Australian Council of Superannuation Investors

Shareholder resolutions in Australia

Is there a better way?

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This research was commissioned by the
Australian Council of Superannutation Investors
and prepared by Dr Kym Sheehan

acsi

ABOUT ACSI

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) issues on behalf of our members.

Our members include 37 Australian and international asset owners and institutional investors. Collectively, they manage over $1.6 trillion in assets and own 10% on average of every ASX 200 company.

Our members believe that ESG risks and opportunities have a material impact on investment outcomes. As fiduciary investors, they have a responsibility to act to enhance the long-term value of the savings entrusted to them.

Through ACSI, our members collaborate to achieve genuine, measurable and permanent improvements in the ESG practices and performance of the companies they invest in.

ACSI undertakes a year-round program of research, engagement, advocacy and voting advice. These activities provide a solid basis for our members to exercise their ownership rights.

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FOREWORD

Australia's corporate governance framework restricts an important right of shareholders – the ability to bring resolutions at company meetings. We think this approach is flawed and needs to be reformed.

Under the existing framework, shareholders who wish to raise an issue must propose a constitutional amendment or vote against the re-election of directors. This makes it difficult for shareholders to hold public companies to account on some important environmental, social and governance (ESG) issues.

In other jurisdictions where non-binding shareholder resolutions are permitted, we have seen shareholders use them to improve company disclosure on risks associated with sustainability, climate change and labour and human rights.

Based on this research, we are recommending the introduction of an ordinary non-binding shareholder resolution framework, maintaining the current threshold of 5% of capital or 100 shareholders for bringing proposals. This is consistent with Australia's strong engagement culture and would provide a mechanism for escalating ESG issues where company engagement is not working.

Recent events highlight the importance and urgency of this issue. We have seen a rush of shareholder resolutions this AGM season which are actually seeking to create a non-binding vote in individual companies. We think this issue would be better dealt with on a market-wide basis.

The business case for the proposed reform is solid. Shareholders lose money when companies ignore ESG risks. Investors and companies are increasingly focused on financially material ESG issues. Ultimately, we want to see all companies better managing climate-related, labour and human rights or disclosure risks.

There is a clear consensus among investors that the current framework is too restrictive and needs to be reformed. Moreover, several companies that we have recently engaged with have signalled that they would support the introduction of a non-binding shareholder resolution in Australia.

We commissioned this research to stimulate a well-informed policy discussion among companies, regulators, civil society and a broad set of investors. We encourage you to read the report and participate in the ensuing discussion about this important issue.

Louise Davidson
Chief Executive Officer
Australian Council of Superannuation Investors

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EXECUTIVE SUMMARY

The purpose of the paper is to stimulate an informed policy debate regarding the framework for shareholder resolutions in Australia.

WHAT IS WRONG WITH THE CURRENT SYSTEM?

In Australia, the courts define a shareholder resolution as a 'decision' of the company, so do not permit shareholders to propose either an advisory resolution[1] or a shareholder vote to express an opinion. Resolutions on ESG issues currently take the form of a constitutional change resolution, which can only be passed with a 75% vote in favour. This threshold is so high that, to date, none of these resolutions have passed except for the 2016 Rio Tinto board-endorsed resolution in favour of improved climate-related disclosure.[2] ACSI, like other service providers to investors, believes these types of constitutional amendment proposals are unsuitable for the types of change that are usually sought.

The absence of an alternative to the constitutional amendment resolution leaves shareholders who are dissatisfied with how the company is managing ESG risks with the only alternative of voting against one or more directors. This is a blunt instrument to use. These challenges explain why few ESG resolutions are proposed and even fewer are included on the agendas of Australian general meetings (19 meetings between 2012 and October 2017).[3]

WHAT LESSONS CAN BE DRAWN FROM OVERSEAS?

In the UK and the US, shareholders can propose non-binding resolutions which do not compel the company to act but do create the opportunity for both public and private dialogue with shareholders on ESG issues.

In the US, the threshold to move non-binding resolutions is low[4] and they are common (241 environmental and social (E&S) resolutions in 2016; 173 E&S resolutions to early October 2017).[5] Resolutions are used as a vehicle to encourage shareholder-company engagement in a country perceived to have a relatively weak engagement culture. Once a proposal is lodged, a company can seek an informal review of the proposal from the Securities and Exchange Commission (SEC). Informal review imposes legal costs for shareholders, because the SEC rules contain exceptions that allow companies to avoid including the item on the agenda.[6] Informal also review takes time, meaning that proposals must be submitted 120 days (about four months) before the meeting materials are filed by the company. While one outcome of the informal review is that the company can exclude the resolution from the agenda,[7] another outcome is that the resolution is withdrawn by the shareholder/s who proposed it. The latter typically occurs because the company engages with the shareholder on the substance of the proposal.

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[1] The advisory vote on the remuneration report is a statutory requirement under s 250R of the *Corporations Act 2001* (Cth).
[2] This resolution was moved by the Aiming for A coalition under Rio Tinto plc's constitution. The dual-listed structure and voting agreement meant that shareholders in Rio Tinto Ltd also had a vote on this proposal.
[3] Details of these resolutions can be found in Table 1. This count excludes EGMs requisitioned by a shareholder to vote to remove one or more of the current directors and elect new directors in their place.
[4] Although this is changing: see note 45 below.
[5] The data on US shareholder proposals comes from two main sources: the annual Proxy Preview reports from the collaboration of As You Sow, the Sustainability Investments Institute and Proxy Impact; and the annual reports from Georgeson Proxy. Further data can be found below from pages 23 - 25. Data for 2017 from Proxy Insight and Proxy Monitor.
[6] These exceptions include that the proposal relates to the ordinary business of the company and does not address a significant policy issue.
[7] This is because the SEC issues a 'no action' letter which means that it will not take administrative action against the company for failing to include the proposal. This is explained further below on page 22.

In the UK, there are options for both binding resolutions on a narrow list of topics[8] and non-binding resolutions on a broad range of topics. The threshold to file a proposal is similar to that in Australia.[9] The only basis on which a company can exclude a proposal is by applying to a court for a declaration that the proposal is vexatious, frivolous or defamatory. The UK and Australian contexts are similar, with a preference for engagement behind the scenes to raise issues with company boards and to seek a commitment to change. That preference is one probable explanation for the small number of shareholder resolutions on E&S issues in the UK over the period 2010-2016 (five E&S resolutions for the FTSE350 in 2016).[10] 'Aiming for A's' successful proposals in 2015 and 2016 do not merely illustrate the importance of gaining board endorsement of the proposal via engagement. They also illustrate the value in continuing through to the public event of a vote at the AGM.

Aiming for A

The Aiming for A coalition is a group of long term institutional investors including pension funds, commercial fund managers, charities and churches which has been putting pressure on major carbon emitting companies regarding climate change disclosure and action since 2012. They are seeking a 'smooth transition' to a low carbon economy. Aiming for A shareholder resolutions call on companies to make a step change in the way they disclose to investors their strategy on the risks and opportunities posed by climate change. The major oil and gas and mining companies have been the key focus for this group.

The UK and US frameworks illustrate how a mechanism that looks similar on paper works very differently in practice. While subtle differences in the legislation might explain this, a more compelling explanation for the dramatically different numbers of proposals filed are the regulatory gaps and lack of engagement culture in the US compared to the UK. In the US, engagement culture is relatively weak compared to that in the UK and Australia. Also, American regulatory gaps appear to motivate shareholder proposals. An example is weak US regulation relative to the UK on the issue of disclosure of corporate political donations and expenditure. The UK Companies Act requires shareholder approval of political donations and expenditure over £5,000, and mandates companies disclose any such expenditure within the Directors' Report.

WHAT WAS THE BASIS OF THE RESEARCH AND WHAT DID IT FIND?

