However, just like most other social concepts and ideals, it needs constant refinement and changes to keep ahead and remain functional as a social tool.

It can be argued that corporate governance is an important feature of any developed or developing economy. In recent times, it has become an integral form of regulation for companies, and stakeholders as they manage the growing influence of corporate bodies on culture, consumption, lifestyle, goods and services of and for the society. Corporate governance is important for a lot of reasons. One of the reasons that has been attested is the role corporations have come to play in the economic and social aspects of the society[1]. Corporate governance is also important for the thriving of a healthy economic system, which makes such a system a good destination for capital inflow. It is a system of governance that encourages the creation of standards and policies which encourage transparency, anti-corruption, healthy competition, among others. The origin of the concept of corporate governance itself has been traced to the Asian Economic Crisis in the late 90s[2].

There are several attempts and efforts made to define the concept of corporate governance by different scholars and theorists alike. However, the definition of the Organization for

[1] Shafi Mohamad, 'The Importance of Effective Corporate Governance' [2011] SSRN Electronic Journal.
[2] Ibid.

Economic Cooperation and Development (OECD) is said to symbolize the international consensus on the meaning of the concept which it defines as the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of right and responsibilities among different participants in the corporation such as the board, managers, shareholders and other stakeholders and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set and the means of attaining those objectives and monitoring performance.[3]

Corporate governance is a wide field of regulations, laws and practices that guide the corporate bodies which have become very important for developed and developing economies. This work seeks to assess the corporate governance standards in two different countries, namely Australia and Nigeria. The purpose of which is to determine possible distinctions between the two jurisdictions, as against international standards and how this can be used to improve the state of corporate governance. The work also intends to show the debates surrounding the different theories of corporate governance, that is, whether the stakeholder or shareholder theory holds. Through an analysis of these theories, and which applies in the respective countries, this work attempts to determine which theories are prevalent and effective.

This research is a comparative exercise that will show what roles corporate stakeholders play in the corporate governance regimes of different countries and how the comparison can be used to improve the corporate governance regime of Nigeria. The work will also assess the theories of corporate governance which are more popular in the settings of the jurisdictions selected.

[3] Organization for Economic Corporation and Development (2004) 'OECD principles of corporate governance' OECD publication service, pp. 11-15

Finally, the thesis will make use of international benchmarks such as the Organization for Economic Cooperation and Development (OECD) 2004 principles to make recommendations on possible solutions to policymakers and stakeholders in the respective countries.

1.2. STATEMENT OF PROBLEM

Some of the debates which can be raised on the history and development of corporate governance is whether it is a legal concept or a sociological concept. These interpretations can also be extended into asking whether corporate governance is a legal obligation or merely a social duty that companies may independently opt for as a form of social responsibility.

This study seeks to explore the continuous changing nature of corporate governance using the two case studies of Australia and Nigeria. The problem that social concepts such as corporate governance encounter is that they are easily subject to changes in response to the changing dynamics of society. These changes make it necessary to study and assess how tools like corporate governance fit into new situations.

1.3. RESEARCH QUESTIONS

1. What is the legal climate for corporate governance in Australia and Nigeria?
2. What are the distinctions between the legal frameworks of corporate governance in Nigeria and Australia?
3. In what instances have the Nigerian legal framework for corporate governance fallen short of international standards?

4. What are the means of efficient corporate governance, as measured against OECD Principles?

1.4. OBJECTIVES OF THE STUDY

1. To identify and define the principal stakeholders in the corporate governance structure under Australian and Nigerian Laws.

2. To distinguish between the shareholder theory and the stakeholder theory and determine which one, based on theory, is more prevalent in the legal framework of the countries identified.

3. To compare the legal and administrative frameworks of Australia and Nigeria and measure them up against the standards of the OECD Principles.

1.5. RESEARCH METHODOLOGY

The method required for exploring this chosen topic consists of the qualitative method. Peripheral data sources on the impact of corporate governance on economic growth and development in the two case study countries will be assessed. Primary sources such as laws, statutes, court cases and regulations of the countries will be analyzed. The research will also assess secondary sources such as reports, journals and articles on the question of corporate governance. A discourse analysis will also be undertaken with heavy reference to OECD principles and surveys. The preference for OECD data stems from its entrenched impact on the sector and its international guiding role in the regulation of corporate governance globally.

1.6. SIGNIFICANCE OF THE STUDY

Corporate governance is becoming more important in a society which is highly powered by corporations providing goods and services through business solutions that are continuously innovative. As globalization increases and modern technology makes more changes to established systems, the need for up-to-date corporate governance standards also become very important. One of the significance this study brings is the comparative nature which allows a cursory look into how corporate governance standards impact service delivery in developed and developing countries. While developed countries like Australia may have a host of studies which assess the positive impact of corporate governance standards, there is a dearth of studies on developing countries[4].

Furthermore, there have been a few theoretical explanations on the importance of corporate governance to the society such as the one highlighted by Gregory and Simms (1999) in [5] In the more competitive world of attracting investments, different countries have mustered their standards in a bid to attract foreign capital inflow to shore up their economic growth and development. It therefore becomes imperative for a study on the impact of corporate governance on the economic development of countries. The study will enable us study if corporate governance has positively impacted the economic growth of economies like Australia's. In addition, this study will analyze the current loopholes in the corporate governance systems of Nigeria, particularly through the aforementioned comparative, and the contributing factors to same. It will also help us study whether improving corporate governance standards can positively drive the growth of economies

[4] Zain Sharar, 'A Comparative Analysis of the Corporate Governance Legislative Frameworks in School of Law A Comparative Analysis of the Corporate Governance Legislative Frameworks in Australia and Jordan Measured against the OECD Principles of Corporate Governance 2004 '.

[5] Mohamad (n 1).

in developing countries like Nigeria and whether their standards are at par with current international standards.

1.7. THEORETICAL FRAMEWORK

A lot of literatures have discussed what the concept of corporate governance is and how it affects development in the society. For example, some studies have assessed how corporate governance rules influence investing behaviour.[6] Other studies have also assessed how corporate governance impacts sector-wide industries. For example, the banking industry is one which has been heavily influenced by corporate governance standards.[7] While the good side of corporate governance has been highlighted by several studies, some have also explored the negative aspect of poor corporate governance standards, by highlighting scandals such as the Enron Scandal, the WorldCom Scandal, and the Lehman Brothers scandal in the past decade among many others.[8] These have significantly analyzed how said scandals affected the respective industries, and how they may be prevented in the future.

However, this study intends to take the analysis of corporate governance structures beyond definitions and how they only impact sectors. This study will conduct a comparative analysis between a developed country and developing country with a view to highlighting how corporate governance could impact economic growth and development. While studies such as Sharar[9] have done a comparative analysis of corporate governance codes in Australia and Jordan but not many studies have assessed Nigeria.

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[6] Dimity Kingsford Smith, 'Governing The Corporation: The Role Of "Soft Regulation"' (2012) 35 Unswlj 378.
[7] Bank for International Settlements, *Principles for Enhancing Corporate Governance* (2010).
[8] Md ShamimulHasar, Normah Binti Omar and Morrison MandleySchachler, 'The Importance of Corporate Governance in Promoting Business : Perception and Reality' [2015] ResearchGate.
[9] Sharar (n 3).

The prevailing theories of corporate governance in many jurisdictions are the shareholder primacy and the stakeholder theories. While the shareholder primacy theory proponents suggest that corporate law must drive directors to provide and maximize shareholder value above every other thing, the stakeholder theory widens the beneficiary of corporate duty to other stakeholders like the consumer, community of participation etc. The nature and extent to which either of this is practiced in Nigeria remains nebulous given the recent revamp of the legal framework to introduce the companies and allied matters act of 2020 and the regulations in the next year. To this end, this study will investigate the status of these theories within the context of Nigerian laws and administrative bodies as well as against international standards with core lessons drawn from functional jurisdictions like Australia and the OECD principles.

1.8. LEGAL FRAMEWORK

The primary corporate law in Nigeria is the Companies and Allied Matters Act 2020. This was recently introduced as part of a revamp of Nigeria's corporate sphere to keep pace with international standards and functional demands of commercial activity. This will form the key component of this research while answering the research questions. Further sources of laws applicable include the Companies Regulations issued by the corporate affairs commission in 2021, judicial precedents and applicable codes of corporate governance issued by regulators in varying fields. On the administrative end, the Corporate Affairs Commission (CAC) is the primary regulator responsible for enforcing the provisions of the CAMA and other extant laws. The Securities and Exchanges Commission (SEC) also plays a significant role in the regulation of publicly listed companies by issuing regulations including its own Code of Corporate Governance for Public Companies.

Unlike Nigeria where corporate governance laws are hard coded, Australia takes a soft law approach with minimal mandatory provisions contained in its applicable laws. This forms part of the key investigations in this research. The primary law in Australia is the Corporations Act of 2001 enforced alongside the provisions of common law and periodic regulations issued by the Australian Securities and Investments Commission (ASIC). Aside from these legal instruments, companies desirous of listing and publicly listed companies are bound by the rules of the Australian Stock Exchange (ASX) as well as the ASX Corporate Governance Principles and Recommendations.

1.9. STRUCTURE OF STUDY

This chapter of this study has laid the background to the research providing an insight into the problem, research questions, aims and objectives of study, as well as an overview of the legal and theoretical framework to be considered in the course of this research. Chapter two will examine existing literature in a bid to expose the research gaps and highlight the areas where this research intends to contribute to existing knowledge in the field of corporate law. Under chapter three and four the shareholder primacy and stakeholder consideration theories in Australia and Nigeria are considered along with other issues arising in relation to corporate governance in Nigeria when put against the international benchmarks set by the OECD. Chapter five concludes the research and provides recommendations to address some of the lapses that have been highlighted by this research.

1.10. DEFINITION OF TERMS

Shareholder Primacy means the theory of corporate governance that requires directors to ensure that they maximize shareholder value.

Corporate Governance is the entire gamut of oversight and supervisory function of the directors of a company. Alternatively, corporate governance is the system of rules, practices and processes by which a company is directed and controlled.

Stakeholder means persons or entities who are reasonably affected by the acts or omissions of a company. Stakeholder includes shareholders, employees, analysts, creditors, customers, regulators, vendors, host community, non-governmental organizations and government.

Shareholder means a person who bears membership of a company by reason of its contribution to its funds or its promise to share its liability at winding up.

Company means a corporate entity incorporated under the relevant laws of a jurisdiction. For the context of Nigeria, a company means a company incorporated under the Companies and Allied Matters Act, Cap 20. Laws of the Federation of Nigeria 2004.

OECD means the Organization for Economic Cooperation and Development.

CHAPTER TWO

LITERATURE REVIEW

2.1 ANTECEDENCE OF CORPORATE GOVERNANCE AND THEORETICAL FRAMEWORKS THROUGH EXISTING LITERATURE

A lot of research efforts have been directed towards understanding the historical antecedents of corporate governance at the national and international level. This may be attributed to various reasons including the bid to understand the nature and source of some of the most dominant principles of corporate governance and their socio-political significance in respect of each location of study. Research suggests that the domestic frameworks of corporate governance developed mostly alongside the international framework particularly with the central role the Organization for Economic Cooperation and Development (OECD) has played in the development of the modern framework.[10]

Zain Sharar, in their work on the corporate governance structure in Jordan traced the history of modern corporate governance framework to the financial crises in East Asia, Russia, and incidences of corporate scandals and failures across several continents leading to increased focus on corporate governance systems to forestall further occurrences and protect the stability of the international financial market.[11] There has been copious research corroborating this position to such extent as implying that corporate fraud and catastrophes

[10] SODALI and Governance Consultants S.A., 'White Paper on the Importance of Corporate Governance in State Owned Enterprise Prepared for CAF - Latin American Development Bank' (2012) <http://www.oecd.org/daf/ca/SecondMeetingLatinAmericaSOECAFWhitePaper.pdf>.

[11] Zain Sharar, '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.' (2007).

have been the catalysts to the development of a robust corporate governance framework at the domestic and international scene.[12]

This reportedly formed the build-up to the push by the OECD policy makers in 1998 along with other international organizations and stakeholders in the private sector to form a set of corporate governance principles with universal application. This essentially laid the foundation for the OECD Principles of Corporate Governance of 1999. A revised edition was subsequently introduced in 2004. While this developed at the international level as a standard form of corporate governance rules, states have developed bespoke codes and rules governing corporate governance within their territories by mostly adapting the OECD standard with necessary modifications.

The influence of the OECD has been expressed by academics to be one of the major reasons why the term "Corporate governance" has now come to be of popular usage.[13] Some of the recorded effects of this intensified efforts at corporate governance by the OECD includes substantial change in stock market activities at a time when the Australian economy has been awash with series of corporate scandals. The media at the time also drew attention on these corporate excesses with more stakeholders joining in on the call for a robust framework of corporate governance to address the problems arising.[14]

As the intensity of research on the subject of corporate governance grew across the world, several theories underpinning each writer's understanding of the subject was developed and popularized. For instance, Millstein wrote extensively on the agency theory of corporate governance, a spectrum from which he viewed the subject as the monitoring mechanism for

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[12] Ghulam Abid and others, 'Theoretical Perspectives of Corporate Governance' (2014) 3 Bulletin of Business and Economics 166, 167.

[13] Barbara Marie L'Huillier, 'What Does "Corporate Governance" Actually Mean?' (2014) 14 Corporate Governance (Bingley) 300, 3.

[14] Marie L'Huillier (n 4); Dignam Alan and Galanis Michael, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2004) 28 Melbourne University Law Review 623.

shareholders to constantly keep the manager's control in check for enhancement of profit and promotion of gains on shareholding.[15] The agency theory was one of the earliest offshoots, as a previous understanding of corporate governance was that it was rather narrowly focused on the *principal–agent* relationship[16] between the shareholders and the management of the company.[17] Conversely, *Vasudev* argues that there is evidence of the stakeholder theory in practice in the early nineties as corporate philanthropy and accounting for interests of non-shareholder groups.[18] This eventually grew into the modern focus on corporate social responsibility as a mainstream practice of good corporate governance.[19]

The history of corporate governance in Nigeria is more often traced to the colonial relationship between the country and Britain. This is mostly because of the relative lack of indigenous corporate structures prior to the British annexation of Lagos in 1861, which ushered in some foreign companies for exports and trading purposes.[20] Afolabi alludes to this point in their work on the corporate governance practices in Nigerian and Ghanaian firms.[21] The work further establishes that by this colonial relationship, the country inherited the Anglo-Saxon model of corporate governance consisting mostly of legislations and regulations including the Companies ordinance of 1922 which was promulgated by the colonial masters and the Nigerian Companies Act of 1968 which was modelled after the 1948 United Kingdom's Companies act. Citing, Adegbite and Nakajima, the work argues that this reliance on the UK model has caused a lasting deficiency in the Nigerian Corporate Governance

[15] Frederick Ochieng Oluoch, 'Corporate Governance as a Respnse to Environmental Turbulence: The Role of Non-Governmental Organization's Board' (2017) 26 <https://ci.nii.ac.jp/naid/40021243259/>.
[16] Peer C Fiss, 'Institutions and Corporate Governance' [2011] SSRN Electronic Journal 389, 389.
[17] Augustine Ujunwa, 'Rethinking Corporate Governance in Nigeria' (2011) 9 Corporate Ownership and Control 269, 275.
[18] PM Vasudev, 'The Stakeholder Principle, Corporate Governance and Theory - Evidence from the Field and the Path Onward' (2012) 41 SSRN 27.
[19] ibid 29.
[20] Ujunwa (n 8) 270.

[21] Adeoye Amuda Afolabi, 'Examining Corporate Governance Practices in Nigerian And' (2015) 3 European Journal of Accounting Auditing and Finance Research 10.

Model given that it has failed to consider the peculiarities of the Nigerian Polity especially the socio-political factors and the general business environment.

A striking similarity in the development of the individual corporate governance frameworks for Nigeria and Australia is the initial influence of bank failures and poor financial performance of corporate bodies in the calls for a well-developed framework.[22] Thomson and Jain examined the impact of corporate governance failures on national bank collapses in Australia and concluded that these events were catalysts for the emergence of the more robust framework post 2000s.[23]Ailemen and Ojeka argued regarding the Nigerian jurisdiction that though there are a lot of financial related factors involved in the distressed banks situations in the early 2000s in Nigeria, much of the problem could have been curbed by good corporate governance through well-designed regulations, codes and policies.[24]Onakoya, Ofoegbu and Fasanya also considered this subject by examining six selected banks listed on the Nigerian Stock exchange and their performance between 2005 and 2009.[25] The conclusion of the study aligns with Ailemen and Ojeka's position because it cites a failure of corporate governance as the reason for the poor performance of the studied banks although it placed responsibility for such failure on the lax attitude of the management towards the prevailing good corporate governance practices.[26] Several other research conducted in both jurisdictions lend credence to this notion.[27]

[22] Ian Willliams, 'Corporate Governance in Australia' 6.
[23] Dianne Thomson and Ameeta Jain, 'Corporate Governance Failure And Its Impact On National Australia Banks Performance' (2006) 2 Journal of Business Case Studies (JBCS) 41, 53.
[24]IkpefanOcheiAilemen and Stephen Ojeka, 'Corporate Governance as a Tool For Curbing Bank Distress In Nigeria Deposit Money Banks: Empirical Evidence' (2013) 7 Journal on Management 41, 48.

[25] ABO Onakoya, Donald I Ofoegbu and Ismail O Fasanya, 'Corporate Governance and Bank Performance: A Pooled Study of Selected Banks in Nigeria' (2012) 8 European Scientific Journal 155.
[26] ABO Onakoya, Donald I Ofoegbu and Ismail O Fasanya, 'Corporate Governance and Bank Performance: A Pooled Study of Selected Banks in Nigeria' (2012) 8 European Scientific Journal 155.
[27] David Nkata Bassey, 'Corporate Governance Implementation in the Nigerian Banking Industry.' (2018) 1,2.

2.2 LEGAL AND REGULATORY FRAMEWORK FOR CORPORATE GOVERNANCE

2.2.1. CORPORATE GOVERNANCE IN AUSTRALIA

The primary regulatory body charged with the administration of the affairs of companies and corporate bodies in Australia is the Australian Securities and Investments Commission.[28] It is saddled with the authority to make regulatory guidelines and enforce compliance with disclosure requirements of the extant laws. Williams categorizes the legal framework into hard law such as the Corporations Act of 2001, soft law such as the Australian Securities Exchange Limited listing rules and non-binding guidelines such as the Securities Exchange Corporate governance principles.[29] The work particularly emphasizes the highly regulated nature of the framework and extensive provisions on personal liability of directors because of the *ad hoc approach* the country has taken in relation to legislative reform.[30]

Like Nigeria, the Australian system is also largely influenced by the British framework, and this partly informs the regular description of the country's framework as being like the Anglo-Saxon outsider system of ownership and control. Although academics have tried to debunk this in copious literatures,[31] the influence of the Anglo-Saxon system can hardly be divorced from the Australian framework.[32] Like many other spheres, studies have revealed that the corporate governance principles in Australia are constantly developing with new provisions governing the duties of the board of directors being churned out periodically by

[28]Organisation for Economic Co-operation and Development, 'OECD Corporate Governance Factbook 2019' [2019] www.oecd.org/Corporate/Corporate-Governance-Factbook.Htm 1 <https://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf%0Ahttp://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf>.

[29]Willliams (n 13) 3.

[30] Ibid 3.

[31] Reza M Monem, 'Determinants of Board Structure: Evidence from Australia' (2013) 9 Journal of Contemporary Accounting and Economics 33; Asjeet S Lamba and Geofrey P Stapledon, 'The Determinants of Corporate Ownership Structure: Australian Evidence' [2005] SSRN Electronic Journal 1.

[32] Alan and Michael (n 5) 625.

regulators.[33] This has been attributed to a myriad of reasons including social, political and economic factors. With the corporate space becoming increasingly politically saturated, public policy consideration takes center stage in decision making the boards of directors of companies. Some writers have argued, using the United States and Donald Trump example, that corporate leadership change constantly because of the changing business landscape and normative implications of changes in the political environment.[34]

2.2.2. CORPORATE GOVERNANCE IN NIGERIA

There has been some significant development in the corporate governance law and policy space since Nigeria gained independence from Britain in 1960. The law has since evolved from mere provisions of the Companies and Allied Matters Act of 1990 to the enactment of certain codes and regulations of general and specific application to all sectors of the Nigerian economy. Funminiyi Adegoke made assertions in their work on the relative weaknesses of the Nigerian codes, particularly before the enactment of the specific codes.[35] The work reveals the weak nature of the Nigerian corporate governance culture, with many boards of companies having their powers fettered and being unable to claim responsibility for the success or failure of the company.

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[33] Mark Rix, 'The New Australian System of Corporate Governance: Board Governance and Company Performance in a Changing Corporate Governance Environment' (2019) 1 Corporate Law and Governance Review 29, 4.

[34] ibid 41.

[35] Jonathan Funminiyi Adegoke, 'Corporate Governance and Productivity in Nigerian Manufacturing Industries' (2013) 18 EJBO : Electronic Journal of Business Ethics and Organizational Studies 38, 45.

Ujunwa further expounds on corporate governance in the period after the Nigerian independence from Britain. The work discloses that the policy direction at the time was of state ownership and control of major sources of production with minimal foreign ownership. This had a spillover effect on the corporate governance structure in the country as the government introduces indigenization policies setting maximum ownership of foreign investors in Nigerian companies through the two pronged legislative approach in the form of the Foreign Exchange Control Act of 1962 and the Nigerian Exports Promotion Decree No. 4 of 1972. Aside from the obvious complications this brought to the Nigerian Foreign exchange scenes, the work also appreciates the complications involved in the government membership or ownership of corporate bodies despite being the regulator. Some issues raised in this work have been subsequently addressed by the author and some other researchers, particularly in the light of the enactment of the companies and allied matters act of 1990 amended in 2020. However, there is still a dearth of research on the direction taken by the 2020 act regarding the theories of corporate governance, and this work intends to fill that gap. This work will compare the general Nigerian Legal framework with the Australian framework and identify differences and deficiencies.

CAMA 1990 governed corporate affairs in the nation prior to its abolition. It created the Corporate Affairs Commission, which provided for the formation of corporations, the registration of company names, and the formation of Trustees of various communities, organisations, and associations.[36] However, it quickly became hampered and became a breeding ground for some business malpractices, owing principally to the impending shift of the Nigerian corporate scene.

Stakeholders' need for a more refined piece of law resulted in the passage of CAMA 2020, which has been deemed a welcome and timely development. Not only did it remove the

[36] Section 1 CAMA 2020

previous 30-year-old Act, which had been suited to British legislation and had become stale, but it also acknowledged modern business realities and developments and, as a result, developed expanded provisions in conformity with best practices.[37] Upon the abolition of CAMA 1990 by CAMA 2020, the Corporate Affairs Commission ("CAC") and business administration in Nigeria have undergone substantial changes. From the incorporation procedure through the post-incorporation affairs of the corporations, to meet the current need in the establishment and administration of commercial and non-business organizations. The Act made significant modifications in the realm of corporate governance.

Research has shown that good corporate governance practices along with conscientious adoption of the principles by the directors of the company has a significant positive effect on the financial performance of the companies[38]. Oyerinde alludes to this point in their work on the relationship between corporate governance and the performance of banks in Nigeria which revealed a proximity between bad corporate governance practices and the poor performance of banks before the enactment of the Central Bank of Nigeria (CBN) Code of Good Corporate Governance for Banks and Other Financial Institutions in the early 2000s.[39]

2.2.2.1 Corporate Governance under Companies and Allied Matters Act 2020

The primary law governing corporate governance in Nigeria has been the Companies and Allied Matters Act for many years. The mechanisms for good corporate governance it offer include the appointment of directors by the company, the removal of directors by ordinary resolution, the duties and liabilities of directors, the requirements for auditors and the audit

[37] Ibid

[38] Ruth Osaretin O Urhoghide (Ph.D) and Korolo Emmanuel Omolaye, 'Effect of Corporate Governance on Financial Performance of Quoted Oil and Gas in Nigeria' (2017) 8 International Journal of Business and Social Science 48, 9.

[39] Adewale AtandaOyerinde, 'Corporate Governance and Bank Performance in Nigeria: Further Evidence from Nigeria' (2014) 9 International Journal of Business and Management 133.

committee, the disclosure requirements, and the requirement that shareholders participate in certain corporate decisions.

CAMA 2020 has taken deliberate steps to ensure that enterprises in Nigeria are managed in an efficient, responsible, and transparent manner. This is evident in areas like as directors, secretaries, audit and auditors, meetings, and corporate finance. The sections listed below must be evaluated.

Directors: The requirement for the appointment of independent directors to company boards stems from the fact that independence is an important pillar of excellent corporate governance procedures. By offering boards of directors their unbiased and independent opinions, independent directors are supposed to act as a check on the administration of companies.[40] Additionally, they stand in for the interests of small shareholders. Thus, to enhance corporate governance principles in publicly owned companies, the Act provides for the minimum threshold of at least three Independent Directors for public companies and at least one director for small companies.[41] Although a right move, the Act in respect to the qualifications of Independent Directors conflicts with the **principle 7** of the Code of Corporate Governance 2018 (CCG) published by the Financial Reporting Council of Nigeria (FRCN).[42]

The Companies and Allied Matters Act provides thus:

> *275.—(1) A public company shall have at least three independent directors. (2) In a public company, any person who nominates candidates for the board who would comprise a majority of the members of the board shall nominate at least three persons who would be independent directors. (3) In this section, "independent director" means a director of the company who, or whose relatives either separately or together*

[40] ULOAKU E, Business day 'A look at the new CAMA from a corporate governance perspective' https://businessday.ng/amp/opinion/article/a-look-at-the-new-cama-from-a-corporate-governance-perspective/ accessed 19 August 2022

[41] Section 275 CAMA

[42] Obayomi W, The sea is history – the Companies and Allied Matters, 2020 aspires to optimize corporate regulation in Nigeria. KPMG Nigeria.

with him or each other, during the two years preceding the time in question— (a) was not an employee of the company ; (b) did not— N (i) make to or receive from the company payments of more than 20,000,000, or

(ii) own more than a 30% share or other ownership interest, directly or indirectly, in an entity that made to or received from the company payments of more than the amount stated in subparagraph (i) or act as a partner, director or officer of a partnership or company that made to or received from the company payments of more than such amount

(c) did not own directly or indirectly more than 30% of the shares of any type or class of the company, and Liability of a person where not duly appointed. Share qualification of Directors. Duty of Directors to disclose age and multiple directorship to the company.

(d) was not engaged directly or indirectly as an auditor for the company.

The CCG on the other hand prescribes:

An Independent Non-Executive Director (INED) should represent a strong independent voice on the Board, be independent in character and judgment and accordingly be free from such relationships or circumstances with the Company, its management, or substantial shareholders as may, or appear to, impair his ability to make independent judgment.

7.2 An INED is a NED who:

7.2.1 does not possess a shareholding in the Company the value of which is material to the holder such as will impair his independence or in excess of 0.01% of the paid up capital of the Company;

7.2.2 is not a representative of a shareholder that has the ability to control or significantly influence Management;

7.2.3 is not, or has not been an employee of the Company or group within the last five years;

7.2.4 is not a close family member of any of the Company's advisers, Directors, senior employees, consultants, auditors, creditors, suppliers, customers or substantial shareholders;

7.2.5 does not have, and has not had within the last five years, a material business relationship with the Company either directly, or as a partner, shareholder, Director or senior employee of a body that has, or has had, such a relationship with the Company;

7.2.6 has not served at directorate level or above at the Company's regulator within the last three years;

7.2.7 does not render any professional, consultancy or other advisory services to the Company or the group, other than in the capacity of a Director;

7.2.8 does not receive, and has not received additional remuneration from the Company apart from a Director's fee and allowances; does not participate in the Company's share option or a performance-related pay scheme, and is not a member of the Company's pension scheme; and

7.2.9 has not served on the Board for more than nine years from the date of his first election.

Said conflict is however less significant in the actual application of the two legislation. This is noted as CAMA is the main and prevalent legislation on all matters relating to companies. Furthermore, it is provided under Principle 7 of the Code of Corporate Governance (CCG), particularly 7.3 that; "*The above-mentioned criteria for establishing the independent status of an INED are not exhaustive, but should be considered as examples of some of those relationships or circumstances which may impair, or appear to impair an INED's independent judgment.*"

By implication, and in accordance with its core ideology of flexibility, the code recommends standards with the intention that it should apply to a wide range of companies of differing sizes, while CAMA mandates the same, but all aimed at achieving the same purpose of effective corporate governance.

Separation of the office of the Chairman and Chief Executive Officer of a public company.

The distinction of the CEO's and Board Chairman's responsibilities has been noted as one of the key characteristics of optimal corporate governance practice. This guarantees that each of their tasks and responsibilities is precisely described, that accountability lines are established, and that the essential checks and balances are established.[43]The office and function of the chairman is provided for, and explained under the Act thus:

[43] ULOAKU E, Business day 'A look at the new CAMA from a corporate governance perspective' https://businessday.ng/amp/opinion/article/a-look-at-the-new-cama-from-a-corporate-governance-perspective/ accessed 19 August 2022

265.—(1) The chairman, of the board of directors shall preside as chairman at every general meeting of the company, and if there is no such chairman, if he is not present within one hour after the time appointed for the holding of the meeting or is unwilling to act, the directors present shall elect one among themselves to be chairman of the meeting.

(2) If at any meeting no director is willing to act as chairman or no director is present within one hour after the time appointed for holding the meeting, the members present shall choose one among themselves to be chairman of the meeting.

(3) The duties and powers of the chairman includes a duty to—

(a) preserve order and power to take such measures as are reasonably necessary to do so ; (b) see that proceedings are conducted in a regular manner ;

(c) ensure that the true intention of the meeting is carried out in resolving any issue that arises before it ;

(d) ensure that all questions that arise are promptly decided ; and

(e) act in the interest of the company.

(4) The Chairman shall cast his vote in the interest of the company as a whole, but if he is a shareholder, he may cast it in his own interest. (5) The Chairman has power to adjourn a meeting in accordance with section 264 (1) of this Act.

(6) The chairman of a public company shall not act as the chief executive officer of such company.

The Act, in subsection 6, reiterates the global norm that bans the chairman from being involved in the day-to-day management of the firm, in order to protect the interests of shareholders, and forbids the MD/CEO from acting as the Chairman of the same Company. Instead, the Act's section 443 provides for the appointment of a corporate administrator, who is responsible for overseeing the affairs, operations, and assets of the company.

The provisions for Administrators under CAMA 2020 are as follows:

443.—(1) A person may be appointed as administrator of a company by—

(a) an administration order of the Court under section 449 of this Act ;

(b) the holder of a floating charge under section 452 of this Act ; or

(c) the company or its directors under section 459 of this Act.

(2) Where an administrator is appointed out of Court, if it is an administration that has a cross-border element, an application shall be made ex parte to the Court for approval.

(3) An extra curia administrator appointed under subsection (1) (b) may, in addition to statutory notice to the Court under section 457, also request, in an accompanying ex parte application to the Court, a formal court order. 444.—(1) The administrator of a company may do all such things as may be necessary for the management of the affairs, business and property of the company, and shall perform his functions with the objective of—

(a) rescuing the company, the whole or any part of its undertaking, as a going concern ;

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration ; or

(c) realising property in order to make a distribution to one or more secured or preferential creditors.

(2) Notwithstanding subsection (1) (b) and (c), the rescue of the company is the primary objective of the administrator in the performance of his functions, except where he is of the opinion that it is not reasonably practicable or a better result can be achieved for the company's creditors by pursuing some other course in order of priority as specified in that subsection.

(3) Subject to subsection (5), the administrator of a company shall perform his functions in the interests of the company's creditors as a whole. (4) The administrator shall perform his functions with the objective specified in subsection (1) (a) unless he is of the opinion that—

(a) it is not reasonably practicable to achieve that objective ; or

(b) the objective specified in subsection (1) (b) would achieve a better result for the company's creditors as a whole.

(5) The administrator may perform his functions with the objective specified in subsection (1) (c) only if he—

(a) is of the opinion that it is not reasonably practicable to achieve either of the objectives specified in subsection (1) (a) and (b) ; and

(b) does not unnecessarily harm the interests of the creditors of the company as a whole.

(6) The administrator shall, within 60 days of his appointment prepare a detailed schedule of assets and submit a copy to the person by whom he was appointed. Standard of performance of administrator. Status of administrator. General restrictions on appointment of administrator.

445. The administrator of a company shall perform his functions as quickly and efficiently as is reasonably practicable.

One individual should not hold the posts of chairman and CEO, according to the 2018 Nigerian Code of Corporate Governance (NCCG). It is therefore admirable that CAMA 2020 has given this advised practice legal status per section265(6) CAMA 2020 which provides that the chairman of a public company shall not act as the chief executive officer of such company.[44]

The contributions of the CCG to this are contained in Principle 2.7 that:

> *2.7 The positions of the Chairman of the Board and the Managing Director/Chief Executive Officer (MD/CEO) of the Company should be separate such that no person can combine the two positions.*

The Central Bank's Code of Corporate Governance for Financing Companies extends on this in its provisions for separation of powers, stating:

> *2.3.1 The positions of the Board Chairman and the MD/CEO shall be separate. No one person shall combine the two positions in any FC at the same time. For the avoidance of doubt, no executive Vice Chairman shall be allowed in the Board structure.*
>
> *2.3.2 Not more than two members of a family shall be on the board of a FC at the same time. The expression 'family' includes director's spouse, parents, children, siblings, cousins, uncles, aunts, nephews, nieces and in-laws.*
>
> *2.3.3 Where the FC is a member of a holding company, not more than two family members shall be allowed to serve on the Boards of the FC and the holding company.*
>
> *2.3.4 No two members of a family shall occupy the positions of Chairman and MD/CEO or Executive Director of the FC and Chairman or MD/CEO of a FC's subsidiary at the same time.*

Limitation on a director

[44] Ibid

According to the NCCG (2018), serving on too many boards concurrently may interfere with an individual's capacity to discharge tasks.[45] It provides:

> *2.8 Directors may hold concurrent directorships. However, concurrent service on too many Boards may interfere with an individual's ability to discharge his responsibilities. To assist the Board in determining the appropriateness of concurrent directorships:*
>
> *2.8.1 Prospective Directors should disclose memberships on other Boards, and current Directors should notify the Board of prospective appointments on other Boards. This information should be kept current by serving Board members.*
>
> *2.8.2 The Board should consider the disclosed directorships, taking into account the number of other directorships and the responsibilities held, and determine whether the individual can discharge his responsibilities and contribute effectively to the performance of the Board before recommending such a person for appointment or continued service.*
>
> *2.8.3 Directors should not be members of Boards of competing companies to avoid conflict of interest, breach of confidentiality, diversion of corporate opportunity and divulgence of corporate information.*

A board member is quite likely to underperform if he or she is plagued with too many directorship duties, given the large level of commitment necessary to perform well in that post. According to a study on the influence of multiple directorships on efficiency for companies listed on the Johannesburg Stock Exchange (JSE), directors who are over-boarded attend significantly fewer board meetings.[46] CAMA, 2020 addressed this critical issue by limiting the number of directorships. Section 307(1) CAMA 2020 forbids a person from serving as a director of more than five public companies at the same time. It also states that anyone who is now a director of more than five (5) public corporations must resign as a director of all but five (5) of them within two years of the Act's passage. The section reads:

> *307.—(1) The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company, including a duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of the other company, or to his own or other person's advantage.*

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[45] Principle 2(2.8) NCCG 2018

[46] NgonidzasheChiranga, 'Impact of Multiple Directorships on Performance for CompaniesListed on the Johannesburg Stock Exchange (JSE)'
Economics World, ISSN 2328-7144 June 2014, Vol. 2, No. 6, 378-387 doi: 10.17265/2328-7144/2014.06.003

(2) Subject subsection (3), a person shall not be a director in more than five public companies.

(3) Any person who is a director in more than five public companies shall, at the next annual general meeting of the companies after the expiration of two years from the commencement of this Act, resign from being a director from all but five of the companies.

(4) Any person who acts as a director of a public company in contravention of the provisions of this section is liable to a daily penalty in such amount as the Commission shall specify in its regulations and shall refund to each of the companies every remuneration and allowances paid to him as a director in each of the companies.

Section 278 of the CAMA also requires a person appointed as a director of a public corporation to disclose any other directorships he or she has. The section also provides that:

"*The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company, including a duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of the other company, or to his own or other person's advantage.*"

It is often assumed that the members in general meeting are a corporation's primary organ and that the board of directors are merely agents of the firm subject to the direction of the members in general meeting. However, judgements appear to have reversed this position, stating that members in general meeting cannot intervene with the directors' choices unless they are contradictory to the terms of the Act or the Articles.[47]

The case of *Automatic Self- Cleansing Filter Syndicate Co v Cuninghame [1906] 2* exemplifies this.

"Facts: There were 2700 shares and the plaintiff, Mr McDiarmid, owned 1202 of them. The company was in the business of purifying and storing liquids. He wanted the company to sell its assets to another company. At a meeting he got 1502 of the shares to vote in favour of such a resolution, with his friends. The directors were opposed to it. They declined to comply with the resolution. So Mr McDiarmid brought this action in the name of the company, against the company directors, including MrCuninghame.

The constitution stated that only a three quarter majority could remove the directors. It said the general power of management was vested in the directors 'subject to such regulations as might from time to time be made by extraordinary resolution' (art 96). They were also explicitly allowed to sell company property (art 91). In this case the

[47] Automatic Self- Cleansing Filter Syndicate Co v Cuninghame [1906] 2 Ch.D, 34; Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB, 113.

words 'regulations' referred to the articles of association. So the articles could be changed by a three quarter majority of votes. It did not say anything about issuing directions to the directors.

High Court

Warrington J held that on the true construction of the articles that unless directions were given through special resolution, then it was impossible for a mere majority to override the views of the directors. This was simply a matter of construction.

Court of Appeal

Lord Collins MR held that the simple majority of shareholders was not enough to override the requirement in the constitution that the directors may only be given instructions through a three quarter majority. So the directors were entitled to reject the offer. They are not agents to the shareholders nor the company. The shareholders would need to dismiss the directors or change the constitution. He elaborated.

It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are the agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents… There are provisions by which the minority may be overborne, but that can only be done by special machinery in the shape of special resolutions.

Cozens Hardy LJ agreed. He said that going back to the root principle which governs these cases under the Companies Act 1862... [it] seems to me that the shareholders have by their express contract mutually stipulated that their common affairs should be managed by certain directors to be appointed by the shareholders in the manner described by other articles, such directors being liable to be removed only by special resolution."

Sections 87 (2) to (4) of the CAMA 2020 adopted the common law view.

87.—(1) A company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived from, the members in general meeting or the board of directors.

(2) Subject to the provisions of this Act, the respective powers of the members in general meeting and the board of directors shall be determined by the company's articles.

(3) Except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Act or the articles required to be exercised by the members in general meeting.

(4) Unless the articles otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, ***is not bound to obey the directions or instructions of the members in general meeting*** *provided that the directors acted in* ***good faith and with due diligence****.*

(5) Notwithstanding the provisions of subsection (3), the members in general meeting may—

(a) act in any matter if the members of the board of directors are disqualified or unable to act because of a deadlock on the board or otherwise ;

(b) institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or neglect to do so ;

(c) ratify or confirm any action taken by the board of directors ; or

(d) make recommendations to the board of directors regarding action to be taken by the board.

(6) No alteration of the articles invalidates any prior act of the board of directors which would have been valid if that alteration had not been made.

Nonetheless, what looks to be a sword in the hands of the members in general meeting, as evidenced in section 87(4) CAMA 2020, is a toothless bulldog that barks but does not damage its victim. This statement stems from the fact that the section permits the board of directors not to be compelled to obey the directives of the members in general meeting unless the articles state otherwise or if the board acted in good faith and with due diligence. Unfortunately, the Act does not define the terms "good faith" or "due diligence."[48]

It goes without saying that the Companies and Allied Matters Act of 2020 contains genuine measures for corporate checks to restrain the board's arbitrary acts. However, these checks are frequently ineffective and therefore fall short of their intended purposes.[49] As an example, section 87(5) CAMA specifically provides for the residual duties of the members against the actions and inactions of the board. Which include the authority of the members in general meeting to take action in the event that the board is ineligible to do so or is unable to do so due to a deadlock, the authority to file legal actions in the company's name and on behalf of

[48] M. O. Sofowora, 'Shareholders, Directors, Corporate Managers and the Balance of Power' [2000] 4, Law and Business Quarterly, 122.

[49] G C Okara, 'EXAMINING CORPORATE GOVERNANCE IN NIGERIA UNDER THE COMPANIES AND ALLIED MATTERS ACT 2020 AND THE NIGERIAN CODE OF CORPORATE GOVERNANCE 2018: THE WAY FORWARD'

the company, the authority to adopt or confirm any action taken by the board of directors, and the authority to advise the board on future course of action. The foregoing provision is excellent on paper, but in reality, it can be challenging because there may not always be a deadlock that would allow the court to exercise its authority.[50]

Additionally, the Companies and Allied Matters Act 2020 imposes a number of restrictions on the rights and powers of the members, limiting their ability to effectively carry out their oversight responsibilities of keeping an eye on and reining in the board's excesses in the performance of their duties. These restrictions will include members' rights to request extra ordinary general meetings, which are restricted to the extent that the articles may provide that a member shall not be entitled to request extra ordinary general meetings[51] if he has not paid all calls or sums payable by him in respect of the member's shares which can only be used by members who hold at least one-tenth of the company's paid-up capital, the power to approve and declare dividends[52], the ability to demand voting by poll[53], which is only available to members, the right to request the appointment and removal of directors and auditors.

It is interesting that the member's right to appoint directors is usually not absolute. The board typically takes advantage of the appointment of subsequent directors while pretending to fill a sudden board vacancy, even if they have the authority to appoint first directors.[54] For the purpose of appointment of directors, the relevant provisions state:

> *271.—(1) Every company, not being a small, company shall have at least two directors.*
>
> *(2) Subject to subsection (1), any company whose number of directors falls below two shall, within one month of its so falling, appoint new directors and shall not carry on business after the expiration of one month, unless such new directors are appointed.*

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[50] Ibid

[51]

[52] S. 239 CAMA 2020

[53] S. 249 CAMA 2020

[54] S. 272 CAMA 2020

(3) A director or member of a company, not being a small company, who knows that a company carries on business after the number of directors has fallen below two for more than 60 days is liable for all liabilities and debts incurred by the company during that period when the company so carried on business. 272. Subject to section 271 of this Act, the number of directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them or the directors may be named in the articles.

273.—(1) The members at the annual general meeting may re-elect or reject directors and appoint new ones.

(2) In the event of all the directors and shareholders dying, any of the personal representatives apply to the Court for an order to convene a meeting of all the personal representatives of the shareholders entitled to attend and vote at a general meeting to appoint new directors to manage the company, and if they fail to convene a meeting, the creditors, if any, may do so.

274.—(1) The Board of directors may appoint new directors to fill any casual vacancy arising out of death, resignation, retirement or removal.

(2) Where a casual vacancy is filled by the directors, the person may be approved by the general meeting at the next annual general meeting, and if not so approved, he shall immediately cease to be a director.

(3) The directors may increase the number of directors if it does not exceed the maximum allowed by the articles, but the general meeting may increase or reduce the number of directors generally, and may determine in what rotation the directors shall retire, provided that such reduction shall not invalidate any prior act of the removed director.

The aforementioned regulatory restrictions impede Nigeria's adoption of effective corporate governance practices.

2.3.2 Corporate Governance Codes in Nigeria

Within the development of Corporate Governance in Nigeria, there has been the establishment of certain important principles, rules and codes. It is premised on these principles – such that are obtainable internationally and within similar jurisdictions, that corporate governance is administered and ensured. They function as the basis that, informally as a matter of policy or formally in the form of acts or other legislative instruments, control, determine or guide the practice of corporate governance.

While there is some disagreement as to whether corporate governance ought to be promoted through mandatory provisions having the force of law (known as hard laws) or voluntary recommendations and guidelines (referred to as soft laws, like codes)[55]as well as their respective levels of effectiveness, attention will be given to soft laws, particularly in their application in Nigeria.

Codes do not necessarily have the same force of law like instruments like laws but consist of the best voluntary practices for corporate governance.[56] The reason behind this is to present a more cooperative stance towards achieving efficiency and transparency within the affairs of corporate governance, especially when there are deficiencies in regulation covering for same. Even without the forcefulness that comes with hard laws, codes have been shown to improve companies' compliance with good corporate governance practices[57] particularly to improve their profiles and attractiveness to prospective investors. Compared to hard laws, Codes, like other soft laws, allow a flexibility that motivates companies to embrace policies.

The essence of these codes is to uphold the core values of corporate governance, as well as provide guidelines towards their ensuring that these are achieved, including power sharing and separation, transparency measures and other suitable policies a company may adopt in order to ensure good corporate governance. As is the norm, the codes of Nigeria's corporate governance are aimed at ensuring accountability and responsibility, and efficiency within companies.