The research involved a review of the relevant law, data on shareholder proposals, voting outcomes and academic writings, as well as interviews with twenty asset owners, pension and superannuation funds in Australia, the UK and US. The total funds under management of the interviewee organisations was more than AUD$1,585 billion.[11] The purpose of the interviews was to understand investor views of the current systems and the alternatives. UK and US investors were chosen for their experience in moving shareholder proposals. They explained what was involved in filing a proposal, what happened once the proposal was filed, and whether they viewed the voting outcome for their proposal as a 'success'. To date, the Securities and Exchange Commission has been reluctant to make rules in this area, despite evidence of voter and investor appetite for such a reform.[12]

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[8] These topics are not defined in the legislation but rather reflect the position that a resolution is a decision of the company. Some company constitutions do allow shareholders to move 'directive' resolutions, directing the company to take or refrain from taking particular action. This is explained further below on page 20.
[9] Five per cent of issued capital or at least 100 shareholders, but the UK also requires the 100 shareholders to have a combined holding of £10,000 (average of £100 each.
[10] The other probable explanation is the observed differences in UK constitutions that permit directive proposals and those that do not.
[11] Estimated as at 19 July 2017.
[12] Refer to Graph 2 below for evidence of US shareholder proposals on political spending and lobbying. See also Center for Political Accountability and the Carol and Lawrence Ziklin Center for Business Ethics Research, The 2017 CPA-Zicklin Index of Corporate Political Disclosure and Accountability (26 September 2017); and Robert Yablon, Campaign Finance Reform Without Law (July 13, 2017). 103 Iowa Law Review, Forthcoming; Univ. of Wisconsin Legal Studies Research Paper No. 1418. Available at SSRN: https://ssrn.com/abstract=3001972

Australian investors were selected from ACSI's membership and other large fund managers. Investors were asked about their experiences in voting on the advisory vote on the remuneration report, voting against director elections, and voting on shareholder proposals filed by others (including any US or UK meetings). Those investors who had direct experience of filing a proposal were asked about the mechanics of doing so and their view on the voting outcome. The participants were asked whether they supported law reform in Australia to allow for non-binding proposals on ESG issues.

Based on the findings from the desktop study and the interviews, four reform options were identified. These options were:

1. A general right to move non-binding proposals on a broad range of topics.
2. A non-binding vote on the annual report.
3. A non-binding vote on a sustainability or ESG report.
4. A right to move binding, directive proposals.[13]

These reform options were then discussed at two workshops with a range of institutional investors, asset owners and representatives of retail investors.

Investors preferred non-binding resolutions rather than binding resolutions. They believed non-binding resolutions would be a better fit with Australia's existing strong engagement culture. They thought that the right to move non-binding proposals under option 1 or even the routine annual votes under options 2 or 3 could trigger deeper or more meaningful engagement on issues of importance to investors.

The most contentious aspect of option 1, the general right to move a non-binding resolution, was how to manage the risk of spurious, frivolous or vexatious resolutions making their way onto annual general meeting (AGM) agendas. A US-style informal review mechanism had some appeal to workshop participants. Investors acknowledged that while the Australian Securities and Investment Commission (ASIC) would be the logical regulator to play this role, it would need to be resourced appropriately to take on this task on top of its existing regulatory functions. An alternative would be for the ASX to take on this role.[14]

If the law is changed to allow non-binding shareholder resolutions, shareholders would be equipped with a nuanced mechanism to complement what is already a strong and generally effective strategy of institutional investors seeking change by engaging directly with Australian company boards. It would also complement shareholders' existing rights to move binding resolutions.

[13] These four options are explained below from page 29 to page 35.
[14] This would require an amendment to the ASX Listing Rules to insert a right to move shareholder proposals. Entities wanting to exclude a shareholder proposal could seek a waiver under ASX Listing Rule 18.1, or else the ASX could choose to waive the need for compliance for particular kinds of proposals.

BACKGROUND & METHODOLOGY

ACSI commissioned this research to stimulate a policy discussion about whether shareholders should have the right to move non-binding resolutions on a wide range of issues. This report contributes to this debate via analysis of how the Australian regime and comparable overseas jurisdictions work on paper and in practice.

METHODOLOGY

This research combines a desktop study of publicly available materials with semi-structured interviews of institutional investors in Australia, the UK, EU and European Union (EU).

Five key issues were addressed during the research:

1. Why does the Australian legal system apply a narrow view of shareholders' rights to bring resolutions relating to policy issues or express an opinion on matters of interest to shareholders before a company's annual general meeting (AGM)?
2. What is the history of shareholder resolutions on ESG issues (other than remuneration) in Australia?
3. How do other countries allow for non-binding (advisory) resolutions to be placed on the agenda by shareholders?
4. What are the advantages and disadvantages of the Australian, UK and US frameworks?
5. What workable proposals exist for law reform to resolve the shortcomings of the current system?

Between January and March 2017, twenty investors from superannuation funds, pension funds and fund managers in Australia, the UK and US were interviewed.[15] Overseas fund managers were identified from research of environmental and social themed shareholder resolutions in those jurisdictions. Australian and overseas members of ACSI were also invited to participate in an interview.

Australian participants were asked how they use their current rights to move resolutions and what their voting habits are, using examples (such as the advisory vote on the remuneration report) or instances where they voted against a resolution (for example if had voted against the re-election of a director) to frame the discussion. Their views on the need for a mechanism to move non-binding shareholder resolutions were sought, as well as their current appetite for using an advisory shareholder proposal mechanism.

Overseas interview participants were asked how the regulatory framework in their own jurisdiction operated in practice. This included understanding not only aspects of the various shareholder resolution rules (such as mechanics of filing or informal review) but also investors' motivations for using this mechanism, how they garnered support from other investors for the resolution, how companies reacted to the proposal, and whether outcomes were perceived as successful and why.

Based on the interviews and the earlier desktop research, four options for reform were identified. Two workshops on these reform proposals were conducted with interviewees and some new Australian participants including representation from retail investors in late March 2017. These were followed by several one-on-one discussions in early April. Participants were asked to express their preferences for reform, based on options identified during the research, and explored any practical issues they anticipated might arise if a particular option was implemented.

All the quotes in this paper are derived from the interviews conducted during this research.

[15] Ethics approval to allow the interview-based research questions was obtained from The University of Sydney Human Research Ethics Committee in December 2017.

PERSPECTIVES ON THE NEED FOR NON-BINDING RESOLUTIONS IN AUSTRALIA

Over the last 17 years there has been much discussion of whether shareholders should be able to move non-binding resolutions at company meetings.[16] Giving shareholders an advisory vote on a specific report is now broadly accepted by companies and shareholders, following its introduction for remuneration reports in 2004. This reform and the subsequent two-strike rule are generally credited with having improved the level and quality of company engagement in Australia.[17] Despite this, the prevailing view from 17 years of reform consultations was that shareholders did not need to have a right to move non-binding resolutions on a broad range of topics.

However, a majority of Australian superannuation funds and fund management representatives interviewed for this report indicated this type of reform was necessary:

> Removal of directors, change of management is a pretty blunt tool if you're unhappy. If there's a particular part of the business you're unhappy with and you want to apply pressure to have it handled differently, then you'd put it on the agenda and see what other shareholders think and send a message. The message might be "Well, you're the only one that's got a problem with it." That's fine. It just seems to be it can be a fairly efficient way of dealing with that (*Australian fund manager).*

> That type of outcome would benefit our corporate environment and, to be honest, would benefit the society as a whole (*Australian superannuation fund manager*).

> The formal way of having that advisory [vote] would be helpful (*Australian fund manager).*

Although several interviewees cautioned about how such a change would be made:

> We don't want to create a situation where there are nuisance resolutions. They should be really well considered and have the support of a part or segment of the market that thinks it's an important piece (*Australian superannuation fund manager).*

> I think there needs to be the right balance between the amount of share ownership and the ability to be able to put a resolution forward (*Australian superannuation fund manager*).

> In terms of what the mechanisms are, I think we'd need mechanisms to achieve a couple of things. The first of these is that spurious resolutions don't get up. They're just going to take everyone's air time. A mechanism that makes sure that these issues are significant enough, both in terms of their importance and also that they have a sufficient level of support. It's not just one person with an axe to grind. The second thing is making sure that what they're asking the company to do is reasonable (*Australian superannuation fund manager*).

Only one participant thought that a change would be a potential backward step:

> Something like that could be really obstructionist and really detract from the way companies operate…you can see activist groups would put huge pressure on super funds to use the super funds' power to drive their own agenda…are they actually acting in the best interest of the company and the broader shareholders? I'd query that (*Australian superannuation fund manager).*

In practice, non-binding resolutions may assist in shareholders in negotiating changes at companies. This may occur either by effective engagement which results in the resolution being withdrawn or by public pressure on the board to justify their current stance on the issue.