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[55] Duh, M., 2017, 'Corporate Governance Codes and Their Role in Improving Corporate Governance Practice', in O. L. Emeagwali (ed.), Corporate Governance and Strategic Decision Making, IntechOpen, London. 10.5772/intechopen.69707.

[56] Aguilera RV, Cuervo-Cazurra A. Codes of good governance. Corporate Governance: An International Review. 2009;17(3):376-387. DOI: 10.1111/j.1467-8683.2009.00737.x

[57] Nowland J. The effect of national governance codes on firm disclosure practices: Evidence from analyst earnings forecasts. Corporate Governance: An International Review. 2008;16(6):475-491. DOI: 10.1111/j.1467-8683.2008.00707.x

Historically, Nigeria's codes on corporate governance evolved to address the growing lacuna which at that time faced the banking industry – poor corporate governance policies had allowed and led to numerous scandals and setbacks. The liquidation of multiple banks, and other financial institutions came at a loss to investors, and the economy in general. In response and to restore confidence and trust in the economy, there was the need to provide for some form of regulation for the activities of directors who had been identified as major contributors to the problems of the industry. To this end, the SEC (Securities and Exchange Commission) developed a code of best practices in corporate governance in 2003.

As a consequence of this specificity however, a number of the codes of corporate governance that evolved were highly specific or dealt exclusively with a particular field or industry and were very restrained in their relevance and application. The Code of Corporate Governance for Banks and Discount Houses in Nigeria, May 2014, The Code of Corporate Governance for Public Companies, and The Code of Corporate Governance for the Telecommunications Industry 2016, are examples of these codes which, while relevant, were limited in their scope of application. In addition, they often couldn't accurately capture an image of what ideal corporate governance given the local circumstances was meant to look like, and generally didn't receive significant compliance from market players.

The same SEC code was reviewed starting in 2008 – highlighting some of the major problems of the corporate practices in Nigeria, comparing with other jurisdictions and prescribing better practices as well as how to ensure compliance with these practices. The review eventually resulted in the aforementioned Corporate Governance Code for Public Companies in 2011, whose main principles included leadership, effectiveness, remuneration,

accountability and relations with shareholders. While it was for Public Companies, Private companies were advised to adopt it as well.[58]

Another code that existed previously was the CBN Code for Corporate Governance for Banks in Nigeria Post Consolidation, 2006. Once again, this code was made in response to a dilemma that existed within a particular sector, and to complement other existing policies in the Nigerian Banking sector. Particularly, it aimed at accountability of bank CEOs and a set of values necessary for the proper delivery of their services. The code specified an accountability structure, provided for board composition, requirements for non-executive directors and specified some penalties. There was a lot of attention given to the qualifications and roles of an internal auditor, which specifically sought to improve accountability.

Since then, the CBN has released a number of similar codes like Code of Corporate Governance for Bureaux de Change, Code of Corporate Governance for Finance Companies in Nigeria and Code of Corporate Governance for Banks and Discount Houses in Nigeria – all of which seek to achieve accountability and better practices in their respective sectors. These codes have also received review over the course of time to include new, and more effective, practices in corporate governance, or to remedy previously existing loopholes or gaps within the legislation.

There have been similar policies and codes within sectors like the NAICOM code for insurance companies, created in 2009 to complement the SEC code and improve upon quality and efficiency of the insurance industry, for the benefit of consumers and the national economy. It created the code of Business Ethics and guiding principles of Corporate Governance for the Insurance industry, with the purpose of addressing the growing issues with the insurance sector. Another code, created in 2008, is the Code of Corporate

[58] Abstract, Code of Corporate Governance for Public Companies, 2014, accessible at <https://sec.gov.ng/code-of-corporate-governance-for-public-companies_may-12-2014/>

Governance for Licensed Pension Operators, created by National Pension Commission. As may be inferred, its main purpose was to instruct and advise Pension fund administrators on the best corporate practices for accountability and efficiency. It performed a complementary role, largely consistent with, and improving upon, the Pension Reform Act, 2004.[59]

For a more comprehensive list, these are some of the codes that apply in Nigeria[60]:

- The Central Bank of Nigeria's Circular on the Guidelines for the Appointment of Independent Directors, October 2007 (Circular BSD/DIR/GEN/CIR/VOL.1/ 013);
- The Code of Corporate Governance for Banks and Discount Houses in Nigeria, May 2014;
- The Code of Corporate Governance for Public Companies in Nigeria 2011;
- The Code of Corporate Governance for the Telecommunications Industry 2016;
- The Companies and Allied Matters Act No 3 of 2020;
- The Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018;
- The Guidelines for Appointment to Board and Top Management Positions of Pension Funds Administrators and Pension Funds Custodians
- The Code of Corporate Governance for Public Companies 2011.

Following the need for a regularization and harmonization of the codes and practices in Nigeria, especially in light of conflicts between those codes, criticisms of the legislation or implementation and failings of existing regulations, there was the introduction of a uniform

[59] Kunle Aina and Bolanle Adejugbe, A Review of Corporate Governance Codes and Best Practices in Nigeria, 2015, Journal of Law, Policy and Globalization ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online), Vol.38, 2015.
[60] Afolabi Elebiju and Gabriel Omoniyi, Nigeria: Corporate Governance Comparative Guide, 11 May 2002, <https://www.mondaq.com/nigeria/corporatecommercial-law/1131674/corporate-governance-comparative-guide>.

code for promoting corporate governance in Nigeria. The Nigerian Code of Corporate Governance, 2018, contains extensively the guiding principles by which corporate governance is to be practiced in the country.

The code which covers for all companies – public, private and not-for-profit, is a product of the Financial Reporting Council of Nigeria (FRCN) which is a body corporate with perpetual succession and a common seal. The body, established by the FRC Act in 2011 describes itself on its website[61], as a federal government agency established for the purpose of "developing and publishing accounting and financial reporting standards to be observed in the preparation of financial statements of public entities in Nigeria; and for related matters." The agency, formerly the Nigerian Accounting Standards Board, is responsible for, among other things, setting accounting standards for the country.

Listed amongst its core objectives are:

- Protect investors and other stakeholder's interest
- Give guidance on issues relating to financial reporting and corporate governance to professional, institutional and regulatory bodies in Nigeria
- Ensure good corporate governance practices in the public and private sectors of the Nigerian economy

The body achieves these goals through the establishment of directorates, each of which is managed by a team of professionals and experts. One of these departments is the Directorate of Corporate Governance[62], charged with the responsibility of developing principles and

[61] https://www.financialreportingcouncil.gov.ng/about-us/
[62] Section 23, FRCN Act, 2011.

practice of corporate governance, and promoting the highest standards of corporate governance, amongst other things.[63]

Upon establishment in 2012, the Directorate, and indeed the whole of the Financing Reporting Council of Nigeria (FRCN), has worked towards the provision of a uniform code for ensuring corporate governance, which culminated in three codes in 2016: National Code of Corporate Governance for the Private Sector in Nigeria 2016 (Private Sector Code), Public Sector Governance Code in Nigeria 2016 (Public Sector Code), and Not-For-Profit Organizations Governance Code 2016 (Not-For-Profit Code).[64]

Eventually, these three were harmonized into the singular Nigerian Code of Corporate Governance by 2018, after controversies on the implementation of the 2016 code. One of its major criticisms was the number of glaring contradictions and inconsistencies it had with other codes and especially the CAMA. Examples of these are the recommendations on size of the board, frequency of general meeting, composition and officers of the board and appointment of directors. These criticisms were significant and eventually led to the suspension of the code before it fully came into force, and informed the need for critical analysis in effecting corporate governance in Nigeria, due to the complex social and legal landscape.

Within its introduction, the NCCG states that one of its main purposes is to institutionalize the best practices of corporate governance. It also adds that it aims to inform the public on corporate values and ethics, all of which are directed at restoring confidence and trust in the economy. It does this through a principle-based approach, containing altogether twenty-eight

[63] Objectives of the Directorate of Corporate Governance, FRCN, <https://www.financialreportingcouncil.gov.ng/directorates/directorate-of-corporate-governance/>

[64] Eti Herbert and IbitayoOyindaDurosomo, "Tracing the Evolution of Corporate Governance Regime in Nigeria",Journal of Corporate Governance (2019) Vol. 11 No. 2 pages 2382-2420, accessible at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721903>

principles divided into seven sections. The first and most lengthy part (containing sixteen principles) deals with the company Board of Directors, their composition, duties and qualifications. The next four deal with assurance, three on stakeholder relationship, and then two on ethical business conduct. The remaining four deal on sustainability and transparency.

It is clear that the code contains principles and provisions similar to previous codes, and comparable with international standards of corporate governance, such as those of the OECD[65]. While it applies concurrently with the codes of other sectors, it is however superior to them, by the doctrine of covering the field. This represents a step up from the 2016 codes that were in conflict with the codes of sectors, and the SEC code which stated that if there is conflict between its provisions and any sector code, the sector code would prevail[66] which allowed companies to escape compliance.

For the purpose of performing its duties, the code opts for an "Apply and Explain" approach (similar to the Comply and Explain approach used in multiple jurisdictions) which allows companies greater flexibility in effecting the minimums it sets out. This is achieved by setting out within the core principles of Corporate governance and providing general recommendations (or minimums) for how companies ought to apply these principles. Companies don't only have to show that minimums were met, but show how they were met, or as the code puts it "*this requires companies to demonstrate how the specific activities they have undertaken best achieve the outcomes intended by the corporate governance principles specified in the Code*". Rather than a "box ticking exercise", it adopts a more dynamic position that allows companies to adjust their own code of corporate governance to fit industry and market peculiarities which presents greater incentives for compliance. This also allows, to some extent, companies to implement policies that have considerable higher

[65] OECD, G20/OECD Principles of Corporate Governance, 30 November 2015, <https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en>
[66] Section 1.3(e) SEC code.

efficiency but cannot necessarily be implemented generally due to different circumstances; there is no upper cap on the implementation of corporate governance, but a lower cap exists to maintain standards.

As part of provisions to ensure the protection of shareholders' interests, it also provides for INEDs (Independent Non-Executive Directors), the only code apart from that of the CBN to do so. The importance of INEDs have already been touched on, in relation to the provisions of CAMA, which the code aims to complement. Generally, they function to "*bring a high degree of objectivity to the Board for sustaining stakeholder trust and confidence*" according to the code.

In brief, the evolution of regulations around corporate governance in Nigeria has seen significant progress, especially with the introduction of the Code of Corporate Governance. While there is still work to be done within application, and compliance, especially given longstanding friction between the FRCN and other bodies/agencies, it is commendable what currently subsists.

2.3.3 Corporate Governance Monitoring Agencies in Nigeria

In the implementation and supervision of the implementation of Corporate Governance, a number of bodies and agencies are directly involved, usually in assessing the level of compliance of companies to established standards. These agencies work to prescribe standards, the means of compliance, and/or supervise their execution. Some agencies equally have the power to prosecute and/or punish for failing to comply with their regulations.

The importance of these agencies is found in translating policy to reality, or in other words, making sure that companies properly comply. Without the pressure of enforcement and monitoring from these agencies, there is greater likelihood of companies deviating or

altogether ignoring corporate governance guidelines. It is also important that existing monitoring agencies are empowered to properly carry out this duty.

Usually, it follows that a body is created to ensure, amongst other things, corporate governance, and its function is set out either in the statute that establishes the body or its code. A regulatory agency is then put in place for the purpose of enforcing the codes. This means that there is a multiplicity of agencies charged with, directly or otherwise, monitoring the practice and execution of corporate governance. Furthermore, due to the previously stated specificity within codes (like the CBN Code which applies only to Banks and financial institutions under the Central Bank), there are multiple agencies, usually each overseeing a particular sector or industry.

Some of these monitoring agencies are:

- The Corporate Affairs Commission, by virtue of the Companies and Allied Matters Act, CAMA.
- The Central Bank, through the Code of Corporate Governance for Banks and Discount Houses, as well as other similar codes.
- The Securities and Exchange Commission, through the SEC Code of Corporate Governance for Public Companies, 2011.
- Financial Reporting Council of Nigeria, through the Nigerian Code of Corporate Governance, 2018.
- National Insurance Commission (NAICOM) through their Code of Good Corporate Governance for the Insurance Industry in Nigeria. (2009)
- National Pension Commission (PENCOM), through the Code of Corporate Governance for License Pension Operators (2008).

- Nigerian Communications Commission through the Code of Corporate Governance for the Telecommunications Industry, 2016.

The primary legislation for Companies in Nigeria is the Companies and Allied Matters Act, CAMA, which determines the conditions for the establishment, dissolution, and operation of all companies within the country. Primarily, it mandates companies to carry out some duties at registration and within running – like sending annual reports and financial statements whose form and content it also prescribes which are directed at effective corporate governance. It equally states the duties and functions of directors, providing for the limits of their powers, with the aim of providing for accountability and responsibility, which are core principles of Corporate Governance[67]. A number of its provisions also indirectly ensure corporate governance in regulating the amount of external influence that is involved in the running of the company, and to whom the company owes obligations.

It acts primarily through the Corporate Affairs Commission, who are vested with the duty of ensuring compliance with the contents of the act[68]. As stipulated by the act, the commission, through the governing board, is to:

> *4. The Board shall— (a) review and provide general policy guidelines for performing of the functions of the Commission in accordance with international commercial best practice ;*
>
> *(b) have general oversight on the administration of the Commission ;*
>
> *(c) review and approve the strategic plans of the Commission ;*
>
> *(d) receive and consider management reports and advise the Minister on the reports ;*
>
> *(e) determine the terms and conditions of service of employees of the Commission ;*
>
> *(f) fix the remuneration, allowances and benefits of employees of the Commission, in consultation with the National Salaries, Income and Wages Commission ;*

[67] Chapter 11, sections 269 to 329, CAMA 2020.
[68] Section 4(g)(h) CAMA 2020

(g) ensure compliance with the provisions of this Act ; and

(h) do such other things as are necessary to ensure the effective and efficient performance of the functions of the Commission.

Given the mandatory nature of the act, and its general nature, all companies must conform to its contents, under the monitoring of the Corporate Affairs Commission.

As the highest bank, the Central Bank is vested with powers to oversee and regulate the banking sector, in order to ensure efficiency, the maintenance of standards and accountability. Particularly, the Banking and Other Financial Institutions Act empowers the CBN to make subsidiary legislation for banks and financial institutions. Some of these subsidiary legislation include the unique codes of corporate governance it has designated for specific portions of the sector, such as the Code of Corporate Governance for Bureaux de Change, Code of Corporate Governance for Finance Companies in Nigeria and Code of Corporate Governance for Banks and Discount Houses in Nigeria.

The BOFIA act provides for regulations that direct the affairs of those in charge of the administration of financial institutions. In addition, the codes for corporate governance are enforced by the CBN, with compliance usually being a prerequisite for the issuance or renewal of licenses that allow these institutions to operate. There is also provision for accounts and auditors must be approved by the CBN. In addition to these, it adapts some of the provisions of CAMA as to the various offices within companies and how they are organized to promote corporate governance, amongst other things.

The Securities and Exchange Commission was established by the Investment and Securities Act in 2007, with a goal to protect investors and their investment from fraudulent practices, and provide for a fair and efficient market. It is vested with the responsibility of regulating the capital and securities market, an important subset of the economy. Any securities that are

to be sold, like shares, must first be registered with the SEC and approved. It monitors market activity and exchange carefully, with the core philosophy being the protection of investors.

The SEC has provided the Code for Corporate Governance for Public Companies in Nigeria, which applies to all public companies and companies who wish to raise capital through securities. Within the code, it lists the responsibilities of directors, composition of the board of directors, the need to declare conflicts of interests and other relevant provisions based on established principles for the purpose of corporate governance. Default or contravention of these provisions is prosecuted through the Investments and Securities Tribunal which is also established by the Investment and Securities Act. The SEC was particularly active and the most recognizable body for the promotion of corporate governance during the development of corporate governance in Nigeria. This may be as a result of the wide range of companies who fall under its jurisdiction.

Established for the purpose of developing and publishing financial reporting standards, The Financial Reporting Council of Nigeria (FRCN) is an important agency in the monitoring of corporate governance. Through its directorate of corporate governance, it is responsible for the enforcement of compliance with corporate governance in Nigeria.[69] It achieves this through the Nigerian Code of Corporate Governance, which is an encompassing code that addresses corporate governance issues across the country, as opposed to sectoral codes (like the SEC Code) that address specific issues in specific sectors.

The principle based "Apply and Explain" approach within the NCCG ensures a high level of compliance as well. It is noted that the FRC often works in a collaborative role, recommending to other monitoring agencies when it is believed that a company has failed to comply with standards, either within the NCCG or sectoral codes. This new stance was

[69] Section 7(2)(a), 51 and 52, FRC Act, 2011,

adopted to present a holistic application of the codes of corporate governance, which allows for the individual sectors to apply their own rules with some supervisory activity from the FRC.

In addition to these, The NCC, NAICOM and PENCOM perform monitoring functions as regards corporate governance, particularly in the application of standards as stated within their respective codes. These include special qualifications for directors and reports to be made to the relevant governing bodies.

Summarily, there are a number of bodies who perform monitoring functions in the process of promoting corporate governance, both generally and within specific sectors, particularly those with significant risk. These bodies are meant to oversee and ensure the execution of good corporate governance and efficient management. However, there has been little significant implementation or enforcement. These could be credited to bottlenecks such as corruption, bureaucracy, and lax policy enforcement. There has also been some friction within the enforcement of certain general codes, such as the SEC code or the FRC due to conflict over which codes would apply to particular companies. It is expected that with the continued review of the NCCG and significant attention given to compliance, there would be improvement within the sector.

It is also noted that there is a need for greater education amongst companies, investors and entrepreneurs on the existence and importance of these agencies, as this would help improve the level of compliance.

2.4 THE DISTINCTION BETWEEN THE SHAREHOLDER PRIMACY THEORY AND STAKEHOLDER THEORY IN NIGERIA AND AUSTRALIA

Several researches has been conducted into the theories underpinning corporate governance, particularly the widely adopted ones, including the stakeholder and shareholder theories. The

peculiarities of the jurisdiction where it is being practiced have keenly influenced the differences between these two popular adopted theories. Lai Oso and Bello Semiu in their work on the concept and practice of corporate governance in Nigeria explained that the stakeholder theory emerged as a further development on the concept of stake holding in an organization.[70] Citing Freeman, the work argues that the underlying idea of the stakeholder theory may be described as a redefinition of the organization in terms of structure and conceptualization.[71] Juxtaposing this with the shareholder theory of corporate governance, the writer suggests that the stakeholder theory takes a wider group of constituents into account including employees, public, distributors, shareholders etc., and recommends a conscientious application of the theory in modern corporate governance practice in Nigeria.

Williams argues that the direction of the Australian framework is a bi-focal being that it focuses on the development of governance systems for protection and support of the sustainable growth of the wealth of shareholders while simultaneously placing a premium on increased disclosure obligations on company management regarding their position and performance.[72] This suggests that the legislative position of the Australian framework tacitly favours the shareholder theory over the stakeholder theory. Conversely, Evangeline Elijido-Ten argues in their analysis of corporate environmental behaviour of Australian Listed companies through the stakeholder framework, that regulatory sanctions have played a major role in incorporating substantive environmental performance into corporate practice.[73] They attributed this to the increased industry sensitivity that has grown out of these widening regulations. While this work does not especially allude to a specific provision in any of the

[70] Lai Oso and Bello Semiu, 'The Concept and Practice of Corporate Governance in Nigeria: The Need for Public Relations and Effective Corporate Communication' (2012) 3 Journal of Communication 1.
[71] Ibid (3)
[72] Willliams (n 13) 5.
[73] Evangeline Elijido-Ten, 'Applying Stakeholder Theory to Analyze Corporate Environmental Performance: Evidence from Australian Listed Companies' (2007) 15 Asian Review of Accounting 164, 17.

hard or *soft* laws, it suggests that the legislative direction may not have completely ignored stakeholder interests.

Nojeem Amodu[74] expounded on the scope of the stakeholder theory, especially in relation to the Corporate Social Responsibilities of companies in his work on the comparative study of the Nigerian and South Africa positions. The work establishes that one of the best practices in corporate governance provisions across several codes in different jurisdictions is stakeholder management and protection. This is underpinned under the stakeholder theory, but the work argues that elements of it could be found in the shareholder primacy theory. The companies and Allied Matters Act which is the Nigerian principal legislation on corporate practice tilts towards shareholder primacy as the dominant theme in its provisions mandating disclosures to shareholders in certain respects and setting the members in general meetings as the primary organ of the company. Although both Jurisdictions appear to favour this theory, the reasons for reaching the conclusions appear to contrast as research shows that the difficulty in definition of the scope of stake holding is the reason why it is not favoured in Australia while the lack of specific statutory provisions is why it is less favoured in Nigeria.

Andrea Corfield,[75] in their work on the future of the stakeholder theory in Australia, canvassed moral and ethical arguments to support the stakeholder theory. The arguments in particular draw strength from the fact that the shareholder theory as perceived in the Australian concept is too narrow and single-minded and the long-term profitability of a company is not merely dependent on the concentration of shareholder wealth. However, the work admits that the stakeholder theory is not as clearly defined in the Australian corporate law jurisprudence because of a couple of difficulties, including the inability to clearly define

[74]Nojeem Amodu, 'Stakeholder Protection and Corporate Social Responsibility from a Comparative Company Law Perspective: Nigeria and South Africa' (2020) 64 Journal of African Law 425.

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

the class of stakeholders to whom the theory should apply. This appears to be the same in the Nigerian context, although much of the research done has focused on the Corporate Social Responsibility (CSR) and its relative absence from the primary companies' legislation.[76]

The reviewed research works have incredibly contributed to the continuing discourse on corporate governance in both jurisdictions and the seemingly unending tussle for relevance between the shareholder primacy and stakeholder theories of corporate governance. However, much of the works were focused on separate jurisdictions with no particular one doing a robust comparative study of the differences. Aside from this, the corporate governance systems of both countries continue to evolve and they have enacted more regulations and principles since some of these reviewed works were being made. This research aims to cover these research gaps to provide a clearer look at the prevailing principles and reconcile differences both in antecedence and per jurisdiction.

[76]Amodu (n 31) 448.

CHAPTER THREE

3.0 CORPORATE STAKEHOLDER THEORY IN CORPORATE GOVERNANCE: NIGERIA AND AUSTRALIA

Stakeholder theorists are inclined to advocate that the obligations a company or any corporate body owes should be not just to shareholders but to other groups, entities or individuals that are affected by its conduct.[77] The rationale is not far-fetched; Corporate Governance as a concept is itself at the core of global contemporary issues for the many downturns, financial scandals and corporate collapses in the last two centuries. The catastrophic effects these events had on innocent depositors, employees, creditors and shareholders remain fresh in the memory, and are being effectively leveraged as justification for policy and regulation that is wider in scope and governance principles than the Stakeholder/Shareholder theory.