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[16] Debate started with the Corporations and Markets Advisory Committee (CASAC) report in 2000 and included the Parliamentary Joint Committee (PJC) Report on the Corporate Law Economic Reform Program 9 (CLERP 9) reforms that introduced the non-binding vote on the shareholder report in 2004, the 2008 PJC report on shareholders and engagement, the 2009 Productivity Commission Report on executive remuneration, the 2011 Treasury Consultation on draft amendments introducing the two strikes rules, and the 2012 CAMAC discussion paper on the AGM.

[17] Source: Interviews with Australian superannuation funds, pension funds, and fund managers conducted over the period January – March 2017. This view is also reflected in comments found in submissions made to a variety of law reform inquiries – from 2008 PJC *Better Shareholders, Better Company* at 60, [4.80], the 2009 Productivity Commission Report *Executive Remuneration in Australia*, 285; though to submissions to the 2012 CAMAC discussion paper, The AGM and Shareholder Engagement, (submission from the then Chartered Secretaries Australia Ltd – 'provided a strong incentive for companies to do a better job of engaging with their shareholders: a good governance outcome'; Financial Services Council Submission – 'increased the level and quality of director engagement with shareholders on remuneration practices').

SHAREHOLDER RESOLUTION FRAMEWORK AND EVIDENCE: AUSTRALIA

This section begins by examining a range of issues relevant to shareholder resolutions in Australia, including how the courts have interpreted the requirements for bringing a shareholder resolution. A recent (and brief) history of shareholder resolutions is then presented. This is followed by a discussion on voting on director resolutions. Finally, engagement culture is discussed to put the Australian experience in context with the UK and US regimes.

LEGAL TREATMENT OF SHAREHOLDER RESOLUTIONS[18]

Australian courts have consistently taken the view that a resolution of a general meeting of shareholders is a formal act of the company;[19] that is, it is a binding decision of the company.[20] In order for shareholders to propose a resolution, the decision to be made must be one that the law will allow shareholders to make as the company.[21] The decision-making rights given to shareholders in the *Corporations Act 2001* (Cth) (the Act) and ASX Listing Rules, combined with any decision-making rights in the company's constitution, are what the courts mean by a decision the law allows shareholders to make.

Given the constitution allows for decision-making rights to be allocated to shareholders, a proposed amendment to the constitution could give shareholders the right to make particular kinds of decisions that are not currently provided for in either the Act or ASX Listing Rules. This approach was attempted at Roc Oil in 2015 (the right to vote on a capital raising to finance a reverse takeover)[22] and Billabong International Group in 2014 (resolutions relating to capital management and strategy). In both cases, the resolutions failed to pass by the required 75% majority.

The other basis on which shareholders can be said to make a decision as the company is their residual power to act when the board is 'unable' or 'unwilling' to exercise its decision-making powers.[23] The Act provides that a board may be unable to act in the case of conflicts of interest[24] or if the board is unable to form a quorum. If the board is deadlocked, the appropriate course of action is for the general meeting to appoint additional directors, not make a decision that is reserved to the board.[25]

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[18] Collective action rules were examined to determine if they were would be an obstacle or if exercising rights under s 249D and s249N would be troublesome for investors who co-sign such requisitions. Australian interviewees did not see the rules as a barrier to putting forward shareholder proposals.
[19] *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517, 522.
[20] *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 337 ALR 558, 563-44 [21]-[24].
[21] *Isle of Wight Railway Co v Tahourdin* (1883) 24 Ch D 320, 334; *Turner v Berner* [1978] 1 NSWLR 66, 72; *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517, 521.
[22] The ASX has recently consulted on proposed changes to ASX Listing Rule 7 to make clear that the requirement to obtain shareholder approval under ASX Listing Rule 7.1 for an issue of shares will be required when an issue is required for a reverse takeover. See further, ASX, Reverse-takeovers: Shareholder approval requirements – exposure draft listing rule amendments responses to consultation http://www.asx.com.au/documents/public-consultations/Reverse-Takeovers-Exposure-Draft-Listing-Rule-Amendments.pdf and the revised Exposure Draft http://www.asx.com.au/documents/resources/reverse-takeover-rule-amendments.pdf.
[23] Residual powers also form the basis of the directive resolutions power found in the model company constitution in the UK. These are discussed in the section on UK and US resolutions.
[24] *Corporations Act 2001* (Cth), s 195 for when shareholder approval of what would be a board decision is required as the director or directors have a material personal interest in the decision. Another example is s 208(1) for related party transactions.
[25] *Massey v Wales* (2003) 57 NSWLR 718, 730. These residual powers are said to arise 'by implication or presumed intention of the members on the basis of business efficacy or necessity', so that the company is not rendered powerless to act if the board are unable or unwilling to do so.

As for the board being unwilling to exercise its decision-making powers, any court considering this in light of a proposed shareholder resolution would need to determine whether the board was justified in deciding not to exercise a power. Resolving this issue would require an assessment of whether the decision not to exercise a power conforms or conflicts with the duties imposed on directors. Cases on directors' duties illustrate just how unwilling the courts are to replace the directors' decisions on business issues with the court's assessment of what that decision should be. The courts have focused on the process of decision-making,[26] to determine whether the directors have acted with reasonable care, or else have examined the directors' motivation for reaching a decision, [27] to determine whether the directors are acting in the best interests of the company and for a proper purpose.

Using a combination of the above legal reasoning, the courts have rejected shareholder resolutions seeking to make a decision reserved to the board, either under the company's constitution or otherwise in the law.[28] This approach preserves the organic view of a corporation, whereby the board of directors is one corporate organ and shareholders in general meeting are another. Decisions vested in one organ (the board) cannot be exercised by the other organ (the members in general meeting) and vice versa.[29]

This reasoning has also been used to reject proposed shareholder resolutions that do not explicitly seek to make a decision reserved to the board, but instead seek to express shareholder opinion,[30] or where shareholders tried to argue they had a legitimate interest in the topic of the resolution.[31] Notwithstanding the statutory and internal governance rules on member decision-making, shareholders have sometimes been able, at the discretion of the company, to propose ordinary resolutions at AGMs on matters within the board's power of management. This type of resolution was put to the 2014 Santos Ltd AGM (noted as advisory in the company's statement in the AGM materials).[32] By contrast, CBA was found to have acted within the law when it refused to allow shareholders to vote on advisory resolutions at its 2014 AGM.[33]

Boards however appear free to propose such resolutions to shareholders and do so regularly when they ask shareholders to approve an issue of securities to an executive director 'in the interests of good governance', while indicating the company's intention to rely on the exception in ASX Listing Rule 10.15B for on-market purchases of shares to satisfy vested equity awards.[34] The Australasian Centre for Corporate Responsibility *(ACCR) v CBA* case left this issue unresolved as it was not relevant to the resolutions proposed by ACCR.[35] The Court acknowledged that "shareholders of a company are, of course, free to express their opinions concerning the management of the company, individually and collectively".[36] The Court failed to indicate how shareholders could do so collectively if they cannot do so via a meeting of shareholders. After all, engagement is unlikely to ever represent the only possible shareholder opinion on an issue.

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[26] Relevant to the duty of care and the business judgment rule: *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449-50; *Australian Securities & Investments Commission v Cassimatis* (No. 8) [2016] FCA 1023 [479]-[487]; *Australian Securities & Investments Commission v Drake* (No. 2) [2016] FCA 1552 [395]-[401].
[27] *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 218 (Ipp J); *Westpac Banking Corporation v Bell Group Ltd (in liq) (No. 3)* (2012) 44 WAR 1, 170 [933] (Lee AJA), 353 [1988], 362 [2027], 371 [2073] (Drummond AJA) 566-7 [2923] (Carr AJA).
[28] *Clifton v Mount Morgan Ltd* (1940) 40 SR (NSW) 31, 44-5; *Taiqi Investments (Aust) Pty Ltd v Winlyn Developments Pty Ltd* (2011) 86 ACSR 197.
[29] *John Shaw and Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, 134.
[30] *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 337 ALR 558, 570 [60].
[31] *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 337 ALR 558, 567-8 [41]-[45] relying on the authority of *Samuels JA in Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 683-4.
[32] Resolution 5 stated 'That the Narrabri Gas Project in North West NSW be withdrawn from Santos' portfolio.'
[33] *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 337 ALR 558, 568 [45], 570 [64].
[34] ASX Listing Rule 10.15B states shareholder approval isn't required if securities to satisfy vested awards will be purchased on market. A non-remuneration example comes from the 2016 AGM for Wealth Defender Equities Ltd (ASX:WDE), resolution 4 sought shareholder approval for an advisory resolution to adopt the company's capital management strategy as outlined in the explanatory memorandum accompanying the AGM Notice of Meeting. The resolution failed to pass on a poll with only 43.71% of votes in favour of it.
[35] *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 337 ALR 558, 570 [57].
[36] *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 337 ALR 558, 569 [50].

WHO CAN PROPOSE A RESOLUTION?

The voting rights shareholders currently enjoy in Australia include a mechanism to put resolutions on general meeting agenda under s 249N of the Act, if the threshold of 5% shareholding or 100 shareholders is met. However, s 249D requisitions to the company to call a meeting of members are restricted to shareholders who are able to command the minimum 5% threshold. An activist investor is likely to use these two methods plus s 203D resolutions to remove the existing directors, and rely on the rights in the company's constitution for the members in general meeting to appoint directors to attempt to change of the board of directors.[37] This combination of rights can also be used as a 'shadow threat':

> It's usually a meeting across this table where we say, "Here's a section 249D notice, if I give it to you, you are obligated by law to call this meeting. If you don't do something within X number of days or weeks, whatever's reasonable, I'm going to give this to you." And usually that is the 'come to Jesus' moment that seems to get a lot of action because they hate seeing these things (*Australian fund manager).*

Given the shareholder or shareholders can satisfy the 5% shareholding threshold under s 249D, there are no obvious obstacles to moving s 203D resolutions, nor to proposing alternative board candidates for election at that GM or indeed at any AGM, other than ensuring the timing requirements for putting that item on the agenda are satisfied. As for other types of shareholder resolutions on a broader range of issues, the main obstacle is the view that they must be a binding decision of the company, otherwise the company is acting within the law to exclude them from the meeting agenda.

AUSTRALIAN SHAREHOLDER RESOLUTIONS: 2012 TO 2017

Few shareholder proposed resolutions (outside director removals and director elections) have been included on meeting agendas in Australia's recent history. Nineteen company meetings, some with multiple resolutions, were identified for the period from 2012 to October 2017 and these are summarised in Table 1. Virtually all the resolutions were moved as s 136 constitutional amendment resolutions, and most related to environmental themes. While many of the environmental resolutions were a request for disclosures, the real substance of the issue was for the company to identify how it was managing particular risks (such as the 2° warming scenario resolutions coordinated by the ACCR at Origin Energy and AGL in 2015).

Of the other examples of shareholder resolutions identified in Table 1, a small number sought approval to reserve to shareholders the right to make decisions for the company (for example the 2012 proposal for $1/bet limits on poker machines at Woolworths and the 2014 Wilderness Society resolution to compel Santos to withdraw from the Narrabri Gas Project). The substance of these examples were decisions which the company's constitution, the Act or the ASX Listing Rules say directors can make, even if some can only be made within certain thresholds (for example, an issue of capital under ASX Listing Rule 7.1).

[37] Activist Insight, *Shareholder Activism in Australia: A review of trends in activist investing* (2016) 5-6 reports data on shareholder activism over the period 2003 to 2016. Eight-six per cent of the public demands made by the investor are board-related, much higher than the situation in Canada (45%, the US (42%) and the UK (56%). Sixty-two per cent of the publicly targeted companies are in the base metals sector and 73% are classified as nano-cap.

The position of company boards recommending shareholders vote against these proposals, as evidenced by their statements on the proposal within the meeting materials,[38] is frequently shared by shareholders and proxy advisers. [39] Investors and fund managers interviewed for this study queried the appropriateness of using a resolution to amend the constitution to give shareholders novel voting rights or to impose reporting obligations. A bespoke constitution that does not align with market practice in these areas could be a disadvantage for the company and its shareholders. A framework which allows non-binding proposals would resolve the issue of the mechanism being a barrier to resolutions passing. In other words, non-binding resolutions would allow the focus to be on the topic of the resolution rather than the form of the resolution.

Previous resolutions in Australia have therefore sought to overcome gaps in the regulatory framework for shareholder voting decisions on particular transactions (capital issue to fund a reverse takeover) or regulatory gaps concerning the disclosure and reporting of ESG issues.

[38] None of the company responses to these resolutions were as direct as saying 'not the constitution' but seemed to suggest that there were already sufficient rules in place on the company's practices and its disclosure of these practices. See for example the Commonwealth Bank of Australia's response to item 6 on the 2014 AGM agenda; AGL Energy's response to item 6 on its 2015 AGM agenda; Origin Energy's response to item 11 on its 2015 AGM agenda.
[39] ACSI Submission to the 2012 CAMAC discussion paper, *The AGM and Shareholder Engagement*: "ACSI believes constitutional amendments were not the most appropriate means for achieving change in these areas." FSC submission to the 2012 CAMAC discussion paper 'Aside from requiring a greater portion of shareholders to pass (75% as opposed to a simple majority) constitutional amendments are not the most appropriate medium for achieving change in areas like these' (referring to the Woodside Petroleum 2011 AGM resolution on climate change disclosure and the Woolworths 2012 AGM resolution on gaming machine bet limits). As for proxy adviser views, see CGI Glass Lewis, Proxy Paper Guidelines, 2016 Proxy Season Australia (2016); ISS Governance, Australian Proxy Voting Guidelines 2016-2017, Benchmark Policy Guidelines (16 September 2016); Ownership Matters, Voting Guidelines (January 2016); ACSI, ACSI Governance Guidelines (October 2015).

Table 1: Examples of shareholder resolutions on ESG at ASX200 listed entities, 2012-2017

Year	CO	Requisitioning shareholders or coordinating group	Proportion of Shareholders*	Board Endorsed	Substance of Resolution	Format of Resolution	Mechanism	Outcome % for
2012	WOW	GetUp!	0.02% 210 shareholders	No	$1/bet limit poker machines, hourly profit and consecutive operation hour limits	Constitutional Amendment	ss 249D & 249P	2.53%
2013	BBG	Coastal Capital International	7.6%	No	Various amendments for shareholder approval requirements for transactions	Constitutional Amendment	ss 249N & 249P	18.76%; 18.74%; 29.47%; 18.77%; 18.87%; 29.53%
2014	CBA	ACCR	0.0086%	No	Disclosure of financed emissions	Constitutional Amendment	ss 249N & 249P	3.17%
2014	ANZ	ACCR	< 0.01%	No	Disclosure of financed emissions	Constitutional Amendment	ss 249N & 249P	2.9%
2014	NAB	ACCR	0.0102%	N/A	Disclosure of financed emissions	Constitutional Amendment	ss 249N & 249P	Withdrawn following commitment from NAB for policy change to increase disclosure
2014	STO	The Wilderness Society	0.0475% of shares 161 shareholders	No	Withdraw from Narrabri Gas Project	unclear: ordinary resolution	ss 249N & 249P	0.78%
2014	ROC	Allan Gray Australia (also HOSTPLUS)	Not provided, at least 5% pursuant to s 249D	No	Restrict ROC ability to issue new shares	Constitutional Amendment	Ss 249D, 249N & 249P	51.15% (not passed by 75% required)
2015	ANZ	ACCR	< 0.01%	No	6a Allow shareholder advisory opinions and requests via ordinary resolutions 6b Request disclosure of financed emissions and express opinion on climate change management	6a Constitutional Amendment 6b Ordinary resolution (conditional on constitutional amendment resolution passing)	ss 249N & 249P	6a 10.52% 6b not put to AGM