Interestingly, embryonic iterations of the Stakeholder concept can be tracked as far back as the writings of Adam Smith[78]. In 1963, the word, as we now use it, made an appearance in internal memoranda at the Stanford Research Institute[79], challenging the idea that the managers of a company need only be responsible and responsive to stockholders. Over the next two decades, much of the groundwork for its eventual exposition was laid as the frenzy to develop management theories that help explain management problems arising from the prevailing change and uncertainty was laid.[80]

However, modern stakeholder theory was effectively birthed with a publication by business ethicist Edward Freeman in what was perhaps his best seminal work[81]. The crux of his

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[77] Australian Journal and others, 'Stakeholder Theory from a Management Perspective : Bridging the Shareholder / Stakeholder Divide' (2016) 31 187.

[78] Victoria Baumfield, 'Stakeholder Theory from a Management Perspective : Bridging the Shareholder / Stakeholder Divide' (2016) 31 187.

[79] Now known as SRI International, Inc.

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

[81] Edward Freeman, "*Strategic Management*: A Stakeholder Approach" (1984)

argument therein being that it is only correct, as a matter of morals, for businesses to fashion their operations taking into account how the frequency and extent to which their activities would affect "their stakeholders"[82]. Furthermore, it was argued that it was also "strategically in their best interest to do so", thus showing the need for a framework to protect the interests of the persons and entities now envisaged within the corporate unit, whose welfare will affect.

Underpinned by social considerations, the proponents of this theory indubitably hold that the versatility of modern corporate structures inherently create consequential affiliations with the rich variety of entities with whom they have legitimate concerns.[83] This contact, it is posited, leaves not only the company exposed to various risks but also the many employees, suppliers, customers, shareholders and communities with which it operates. A setup which admittedly becomes very problematic with Shareholder theory principles where one often gets the sense that corporate risks and gains are not democratized in proportion.[84]

In essence, modern stakeholder theoryoperates to develop the earlier, popular and admittedly narrow concept of the modern corporation as created for and only adjustable to shareholder profit. The gist is that profitability, in the long term, of any business venture hinges on far more than an undue focus on shareholder wealth[85]. A point phrased eloquently by Roberta Karmel where she suggests that:

> *'the stakeholder model may provide a helpful framework with a renewed focus on jobs and competitiveness in a global marketplace where long term strategic planning has a higher value than stock market prices[86].*

Since the publication of Freeman's paper, academic discussions of the stakeholder theory have drawn scholars and experts from a diverse spectrum of disciplines including but not

[82] Evangeline Elijido-Ten, 'Applying Stakeholder Theory to Analyze Corporate Environmental Performance: Evidence from Australian Listed Companies' (2007) 15 Asian Review of Accounting 164.
[83] Santosh Pande, 'The Theoretical Framework for Corporate Governance' [2012] SSRN Electronic Journal.
[84]Bidhan L Parmar and others, 'Stakeholder Theory : The State of the Art'.

[85]Baumfield (n 2).
[86] Roberta Karmel, "Implications of the Stakeholder Model' (1993) PL 1158.

limited to Business Management, Organizational Theory, Business Ethics, Network Theory, Public Administration, and Corporate Law. In Corporate practice, the concept has garnered unflinching support in contemporary international corporate circles. Generously used as the basis of competition laws and anti-takeover statutes, it is the preferred corporate governance structure in countries like Germany and Japan. In places where it is not the predominant ethos, it is extensively referred to and has been leveraged to evolve balanced legislation, codes of conduct and policy directions in light of modern realities.

3.1 WHO IS A CORPORATE STAKEHOLDER?

Just as the classic definition of economics is recognized today as flowing from Adam Smith's 'The Wealth of Nations', the classic explanation of a stakeholder obtains in Freeman's seminal text as "*any group or individual who can affect or is affected by the achievement of the organization's objectives*".[87] The popularity of this definition is perhaps best shown in the many that come after it. Representing, perhaps, the Stakeholder theory at its broadest and most elaborate; Friedman[88] mentions the definition as leaving open the idea that external individuals or groups may be considered as stakeholders in an organization, without of course, the organization recognizing them in kind.[89]

The Stanford Research Institute in turn defines stakeholders as "*those groups without whose support the organization would cease to exist*". But perhaps the best definition of a stakeholder is the one by the Pennsylvanian Stakeholder Statute thus:

> '*stakeholders are identified by their interest in the corporation, whether or not the corporation has any corresponding functional interest in them…each group of*

[87] PM Vasudev, 'The Stakeholder Principle, Corporate Governance and Theory - Evidence from the Field and the Path Onward' (2012) 41 SSRN Electronic Journal.
[88] *Stakeholders*.
[89] Kingsley O Mrabure and Alfred Abhulimhen-Iyoha, 'Corporate Governance and Protection of Stakeholders Rights and Interests' (2020) 11 Beijing Law Review 292.

stakeholders merits consideration for its own sake, and not merely because of its ability to further the interests of some other group, such as the shareowners.'[90],[91]

Stakeholders, who are directly engaged in dealings with the company or organization are referred to as primary shareholders. The entities falling into this classification, according to Freeman[92] include suppliers, customers, employees, financiers (covering shareholders and creditors that double as bank lenders and bondholders) and communities. A broader formulation (only in that it envisages more that Freeman's original design) captures those groups or individuals that affect a company, whose managers must consequently take into consideration in day to day decisions.[93] These generally consist of consumer advocate groups and special interest groups such as the media, the government, environmentalists, competitors, and even such remote actors like terrorists.[94] The idea is that although these groups might not be directly# involved with the corporation, they can be a source of significant concern if not factored into considerations.[95]

An issue that often arises after identifying stakeholders is the determination of their "interest" or "stake" in the corporation. For employees, that interest is usually characterized as an input of human capital; particularly in the case of long-term employees who have over time consolidated expert skills devoted to assisting the successful management of the company. For suppliers, this interest is usually the revenue from goods made available to the company. The interest or stake of owners is primarily economic in that they depend on their shareholdings in the company to turn a profit. For the community, it is often the need for a clean environment and the necessary jobs and good needed to maintain a healthy economy.

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[90] Dignam Alan and Galanis Michael, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2004) 28 Melbourne University Law Review 623; Ian Willliams, 'Corporate Governance in Australia' 6.

[91] Vasudev (n 11); Andrew Friedman and Samantha Miles, *Stakeholders: Theory and Practice* (5th edn, Oxford University Press 2006).

[92] Freeman (n5)

[93] Elijido-Ten (n 6).

[94] Baumfield (n 2).

[95] ibid.

Finally, the stake of creditors is that the company continues to perform well, securing the eventual satisfaction of any debts owed.[96]

Over the years, certain contributors to the body of literature have suggested that the class of entities that can be surmised to be stakeholders may include groups other than those identified by through direct harm or benefit they incur from the company's actions[97]. But this tends to amount to stretching the stakeholder concept to include entities with any or some influence over the company, often at the risk of workability.

3.2 SUPPORTS FOR THE STAKEHOLDER THEORY IN CORPORATE GOVERNANCE

Support for the stakeholder theory is not readily found in every situation or country, top to bottom. This assertion does not, of course, disregard the wide adoption of stakeholder theories in legislation and legal principles, Court decisions, and codes of corporate governance around the world.[98] In many cases, such as with the adoption of ESV (Enlightened Shareholder value) primacy in the United Kingdom, corporate governance theories readily mix stakeholder and shareholder primacy structures.

So, it is often the case that, yes, many corporate law theorists contend the assertion that corporations should be managed in the interests of stakeholders in whatever arrangement, rather than solely for the benefit of shareholders.[99] In many cases, disagreements attach to the practicality of the stakeholder model, often putting forward the argument that if the stakeholder model often resulted in greater returns, companies would have voluntarily

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[96]NojeemAmodu, 'Stakeholder Protection and Corporate Social Responsibility from a Comparative Company Law Perspective: Nigeria and South Africa' (2020) 64 Journal of African Law 425.

[97]Zaleha Othman and Rashidah Abdul Rahman, 'Understanding Corporate Governance from a Social Constructionist Perspective' (2011) 1 International Journal of Humanities and Social Science 123 <http://www.ijhssnet.com/journals/Vol._1_No._2;_February_2011/17.pdf>; Mrabure and Abhulimhen-Iyoha (n 13); Friedman and Miles (n 15).

[98]Amodu (n 20).

[99]Asjeet S Lamba and Geofrey P Stapledon, 'The Determinants of Corporate Ownership Structure: Australian Evidence' [2005] SSRN Electronic Journal 1.

adopted it.[100] One ground is that the immense likelihood for overregulation effectively inundates stakeholder primacy.[101] The idea is that when managers are answerable to many stakeholders, and not just the shareholders, the corporation is inevitably harmed in that:

> "*diffusing this responsibility among many groups of stakeholders means, in practice, that managers are accountable to no one*."[102]

Another prominent criticism relates to the competing interests of stakeholders, often intimating abuse of the judicial process in resolving adverse claims. The idea is that competing claims and ultimatums – for example, the shareholders that want to recoup as much as possible in capital gains and dividends and the employee that would see those profits served towards better wages and working conditions– from stakeholders make the theory unsustainable and difficult to balance. Especially amongst shareholders, as some might be more willing to promote CSR at the expense of profits and vice versa.[103] Following that, even where they agree on which motive to pursue, disagreements may persist in how to pursue it.

Another oft-posited criticism is that the stakeholder theory does not demand that a corporation focuses on profitability. But stakeholder primacy by nature opposes such narrow reasoning. After all, the theory's ultimate objective is the concern for continued existence of the company, something it postulates as achievable only by balancing the interests of all stakeholders (including shareholders). So, the claim falls flat, considering that the stakeholder theory operates to balance all stakeholders' interests, profit making inclusive.

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[100] Corfield (n 4).

[101] Frederik Dahlmann, Layla Branicki and Stephen Brammer, 'Managing Carbon Aspirations: The Influence of Corporate Climate Change Targets on Environmental Performance' (2019) 158 Journal of Business Ethics 1; Pande (n 7).

[102] Corfield (n 4).

[103] ibid.

Notwithstanding its considerable opposition, critics of the stakeholder theory do concede that it is conceivably valuable as it would be unwise for corporations to ignore stakeholder concerns that might negatively impact its ability to generate profit.[104]

3.3 CORPORATE STAKEHOLDERS IN NIGERIA

Owing to its colonial heritage, Nigerian Corporate governance (or its corporate law regime for that matter) often flows in the same direction as that of the UK. Just like in the UK, its earliest iterations of corporate governance principles can be traced back to the Cadbury report of 1992. Nigeria also adopts corporate governance codes serving as international benchmarks; especially those by the Organization for Economic Cooperation and Development (OECD). In 2018, the Financial Reporting Council of Nigeria released its standardized code –The Nigerian Code of Corporate governance 2018– currently in operation.

Other statutes and codes which the Nigerian legal system uses to institutionalize Corporate Governance best practices in Nigerian companies include: The Companies and Allied Matters Act (CAMA) of 2004 (repealed in 2021), Investment and Securities Act of 2007, Securities and Exchange Commission Rules (2013), the Bank and Other Financial Institutions Act (BOFIA)of 2004, the Insurance Act of 2004, the Code of Corporate Governance for Banks in Nigeria Post Consolidation, the Code of Corporate Governance for Public Companies in Nigeria, the Code of Conduct for Capital Market Operators and their Employees, and the Code of Corporate Governance for Insurance Industry in Nigeria.[105]

The country's SEC 2011 code,[106]particularly, emphasizes the involvement of stakeholders in company practice. Section 28(3)(c) for example requires companies to disclose their policies,

[104] Mark Rix, 'The New Australian System of Corporate Governance: Board Governance and Company Performance in a Changing Corporate Governance Environment' (2019) 1 Corporate Law and Governance Review 29.
[105]Mrabure and Abhulimhen-Iyoha (n 13).
[106] SEC Code of Conduct for Capital Market Operators and their Employees 2011

plans and strategies for addressing and managing such public health issues as the impact and eradication of HIV/AIDS, malaria, and other serious diseases, especially as regards employees and their families. This complements paragraphs 7 and 8 of the 5th Schedule of CAMA[107] which requires companies to disclose in Annual Directors Reports, matters relating to the employment of disabled persons, and the health, safety, and welfare at work of the company's employees.

The schedule provides, amongst other things:

> *7. The directors' report shall contain a statement showing how many disabled persons were employed during the year and describing the policy which the company has applied during the year—*
>
> *(a) for giving full and fair consideration to applications for employment by the company made by disabled persons, having regard to their particular aptitudes and abilities ;*
>
> *(b) for continuing the employment of, and for arranging appropriate training for, employees of the company who have become disabled persons during the period when they were employed by the company ; and*
>
> *(c) otherwise for the training, career development and promotion of disabled persons employed by the company.*
>
> *8. The directors' report shall contain a statement as to the arrangement in force in the year for securing the health, safety and welfare at work of employees of the company and its subsidiaries, and for protecting other persons against risks to health or safety arising out of or in connection with the activities at work of those employees.*

Notably, Nigeria's Securities and Exchange Commission ("SEC") – the regulatory body for listed corporate bodies – reviewed its 2003 Code of Corporate Governance for Public Companies[108] considering preceding corporate failures. Seeking to shore up "weaknesses and improve mechanisms for enforceability", the code implemented swathes of stakeholder primacy real estate in its provisions. The provisions, despite being applicable only to public

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[107] The Companies and Allied Matters Act, Laws of the Federation of Nigeria LFN 2004. Since repealed by a new iteration enacted in 2019 and signed into law in 2020.

[108] SEC Website with a Guide of All Corporate Governance Rules and Code in Nigeria. (2019). http://www.sec.gov.ng/rules-and-codes.html> accessed 14th May 2021
Shleifer,

companies in Nigeria, are encouraged for broad application in other companies where appropriate[109].

The Code of Corporate Governance for Public Companies (SEC Code) thus came to being in October 2003, representing the first code of corporate governance in Nigeria. A revised version of the code was released in the first quarter of 2011, with the principles and provisions largely consistent, although some amendments were introduced. In the preface to the 2003 code, the reason for setting up the committee was given as "the need to align with the international best practices". They also note that the development of the SEC Code is connected to global inclinations towards corporate governance regulation.

The 2003 SEC Code (pp. 2) further provides that:

> *"Companies perceived as adopting international best corporate governance practices are more likely to attract international investors than those whose practices are perceived to be below international standards"*
>
> *"This realisation prompted the Securities and Exchange Commission ("SEC" or "the Commission"), the apex regulatory body in the Nigerian capital market, to inaugurate the Committee on Corporate Governance of Public Companies in Nigeria ("the Committee") on 15 June 2000"*

As in other countries, the content of the SEC Code has been influenced by developments in other countries. In its 'terms of reference', the Committee that drafted the SEC code was required (amongst others), "*to examine practices in other jurisdictions with a view to the adoption of international best practices in corporate governance in Nigeria*". Furthermore, the SEC Code committee ascertained existing corporate governance practices in the country, comparing them with corporate governance practices around other jurisdictions and markets and countries such as the UK. Whilst it is good to learn from other countries, adopting corporate governance guidelines which are better suited for more advanced economies may constitute significant misfits.

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[109] Ibid

The SEC Code of Best Practices in Nigeria is described as follows:

"A code to make provisions for the best practices to be followed by public quoted companies and for all other companies with multiple stakeholders registered in Nigeria in the exercise of power over the direction of the enterprise, the supervision of executive actions, the transparency and accountability in governance of these companies within the regulatory framework and market; and for other purposes connected therewith".

The Code is required to be cited as the "Code of Best practices on Corporate Governance in Nigeria", and is divided into five parts – A to E.

Part A, relating to the board of directors provides guidance on the responsibilities of directors, the composition of the board, the positions of the chairman and chief executive, proceedings, and frequency of meetings of the board, specifics relating to non-executive directors, compensation of board members and their reporting obligation. The Code also requires boards of listed companies to put in place adequate systems of internal control and to manage the affairs of their company in a lawful and efficient manner, to create value for the shareholders. The board should ensure that the value being created is shared among the shareholders and employees with due regard to the interest of the other stakeholders. Indeed, apart from the global inclination with regards to the need to codify corporate governance principles and requirements, which supports the social legitimation argument, the need to prevent corporate scandals further facilitated the development of the SEC Code. The 2003 SEC Code (Pp 2) further confirms this:

"The importance of effective corporate governance to corporate and economic performance cannot be over-emphasised in today's global marketplace".

The code further states in Paragragh.1(c) that the "the Board's functions should include but not be limited to the following:

i. Strategic planning
ii. Selection, performance appraisal and compensation of senior executives
iii. Succession planning
iv. Communication with shareholders
v. Ensuring the integrity of financial controls and reports
vi. Ensuring that ethical standards are maintained and that the company complies with the laws of Nigeria"

In line with the OECD principles of good corporate governance, the code also requires that the board be composed in such a way as to ensure diversity of experience without compromising compatibility, integrity, availability, and directors' independence. Whilst the Code recognizes the need for the separation of the chairman and CEO roles (para.2(b)), it states that "in exceptional circumstances where the position of the Chairman and Chief Executive Officer are combined in one individual, there should be a strong non-executive independent director as Vice Chairman" (para.2 (c)). Meetings of the board are further required to take place at least once a quarter, with sufficient notice (at least 21 days) being given to the shareholders. The service contracts of directors should not exceed three years without the prior approval of shareholders. The Code requires that companies establish remuneration committees consisting mainly of non-executive/independent directors and chaired by a non-executive director. The remuneration committees are to recommend the remuneration of directors. Also, the total emoluments of directors should be fully disclosed, including those of the Chairman and the highest paid director. Such disclosures include pension contributions and stock options where earnings are in excess of N500, 000 ($3,170).

Furthermore, considerably owing to social legitimation/alignment pressures with other codes of best practices, the SEC Code states that the prime responsibility for maintaining an adequate system of internal control rests with the board. They must also report on the effectiveness of the system of internal control, and that the business is a going concern, with supporting assumptions or qualifications as necessary in compliance with the Companies and Allied Matters Act of 1990 (CAMA). CAMA (1990) is the main legal framework for corporate governance in Nigeria. Also, there is an overriding need to promote transparency in financial and non-financial reporting. The Board is also required to maintain "an objective and professional relationship" with the auditors. The latter should not have any business relationships with the company. Many of these requirements and other ones relating to the directors ('deontology' for directors) (executive and non-executive) are similar to what obtains in the UK Corporate Governance Code, including the need for newly appointed directors to be properly orientated and given appropriate training, where deemed relevant, at the company's expense. This further suggests that the need for social legitimation acted as a strong factor in shaping the Nigerian corporate governance code.

PART B of the 2003 SEC Code deals with shareholders' rights and privileges. The board of directors should ensure that shareholders' statutory and general rights are always protected. The code states that the shareholders "should remain responsible for electing directors and approving the terms and conditions of their directorships". There is a strong emphasis in the code on the need to ensure equity in the treatment of shareholders. Whilst the code encourages boards to use the general meeting as a forum to communicate with shareholders, it requires that shareholders holding more than 20 percent of the total issued share capital of a company should possibly have a representative on the board unless they are in a competing business or have conflicts of interest that warrant their exclusion from the board. Appropriately, majority shareholders should act and influence the standard of corporate

governance positively and thereby optimize stakeholder value. Also, as much as possible, there should be one director on the board representing the interest of minority shareholders (para.9 (j)). Further, boards of directors are required not to discourage shareholder activism whether by institutional shareholders or by organized shareholders' groups. PART C of the code relates to audit committees – their composition, qualification, terms of reference and meetings. The code requires that audit committees be established as specified in the Companies and Allied Matters Act (CAMA) 1990 (Section 359 (4).

CAMA 1990 stipulates that the audit committee should consist of an equal number of directors and representatives of the shareholders of the company (subject to a maximum of six members). The code strengthens this requirement by stating that not more than one executive director should be on the audit committee. It also states that "the chairman of the audit committee should be a non-executive director, to be nominated by the members of the audit committee. Majority of the members of the audit committee should be independent of the company, and the committee should meet at least 3 times in a year. These provisions further suggest that the need for social legitimation as well as the pursuit of efficiency gains acted as a strong factor in shaping the Nigerian corporate governance code.

To improve corporate governance in Nigeria, the SEC, in September 2008, inaugurated a National Committee for the Review of the 2003 Code of Corporate Governance for Public Companies in Nigeria to address its weaknesses and to improve the mechanism for its enforceability and effectiveness. Some of the amendments introduced by the Board include limiting its coverage only to public companies, as well as removing any unnecessary restrictions on the freedom of companies to innovate in their management practices. The revised code of corporate governance notes that unlike the previous code, it is intended to be fully enforceable by SEC, aims to ensure the highest standards of transparency, accountability, and good corporate governance, without unduly inhibiting enterprise and

innovation. Whilst the revised code sufficiently demonstrates significant social legitimation pressures, it can be suggested that the Code has moved towards the pursuit of efficiency gains, to particularly address problems relating to corporate corruption, which it highlighted as a major obstacle to good governance in Nigerian corporations.

In Nigeria, the body of codes and laws appears to have evolved based on series of theories put forward by different theorists at various times, chief of which are the Stakeholder theory and the Stockholder/Shareholder/Agency theory. Thus, the corporate governance structure operates on a multi-theoretical basis, incorporating both shareholder and stakeholder principles in the body of law. Stakeholder theory under the Nigerian corporate governance structure essentially broaden the horizons of the entities and persons whose welfare are affected by the corporate unit. These are all referred to as including shareholders, creditors, the society, and the government. The codes mandate companies under their purview to clearly incorporate legitimate shareholders in policies and operations, respecting and fulfilling[110] all legal, moral, and social obligations as are reasonably necessary.

3.4 CORPORATE STAKEHOLDERS IN AUSTRALIA

Australia maintains a shareholder primacy, first and foremost. For many years, the Stakeholder theory did not even enjoy basic apperception in Australian Corporations Law. But since prominent many corporate collapses and scandals occurred in the US from 2001-2002 (Enron, Tycon etc.) had counterparts in Australia, stakeholder theory has gradually crept into Australian Corporate Governance. However, Australia's corporate governance environment is still generally reflective of shareholder primacy.