Year	CO	Requisitioning shareholders or coordinating group	Proportion of Shareholders*	Board Endorsed	Substance of Resolution	Format of Resolution	Mechanism	Outcome % for
2015	ORG	ACCR	~ 0.016% 141 shareholders	No	Disclosure of climate change exposure	Constitutional Amendment	ss 249N & 249P	6.5%
2015	AGL	ACCR, GetUp!	< 0.3% ~120 shareholders	No	Climate change business model and disclosure of ongoing emission management against that model	Constitutional Amendment	ss 249N & 249P	5.2%
2016	STO	Not provided	~ 0.019% 104 signatories, 98 verified shareholders	N/A	1. Withdraw from Narrabri Gas Project 2. Investigate renewable energy investment options	Unclear: ordinary Resolution	Failed at s 249N (< 100 verified shareholders)	N/A
2016	RIO	RIO plc: Aiming for A coalition RIO Ltd.: N/A (voting by way of dual listing agreement on voting)	Not disclosed in the Notice of Meeting	Yes	Disclosure of climate change exposure	Special Resolution	RIO plc's constitution	99.16%
2017	STO	Market Forces	0.18% Group of shareholders	No	Disclosure of climate change risk	Constitutional Amendment	ss 249N & 249P	5.2%
2017	OSH	Market Forces for resolution 7 ACCR for resolution 8	Less than 0.001% for each resolution	No	Resolution 7: Disclosure of climate change risks Resolution 8: Human rights compliance and reporting	Non-binding resolutions	Clause 14 OSH constitution	Resolution 7: withdrawn by Market Forces Resolution 8: 6.2% for
2017	WOW	ACCR	0.0097% 106 shareholders	No	7a: amend constitution to gives shareholders the right to move advisory proposals (express an opinion or request information) 7b: Company to prepare report on human rights due diligence for shareholders within 90 days of AGM	7a Constitutional Amendment 7b ordinary resolution	ss 249N & 249P	AGM scheduled for 23 November 2017

Year	CO	Requisitioning shareholders or coordinating group	Proportion of Shareholders*	Board Endorsed	Substance of Resolution	Format of Resolution	Mechanism	Outcome % for
2017	ORG	Market Forces	0.0169% Group of shareholders	No	Resolution 7a: constitutional amendment to give shareholders the right to move advisory proposals (express an opinion or request information) Resolution 7b: Provide routine annual information about climate change related risks in accordance with TCFD final recommendations Resolution 7c: Provide routine annual information on transition to low carbon technologies with emissions-reduction targets and details on alignment with capital expenditure, remuneration structure and public policy lobbying Resolution 7d: Provide routine annual information on strategy to measure and reduce short-lived climate pollutants	7a: Constitutional Amendment 7b, 7c and 7d: ordinary resolutions	ss 249N & 249P	7a: 4.7% for As 7a did not pass, the other resolutions were not put to the AGM. Proxies lodged prior to the meeting were as follows: 7b: 13.8% for 7c: 3.4% for 7d: 4.8% for
2017	CBA	Market Forces	0.0077% Group of shareholders	No	Directors to ensure that the company manages the business in manner consistent with objective to restrain global warming to below 2 degrees Celsius	Constitutional Amendment	ss 249N & 249P	Meeting to be held on 16 November 2017
2017	DOW	Galilee Blockade	0.0035% Group of shareholders	No	Directors to ensure that the company manages the business in manner consistent with objective to restrain global warming to below 2 degrees Celsius	Constitutional Amendment	ss 249N & 249P	Meeting to be held on 2 November 2017
2017	BHP	ACCR	0.0075% of shares on issue in Ltd (and 0.0045% of shares on issue in combined BHP Group) Group of shareholders	No	Resolution 22: constitutional amendment to give shareholders the right to move advisory proposals (express an opinion or request information) Resolution 23: Undertake review and release a report within 90 days of the AGM on direct or indirect lobbying payments related to climate & energy policy from 2012 to present. Report should also assess the consistency of advocacy positions of industry bodies (of which BHP is a member) & the company's position; plus describe immediate & long-term impacts of policy uncertainty in Australia on BHP's economic prospects. Proposed actions on these issues are to be included in the report.	Constitutional Amendment	ss 249N & 249P	Meeting to be held 16 November 2017

*The column labelled 'proportion of shareholders' reflects the size of the holding of the requisitioning shareholder/s. This was calculated based on the information disclosed in either (a) the requisition for the resolution and/or (b) the notice of meeting.

Source: Compiled from primary sources (company web sites and the ASX). Voting on director elections in Australia

VOTING ON DIRECTOR ELECTIONS IN AUSTRALIA

Section 249D rights to requisition a meeting, together with s 203D rights to remove directors, plus rights to elect new directors are important shareholder rights. Empirical research indicates that shareholder proposed resolutions have largely been concerned with director elections and removals.[40] As noted in a recent ASIC report, "Shareholder-requisitioned meetings are one of the few mechanisms shareholders have to effect significant timely change in the management and direction of their company."[41]

One line of argument evident from past inquiries[42] is that shareholders who are dissatisfied with a company's performance should not be given the right to move non-binding shareholder resolutions. Instead these shareholders can use their existing rights to vote against directors who are up for re-election. With director elections occurring at every AGM, shareholders have an opportunity to change the board. The other option for dissatisfied shareholders is exit – sell their shareholdings and leave the company.

While most directors are re-elected with high levels of support, recent proxy voting records of Australian fund managers and superannuation funds indicate that they do, on rare occasions, vote against a director seeking re-election. Interviewees say these are difficult decisions to make, which may explain why this option is not used more frequently:

> It's always very difficult to evaluate the performance of a director from the outside. We're really conscious of that. We've seen people as executives come onto boards, we've seen corporate failings and reincarnations (*Australian fund manager).*

> Somewhat paradoxically, it's also the hardest thing, the thing we probably are most ill-equipped to do. It just something we don't have enough information on at the end of the day. We can tick the box: governance, what's the skills matrix, what's the level of diversity, rah rah rah. But at the end of the day, how does that group of directors operate as a group? What's the dynamic in the boardroom? We don't have any visibility on that *(Australian fund manager).*

Also observed at listed company AGMs, but less frequently than at s 249D requisitioned general meetings, are resolutions to elect non-board endorsed candidates.[43] These are relatively rare in the ASX 300. Even rarer, are non-board endorsed candidates who are subsequently elected, as Table 2 indicates.

Table 2: Non-board endorsed director elections at AGMs, ASX300

Year	Resolutions	Companies	Withdrawn	Passed	AGM and company: resolutions passed
2012	6	6	2	nil	NA
2013	13	8	6	2	MIO 2013 AGM 14 June 2013
2014	13	9	nil	3	IAU 2014 AGM 13 May 2014
2015	5	4	1	nil	NA
2016	2	1	Nil	Nil	NA
2017 (to July)	1	1	Nil	Nil	NA

Source: ACSI data

[40] Hui, Xian Cha, 'An analysis of shareholder resolutions involving Australian listed companies from 2004 to 2013' (2016) 34 *Company and Securities Law Journal* 618, 620-23. Of the 877 shareholder proposed resolutions in the ASX 300 over the 10-year period studied, most of the resolutions were moved at EGMs (625 resolutions) rather than AGMs (252 resolutions), with 41% to remove directors and 51% to elect directors.
[41] Australian Securities and Investments Commission, *ASIC regulation of corporate finance: July to December 2016*, Report 512 (February 2017), 49.
[42] See the list at footnote 16 above.
[43] The right to nominate candidates is typically governed by any requirements in ASX Listing Rule 14.3 or the company's constitution on the amount of notice required to make a nomination. It is open to shareholders with small shareholdings to pursue this strategy.

ENGAGEMENT CULTURE AND INFLUENCING CHANGE

Interviewees and workshop participants repeatedly stated their view that Australia has a strong culture of institutional investor engagement with company boards, although participants agreed that some companies are more amenable to meaningful engagement with shareholders than others. However, there are limits to engagement, as overseas investors with existing rights to move shareholder resolutions acknowledge:

> At the end of the day, you can be very nice and write letters and speak to management and ask, but if all that engagement gets you nowhere then I think you're very justified to put something to the board and make the board consider the issues that are important to shareholders (*UK pension fund manager).*

While engagement alone may not be sufficient to achieve change, voting on advisory resolutions may also not be sufficient, as the period before the introduction of the two-strike rule illustrates.[44] Even since the introduction of that rule, some companies are seemingly at ease with ignoring the will of shareholders when there is a large vote against the company. While the level of insider ownership on the company's register can be one reason for this attitude (as the insider has sufficient shareholdings to control the election of directors at a general meeting should shareholders pass the spill resolution), that alone cannot account for ongoing reluctance at some widely-held companies to effect meaningful change in culture and remuneration practices.

[44] Productivity Commission of Australia, *Executive Remuneration in Australia*, Report No 49 (December 2009), 282-5; 297.

SHAREHOLDER RESOLUTION FRAMEWORKS AND EVIDENCE: UK AND US

Legislation in the UK and the US allows shareholders to move advisory resolutions on a range of topics. Table 3 summarises the core statutory rules for moving non-binding resolutions.