Although prominent corporate failures in Australia's past have spurred discourse on the plausibility of stakeholder principles, the corporate governance structure is still entrenched in

[110]Mrabure and Abhulimhen-Iyoha (n 13).

the shareholder primacy model, failing to give stakeholders real and justiciable rights.[111][112] Instead, Australia operates a "Business Approach", in tally with the prevailing understanding of stakeholder primacy structures as unnecessary ethical burdens.[113]

Like the United Kingdom's Enlightened Shareholder Value (ESV), Australia's business case approach charges company managers to merely consider stakeholder interests and report on non- financial matters of CSR like employee or environmental matters so long as it will make business sense (cost-benefit implications). Such considerations are to be held in relation to the overall economic performance of the company and without prejudice to enhancing shareholder value.[114]

3.5 SHAREHOLDER THEORY UNDER NIGERIAN CORPORATE GOVERNANCE LAWS

Corporate Governance as an ideology is guided by a set of principles dictating actions or responsibilities, most of which have already been detailed. It also dictates who these responsibilities are owed to, or ought to be directed towards, in addition to how best they may be performed. These theories relate to an overall view of corporate administration and receive recognition in some way or form.

Majorly, there is debate as to which of the theories is most appropriate, between the shareholder and stakeholder theory. The two presume a relationship exists between the

[111] Samuel Ojogbo and NwannekaEzechukwu, 'Shareholder Protection: A Comparative Review of the Corporate Legal/Regulatory Regimes in the UK and Nigeria' (2020) 64 Journal of African Law 399; Amodu (n 20).
[112] Elijido-Ten (n 6).
[113] Amodu (n 20).
[114] Pande (n 7); Elijido-Ten (n 6).

directors who are primarily responsible for the running of the company/firm and some other person(s), who they must consider primarily in making decisions.

The shareholder theory is premised on the goal of a business to make and maximize profit[115]. It asserts that there is no moral obligation on a business to do anything but make profits. Similarly, it opines that the primary responsibility of the directors ought to be the interests of the shareholders. This obligation to shareholders is viewed as most important and takes precedence over the interest of other corporate stakeholders like the consumer, employees, supplier, or society.[116] This is premised on the idea that shareholders are the ultimate contributors – and by virtue owners, of corporate assets. It assumes the metric of assessment of shareholders to be share price and dividends.

Certain aspects of the shareholder theory are prevalent in global application of Corporate Governance, particularly those of the OECD. These include provisions for equal votes (usually applied on a "one vote per share" basis) in addition to protection for minority shareholders. Equally, there are provisions for the composition and functioning of the board of directors of the companies. Given its specific importance, as the place where interests do frequently collide, multiple things are put into place to ensure the protection of the shareholder. Requirements of reporting and approving certain decisions, independent directors and qualifications are all geared, amongst other things, are all directed at protecting the interests of shareholders.

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[115] Terence Tse, "Shareholder and stakeholder theory: After the financial crisis", Qualitative Research in Financial Markets 3(1), 51-63, 2011,<https://www.researchgate.net/profile/Terence-Tse-2/publication/227430211_Shareholder_and_stakeholder_theory_after_the_financial_crisis/links/56212ac908aea35f2681b5ca/Shareholder-and-stakeholder-theory-after-the-financial-crisis.pdf>

[116] Maeve O'Connell and Anne Marie Ward, "Shareholder theory/shareholder value", Encyclopedia of Sustainable Management, 1-7, 2020, available at <https://www.researchgate.net/profile/Anne-Marie-Ward/publication/340620401_Shareholder_TheoryShareholder_Value/links/61161a581e95fe241aca6fe5/Shareholder-Theory-Shareholder-Value.pdf>

At its heart, the theory advances a level of separation between shareholders and the actual running of the company through directors – themselves acting in the interest of the shareholders. Within this relationship, there is some monitoring of the board of directors by the shareholders that, under corporate governance, allows for control within legal limits.

Corporate governance in Nigeria incorporates aspects of the shareholder theory within its systems and laws, in promoting the ideal corporate world. An examination of the theory and how it has been applied or otherwise within the relevant laws and codes will be provided.

Considering the history of misappropriation of funds, large-scale corruption and mismanagement that have characterized the Nigerian Corporate world, it is difficult to say that the shareholder interest is considered as primary. Rather, there seems to be more focus on the selfish and personal interests of the directors, a trend that has negatively impacted on investor confidence and has inhibited the growth of the corporate world. It is considering this that shareholder interest is given significant attention within the regulations and guidelines for corporate governance.

The practice of Corporate Governance in Nigeria which has already been chronicled to be a product of a colonial system operates on an Anglo-Saxon or outsider control system.[117] This outsider control system, operating based on the shareholder theory, prioritizes the maximization of shareholders' interest in day-to-day running. Other important values, all which seek to achieve the same purpose are the clear delineation of the rights and duties of key players and systems of accountability, most of which are contained within statute.

The already mentioned main regulation for all companies in Nigeria, the Companies and Allied Matters Act (CAMA) 2020, provides for a number of protections for the shareholder

[117]Elewechi Okike, "Corporate Governance in Nigeria", Corporate Governance in Commonwealth Countries (pp.145 -184), April 2019, International Centre for Research in Accountability and Governance

interest in line with the shareholder theory. While there is no outright proclamation of such, inferences can be drawn from its provisions. It provides that the board of directors are charged with the duty of the running of the company, and in performing said duty are not explicitly bound to follow the instructions of the members in general meeting (which refers to a meeting of shareholders)[118]. They must however be seen to have acted in good faith, and in the interest of the company[119]. In keeping with the theory of shareholder interest, it also provides that the members have the power to ratify and confirm decisions made by the board as well as make recommendations to them[120].

Similar to the OECD provisions, equal vote for members is granted under Nigerian interpretation of Corporate Governance. CAMA provides that every member has the right to attend, speak and vote at general meetings, granted they have paid all sums payable for shares in the company[121]. Under the act, it is specified that:

> *107. Every member shall, notwithstanding any provision in the articles, have a right to attend any general meeting of the company and to speak and vote on any resolution before the meeting : Provided that the articles may provide that a member shall not be entitled to attend and vote unless all calls or other sums payable by him in respect of shares in the company have been paid.*

The act also provides that a register of all members be kept for record and identification purposes this:

> *109.—(1) Every company shall keep a register of its members and enter in the register the—*
>
> *(a) names and addresses of the members, and in the case of a company having a share capital, a statement of the shares and class of shares, if any, held by each member, distinguishing each share by its number so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each member ;*
>
> *(b) date on which each person was registered as a member ; and*

[118] Section 87 (1)(2)(3) CAMA 2020.
[119] 87(4), 305(3), CAMA.
[120] 87(5) CAMA
[121] 107 CAMA

(c) date on which any person ceased to be a member.

(2) The entry required under subsection (1) (a) or (b) shall be made within 28 days of the conclusion of the agreement with the company to become a member or, in the case of a subscriber of the memorandum, within 28 days of the registration of the company.

(3) The entry required under subsection (1) (c), shall be made within 28 days of the date on which the person concerned ceased to be a member, or if he ceased to be a member other than as a result of action by the company, within 28 days of producing to the company evidence satisfactory to the company of the occurrence of the event whereby he ceased to be a member.

(4) Where a company defaults in complying with the provisions of this section, the company and each officer of the company is liable to—

(a) such penalties as the Commission shall specify by regulation ; and

(b) an additional daily default fine that the Commission shall specify by regulation.

(5) Liability incurred by a company from the making or deletion of an entry in its register of members, or from a failure to make or delete any entry, is not enforceable after the expiration of 20 years from the date on which the entry was made or deleted or, in the case of any such failure, from the date on which the failure first occurred.

In addition to this, independent directors are equally mandated under the act, particularly for public companies that have a large base of shareholders and investment[122]. A degree of separation and independence from shareholder influence is necessary in determining who is eligible to be an independent director. They are essential to corporate governance and in balancing competing interests with the holistic goal of the company[123].

It is important to note that the act leans towards the Stakeholder theory and the idea that directors, in the performance of their duties, are to give consideration to "interests of the company's employees in general, as well as the interests of its members."[124] It incorporates not just an obligation to the members or shareholders but an obligation to see to the interests of another stakeholder – the employees. In defining the duties of directors, CAMA 2020 provides that:

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[122] 275 CAMA

[123] Mondaq, "Appointment And Importance Of Independent Director In Nigeria", 11 May 2021, <https://www.mondaq.com/nigeria/shareholders/1066930/appointment-and-importance-of-independent-director-in-nigeria#>

[124] 305(4) CAMA

305.—(1) A director of a company stands in a fiduciary relationship towards the company and shall observe utmost good faith towards the company in any transaction with it or on its behalf.

(2) A director owes fiduciary relationship with the company where—

(a) a director is acting as agent of a particular shareholder ; or

(b) though, he is not an agent of any shareholder, such a shareholder or other person is dealing with the company's securities.

(3) A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances and, in doing so, shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations.

(4) The matters to which a director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members.

(5) A director shall exercise his powers for the purpose for which he is specified and shall not do so for a collateral purpose, and the power, if exercised for the right purpose, does not constitute a breach of duty, if it, incidentally, affects a member adversely.

(6) A director shall not fetter his discretion to vote in a particular way.

(7) Where a director is allowed to delegate his powers under any provision of this Act, such a director shall not delegate the power in such a way and manner as may amount to an abdication of duty.

Another major regulation that incorporates this theory is the Nigerian Code of Corporate Governance 2018, which is the overriding code of corporate governance in Nigeria. Within its aims and objectives, it is contained that it aims to create well managed organizations where "the interests of the Board and management are aligned with those of the shareholders and other stakeholders."[125]

[125]AbisolaTolulopeOshin, "Shareholder Primacy in Nigeria: A Myth or a Reality?", Electronic copy available at: https://ssrn.com/abstract=2000856

In extension, it recommends, similar to CAMA, in that the board of directors have a charter that contains, amongst other things ensures the interest of the company is always paramount, and the board acts in pursuance of this.[126] The first principle reads:

> *The Board, being central in corporate governance and the highest governing body in the Company, should have a charter setting out its responsibilities, which may include the following:*
>
> *1.1 exercising leadership, enterprise, integrity and judgment in its oversight and control of the Company so as to achieve the Company's continued survival and prosperity;*
>
> *1.2 ensuring that the Board and its committees act in the* ***best interest of the Company*** *at all times;*
>
> *1.3 ensuring compliance with the laws of the Federal Republic of Nigeria and other applicable regulations;*
>
> *1.4 considering and approving the long-term and short-term strategies for the business of the Company and monitoring their implementation by management;*
>
> *1.5 ensuring the establishment and implementation of a succession plan, appointment process, training mechanism and remuneration structure for both the Board and senior management of the Company;*
>
> *1.6 being accountable to the Company as well as identifying and managing the relationship with* ***shareholders and other stakeholders****;*
>
> *1.7 establishing and maintaining the Company's values and standards (including an ethical culture) as well as modelling these values and standards;*
>
> *1.8 overseeing the internal audit function, approving the internal audit plan, and appointing and removing the head of the internal audit function on the recommendation of the committee responsible for audit;*
>
> *1.9 establishing the Company's risk management framework and monitoring its effectiveness, setting the Company's risk appetite, receiving and reviewing risk reports;*
>
> *1.10 providing oversight over Information Technology governance;*
>
> *1.11 defining a formal schedule of matters specifically reserved for Board decision and matters delegated to Board committees and management;*
>
> *1.12 overseeing the effectiveness and adequacy of the internal control system;*
>
> *1.13 overseeing the Company's communication and information dissemination policy;*
>
> *1.14 performing the appraisal of Board members and executive management;*

[126] Part A, Section 1.2, NCCG

1.15 ensuring the integrity of annual reports and accounts and all material information provided to regulators and other stakeholders; and 1.16 ensuring that management systems are in place to identify and manage environmental and social risks and their impact.

In its explanation of the principle espoused in the first section, it stated that management ought to be "in the best interests of shareholders and other stakeholders while sustaining the company." It is further stated that "directors should act in good faith and with integrity in the best interests of all shareholders."[127] This expresses the level of value and priority granted to shareholders' interests.

There is also provision for nonexecutive directors, which are recommended to be independent[128], in line with global standards. These independent directors are expected to bring some attractiveness to the company, but more importantly objectivity due to their separation from influences[129]. A portion of the code (Part C) is dedicated entirely to discussing the relationship between shareholders and directors and the means by which to ensure the smooth running of this crucial system. It further prescribes specific rights of shareholders and protections for minority shareholders[130], maintaining principles of equality[131], franchise and accountability. In addition to the above, it posits that the members should always retain a measure of control, in their ability to confirm or remove directors. The principle contains:

23.1 The Board should ensure that:

23.1.1 shareholders at annual general meetings preserve their effective powers to appoint and remove Directors of the Company;

23.1.2 all shareholders are treated fairly and equitably. No shareholder, however large his shareholding or whether institutional or otherwise, should be given preferential treatment or superior access to information or other materials;

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[127] Part C, Section 23.2, NCCG
[128] Part A, Section 2.3(b), NCCG
[129] Part A, Section 7, NCCG
[130] Part C, Section 23.1.3 NCCG
[131] Part C, Section 23.1.1, NCCG

23.1.3 minority shareholders are adequately protected from abusive actions by controlling shareholders;

Another code of importance, as an example of sectional code (created for and applying to a specific sector) is the Central Bank of Nigeria's Code of Corporate Governance for Finance Companies In Nigeria, 2018. This was created to build on existing regulations and cater for the unique conditions of the financing sector. Adding to what is already available under the two previously examined regulations, the code provides that the directors owe a duty to act in the best interest of the shareholders.[132]

The code provides for some of the responsibilities of the board of directors to include:

2.1.1 The Board shall be accountable and responsible for the performance and affairs of the FC. Specifically, and in line with the provisions of the Companies and Allied Matters Act (CAMA) 1990 (as amended), Directors owe the FC the duty of care and loyalty to act in the interest of the FC's shareholders and other stakeholders.

2.1.2 Members of the Board are severally and jointly liable for the activities of the FC.

It provides that a more than half the members of the board of directors should ideally be non-executive directors and at least one must be an independent director[133], which is targeted at maintaining shareholder interest. It possesses the same characteristic separation that is envisioned by the shareholder theory. The prescriptions as to composition of the board are:

2.2.1 The size of the Board of any FC shall be limited to a minimum of 5 and a maximum of 9 with more than fifty per cent of board membership comprising non-executive directors (NEDs).

2.2.2 Members of the Board shall be persons of proven integrity and shall meet the requirements of the Revised Assessment Criteria of Approved Persons Regime. At least two (2) members of the Board of Directors other than the Executive Directors shall be required to have banking or related financial industry experience.

2.2.3 The Board shall consist of Executive and Non-Executive Directors. The number of Non-Executive Directors shall be more than that of Executive Directors.

2.2.4 The Board of FCs shall comprise at least one (1) Independent NonExecutive Director (INED). An Independent Director is a member of the Board of Directors who

[132] Section 2.1, CBN Code of Corporate Governance for Financing companies.

[133] Section 2.2 CBN Code of Corporate Governance for Financing companies

has no direct material relationship with the FC or any of its officers, major shareholders, subsidiaries and affiliates.

Shareholder rights are also greatly explored within this code. The right to obtain relevant material information is granted to shareholders, in addition to the right to participate actively and vote in general meetings when held. This right applies to all shareholders irrespective of class or status. The code also seeks to create some protection for minority shareholders. It adds the right to redress as an added right of shareholders. Its provision reads:

3.1.1 Shareholders shall have the right to obtain relevant and material information from the FC on a timely and regular basis.

3.1.2 Shareholders shall have the right to participate actively and vote in general meetings.

3.1.3 In addition to the traditional means of communication, FCs are encouraged to have a website and communicate with shareholders via the website, newsletters Annual General Meetings (AGMs) and/or Extraordinary General Meetings (EGMs). Such information shall include major developments in the FC, risk management practices, executive compensation, establishment of investment in subsidiaries and associates, Board and top management appointments, sustainability initiatives including Corporate Social Responsibilities (CSR), and any other relevant information.

These rights are those obtainable under the shareholder theory and seek to achieve the protection and realization of shareholders' interest primarily.

Positions and principles within the Nigerian regulations on Corporate Governance have some root and connection to the shareholder theory, particularly in its evolved form. Corporate Governance in Nigeria within its development was created to combat negative and selfish practices, especially management that affected investor confidence, and caused losses for shareholders. This value, that their interests should always be the fore of the actions of the company has persisted and continues to in some ways shape the laws and codes on Corporate Governance.

3.6 STAKEHOLDER THEORY UNDER CORPORATE GOVERNANCE IN NIGERIA

One of the proponents of the "stakeholder theory," Edward Freeman, contends that a company is accountable not only to its shareholders but also to anyone who has a stake in the success or failure of the business venture.[134] Companies are obliged to fulfill the interests of parties besides shareholders. These additional parties typically have an impact on or are impacted by the attainment of a company's purpose, have a legal stake in the company and possess the power to influence it, or are subject to risk due to the firm's operations on the financial, human, or environmental fronts. These individuals or organizations are corporate stakeholders.[135]

In Nigeria, support for the stakeholders in corporate governance can be seen to be entrenched in the laws and codes that regulate corporate activities.

For instance, the Companies and Allied Matters Act, per section 305(3), provides

> *"A director shall act at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, further its business and promote the purpose for which it was formed, and in such a manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances, and in doing so, shall have regard to the impact of the company's operations on the environment in the community where it carries out business operations."*

Pursuant the above highlighted provision of law, it is safe to hold that the CAMA recognizes the stakeholder theory, we however must determine to what extent.

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[134] RE Freeman, Strategic Management: A Stakeholder Approach (Pitman, 1984) p. 46.

[135] BU Ihugba "Compulsory Regulation of CSR: A Case Study of Nigeria", (2012) 5 J. Pol. & L. 68 at 69

As previously noted, individuals and organizations that are affected by the presence and activities of a company (possibly as a result of shared environment or usage) can be referred to as stakeholders of such a company. Therefore, on the surface, we would agree that the CAMA places an obligation on the director of a company to recognize and consider those stakeholders before a step is taken by the board. In essence, before a director makes a decision, he/she has to ensure that it is in the best interest of the company as a whole (the shareholders, the employees, the directors themselves, the customers), and in doing so, consideration must be had for the community/environment where the business operations is being carried out. However, this provision cannot be said to be absolute. According to the above cited provision, the interest of the company, preservation of its assets and furtherance of business always comes first, so in a situation where there is conflicting interest between the company and some sections of the stakeholders, the director would most likely take a stance favourable to the company.

Furthermore, subsection 9 makes any duty imposed on the director enforceable against the director by the company. The issue with this is that, in situations like this, these sections explicitly adopt the shareholder-centric common law position of what constitutes the "company" or the "interest of the company". The term "company" is taken to refer to all the members or shareholders, and what is in the best interest or success of the company is understood to indicate what is in the best (economic) interests of all of the shareholders.[136] This essentially means that only shareholders can bring a case against the director for enforcement. This is displayed in the case of Hutton v. West Cork Railway Co. (1883) 23 Ch.D.

> "*According to the law report, a railway company which had no provision in its articles for paying remuneration to directors, and had never paid any, sold its*

[136] Hutton v. West Cork Railway Co. (1883) 23 Ch.D., 654; Percival v. Wright (1902) 2 Ch 421; Dodge v. Ford Motor Co. (1919) 204 Mich. 459, 170 N.W. 668

undertaking to another company at a price to be determined by an arbitrator. By the Act authorizing the transfer it was provided that on the completion of the transfer the company should be dissolved except for the purpose of regulating their internal affairs and winding up the same and of dividing the purchase-money. The purchase-money was to be applied in paying the costs of the arbitration and in paying off any revenue debts or charges of the company, and the residue was to be divided among the debenture holders and shareholders. After the completion of the transfer a general meeting of the company was held at which a resolution was passed to apply £1050 of the purchase-money in compensating the paid officials of the company for their loss of employment, although they had no legal claim for any compensation, and £1500 in remuneration to the directors for their past services.

Cotton LJ and Bowen LJ held that the money payment was invalid. Baggallay LJ dissented. In the course of his dicta, Bowen LJ held that there is.....a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose."

So, according to Bowen LJ, directors can only spend money that is not theirs but the company's if they are spending it for purposes that are reasonably ancillary to the company's business. That is the usual rule. Bona fides cannot be the sole test; otherwise, you could have a lunatic running the company's affairs and spending its money with both hands in a perfectly bona fide yet perfectly irrational manner... It is for the directors to decide, provided it is a matter that is reasonably incidental to the company's business… The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

As a result, directors of an insolvent firm were not free to make payments to employees because payments could only be made incidental to the business, and an insolvent business had no future business. In English law, the Insolvency Act 1986, Section 187, and the Companies Act 2006, Section 247, allow directors to consider employees directly when a company becomes insolvent.

The judgment's current value stems from the broad idea that, during the life of the company, it may conduct itself in a way that helps stakeholders other than shareholders, but only to the extent that it is ultimately, albeit indirectly, in the shareholders' interest. Section 172 of the Companies Act of 2006.

The repealed CAMA tilted towards the same direction as NojeemAhmodu noted in his work[137] that although the Nigerian basic corporate law by virtue of section 279, takes awareness of stakeholder protection through clear mentions of consideration of other interests in addition to shareholder interests. The value that corporate stakeholders will gain from these portions in terms of protecting their interests in the management of the company, however, is another matter. For instance, the same legislation in the same section immediately weakens the effectiveness of such clause (at least from the viewpoint of any victim employee stakeholder) under sub-section (9) to the effects that even if the executives do not act responsibly in protecting stakeholder interests, only the "company" can complain.[138]

It might be claimed that a number of laws in Nigeria have clauses with expectations that either directly or indirectly control observance or practice of stakeholders' theory. Several environmental protection legislations have been implemented in an effort to promote responsible behaviour. These laws call for criminal penalties for non-compliance rather than voluntarily adhering. The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act of 2007 is an example of one of these laws. This law establishes the requirements for environmental protection compliance. It also specifies environmental offenses and their accompanying penalties. The expected requirements for guaranteeing environmental protection are laid out in Sections 20 through Section 29. Particularly relevant to environmental air quality is Section 20. Hazardous material discharge and related offenses

[137]NojeemAhmodu 'Stakeholder Protection and Corporate Social Responsibility from Comparative Company Law Perspective: Nigeria and South Africa'
[138] ibid

are covered under Section 27. These laws make regard for environment and community as required by section 305 of CAMA unavoidable for corporate bodies.