Table 3: UK and US shareholder resolutions rules

Rule	UK	US
Who can move a proposal	100 shareholders with average £100 each (£10k total) or at least 5% of voting capital	US$2,000 shares held for at least 12 months before filing the proposal Or 1% of capital[45]
How to move a proposal	Written notice to company no later than 6 weeks before the meeting or, if later, the time at which notice is given for the meeting Right to circulate material with other materials No word limits Circulation is a company cost provided notice received before end of financial year; otherwise shareholder bears the cost	≤500 word proposal and supporting statement at least 120 days before proxy statement release date Circulation is a company cost
Any limit on the number of resolutions a person may file at the same company in the same year	No	One resolution per shareholder per company
Any limit on ability to resubmit a resolution that failed to pass at the next meeting	No	Yes[46]
Requirements to pass a resolution	Depending on the format, could require a vote of either 50% or 75% in favour Non-binding resolutions require a vote or 50% or 75% in favour depending on the formulation of the resolution	Vote in favour of >50%

[45] *The Financial Choice Act of 2017*, section 844(b), amends 17 CFR §240.14a–8(b)(1) to remove the US$2,000 limit and to extend the minimum period of holding of 1% of capital from 1 year to 3 years. A further amendment to section 14 of the *Securities Exchange Act of 1934* (15 U.S.C. 78n) to insert a new subsection (j) to not permit for shareholder proposals to be submitted by a person acting in the capacity as a proxy, representative, agent or otherwise acting on behalf of a shareholders. This means that only shareholders can directly submit proposals. The Act was passed by Congress on 8 June 2017 and is now before the US Senate.

[46] *The Financial Choice Act of 2017*, s 844(a) amends 17 CFR §240.14a–8(i)(12) to increase the percentage thresholds required at a previous AGM/s to resubmit a proposal that deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years.

STATUS OF ADVISORY SHAREHOLDER RESOLUTIONS

The UK and US allow for advisory resolutions but do so in different ways.

In the UK, circulating an advisory resolution is possible under s 338A of the *Companies Act 2006* (UK). This section provides that a shareholder or shareholders who meet the threshold requirement may request the company include in the agenda any matter (*other than a proposed resolution*) which may properly be included in the business of the AGM.

The *Companies Act* also provides for shareholders to move binding resolutions under s 338. UK and Australian law have similar requirements about when a binding resolution may be moved.[47] To this end, a resolution is a decision of the company and unless it is a decision that shareholders can make (because the company's constitution or a statute allows them to do so), it is properly a decision of management.

The UK regime is complicated by provisions in the model articles of association regarding the power of management but only if these provisions are part of a company's own articles of association. These articles allow shareholders "to instruct the directors to take, or refrain from taking, specified action" and require the same threshold of majority support (typically 75%) as required to change the articles themselves. The limits of this type of resolution (a directive resolution) are not without controversy. It cannot be used to interfere with a decision the directors have validly made and this is usually expressly provided for in the relevant articles.

Some cases have decided that a 'regulation' made by members under this provision is not the same as an amendment to the articles, so that the regulations have to be consistent with the other articles to be valid.[48] As noted by Paul Davies and Sarah Worthington, academic writers are also divided in their views on its impact.[49] However, if permitted by the company's constitution, the proposal would be regarded as binding, not advisory, because it is the type of decision the law recognises that shareholders can make.

A distinguishing feature between the two provisions is that under s 338, the proposal would have to be a 'resolution'. To be moved under s 338A it would have to be about any matter (other than a proposed resolution). This is why resolutions such as the Aiming for A proposal are often filed under both mechanisms.

The US position is complicated by the intersection of state laws with Securities and Exchange Commission (SEC) rules. While shareholder resolutions can be either binding or non-binding, rule 14a-8(i)(1) of the SEC's proxy rules[50] allows a resolution to be excluded if it is improper under the relevant state law. State laws typically provide for all corporate powers to be exercised by or under the authority of the board. Thus, shareholder resolutions on matters that fall within the broad power of management need to be carefully worded to make it clear they are advisory. Whereas the UK resolutions indicate their status by referring to the relevant section of the Act or the company's constitution, US resolutions indicate their status by the substance of the resolution.

Examples of resolutions from each jurisdiction highlight the practical differences that emerge from the drafting of the rule on the status of the resolution (Table 4). The US resolutions make 'requests' of the Board: to adopt a policy, report on an issue including policy options, or review guidelines and then issue a report. By contrast, the UK (Rio Tinto) example below directs the company in its routine annual reporting to include further information on specific climate-related issues.[51] A second UK example asserts Shell will become a renewable energy company and the expectation of a new strategy within one year.[52]

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[47] UK law also requires a resolution to be a decision that the law allows shareholders to make. See the discussion above on page 10, and cases in footnote 19.
[48] *Quin & Axtens v Salmon* [1909] AC 442, 444 (Lord Loreburn LC).
[49] Paul L Davies and Sarah Worthington, *Gower Principles of Modern Company Law*, 10th Edition (2016), 359-60. A great deal of this debate turns on the interpretation given to the specific words used in the articles themselves. Two commonly cited articles are C Goldberg, 'Article 80 of Table A of the Companies Act 1948' (1970) 33 *Modern Law Review* 177, and M S Blackman, 'Article 59 and the distribution of powers in a company' (1975) 92 *South African Law Journal* 286, 287-8. See also Elizabeth Boros, 'How does the division of power between the Board and General Meeting operate?' (2010) 31 Adelaide Law Review 169; Leo Flynn, 'The power to direct' (1991) 13 *Dublin University Law Journal* 101; Charles Zhen Qu, 'Some reflections on the general meeting's power to control corporate proceedings' (2007) 36 *Common Law World Review* 231.
[50] 17 CFR 240.14a-8.
[51] Article 104 of Rio Tinto plc's Articles of Association, on the General Powers of Directors: "The business and affairs of the Company shall be managed by the Directors, who may exercise all such powers of the Company as are not by the Statutes or by these Articles required to be exercised by the Company in General Meeting subject nevertheless to any regulations of these Articles, to the provisions of the Statutes and to such regulations as may be prescribed by Special Resolution of the Company, but no regulation so made by the Company shall invalidate any prior act of the Directors which would have been valid if such regulation had not been made."
[52] Article 97(A) of Royal Dutch Shell plc's Articles of Association sets out the general powers of directors. Article 97(B)(iii) notes these powers may be limited by any regulations laid down by the shareholders by passing a special resolution at a general meeting. If a change is made to these articles *or if the shareholders lay down any regulation* [which is what this resolution is] relating to something which the board has already done 'which was within its powers, that change or regulation cannot invalidate the board's previous action'.

Table 4: UK and US shareholder resolutions examples

UK	US
Rio Tinto plc 2015 AGM: Example of Aiming for A resolution "That, in order to address our interest in the longer-term success of the Company, given the recognised risks and opportunities associated with climate change, we as shareholders of the Company *direct that routine annual reporting from 2017 includes further information about:* • Ongoing operational emissions management • Asset portfolio resilience to the International Energy Agency's (IEA's) scenarios • Low-carbon energy research and development (R&D) and investment strategies • Relevant strategic key performance indicates (KPIs) and executive incentives • Public policy positions relating to climate change. This additional ongoing annual reporting could build upon the disclosures already made to CDP (formerly the Carbon Disclosure Project) and/or those already made within the Company's Annual Report and Sustainable Development Report."	Exxon Mobil AGM 2016 Item 11: *Shareholders request that the Board of Directors adopt a policy* acknowledging the imperative to limit global average temperature increases to 2°C above pre-industrial levels, which includes committing the Company to support the goal of limiting warming to less than 2°C. Item 14: *Shareholders request the Board of Directors report to shareholders*, using quantitative indicators, by 31 December 2016, and annually thereafter, the results of company policies and practices above and beyond regulatory requirements, to minimize the adverse environmental and community impacts from the company's hydraulic fracturing operations associated with shale formations. Such report should be prepared at reasonable cost, omitting confidential information.
Royal Dutch Shell plc 2016 AGM '*Shell will become a renewable energy company* by investing the profits from fossil fuels in renewable energy; *we support Shell* to take the lead in creating a world without fossil fuels *and expect a new strategy within one year*.	Johnson & Johnson AGM 2016 Item 7: *Shareholders of [company] request that the board of directors issue a report,* at reasonable expense and excluding proprietary information, reviewing the company's existing policies for safe disposition by users of prescription drugs to prevent water pollution, and setting forth policy options for a proactive response, including determining whether the company should endorse partial or full industry responsibility for take back programs by providing funding or resources for such programs.
	Apple Inc. AGM 2016 Item 7: *The proponent requests the board review the Company's guidelines* for selecting countries/regions for its operations and issue a report, at reasonable expense excluding any proprietary information, to shareholders by December 2016. The report should identify [company's] criteria for investing in, operating in and withdrawing from high-risk regions."

AVENUES FOR EXCLUDING RESOLUTIONS

In the UK, shareholder resolutions under s 338 and other matters under s 338A can be excluded if they are vexatious, frivolous or defamatory; concepts which are determined by the court. In the US, shareholder resolutions may be excluded on thirteen different grounds, including:

- Subject-matter of resolution relates to ordinary business of company.[53]
- Resolution or supporting statement is misleading or false.
- Company would lack the power/authority to implement the resolution.
- Resolution substantially resubmits a resolution from the preceding 5 years which received [varying degrees of low support] last time it was included.

The US allows companies to seek informal umpire review from the SEC of their decision to exclude a shareholder proposal. This process involves asking the SEC to issue a 'no action' letter to the company stating that the SEC will not take administrative action against the company for failing to include the resolution. SEC rulings are not legally binding, so an aggrieved party can still go to court for a ruling on inclusion or exclusion.

The number of E&S US resolutions excluded from agendas between 2010 to 2016 ranges from 50 to 66 resolutions a year.[54] This is far fewer than the number of requests actually filed with the SEC, with some of the resolutions being withdrawn after filing as the shareholder was satisfied that the company was open to responding to the requested change or at least to further dialogue.[55]

In both jurisdictions, the court is the final arbiter of whether a company can exclude a resolution from the meeting agenda. While the courts bear responsibility for declaring whether resolutions can or cannot be included, their task is determined in no small part by legislative provisions: highly detailed and prescriptive in the US; less detailed and prescriptive in the UK.

EVIDENCE OF SHAREHOLDER RESOLUTIONS

The quantity of shareholder resolutions in the UK relative to the US is dramatically different. From 2010 to 2016, there was an annual average of less than two E&S shareholder resolutions in the UK FTSE350 (Table 5), with an increasing trend on E&S resolutions in 2015 and 2016. These numbers are low when compared to an average of 202 E&S resolutions from 2010 to 2016 in the US (Graph 1).

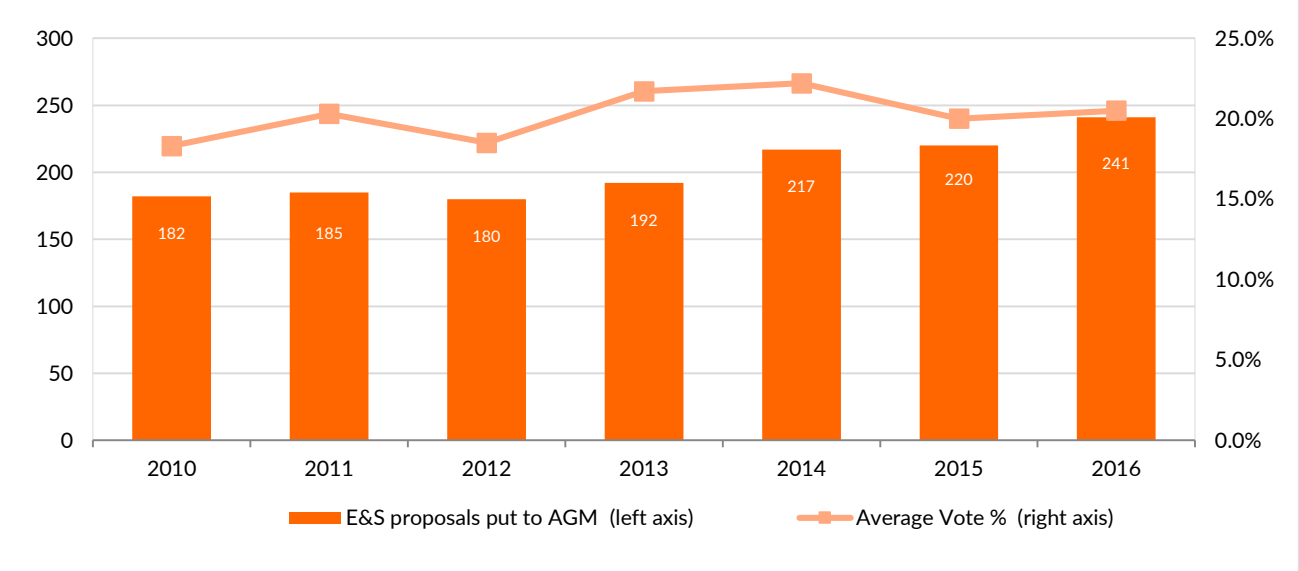
Table 5: UK FTSE350 Shareholder resolutions

	2010	2011	2012	2013	2014	2015	2016
Number of resolutions	14	9	6	1	5	8	8
Number of companies	5	3	4	1	3	8	7
Number E&S resolutions	1	unknown	1	0	1	2	5
Number E&S resolutions passing	0	-	0	NA	0	2	3
E&S Voting outcomes (% votes for)	5.71	-	25	NA	12.8	Average 98.6	Passing Average 97.8

Source: Institutional Shareholder Services, 2015: Europe Voting Results Report (15 September 2015), cross-checked against Proxy Insight data for 2010-2015, with Proxy Insight data for 2016. E&S resolutions were identified from the Proxy Insight data.[56] The average E&S voting outcome for 2016 was 63.38%. All 5 E&S resolutions passing in 2015 and 2016 were Aiming for A proposals.

[53] In *Trinity Wall Street v Wal-Mart Stores Inc* 792 F.3d 323 (3d Cir. 2015) the majority judgment lays down a two-step test to be satisfied in order to show the subject-matter of the resolution is a significant policy issue (an exception to the ordinary business exception): a shareholder must show the subject-matter transcends ordinary business and to do so, the issue must "be divorced from how a company approaches the nitty-gritty of its core business."
[54] Based on data from Proxy Preview 2017, 10.
[55] Based on data from Proxy Preview 2017, p. 10, the number of resolutions withdrawn ranges at around 150 for the period 2010 to 2013, between 170 to 180 for each of the years 2014 and 2015, and around 140 for FY2016. From 1 January to early October 2017, 244 no action requests have been filed with the SEC. Gibson Dunn's review of the 2017 Proxy Season indicates a 78% success rate in arguments for no action (ie the proposal can be excluded), up from 67.8% in 2016. Ordinary business exception and substantial implementation arguments made up just over 70% of the successful exclusions.
[56] Shareholder proposed resolutions from the Proxy Insight database were identified for FTSE100 and FTSE250 by searching in each of the calendar year.

Graph 1: US E&S resolutions put to a vote, with average support levels



Source: Compiled from Proxy Preview Reports from 2013 to 2017 inclusive.

Voting outcomes on E&S resolutions differ between these jurisdictions. From 2010 to 2014 none of the E&S resolutions were passed in the UK. In 2015, the two Aiming for A resolutions at BP and Shell passed and this success continued into 2016 with resolutions at Anglo American, Glencore and Rio Tinto receiving 96% or higher. The number of E&S resolutions in the US that pass by the required simple majority is low, as illustrated by the average vote data above in Graph 1. For example, in 2016 the average vote for E&S resolutions was 20.5%. Although some shareholder resolutions have received more than 50% support, this is rare, as Table 6 below illustrates.