Corporate Social Responsibility as an aspect of stakeholder theory

The idea that a company has a responsibility to society beyond its limited duty to its owners or shareholders is known as corporate social responsibility (CSR).[139] The idea of corporate social responsibility is based on the uncontested principle that organizations have an obligation to care for people beyond themselves since they are a component of society as a whole.[140] In Nigerian organizations, CSR is expressed primarily through three strands: philanthropic, compensatory, and economic support. Philanthropic refers to a humanitarian and charity service that corporate organizations offer to the public. Through their charitable endeavors, businesses inspire confidence in their business among the public. Businesses in the area have frequently started giving small donations to events, festivals, and cultural practices.[141] In Nigeria, economic help is the other CSR practiced area. In this situation, business organizations provide assistance by setting up social amenities like portable water, constructing and maintaining schools, maintaining parks, promoting basic and primary healthcare programs, and starting empowerment programs for the less fortunate, among other things. The compensating CSR strand is advancing steadily. Organizations make up for specific operational missteps throughout the production process by paying the Nigerian government, communities, and individuals. Several organizations in Nigeria, like United Bank of Africa [UBA] and MTN Nigeria, exhibit these three manifestations or strands of CSR.[142] However all of the foregoing expressions of corporate social responsibility are

[139] B U Ihugba, Compulsory Regulation of CSR: A Case Study of Nigeria

[140] Edward Dennehy, 'Corporate governance- A Stakeholder Model' (2012) Vol X International J. Business Governance and Ethics.

[141] C Mordi I S Opeyemi M Tonbara S Ojo, Corporate Social Responsibility and the Legal Regulation in Nigeria

[142] ibid

merely voluntary, and has no legal backing. Thus, it cannot be enforced against the companies.

Asides this and some other laws that seeks to protect the environment, there is no regulation in Nigeria requiring businesses to either include environmental preservation in their corporate policies or to enforce compliance with them. However, the case may not be the same for the extractive industry as there is an act made (NEITI Act) which gives power to the National Stakeholders Working Group to oversee and ensure accountability and transparency in the extractive industry.

Stakeholder theory under NCCG 2018

The NCCG claims that institutionalizing the best corporate governance standards is one of its key goals. Part of institutionalizing optimal corporate practice is recognition of the roles and interests of stakeholders. Companies have realized that incorporating sustainability into their operations adds value, boosts efficiency, and improves brand perception. According to NCCG 2018's Principle 26: "*Paying adequate attention to sustainability issues including environment, social, occupational and community health and safety ensures successful long term business performance and projects the Company as a responsible corporate citizen contributing to economic development."*

For that purpose, it recommends the following practices:

> *26.1 The Board should establish policies and practices regarding its social, ethical, safety, working conditions, health and environmental responsibilities as well as policies addressing corruption.*
>
> *26.2 The policies should include the following:*
>
> *26.2.1 the Company's business principles, practices and efforts towards achieving sustainability;*
>
> *26.2.2 the management of safety issues including workplace accidents, fatalities, occupational and safety incidents;*

26.2.3 plans and strategy for addressing and managing the impact of serious diseases on the Company's employees and their families;

26.2.4 the most environmentally beneficial options particularly for companies operating in disadvantaged regions or in regions with delicate ecology, in order to minimise environmental impact of the Company's operations;

26.2.5 the nature and extent of employment equity and diversity (gender and other issues);

26.2.6 training initiatives, employee development and the associated financial investment;

26.2.7 opportunities created for physically challenged persons or disadvantaged individuals;

26.2.8 the environmental, social and governance principles and practices of the Company; and

26.2.9 corruption and related issues.

26.3 The Board should monitor the implementation of sustainability policies and report on the extent of compliance with the policies.

In order to uphold this value, the Board is required to lead by example in fostering a culture of sustainability that permeates all levels of the organization and includes other stakeholder groups like the local community, suppliers, and investors. The Board ought to demand that CEOs and important staff members comprehend the newest developments in corporate sustainability governance.[143]

The NCCG Code mandates the Board to develop policies and practices to meet its social, ethical, safety, working conditions, health, and environmental duties, as well as policies to combat corruption. These policies must incorporate the company's business concepts and practices for achieving sustainability, as well as its management of workplace safety issues and the plan and strategy for addressing and managing the impact of major diseases on its employees and their families.[144]

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[143]Bisi Adeyemi 'The Nigerian Code of Corporate Governance 2018' Business day https://www.google.com/amp/s/businessday.ng/amp/opinion/article/the-nigerian-code-of-corporate-governance-2018-6/ accessed 01 September 2022

[144] Ibid

In furtherance to this, principle 27 provides clear communication between the board and the stakeholders. This would come in the manner of full, timely and accurate disclosure. This would foster cooperation between the company and stakeholders. It advises this is done by observing the following:

> *27.1 The Board should adopt and implement a stakeholder management and communication policy.*
>
> *27.2 The Board should ensure that the reports and other communication issued to stakeholders are in clear and easily understood language and are posted on the Company's web portal. This information may include description of structures of the Board and management among others, frameworks, policies and other material information about the Company.*
>
> *27.3 Communication with stakeholders and the general public should be governed by the principle of timely, accurate and continuous disclosure of material information on the activities of the Company so as to give a balanced and fair view of the Company, including its non-financial matters.*
>
> *27.4 The Board should establish an investors' portal on the Company's website, where the communication policy as well as the Company's annual reports for a minimum of five immediately preceding years and other relevant information about the Company should be published and made accessible to the public in downloadable format.*

Sadly, the NCCG does not carry the same enforceable force as other laws like the CAMA, therefore it is reasonable to opine that the Nigerian corporate governance laws do not really favour the stakeholder theory.

3.7 SHAREHOLDERS THEORY UNDER AUSTRALIAN CORPORATE GOVERNANCE LAWS & CODES

Generally speaking, this theory's main goal assumes that shareholders come first. It is asserted that a private company's main goal is to generate profits for its shareholders and that it must refrain from actions that would compromise that goal to avoid liability.[145] Simply put, this means that a company's principal agent(s) must organize the firm's operations to

[145] R. Mitchell, et al; 'Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law'. Available at: http://ssrn.com/abstract=753904. Accessed 1 September 2022

maximize the return on the investments of its shareholders. This strategy encourages managers to manage the company effectively in the best interests of shareholders and align their policies to reflect their desires to increase wealth. This is because shareholders have been characterized as one of the most important types of stakeholders in any company[146]. As a result, the ultimate goal of any corporation must be for the benefit of the shareholders because they have significant voting power, influence over the board of directors, and financial support for the business.

The Principles of Corporate Governance, issued by the ASX Corporate Governance Council reiterates that "companies should respect the rights of shareholders and facilitate the effective exercise of those rights".[147] Also, there is the obligation to prompt and transparent disclosure of reports or information[148] by the board of directors to the shareholders. Interestingly, more than 40 shareholder class actions have been commenced in Australia solely on the breach of interest by directors either on the failure to disclose information to shareholders or deceptive conduct among several other claims. In any case, directors' must consistently take broad discretion to integrate the rights of shareholders with that of the company for maximum value creation.

Australia permits shareholder democracy, as earlier mentioned. Over half of the adult population in the country exists as a shareholder in at least one company.[149] The listed companies have a high degree of shareholder control, and shareholders have the chance to increase their value by taking advantage of the company's wealth creation strategies. This demonstrates how vital their influence can be on the business. More specifically, it has been observed that businesses with greater shareholder control experience greater profits and

[146] Syed Naveed, 'An Empirical Study of Shareholders Rights in Australia: Theory and Practice'
[147] Principle 6, ASX, 2014.
[148] ASIC v Vines (2007) 62 ACSR 1 [863]-[866]
[149] Meredith Paynter et al, Analysis of Australian Corporate Governance for the Business Council of Australia, 2019.

growth, whereas those with weaker shareholder rights are frequently vulnerable to corporate exploitation. This type of structure makes the shareholder theory more appealing because it encourages businesses to operate as efficiently as possible for the benefit of the holders of their securities and also makes bigger investments possible.

As a result, managers have a presumptive duty to manage business affairs in the corporation's best interests. The Corporations Act imposes several personal obligations on company directors and company secretaries, including the need to be "honest and careful," to understand what the company is doing, to make sure it pays its debts on time and maintains accurate financial records, to act in the company's best interest rather than their own, and to use any information they learn while serving as a director of the company for the benefit of the company.[150] Additionally, they must disclose any conflicts of interest or private concerns that might affect their capacity to act in the best interests of the company. A person cannot serve as a company director if they are an undischarged bankrupt, have a criminal record, or have been found guilty of a company law violation because doing so could endanger the interests of the shareholders.[151]

Setting corporate governance standards for listed companies is a key responsibility of ASX's Corporate Governance Council, which is made up of well-known business, shareholder, and industry groups. To increase investor confidence and help listed entities meet stakeholder expectations regarding their governance, the Council's main goal is to develop and issue principle-based recommendations on the corporate governance practices to be adopted by ASX listed entities.[152] The Council's Corporate Governance Principles and Recommendations provide a comprehensive list of best practices for corporate governance for ASX-listed

[150] Dianne Thomson and Ameeta Jain, 'Corporate Governance Failure And Its Impact On National Australia Bank‟s Performance' Available at: http://ssrn.com/abstract=2137983 Accessed 1 September 2022
[151] Ibid
[152] Ibid

companies that, in the Council's opinion, are most likely to live up to investors' reasonable expectations.

Invariably, the Corporations Act 2001 (Cth) states that a director or any other office of the corporation must exercise their duties; (i) in good faith in the best interests of the corporation; and (ii) for a proper purpose. In light of the above, some have argued that the legislation does not stipulate that directors must accord their duties to give priority to shareholders' interests over the corporate entity. However, case law has tended to acknowledge shareholders' primacy in holding that "corporations are mainly established and operated for the benefit of stockholders."[153] It has been posited that acting in the best interest of the company is commensurate with acting for the shareholders in general.[154] Although the directors are advised to consider the rights of other stakeholders, they must not only be for their benefit in most cases but should also not override their rights as shareholders. This is because the directors owe a primary fiduciary duty to the shareholders and call for a greater level of accountability and transparency to them. In the same vein, it implies that directors and company executives act as agents and must manage the company's affairs for the overall benefit of the shareholders, their principal. For instance, shareholders are bestowed with the right to confirm the election of a director within two months else he ceases to be a director and if they consider that a particular director tramples on their interests by not acting in good faith for the company, they might elect to remove him through a simple resolution.

The Shareholders theory underpins the corporate framework of companies in Australia as some decisions cannot be taken without the approval of shareholders in certain respects. First, making pivotal changes to the company's nature and scale of activities or ratifying certain types of share buyback, and issues of equity securities to related parties among others. Also,

[153] Section 181(1) Cth Act, 2001.
[154] Judith Fox, 'Shareholder primacy: Is there a need for change?' - Discussion paper.

adjusting the remuneration packages to provide better incentives for senior management so they can pursue optimal wealth maximization for shareholders stands as one of the influences of the theory in the corporate space.

The James Hardie Group[155] is an intriguing case study because it made a specific decision to protect itself from health liabilities that might result from the use of its products solely to advance the interests of the shareholders and avoid financial liability. Another example was the situation with the Tasmanian vegetable growers who were impacted by some unilateral decisions made by businesses that were only interested in maximizing profits, even at the expense of their local communities. These businesses were engaged in decision-making that reflected short-term cost competitiveness. However, some of these decisions, in the opinion of the Parliamentary Joint Committee on Corporations and Financial Services established by the ASIC Act, 2001, were extreme and relatively uncommon in corporate Australia. The thin line between corporate responsibility and irrational profit maximization may eventually erode under circumstances like these, leading to a situation of corporate irresponsibility.

Similarly, it has been argued that considering the interests of non-shareholders by investing in CSR initiatives to increase trust and appeal to customers, employees, suppliers, and investors, as well as putting in place specific risk mitigation measures to address the particular ESG risk the company faces, is an essential part of directors properly discharging their duty to act in the company's best interests. Failure to do so will inevitably affect the company's financial performance, and directors may be held personally liable for failing to uphold their fiduciary and statutory obligations. As a result, what is required is a rational and coherent legal policy that recognizes the long-term interests of both shareholders and other stakeholders. In a way,

[155] Available at: https://lawgovpol.com/case-study-james-hardie-and-asbestos/ Accessed on 2 September 2022

the shareholders' rights may still be of the utmost importance, but it is advised that this should not be done at the expense of other stakeholders.

3.8 STAKEHOLDER THEORY UNDER AUSTRALIAN CORPORATE GOVERNANCE LAWS & CODES

As a former British protectorate, Australia has a corporate governance system which is largely influenced by its colonial background. Australia has a similar corporate governance framework like other Anglo-Saxon countries. Like many other spheres, studies have revealed that the corporate governance principles in Australia are constantly developing with new provisions governing the duties of the board of directors being churned out periodically by regulators.[156]

Since the proposition of the stakeholder model of corporate governance by Edward Freeman IN 1984, the stakeholder theory has increasingly amassed wide patronage by many countries. Especially in the Anglo-American countries, the stakeholder theory is gradually seeing rapid implementation in business management and ethic parlance.[157] Australia, as one of the leading countries with best international standards of corporate governance, is not left out of this development. This backdrop notwithstanding, the aurora of Australia's corporate governance system is still considerably oriented towards the shareholder primacy.[158] However, it is no gainsaying that the possibility of the stakeholder theory overtaking the shareholder primacy deserves being laid bare.

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[156] Mark Rix, 'The New Austaaralian System of Corpate Governance: Board Governance and Company Performance in a Changing Corporate Governance Environment' (2019) 1 Corporate Law and Governance Review 29, 4.

[157] Shelly Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) UNSW Law Journal Volume 35(1), 293.

[158] See Andrew Keay, 'The Director's Duty to Take Into Account the Interests of Company Creditors: When is it Triggered?' (2001) 25 Melbourne University Law Review 315.; See also the decision of the Court in *Kinsela v. Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722.

In Australia, the principal framework on corporate governance – *The Corporations Act* – has not been modified to take into account the stakeholder interests. For instance, section 181(1)(a) of the *Corporations Act* provides for the director's fiduciary duty to act in good faith and in the company's best interests. However, this statutory duty is devoid of the sense of obligation of directors to put into consideration the interests of stakeholders in their duties and decision-making. Similarly, the use of reasonable standard in the director's duty of care, as provided in section 180(1) of the *Corporations Act* does not extensively incorporate the consideration of the interests of stakeholders while making corporate decisions.[159]

On the flip side, Langford has pointed that against the backdrop in the *Corporations Act,* stakeholders themselves may have their succour in the provision of section 1324 of the Act.[160] The section enables a person, the statutory intention of which can be necessarily extended to stakeholders, to protect his interest by seeking injunction from the court against any inimical corporate conduct. Thus, it has been stated in various quarters that directors may need to implement stakeholder interests in their decision making, the failure of which may open them up to liabilities.

It is obligatory for companies listed on Australian Securities Exchange to ensure compliance with the ASX Corporate Governance Principles. The ASX Corporate Governance Principles and Recommendations creates a seemingly binding framework for the observance of corporate social responsibility (CSR) by listed companies. CSR is viewed to be in correlation with the stakeholder theory because of its significant reduction of adverse corporate activities in the community, positive impact on environmental sustainability and societal development. The ASX Governance Principles and Recommendations in its Principle 3 mandates

[159] Victoria Baumfield, 'Stakeholder theory from a management perspective: Bridging the shareholder/stakeholder divide' (2016) Australian Journal of Corporate Law 31(1) 200.

[160] Rosemary Langford, 'Directors' Duties: Stakeholder Interests - Balancing or Considering?' (2014) 32 C&SLJ 64 at 67. See also Victoria SchnureBaumfield, 'Injunctions and Damages Under s 1324 of the Corporations Act: Will McCracken v Phoenix Constructions Revive the Narrow Approach?' (2014) 32 C&SLJ 453.

companies to act in an ethical and responsible manner, which is "consistent with the reasonable expectations of investors and the broader community".[161] Inferring from the Principle, companies are directed to act as 'good corporate citizens'.[162] They should ensure fairness when dealing and relating with stakeholders – the employees, suppliers, clients and the broader society.

Initially, the courts did not give much paramountcy to the interests of stakeholders while determining the directors' breach of obligations. In *Re William Brooks & Co Ltd and the Companies Act*[163], the court considered the interests of the corporation as of much primacy to the interests of the consumers and the public at large. In *Richard Brady Franks Ltd v Price*[164], the court also held that the interest of creditors and debenture holders did not supersede that of the company.[165] In recent times, the courts have been dynamic in its interpretation of the Australian corporate law. The courts have appositely affirmed the suitability of the stakeholder theory in Australia's corporate governance framework. Of much significance is the case of *Kinsela v Russell Kinsela Pty Ltd (in liq)*[166] where the court held that primacy should be given to the interests of creditors when a company is in insolvency or nearing insolvency. In *The Bell Group Ltd (in liq) v. Westpac Banking Corporation,* the court held that in determining the interests of the corporation, the legitimate interests of stakeholders (other groups) cannot be jettisoned.

Over the years, there have been increasing clamors, particularly from advocates of the stakeholder theory that the position of the law should be tacitly modified to permit company

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[161] Victoria Baumfield, n 4, p.202; See ASX Corporate Governance Council, ASX Corporate Governance Principles and Recommendations, 3rd ed, ASX, 2014, p 19.
[162] Ibid.
[163] (1962) 79 WN (NSW) 354
[164] (1937) 58 CLR 112.
[165] See also Re Atlas Engineering Company (1889) 10 LR (NSW) Eq 179.
[166] Supra note 3.

directors to put into consideration the interests of stakeholders.[167] Since there are instances under the corporate legal framework where the directors may be deemed to have run afoul of the law and breach their duties while giving primacy to the interests of non-shareholder stakeholders, the exigency of entrenching 'stakeholderism' into the Australia's corporate governance laws is more pronounced than ever before.

Two recent Australian inquiries[168] have further shaped the paradigm shift of corporate governance in the country from the shareholder primacy to the stakeholder theory. The Corporations and Markets Advisory Committee ('CAMAC') Social Responsibility of Corporations Report in 2006 provided directions on the extent to which the Corporations Act should incorporate the CSR and obligations that directors should take account of while making corporate decisions, for the interest of the non-shareholder stakeholders.[169] One of the recommendations of the CAMAC's Report is that the directors' duty to act in the best interests of the corporation (stakeholders in this context) in section 181 of the Corporations Act should be expanded to permit the directors to take into account external factors if it will benefit the shareholders.[170] In the report, directors are also saddled with the obligation of considering the interests of creditors and debenture holders in a situation of insolvency, even though the Corporations Act does not place any direct fiduciary obligation on the director with respect to creditors and stakeholders.[171] The Report also states that the directors should be given the latitude to determine what will be in the company's interest, while not precluding the interests of stakeholders.[172] The shortcoming of the Report however is that its proposals for change of some of the provisions of the Corporations Act with respect to

[167] Shelly Marshall and Ian Ramsay, n2 at 292.
[168] They are namely: the Corporations and Markets Advisory Committee ('CAMAC') Social Responsibility of Corporations Report, 2006, and the Parliamentary Joint Committee on Corporations and Financial Services ('PJC') Corporate Responsibility Report.
[169] CAMAC, 'The Social Responsibility of Corporations' (Report, Australian Government, 2006).
[170] Ibid 91–2.
[171] Ibid 84.
[172] Ibid 82 and 86.

directors' duties were rejected. The extant position of the law that by requiring directors to act in the interests of the corporations, the interests of others will be sufficiently protected was retained by the CAMAC.[173] The CAMAC maintained the position that:

> *The current common law and statutory requirements on directors and others to act in the interests of their companies are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role of companies and how they should conduct their affairs.*[174]

Notably and digressing from the position of the CAMAC's Report, the Parliamentary Joint Committee on Corporations and Financial Services ('PJC') Corporate Responsibility Report in 2006 rejected the 'shareholder theory' interpretation of the duties of company directors. It states expressly that: "there is no particular objection to directors considering the interests of stakeholders other than shareholders, but the interests of shareholders must be the clear priority".[175] Diverging from the interpretation in the CAMAC's Report, the PJC expanded the interpretation of the directors' duties as follows:

> The enlightened self-interest interpretation of directors' duties acknowledges that investments in corporate responsibility and corporate philanthropy can contribute to the long-term viability of a company even where they do not generate immediate profit. Under this interpretation directors may consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation … The committee considers that the most appropriate perspective for directors to take is that of enlightened self-interest. Corporations and their directors should act in a socially and environmentally responsible manner at least in part because such conduct is likely to lead to the long-term growth of their enterprise.[176]

While the two recent inquiries have not seen to the modification of directors' duties under the Corporations Act, they differed in interpretations of the extent of the directors' duties to the company and the non-shareholder stakeholders.

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[173] Ibid 111.

[174] Ibid. Quoted from Shelly Marshall and Ian Ramsay, n2 at 300.

[175] PJC, 'Corporate Responsibility: Managing Risk and Creating Value' (Report, Parliament of Australia, 2006) 51.

[176] Ibid 52-3. Quoted from Shelly Marshall and Ian Ramsay, n2 at 302.

Empirically however, studies have shown that the majority of the directors of Australian companies understand that their corporate duties transcend beyond the interests of shareholders only. The findings of a survey carried out by Marshall and Ramsay show that the directors understood that the current law does not inhibit them from pursuing the interests of stakeholders in corporate decision making.[177] The data collected in the survey research shows that the directors are striking a balance between shareholders' and stakeholders' interests.

Unlike in the UK where section 172(1) of the *Companies Act 2006* has limited the duty of the directors to the promotion of the success of the company for the benefit of its shareholders, the extant Australian *Corporations Act* impliedly gives the leeway for the consideration of interests of a wider group of stakeholders. Although much is left to be desired in the *Corporations Act*, in coming years, it is predicted that the current gradual paradigm shift in the model of corporate governance in Australia will be stamped into a hard law, which may by implication bring about the modification of the Corporations Act.

3.9 DIFFERENCES AND DISTINCTIONS IN THEORIES OF CORPORATE STAKEHOLDERS IN THE NIGERIA AND AUSTRALIA JURISDICTIONS

Despite a growing recognition of stakeholders' rights, the situation so far shows a legal and regulatory focus on shareholder (and investor) rights, in both Australia and Nigeria.[178] In Nigeria, although the company statute (CAMA) and other corporate governance codes touch on stakeholder protection, there is, in fact, no thorough procedure for that protection -legal or

[177] Shelly Marshall and Ian Ramsay, p. 304.
[178] Amodu (n 20).

regulatory.[179] Even in general, the corporate governance structure is weak. And corruption and unethical business practices often meet with robust legislation and lax enforcement.[180] As a matter of course, merely passing stakeholder rights into law is not enough, because legal protection for stakeholders includes the rights prescribed by laws and regulations and the effectiveness of enforcement.[181]

In Australia, on the other hand, it has not been satisfactorily settled how and in whose interests managers of Australian companies should act.[182] In Australia, although a duty may be generally owed by the company to non-shareholders, it is neither enforceable nor generously applied[183]. Quite unlike the open-ended approach taken to duties owed to shareholders. The prevailing approach is a cautious one, reminiscent of a "if it's not broken, don't fix it" metaphor.[184] This does not mean there have not been any gains. Interestingly, it is a possible defense in Australian law to defend a takeover bid by appealing to suppliers and employees. The presence of this tactical ground, despite trifling support for the stakeholder concept and the absence of anti-takeover laws, shows a mild inadvertent shift towards incorporating stakeholder theories.[185]

[179] Ghulam Abid and others, 'Theoretical Perspectives of Corporate Governance' (2014) 3 Bulletin of Business and Economics 166.
[180] Parmar and others (n 8).
[181] Vasudev (n 11).
[182] Shafi Mohamad, 'The Importance of Effective Corporate Governance' [2011] SSRN Electronic Journal.
[183] Vasudev (n 11).
[184] Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' [2011] SSRN Electronic Journal 291.
[185] Abid and others (n 40).

CHAPTER FOUR

CORPORATE GOVERNANCE IN NIGERIA & AUSTRALIA VIS-À-VIS INTERNATIONAL BENCHMARKS

4.1 OECD PRINCIPLES OF CORPORATE GOVERNANCE

The health and stability of our economies depend critically on the honesty of markets and enterprises. Thus, by supporting market confidence, financial stability, and employee and stakeholder relationships, good corporate governance – the rules and practices that govern the relationship between managers and shareholders of corporations as well as stakeholders like employees and creditors – contributes to growth.

Integrity of the market and economic effectiveness, Governments, authorities, and the public have been particularly focused on recent business scandals.

On the need to solve this problem and the flaws in corporate governance systems, corporations, investors, and the general public should be informed.The OECD Principles of Corporate Governance offer precise recommendations for enhancing the legal, institutional, and regulatory framework that supports corporate governance, with a focus on publicly traded businesses, for policymakers, regulators, and market players. Additionally, they offer helpful recommendations for stock exchanges, investors, businesses, and other parties involved in the process of creating sound corporate governance. They have received the Financial Stability Forum's endorsement as one of 12 important guidelines for ensuring financial stability.

The OECD Principles, which were first released in 1999, have since established themselves as the global standard for corporate governance and served as the inspiration for several reform initiatives undertaken by both public and private sectors. Through a process of

comprehensive and transparent consultations and drawing inspiration from the work of the provincial Corporate Governance Dialogues for non-OECD countries, the Principles were updated in 2003 to reflect changes since 1999. In April 2004, the OECD's member states adopted the revised Principles. The major aspects of the Principles are outlined in this Policy Brief, along with examples of how they handle important corporate governance concerns.

The Organization for Economic Cooperation and Development has played a significant role in the emergence of the modern framework for corporate governance at the international and domestic levels.[186] Mostly, the historical antecedence of these modern principles cannot be discussed without referring to the internal push by resident experts at the OECD for a uniform framework. This role is further heightened by the increasing effects of globalization in the business scene which has been largely attributed to as a catalyst for the continued evolution of corporate governance landscape alongside corporate fraud. In furtherance of the guardian role of the OECD in international economics, it introduced some minimum standards and principles that member countries must meet in the development of their domestic frameworks. Since its introduction in 1999, it has risen to prominence as the major benchmark for corporate governance in the international scene and serves as a guide to governments, corporate bodies, domestic regulatory bodies and international institutions.[187]

The OECD principles provide for six key aspects of corporate governance which are;

1. Ensuring the basis of an effective corporate governance framework: The framework for corporate governance should support open and effective markets, uphold the rule of law, and clearly define the roles and duties of various supervisory, administrative, and enforcement authorities.

[186]Fianna Jesover and Grant Kirkpatrick, 'The Revised OECD Principles of Corporate Governance and Relevance to Non-OECD Countries' (2005) 13 Corporate Governance: An International Review 1.
[187]Deborah Leipziger, 'The OECD Principles of Corporate Governance' [2015] The Corporate Responsibility Code Book: Third Edition 184.

2. considering the rights of shareholders and key ownership functions: The framework for corporate governance should protect and facilitate the exercise of shareholders' rights.
3. The equitable treatment of shareholders: The corporate governance framework should ensure that all shareholders, including minority and foreign shareholders, are treated fairly. All shareholders should be able to seek effective redress if their rights are violated.
4. The role of stakeholders in corporate governance: In order to create jobs, wealth, and the sustainability of financially sound businesses, the corporate governance framework should actively promote cooperation between corporation and stakeholders. It should also recognize the rights of stakeholders established by law or through mutual agreements.
5. disclosure and transparency: The corporate governance framework should make sure that all pertinent information about the corporation, such as its financial situation, performance, ownership, and governance is disclosed promptly and accurately.
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, the board's accountability to the company and the shareholders.

The principles emphasize that such oversight shouldn't entail day-to-day management but should instead guarantee the company's strategic direction and the supervision of internal controls.

But who keeps an eye on the monitors? The shareholders, according to the principles, should be allowed to exercise their fundamental ownership rights, including the ability to appoint and remove board members, and they should be treated fairly by the business. The shareholders in turn are responsible to the board. Another area that is taken into consideration is the effective use of ownership rights to oversee and direct the board of directors. However, reality is frequently more complicated when a majority shareholder controls a company's management, which presents a slightly different situation for monitoring but is nonetheless

covered by the principles. The OECD Principles are extremely pertinent to some recent, well-publicized high-profile corporate failure stories. For instance, rather than being a proactive overseer of management's performance, boards appear to have been inactive or even to have integrated into it in some instances. In other instances, boards seem to be just rubber stamps, carrying out the directives of a powerful stakeholder. In many instances, controlling shareholders have advanced their interests at the expense of minority shareholders, and shareholders appear to have been either inactive or ineffective in imposing sanctions on the board.[188]

These principles altogether address some of the major issues in modern corporate governance and the document provides useful annotations that suggest policy measures taken to achieve the goals as set by these principles.[189] The benchmark seeks to ensure that these principles are not only applied to privately owned companies but also state-owned enterprises. There are also mechanisms set up within the OECD to ensure a periodic review of these principles transparently including the use of questionnaires administered to member countries, survey of corporate governance developments and a general assessment by the Steering Group on Corporate Governance with key contributions from other international institutions.[190] This was clear in the build-up to the 2004 revision of the OECD principles.

The general character of these principles is one which seeks to secure investor interest, including creditors and shareholders, while ensuring that effective system of checks and balances are installed within the ranks of corporate bodies. This includes the need for effective monitoring and disclosures by professional managers.[191]

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[188]policy-brief-oecd-principles-of-corporate-governance-aug-2004.pdf
[189]Deborah Leipziger, 'The OECD Principles of Corporate Governance' [2015] The Corporate Responsibility Code Book: Third Edition 184.
[190]ibid.
[191]Jesover and Kirkpatrick (n 47).

When assessing whether their corporate governance system is compatible with developing the corporate governance they want, governments might refer to the Principles for broad direction. Policymakers are urged to establish the governance structure with an eye toward how it will affect the economy as a whole, the integrity of the market, the incentives it will provide to market participants, and the promotion of open and effective markets. This should help limit the unforeseen implications of policy changes and lower the danger of expensive overregulation. The legislative and regulatory requirements that impact corporate governance procedures should be in line with the rule of law, transparent, and enforced to support market integrity.

How The Principles Deal With conflict of interest

Conflicts of interest are pervasive and frequently result in behaviour that is harmful to shareholders, investors, and stakeholders, which is one of the most startling lessons learned in recent years. Conflicts of interest can take many different forms, thus the Principles address them in various parts. The Principles generally support complete disclosure as well as an explanation by the parties concerned of how the conflict of interest is being handled. Managing conflicts of interest is especially critical for external auditors, whose independence is critical for financial market integrity. The principles supplement the International Organization of Securities Commissions' (IOSCO) Principles of Auditor Oversight released in 2002. These advocates establishing a body to offer oversight of audit quality and execution in the public interest. The OECD Principles recognize the significance of recent legislation implemented by several countries to address the distorted incentive structure that occurs when the external auditor delivers no audit services or is involved in auditing his own work. Managing the connection with the external auditor to ensure a high-quality independent audit is also listed as a crucial role of the board by the principles. A sound corporate governance structure must be supported by effective methods to safeguard the integrity of people who

supply information or advice that may affect investors' decisions, such as investment advisors, brokers, and rating agencies.

This is necessary because tight relationships between service providers and their clients might lead to conflicts of interest. It is critical for the market to understand whether the firm is run in the best interests of all stakeholders its shareholders to that aim, the principles require that any substantial related-party transactions must be fully disclosed by the corporation. These types of transactions are typically, between the corporation and entities in which it or its management has a stake, or with strong financial relationships.

Shareholders, as well as their families and associates According to the Principles, the beneficiary of such a transaction must notify the board, which must then notify the market. This does not, however, absolve the company from maintaining its own monitoring.

The principles stress the importance of protecting minority owners, particularly where there are controlling shareholders whose interests may differ from those of the others. This is especially concerning in places with a lax legal and regulatory framework for minority protection. The principles emphasize that it is acceptable for investors to expect returns.

Insider power abuse, including by controlling shareholders, is expected to be forbidden. In circumstances where such abuses are not expressly prohibited by law, where legislation is lacking or enforcement is ineffective, the principles urge policymakers to adopt steps to fill such gaps.

4.2 MEASURING CASE STUDY COUNTRIES AGAINST OECD PRINCIPLES

A 2017 KPMG/ACCA report on OECD compliance in Africa places Nigeria as fourth out of the 15 countries examined.[192] This signals a significant level of compliance with OECD

[192]ACCA-KPMG, 'Balancing Rules and Flexibility', vol 106 (2014) 14.

principles by the country as the report states that most markets in Africa have met over 80 percent of the requirements. Compliance with the provision on the right of shareholders and key ownership functions and equality of shareholder principle of the OECD is especially high in the Nigerian space as Nigerian legal framework places a premium on shareholder rights as members of the company. This is clear in provisions of the Companies and Allied Matters Act 2020 on rights of members as a majority and even provisions relating to protecting the interests of minority shareholders. For instance, section 341 of CAMA provides that:

> *"Subject to the provisions of this Act, where an irregularity is made in the course of a company's affairs or any wrong is done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct."*[193]

There has also been notable inclusion of disclosure requirements in the statutes and codes, although the extent of compliance is narrow and does not sufficiently consider the interest of stakeholders.[194] Examples are section 257 of CAMA 2020 that requires disclosure of remunerations.

> "*The compensation of managers of a company shall be disclosed to members of the company at the annual general meeting."*

Section 119 as well reads

> *"—(1) Notwithstanding the provisions of section 120, every person with significant control over a company shall, within seven days of becoming such a person, indicate to the company in writing the particulars of such control.*
>
> *(2) A company after receiving or coming into possession of the information required under subsection (1), shall, not later than one month from the receipt of the information or any change therein, notify the Commission of that information provided that a company shall in every annual return, disclose the information required under subsection (1) in respect of the year for which the return is made.*

[193] Sections 340 to 347 of the CAMA 2020 makes significant provisions relating to protection of the rights of minority shareholders in Nigeria.
[194] Amodu (n 20).

(3) The Commission shall maintain a register of persons with significant control in which it shall enter the information received from the company or any change therein under subsection (2).

(4) A company shall inscribe against the name of every member in the register of members the information received in pursuance of the requirements of this section.

(5) If default is made by any person or company in complying with subsections (1), (2) and (4), the person or company and every officer of the company are liable to such fines as the Commission may prescribe by regulation for every day during which the default continues."

In furtherance, section 120 provides that:

"—(1) A person who is a substantial shareholder in a public company shall give notice in writing to the company stating his name, address and full particulars of the shares held by him or his nominee (naming the nominee) by virtue of which he is a substantial shareholder. (2) A person is a substantial shareholder in a public company if he holds himself or by his nominee, shares in the company which entitle him to exercise at least 5% of the unrestricted voting rights at any general meeting of the company.

(3) A person required to give a notice under subsection (1), shall do so within 14 days after that person becomes aware that he is a substantial shareholder.

(4) The notice shall be given notwithstanding that the person has ceased to be a substantial shareholder before the expiration of the period referred to in subsection (3).

(5) The company shall, within 14 days of receipt of the notice or of becoming aware that a person is a substantial shareholder give notice in writing to the Commission of this fact.

(6) If any person or company fails to comply with the provisions of this section, the person or the company is liable to such fines as the Commission may prescribe by regulation for each day the default continues."

Section 303 of CAMA

"(1) Subject to the provisions of this section, it is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a transaction or a proposed transaction with the company, to immediately notify the directors of such company in writing, specifying particulars of the director's interest.

(2) For the purpose of this section, a general notice given to the directors of a company by a director to the effect that he is a member of a specified company or firm and is to be regarded as interested in any transaction which may, after the date of the notice, be made with that company or firm, shall not be deemed to be a sufficient declaration of interest in relation to any transaction so made unless the particulars of the transaction are also disclosed by that director to the board upon being known to

that director, and that the director does all things reasonably necessary to be sure that it is brought up and read at the next meeting of the directors after it is given.

(3) Any director who fails to comply with the provisions of this section commits an offence and is liable to a fine in such amount as the Commission shall specify in its regulations.

(4) Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company."

Section 382 of CAMA

"(1) The additional matters contained in the Second Schedule shall be disclosed in the company's financial statements for the year; and in that Schedule, where a thing is required to be stated or shown or information is required to be given, it is construed to mean that the thing shall be stated or shown, or the information is to be given in a note to those statements.

(2) In the Second Schedule to this Act — (a) Parts I and II deal respectively with the disclosure of particulars of the subsidiaries of the company and its shareholders;

(b) Part III deals with the disclosure of financial information relating to subsidiaries;

(c) Part IV requires a subsidiary company to disclose its ultimate holding company;

(d) Part V deals with the emoluments of directors, including emoluments waived, pensions of directors and compensation for loss of office to directors and past directors; and

(e) Part VI deals with disclosure of the number of the employees of the company who are remunerated at higher rates.

(3) Whenever it is stated in the Second Schedule of this Act that this subsection applies to certain particulars or information, the particulars or information is annexed to the annual return first made by the company after copies of its financial statements have been laid before its shareholders in a general meeting and if a company fails to satisfy this obligation, the company and every officer of it are liable to a penalty as the Commission shall specify in its regulations.

(4) It is the duty of any director of a company to give notice to the company of such matters relating to himself as may be necessary for the purposes of Part V of the Second Schedule to this Act and this applies to persons who are or have at any time in the preceding three years been officers as it applies to directors.

(5) A person who makes default in complying with the provisions of subsection (4), is liable to a penalty as the Commission shall specify in its regulations."

Section 383 of CAMA 2020

"—(1) The group financial statements of a holding company for a year shall comply with Part I of the Third Schedule (so far as applicable) as regards the disclosure of

transactions, arrangements and agreements mentioned therein, including loans, quasi loans and other dealings in favour of directors.

(2) In the case of a company other than a holding company, its individual accounts shall comply with Part I of the Third Schedule (so far as applicable) as regards disclosure matters contained in the Schedule.

(3) Particulars which are required to be contained in Part I of the Third Schedule in any financial statements are required in respect of shadow directors as well as a director given by way of notes. (4) Where by virtue of section 379 (2) or (3), a company does not prepare group financial statements for a year, it shall disclose such matters in its individual statements as would have been disclosed in group financial statements.

(5) The requirements of this section apply with such modifications as are necessary to bring them in line with Part I of the Third Schedule to this Act, (including with particulars of exceptions in respect of recognised banks it shall disclose).”

Section 772(1) of CAMA also requires disclosure from the company.

“*The limited liability partnership shall maintain such proper books of account as may be prescribed relating to its affairs for each year of its existence on cash basis or accrual basis and according to double entry system of accounting and shall maintain the same at its registered office for such period as may be prescribed.”*

Subsection 2 further requires that

“Every limited liability partnership shall, within six months from the end of each financial year, prepare a statement of account and solvency for the financial year as at the last day of the financial year in such form as may be prescribed, and the statement shall be signed by the designated partners of the limited liability partnership.”

Asides the provisions shown above, there are plethora of other provisions on disclosure under the law and codes.

Empirical studies also suggest the growing recognition of stakeholder interest by corporate bodies between 2003 and 2013 because of the corporate governance reforms in the country and new regulations put in place, although the interest of shareholders still overrides that of other stakeholders.[195] The relative deficiency of the regulations regarding recognition of stakeholder rights remain apparent.

[195]Olayemi Simon-Oke, Tajudeen Egbetunde and Oluyemi Ologunwa, ‘The Implementation of Oecd Corporate Governance Principles in Nigeria: Evidence From Stakeholders’ Perspectives’ (2019) VII International Journal of Business and Management.

The Australian experience has mostly been about the failure of corporate governance in the 1980s, and the turbulent journey towards installment of a regulatory agency. The Australian Securities Exchange was subsequently setup to ensure compliance with the legal requirements set under the laws, rules and regulations. There has been significant compliance with the OECD principles since the turn of a millennium as there are similitudes of the OECD principles in the domestic principles in Australia which are hinged on the fundamental tenets of Accountability, Transparency and Disclosure.[196]

Notwithstanding the level of compliance by the Australian state, there have been significant objections or reservations made regarding the principles. In a 2015 General comment made by the Governance Institute of Australia, a major independent professional association in Australia primarily focused on corporate governance, they identify certain shortfalls in the OECD principles and why it may not be suitable for effective corporate governance in the country. The bulk of the comments revolve around the conflicts between the black letter law provisions and the soft law recommendation of the OECD, review of proxy voting recommendations for its perceived anachronism, Intermediary shareholding permissibility, persons to whom disclosures must be made, responsibilities of the board and the role of stakeholders.[197] These are mostly recurring issues in the corporate governance space which calls for the attention of the OECD and perhaps a review of international standards subject to an objective assessment of the position of all member countries.

Notwithstanding, research has shown that the Australian framework is more compliant with the OECD principles even as it accommodates some flexibilities and makes comprehensive

[196]Australian Delegation to the OECD, 'Corporate Governance of Insurers in Australia; Note by the Australian Delegation' (2002) 3.
[197]Governance Institute of Australia, 'OECD Principles of Corporate Governance : Draft for Public Comment — November 2014' 7.

provisions relating to the rights of shareholders.[198] However, there are concerns it may be falling short on the facilitation of ownership rights by all shareholders, including institutional investors. Studies show that institutional investors, whose participation they should encourage in corporate responsibility, are reluctant to get involved in investee companies in aspects of corporate governance.[199] This has been attributed to the restrictive rules on takeovers, shadow directorship, insider trading, and despite efforts to relax these restrictions, this problem has not been fully resolved.[200]

A common shortfall of both jurisdictions is regarding the recognition of the role of stakeholders in corporate governance. This is as yet not much in the way of significant provisions that cater for these in such a manner as to drive compliance. There is also not a clear definition of who qualifies as a stakeholder within the extant laws, just pockets of provisions relating to parties other than shareholders or in the case of Australia, a blanket provision under the ASX Corporate Governance Principles.[201]

4.3 WEAKNESSES IN THE CORPORATE GOVERNANCE STRUCTURE IN AUSTRALIA

While Australia may bear hold some comparative advantage over Nigeria in terms of economic and legal development, the level at which this may be given credence is largely watered down by the fact that corporate governance principles grow with economic activity. We may argue same of general legal development in any country. Nonetheless, the Australian framework is more robust and developed compared to the Nigerian framework. Despite this relative strength of the Australian framework, some weakness and loopholes equally exist and have been a common subject of research in recent years.

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[198]Zain Sharar, '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.' (2007) 86.
[199]ibid 95.
[200]Sharar (n 58).
[201] Principle 10, Australian Stock Exchange Corporate Governance Principles

The moral dilemma of mandatory corporate governance provisions is a front burner issue in the jurisprudence of corporate governance. Academics argue that enacting laws that make it mandatory for the management of companies to follow certain principles in the affairs of the company may protect the interests of investors and stakeholders.[202] However, this may occasion some inflexibility and fetter the discretion of the management, which may be dire in certain instances where key decisions bordering on the future of the company are to be made. Aside from this, principles of corporate governance that are set in *black letter law* nature may pose a challenge to foreign investors, particularly if there is a wide margin of difference between what obtains in the foreign country and their home country.[203] The Australian framework takes a partially mandatory outlook unlike jurisdictions like the United States where there are more mandatory than flexible requirements but there has been much of academic inquiry into how this might still be a weakness and why a voluntary system driven by incentives may be more suitable for driving compliance and economic growth and sustainability.[204]

The free market economists drive the tussle between the voluntary and mandatory structures as against investment advocates. While the free market economists argue that compliance with corporate governance principles is best driven by incentives and not compulsion, investment advocates argue mandatory provisions are the most efficient way to drive compliance and guarantee the interest of investors.[205]

Another weakness in the Australian framework is the lack of a clear definition of parties that fall within the stakeholder definition. This is notwithstanding the fact that the Australian

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[202]John Zadkovich, 'Mandatory Requirements, Voluntary Rules and "Please Explain": A Corporate Governance Quagmire' (2007) 12 Deakin Law Review 23.
[203]Nor Asma Lode and Ibrahim Md Noh, 'Corporate Governance Disclosures and Family Firms' Performance: The Moderating Role of Ceo Choice' (2020) 7 Journal of Critical Reviews 578.
[204]Anita Indira Anand, 'Voluntary vs Mandatory Corporate Governance: Towards an Optimal Regulatory Framework' (2016) 5 Report 2016 48.
[205]Maryam Safari, Soheila Mirshekary and Victoria Wise, 'Compliance with Corporate Governance Principles: Australian Evidence' (2015) 9 Australasian Accounting, Business and Finance Journal 3.

Stock Exchange Principles of Corporate Governance provides under Principle 10 that companies must recognize their legal and other obligations to stakeholders.

> *"Companies have a number of legal and other obligations to non-shareholder stakeholders such as employees, clients/customers and the community as a whole. There is growing acceptance of the view that organizations can create value by better managing natural, human, social and other forms of capital. Increasingly, the performance of companies is being scrutinized from a perspective that recognises these other forms of capital. That being the case, it is important for companies to demonstrate their commitment to appropriate corporate practices."*

The lack of definition of stakeholders makes it difficult to enforce compliance.

There is also a need for clear provisions relating to management of conflict of interest by directors and appointment of independent directors to tasks in the event of a conflict of interest in the legislative framework of corporate governance in Australia. This will further promote transparency and compliance with the OECD benchmark.

4.4 WEAKNESSES IN THE CORPORATE GOVERNANCE STRUCTURE OF NIGERIA

As earlier identified in this study, the development of a robust corporate governance framework took off late in Nigeria, although the history can be traced to the British system adopted in the early 1900s. There has been significant developments in the Nigerian corporate space in terms of enactment of extant laws, codes and general principles to bind the management of companies in the administration of their duties. This includes the enactment of the companies and allied matters act of 2020, which has effectively repealed and replaced the 1990 statute of the same name and several general and sector-specific codes providing for *good* corporate governance practices. Despite these developments in the Nigerian corporate governance framework, some deficiencies and weaknesses remain apparent, albeit recurring.

These deficiencies have been identified in copious research and are clear in the recurring cases of corporate fraud, business failure, financial distress, bank collapse, low regard for

environmental concerns and other issues emanating from the Nigerian corporate space. We will discuss some of these identified weaknesses and loopholes in the Nigerian corporate governance framework under this heading. We will also attempt to compare the framework with the Australian framework to identify best practices that have been tested and proven to be effective for adaptation in the Nigerian space.

A major feature of the Nigerian legal framework is that it mostly adopts the command-and-control method, which makes mandatory provisions on disclosure and other obligations to the management of companies.[206] This, as earlier argued, may pose to be a weakness when perceived through the spectrum of the free market economics even though it superficially secures the benefit of the investor and shareholder. This, when compared with the Australian system, discloses a slight difference as the Australian framework gives room for some flexibility and vests a discretion to *act and explain* to an extent on the Board. Irrespective of whichever spectrum from which this subject is reviewed, the benefit and ability to drive compliance should be the primary focus of the method to adopt. Despite the mandatory nature of the Nigerian framework, it has not been able to sufficiently drive compliance as there are repeated cases of mismanagement, banks' distress and collapse of corporate structures in Nigeria. Perhaps an incentive-based approach could be able to solve or at least ameliorate this problem as it has done in previous use cases, albeit under different subject areas.[207] For instance, Nigerian Government passed the executive order 007 in 2019 to drive tax compliance. The crux of the order was that corporate bodies may invest in road infrastructure for commensurate tax deductions.[208] This has driven compliance with tax obligations to an extent further than it was before the order was made.

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[206]Eti Best Herbert and Ibitayo Oyinda Durosomo, 'Tracing the Evolution of Corporate Governance Regime in Nigeria' (2019) 11 Journal of Corporate Governance 2382, 2382.

[207]I Hashi, 'The Legal Framework for Effective Corporate Governance: Comparative Analysis of Provisions in Selected Transition Economies' [2003] Center for Economic and Social Research 1.

[208]'Presidential Executive Order No. 007 of 2019: Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme Order 2019'.

Another obvious grey area in the Nigerian corporate governance framework is the primary focus on shareholder primacy by the principal corporate law. The Companies and Allied Matters Act (CAMA) of 1990 which has subsequently been revised in 2020, is the primary legislation on corporate law in Nigeria. Sections 64 and 263 of the 1990 CAMA provides for the duty of directors to act in the best interest of the company, the overriding interest of the members in general meeting. Although section 279 of the 1990 CAMA[209] has the flavor of securing the interest of other entities apart from shareholders by mandating that the directors' act in the best interest of the company including the employees.

> *"(1) A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf.*
>
> *(2) A director shall also owe fiduciary relationship with the company in the following circumstances-*
>
> *(a) where a director is acting as agent of a particular shareholder;*
>
> *(b) where even though he is not an agent of any shareholder, such a shareholder or other person is dealing with the company's securities.*
>
> *(3) A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances.*
>
> *(4) The matters to which the director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members.*
>
> *(5) A director shall exercise his powers for the purpose for which he is specified and shall not do so for a collateral purpose, and the power, if exercised for the right purpose, does not constitute a breach of duty, if it, incidentally, affects a member adversely.*
>
> *(6) A director shall not fetter his discretion to vote in a particular way.*
>
> *(7) Where a director is allowed to delegate his powers under any provision of this Act, such a director shall not delegate the power in such a way and manner as may amount to an abdication of duty.*
>
> *(8) No provision, whether contained in the articles or resolutions of a company, or in any contract, shall relieve any director from the duty to act in accordance with this section or*

[209] Now contained under Section 305 of the 2020 Act

relieve him from any liability incurred as a result of any breach of the duties conferred upon him under this section.

(9) Any duty imposed on a director under this section shall be enforceable against the director by the company."

The glaring shortfall is in its limitation of the section to the best interest of the company.[210] It thus, as a result, does not consider the interest of the immediate community in which the company is situated, the public, consumers, creditors and other entities that may come into the stakeholder definition.[211] The bulk of the provisions in this law are focused on protection of the interest of the shareholders individually and collectively. While we may applaud the 2020 amendments for bringing into consideration the impact of company operations on the environment as contained in section 305(3) which states that:

> *"A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances and, in doing so, shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations."*[212]

It appears to have even widened the focus on shareholder primacy at the expense of the stakeholders. Although it is argued in some quarters that it takes a less restrictive stance on shareholder primacy and rather tilts towards the modern version popularly called the ESV model as sourced from the 2006 Companies Act of the United Kingdom particularly under section 172.[213]

> *"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*
>
> *(a) the likely consequences of any decision in the long term,*

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[210]Amodu (n 20).
[211]Abisola Oshin, 'Shareholder Primacy in Nigeria: A Myth or a Reality?' [2012] SSRN Electronic Journal 1.
[212] Section 305(3) of CAMA 2020 requires the taking into account of ecological and environmental concerns by management of companies.
[213]Amodu (n 20) 439.

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

Like the arguments raised regarding the Australian framework, the Nigerian framework pays little to no attention to stakeholder interests and the relative difficulty of circumscribing qualification as stakeholder remains unattended. This has created a spillover effect into specific sectors of the economy, including oil and gas, and environment, as Corporate Social Responsibilities of companies is more difficult to enforce than it would have been if they make important clarifications and obligations in the extant laws.[214] Much of the CSR being carried out in the country has been reported to be in ad hoc form and predicated mostly on philanthropy fuelled by moral or cultural obligation and not legal requirements.[215] For instance, oil exploration in the Niger-Delta region of the company has come at huge ecological costs to the inhabitants of these oil rich communities as they lack basic human needs like portable water and fishing, which is the major business of these communities before oil discovery, has become almost impossible due to oil spillage. Despite the social, economic and environmental costs of these continued exploration by foreign and domestic oil

[214]N Umoh-Daniel and RO Urhoghide, 'Corporate Governance and Corporate Social Responsibility Disclosure in Nigerian Financial Sector' (2018) 2 Accounting and Taxation Review 1.
[215]Å Helg, 'Corporate Social Responsibility from a Nigerian Perspective' [2007] Handelshogskolan Vid Goteborgs Universiteit 101, 46.

companies, the conduct of CSR is seldom considered[216] because of the relative silence[217] of the Nigerian legal framework for corporate governance.[218] Although the 2020 CAMA provides that the management should consider the community within which the company operates, there is little to no development on such provisions that mandates or at least incentivize compliance with CSR objectives.

Developed economies are increasingly tilting towards the adoption of mandatory integrated reporting covering non-financial performance of companies. Evidence of this has been found in recent corporate governance practices of Australian companies as a KPMG report states that over 70% of the largest companies listed on the Australia Stock Exchange (ASX) and several non-listed organizations now place a premium on principles of integrated reporting for creation of long-term value.[219] This helps in the engagement of stakeholders, even though it is not significantly driven by regulation but by long-term benefit to the said companies. Conversely, studies have shown that Nigeria adopts a traditional reporting framework that accords the shareholder primacy theory and falls short of the stakeholder protection goal of integrated reporting.[220] The CAMA and ISA must be revamped to include these measures to effectively cater for stakeholder interest as a conscious application of integrated reporting principles sways shareholder/member/management decisions to such extent as may be required to protect their brand and assets.[221] Research has shown that there is a positive

[216]I Joseph, N Elda and Simplice Asongu, 'Multinational Oil Companies in Nigeria and Corporate Social Responsibility in the HIV/AIDS Response in Host Communities' (2019).
[217] Although the Nigerian Code of Corporate Governance 2018 has some extant provisions under principles 26,27 and 28, they are at best moral obligations which has clearly failed to drive compliance by Nigerian companies. This is because it neither provides for an incentive for participation nor prescribes a legal duty.
[218]H Ijaiya, 'Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria' (2014) 3 Journal Development of Sustainable 60.
[219]Mohamed Zairi and Steve Letza, 'Corporate Reporting: Good Governance Driving Australian Organisations to Adopt Integrated Reporting' (2019) 32 *KPMG* 30.
[220]Amodu (n 20) 442.
[221]Zairi and Letza (n 79).

relationship between a robust regulatory framework and compliance with integrated reporting/ environmental disclosures.[222]

Another weakness of the Nigerian corporate governance system is the poor management of disclosure requirements, particularly regarding constant updating and enforcement. The Companies and Allied Matters Act and the Investment and Securities Act of 2007 (ISA) contain much of the disclosure requirements under Nigerian corporate governance framework. They put these requirements in place to ensure management accountability and in furtherance of the oversight functions of the Corporate Affairs Commission (CAC) and the Securities and Exchange Commission (SEC), the primary regulatory bodies established under the CAMA and ISA respectively. However, there is an immediate need for these bodies to enhance continuous disclosure of material decisions and events of significance as they occur within the company's ranks to identify and flag risk factors early on before the rot eats deep into the corporate structures of the companies. This helps to prevent the undermining of external control measures already put in place by the extant laws.[223]

4.5 CONCLUSION

This chapter examines the corporate governance framework of Nigeria and Australia to identify relative weaknesses and the extent of compliance with the OECD benchmark. The work concludes that though there is a significant level of compliance with the OECD benchmark by both countries, there is still room for further improvement, especially regarding development of the regulatory framework and the diligence of regulatory bodies. The work also finds that the comply or explain approach which appears to be strongly

[222]Grace N Ofoegbu, Ndubuisi Odoemelam and Regina G Okafor, 'Corporate Board Characteristics and Environmental Disclosure Quantity: Evidence from South Africa (Integrated Reporting) and Nigeria (Traditional Reporting)' (2018) 5 Cogent Business and Management 1.
[223]Ige Omotayo Bolodeoku, 'Corporate Governance: The Law's Response to Agency Costs in Nigeria' (2006) 32 Brook. J. Int'l L. 467, 54.

emphasized by the OECD is yet to be adopted within the Nigerian framework and explores arguments around the suitability of the mandatory and the perks of voluntariness.

CHAPTER FIVE

CONCLUSION & RECOMMENDATIONS

5.1 CONCLUSION

This work has examined the legislative and regulatory framework for corporate governance in Nigeria and Australia to identify the policy directions, adopted principles, inherent differences, and the level of compliance with the OECD benchmark. Chapter one provided the background and significance of the study and introduces its objectives, which includes the identification and definition of the principal stakeholders within both jurisdictions, the key differences and a comparative study of how they both measure up against international standards. The chapter also states the questions the research seeks to answer, including an inquiry into which of the shareholder primacy or stakeholder theory of corporate governance is dominant in both jurisdiction and a deduction of the earlier stated objectives. Attempts were made in subsequent chapters to answer these questions and meet the stated objectives.

Chapter two of this work undertakes an inquiry into the theoretical framework and history of corporate governance. The work alludes to the significant role of the Organization for Economic Cooperation and Development (OECD) in the development of the international benchmark of corporate governance principles which has served as the blueprint for development of most of the domestic legal and regulatory framework currently in existence in the polity of nations. More importantly, a key factor which was commonly alluded to in referenced works is the financial crises across different times that has played significant roles in the awakening of states to development of domestic frameworks to prevent recurrence of such crisis and reduce drastically the incidence of corporate fraud. The chapter builds on this by drawing strength from previous literatures to show how there is a casual link between financial fraud, crises and distress in the development of the corporate governance framework

in Nigeria and Australia. For instance, Zain Sharar, in their work on the corporate governance structure in Jordan traced the history of modern corporate governance framework to the financial crises in East Asia, Russia, and incidences of corporate scandals and failures across several continents leading to increased focus on corporate governance systems to forestall further occurrences and protect the stability of the international financial market. The chapter also looked at Millstein, who wrote extensively on the agency theory of corporate governance. From his perspective, shareholders should use this theory as a constant check on the manager's power to maximize profit and encourage ownership gains.Another striking similarity elicited in the chapter is the influence of the British framework for varying reasons, including Nigeria's colonial relationship with Britain and the evidence of Anglo-Saxon outsider system of ownership and control found in the Australian framework, albeit contested. This chapter further examined corporate governance in both Australia and Nigeria, and their legal and regulatory frameworks. The codes include:

- The Corporate Affairs Commission, by virtue of the Companies and Allied Matters Act, CAMA.
- The Central Bank, through the Code of Corporate Governance for Banks and Discount Houses, as well as other similar codes.
- The Securities and Exchange Commission, through the SEC Code of Corporate Governance for Public Companies, 2011.
- Financial Reporting Council of Nigeria, through the Nigerian Code of Corporate Governance, 2018.
- National Insurance Commission (NAICOM) through their Code of Good Corporate Governance for the Insurance Industry in Nigeria. (2009)
- National Pension Commission (PENCOM), through the Code of Corporate Governance for License Pension Operators (2008).

- Nigerian Communications Commission through the Code of Corporate Governance for the Telecommunications Industry, 2016.

Asides the code, the chapter touched on monitoring agencies in Nigeria, they include:

- The Corporate Affairs Commission, by virtue of the Companies and Allied Matters Act, CAMA.
- The Central Bank, through the Code of Corporate Governance for Banks and Discount Houses, as well as other similar codes.
- The Securities and Exchange Commission, through the SEC Code of Corporate Governance for Public Companies, 2011.
- Financial Reporting Council of Nigeria, through the Nigerian Code of Corporate Governance, 2018.
- National Insurance Commission (NAICOM) through their Code of Good Corporate Governance for the Insurance Industry in Nigeria. (2009)
- National Pension Commission (PENCOM), through the Code of Corporate Governance for License Pension Operators (2008).
- Nigerian Communications Commission through the Code of Corporate Governance for the Telecommunications Industry, 2016

The responsibility for enforcing adherence to the CAMA's provisions falls to the Corporate Affairs Commission. All businesses must adhere to the act's requirements because of its general character and requirement that they do so, under the supervision of the Corporate Affairs Commission, On the other hand, the Central Bank has the authority to monitor and control the banking industry in order to guarantee effectiveness, the preservation of standards, and responsibility. The CBN is specifically empowered to create subsidiary legislation for banks and financial institutions by the Banking and Other Financial Institutions Act.The Securities and Exchange Commission was created to safeguard investors' money from

dishonest business activities and to promote a fair and effective market. It has been given authority to control the capital and securities markets. Its main tenet is the protection of investors, and it closely monitors market activity and exchange.An important organization in the oversight of corporate governance is the Financial Reporting Council of Nigeria (FRCN). It is in charge of enforcing corporate governance compliance in Nigeria through its directorate of corporate governance. This is accomplished through the Nigerian Code of Corporate Governance, a comprehensive code that deals with corporate governance issues throughout the nation.

We then went further in this chapter to look at the distinction between shareholder primacy theory and stakeholder theory in both jurisdictions. We find that both jurisdictions seems to favour shareholder theory, while there are different scholarly opinions, and writings as to why this is so.

The third chapter of this work expounded on the history and evidence of corporate stakeholder theory in the Nigerian and Australian Jurisdiction. This theory was traced to the early writings of Adam Smith and a memorandum at the Stanford Research Institute where it was hinted that managers and corporate leaders owe responsibilities beyond those owed to the stockholders. The work acknowledges the development of a modern version with key influences from writings of Edward Freeman, which places a premium on the fact that the profitability of any business venture is hinged on more considerations than shareholder satisfaction. Several rationales that have been posited to support the theory were examined in the work and the criticisms put forward against it. The work submits that both jurisdictions have placed a premium on shareholder primacy over stakeholder theory. The work admits that the Nigerian legal framework tries to incorporate some provisions related to protecting stakeholders. However, there is little to nothing by enforcement to suggest a robust representation. Evidence of mild shifts toward stakeholder recognition in corporate

governance in Australia as an appeal to suppliers and employee in defence of a takeover bid was also examined considering its relative strength and significance in policy directions.

This chapter notes that the determination of each stakeholder's "interest" or "stake" in the organization is a problem that frequently surfaces after stakeholder identification. Employees' interest in the success of the company is typically seen as an input of human capital, especially in the case of long-term employees who have built up specialized knowledge through time. This interest for suppliers typically takes the form of money from products they make available to the business. Owners' interests or stakes are essentially financial in nature because they rely on the sale of their firm shares to generate income. The necessity for a clean environment, as well as the essential employment and goods, is frequently for the community to sustain a thriving economy.

In Nigeria, the corpus of rules and regulations appears to have evolved in response to a number of theories advanced by many theorists over time, the most prominent of which are the Stakeholder theory and the Stockholder/Shareholder/Agency theory. As a result, the corporate governance system operates on a multi-theoretical foundation, with the body of legislation integrating both shareholder and stakeholder concepts. Under the Nigerian corporate governance system, stakeholder theory fundamentally broadens the scopes of the entities and individuals whose welfare is influenced by the corporate unit. Shareholders, creditors, society, and the government are all referred to as such. The regulations require enterprises subject to their jurisdiction to clearly incorporate legitimate shareholders in policies and operations, as well as to respect and fulfil all legal, moral, and social obligations that are reasonably necessary. In determining which theory applies to corporate governance in Nigeria, it is noted that although the shareholders theory prevails, the stakeholders theory is not totally unrecognized as the CAMA incorporates not only an obligation to the members or shareholders but also an obligation to see to the interests of another stakeholder - the

employees. It is important to note that the act leans towards the Stakeholder theory and the idea that directors are to give consideration to "interests of the company's employees in general, as well as the interests of its members," in the performance of their duties.

The Nigerian Code of Corporate Governance 2018, which serves as the country's main corporate governance standard, is another significant statute that applies this approach. It is stated in its aims and objectives that it seeks to establish well-managed businesses where "the Board and management's interests are aligned with those of the shareholders."

Importantly, positions and concepts included in the Nigerian legislation on corporate governance, particularly in their developed form, have some roots in and connections to the shareholder theory. Corporate governance was established in Nigeria during its development to address bad and self-serving behaviour, particularly management that undermined investor confidence and resulted in losses for shareholders. This belief that customers' interests should always come first in a company's decisions has lasted and still influences legislation and corporate governance regulations in some respects.

Australia also favours the shareholders theory over the stakeholders' theory in their corporate governance laws. Over half of the adult population in Australia participates in shareholder democracy and owns shares in at least one corporation. The listed corporations have a high level of shareholder control, and investors can boost their worth by utilizing the wealth creation tactics of the business. This exemplifies how crucial their impact can be to the company. More specifically, it has been found that companies with stronger shareholder rights are typically targets of corporate exploitation, whereas companies with less shareholder rights experience greater profitability and growth. Because it pushes companies to function as efficiently as possible for the advantage of the holders of their securities and also makes

larger investments feasible, this form of structure increases the attraction of the shareholder theory.

Chapter four examines the level of compliance of the legal and regulatory framework of both jurisdictions against the international benchmarks. The chapter appreciates the emergence and the role of the OECD in the international and unified development of corporate governance principles. It further expounds on the 6 core OECD principles and the different approaches adopted by countries in meeting the set benchmark, and how the principles seek to deal with issues such as conflict of interests among others. Aside from providing for the principles, the OECD also set up mechanisms for periodic review of the principles to keep abreast of developments in time and do so inclusively. The Nigerian framework appears to have significantly complied with the OECD principles with a cited KPMG report placing it as 4th out of examined 15 countries in Africa. While we may say same of Australia, there are signs of a possible dissent or reservation as to some principles, especially as regards a perceived anachronism, permissibility of intermediary shareholding, role of stakeholders and responsibilities of the board. Nonetheless, there is still a significant level of compliance weighing more than Nigeria when measured up against the 6 core principles. The weaknesses of corporate governance in both jurisdictions were also examined in this chapter. The moral dilemma of imposing mandatory provisions and its effect on enforcement of minimum standards appear to be the most prominent weakness of the Australian framework. A shared weakness of both jurisdictions, however, is the lack of clear provisions delineating the scope of qualification as stakeholders and the nature of their rights.

5.2 RECOMMENDATIONS

Having examined the conceptual differences between the regulatory framework in Nigeria and Australia, this work concludes that there are adaptable developments in the Australian framework, particularly regarding compliance with the OECD benchmark. While there may be a significant difference in the social and political climes of both jurisdictions, there is interesting evidence that the stakeholder inclined framework may be adaptable to solve some of Nigeria's socio-political problems through a carefully designed corporate governance framework.

On this foreground, the research makes the following recommendations:

1. **Recognition and enforcement of the role of stakeholders**

   The work reveals a relative deficiency in the definition and classification of stakeholders in both the Nigerian and Australian Jurisdiction. While attempts have been made under the Nigerian laws to incorporate provisions with a similitude of protecting stakeholders like the immediate community of operations and employees, more needs to be done in terms of clear and concise classification, and robust enforcement of these laws. This may be a key factor in solving some of the prevalent social, environmental and economic issues currently prevalent in the country like unemployment, oil spillage and environmental degradation.

2. **A Shift away from the mandatory framework to a less restrictive one**

   There is a general problem with enforcement of corporate governance as the moral dilemma of imposing mandatory provisions or otherwise still lags in many jurisdictions including Australia. While the undertone of most of the corporate

governance provisions under Nigerian legislations are mandatory with penalties imposed for non-compliance, there is little to no evidence to suggest the effectiveness of this approach. Thus, it is perhaps best to introduce a less restrictive approach that allows for some freedom of the board to take some decisions and explain when it appears to run afoul of the set standards. This would ensure that the Nigerian framework meets up with the "Comply or explain" standard set up by the OECD. This may however not apply across board especially regarding grave breaches. In those instances, public policy considerations should prevail.

3. **Revamp of Reporting Principles and Administrative Management**

One of the key revelations in this work was that the traditional reporting principles perceived to be the most prevalent under Nigerian laws may not accord sufficiently to the stakeholder protection goal. The key legislations of corporate governance in Nigeria, the Companies and Allied Matters Act and Investment and Securities Act, should be amended to introduce the integrated reporting principles to ensure compliance with stakeholder protection obligations as research has shown as earlier cited in this work that there is a strong nexus between the regulatory framework and compliance with integrated reporting or environmental disclosures.

Furthermore, the poor management of these disclosure requirements has hindered its effectiveness over the years. This work alludes to an immediate need for the regulatory bodies in Nigeria to enhance continuous disclosure of material decisions and events of significance as they occur within the company's ranks to enable them to identify and flag risk factors early on before the rot eats deep into the corporate structures of the companies. This will go a long way to preventing corporate fraud, financial distress and corporate failures, which is the major aim behind the emergence of the corporate governance framework in Nigeria.