Table 6: US E&S resolutions from 2012 to 2016 which passed (requiring a 50% vote)

Year	Company	Resolution	Proponent	Vote for (%)	Category
2012	WellCare Health Plans	Review/report on political spending	Amalgamated Bank	52.7	S
2013	CF Industries Holdings	Publish sustainability report	Presbyterian Church (USA)	67	E
2013	CF Industries Holdings	Review/report on political spending	NYSCRF	66	S
2013	Alliant Techsystems	Report on lobbying	Midwest Capuchins	64.8	S
2013	CF Industries Holdings	Adopt board diversity policy	NYC pension funds	50.7	S
2014	Kraft Foods Group	Commend animal welfare policy	HSUS	80.7	S
2014	SLM	Report on lobbying	AFL-CIO	58.6	S
2014	Smith & Wesson	Report on political spending and lobbying	Amalgamated Bank	55.8	S
2014	Lorillard	Report on lobbying	Midwest Capuchins	53.7	S
2014	Dean Foods	Review/report on political spending	NYSCRF	51.8	S
2014	Valero Energy	Report on lobbying	NYSCRF	51.8	S
2014	H&R Block	Review/report on political spending	NYSCRF	50.6	S
2015	Nabors Industries	Publish sustainability report	Appleseed Fund	51.5	E
2016	Kellogg	Commend animal welfare policy	Humane Society of US	98.2	S

Year	Company	Resolution	Proponent	Vote for (%)	Category
2016	FleetCor Technologies	Report on board diversity	NYSCFR	72.4	S
2016	Fluor	Review/report on political spending	Philadelphia PERS	61.9	S
2016	Clarcor	Publish sustainability report	Walden Asset Management	60.8	E
2016	JB Hunt Transport	Adopt sexual orientation/gender policy	Trillium Asset Management	54.7	S
2016	Joy Global	Adopt board diversity policy	Amalgamated Bank	52.4	S
2016	eBay	Report on female pay disparity	Arjuna Capital	51.2	S
2016	WPX Energy	Report on methane emissions and targets	CalSTRS	50.8	E
2016	NiSource	Review/report on political spending	NYSCRF	50.3	S

Source: Compilation from *ProxyPreview* Reports from 2013 to 2017 inclusive.

ENGAGEMENT CULTURE AND REGULATORY GAPS

The culture of investor engagement is not as well developed in the US compared to the UK and this is one explanation for the difference in numbers of proposals between the two jurisdictions. UK investors have an established engagement culture and good access to company boards and management:

> I've always thought of voting as the first and last resort. The first is to get the attention of the company if there's something they're doing you don't like (*UK pension fund investor*).

By contrast, shareholders file resolutions in the US to help start a dialogue with the company. This was confirmed by interview participants, each of whom had a substantial history of filing shareholder resolutions:

> There is a long- standing process in the US to use shareholder proposals to communicate with management and to communicate with each other (*US pension fund investor*).

The other explanation for the observed differences in proposal numbers is the difference in shareholder rights. In the US, shareholder resolutions are used to fill gaps in the existing regulatory framework, relating to rights which are available to Australian and UK shareholders, such as the right to nominate candidates for election and for these candidates to be included on the same proxy form as the board-nominated candidates (proxy access). This is illustrated by the results for a series of governance resolutions in Table 7 below.

Table 7: Average voting outcomes* for a selection of US governance resolutions

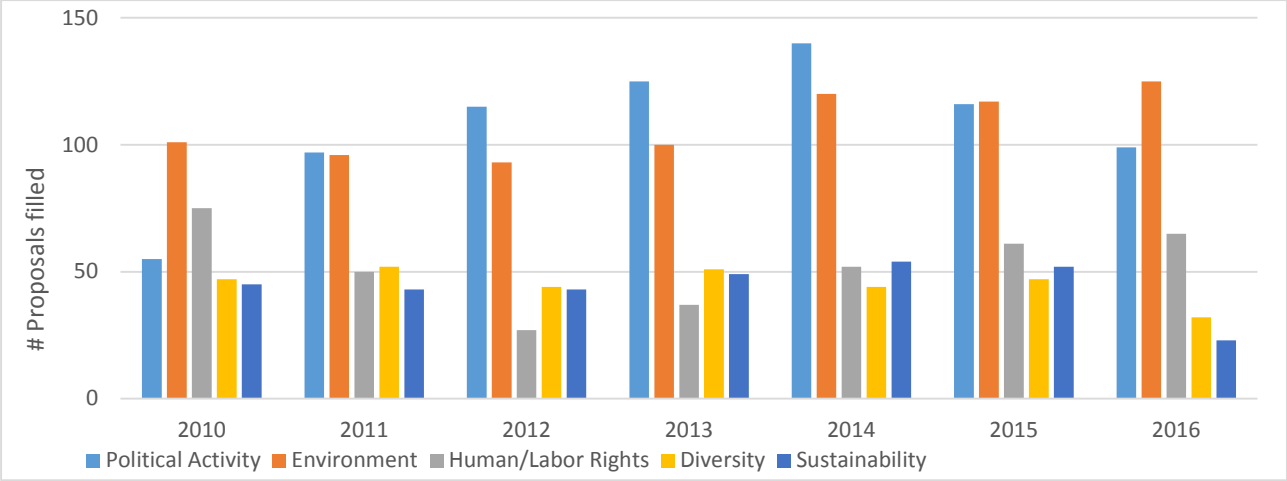
Topic of resolution	2010	2011	2012	2013	2014	2015	2016
Independent board chair/separate chair/CEO	27	32	36	31	31	30	29
Majority vote to elect directors	56	57	61	59	57	66	51
Eliminate supermajority provision	73	62	69	72	65	60	57
Repeal classified board	69	77	81	80	81	77	80
Shareholder right to act by written consent	54	48	45	40	38	39	41
Shareholder right to call special meeting	43	40	41	42	42	43	43
Proxy access	-	-	42	32	39	55	50

* Votes for as % of votes cast at meeting

Source: Compilation from Georgeson *Annual Corporate Governance Review* from 2010 to 2016 inclusive.

Another key issue for US resolution filers has been disclosure on political activities as demonstrated in Graph 2 below (first bar shown for each year). In the UK, the company must seek shareholder approval to make political donations or incurring political expenditure above a minimum threshold; any political donations or expenditure made must be disclosed in subsequent annual reports.[57]

Graph 2: US E&S topic trends



Source: Proxy Preview 2016, 10.

A common approach to address regulatory gaps is for investors to adopt a thematic campaign targeting a specific gap and running the same resolution at multiple companies (see Table 7 above). As one seasoned US resolution filer observed:

> Say on pay originally began life as a shareholder proposal. It's now part of the Dodds-Frank Act. Annual elections are now a routine practice, similarly with the independence of boards and the key committees. These were originally shareholder proposals (*US pension fund investor).*

US interviewees explained how they identified issues suitable for a thematic campaign, with a view to bringing shareholder resolutions should engagement fall short of delivering change:

> We're an investment firm with a number of clients who have a number of interests and have more than one priority. What are our priorities? What are our clients telling us about? So the issues can come to you in a number of ways and they differ. Some other firms may have some of the same issues of concern that we do, so we can cooperate. We do a review: we have a series of criteria about which companies we would choose on those issues (*US fund manager).*

For some institutional investors, this type of thematic campaign is too challenging:

> You have to have some kind of method and structured methodology to go about this. And I think that's where a lot of funds, including some very large institutional funds across America or elsewhere might be a little lost. It's one thing to engage companies on very straight forward issues. Governance issues: they either have proxy access or they don't, right? Relatively easy to identify and see and you can utilise a screen tool via Bloomberg or many of the other products out there. Likewise, on diversity, it's easy to identify, not the race of individuals, that's extremely difficult and inherently inaccurate, but you're able to identify what gender a person identifies as. Those engagements are pretty straight forward. What it comes down to on the environmental side, those engagements can be a degree of magnitude more complex (*US pension fund investor).*

> Shareholders rights, while superficially similar in each jurisdiction (voting rights, information rights, and engagement), differ dramatically in practice due to different regulatory frameworks (a regulatory gap in the US may not exist in the UK) and engagement cultures.

[57] The obligation to seek shareholder approval in the UK is governed by section 366 of the *Companies Act 2006* (UK) and the requirement for the expenditure to be disclosed in the directors' report is governed by the *Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008* (UK), regulation 10(1) and schedule 7(1).

ADVANTAGES AND DISADVANTAGES OF UK AND US FRAMEWORKS

The UK and US approaches have some features that may be welcomed by investors in Australia, as well as others that may be regarded as restricting the exercise of rights by shareholders. Comparing these approaches with the current Australian approach highlights advantages and disadvantages of each (Table 8).

Table 8: Comparison of advantages and disadvantages between jurisdictions

	UK	US	AUSTRALIA
Pros	▪ Option to move binding resolutions (combined with constitutional provisions allowing for directive resolutions) on a narrow range of topics or advisory resolutions on a broad range of topics provides a useful and flexible set of tools ▪ Threshold of 100 shareholders is qualified by average shareholding value (combined £10,000) ▪ More likely to proceed to a vote and thus create the public debate, although behind the scenes engagement is the preferred strategy ▪ No informal umpire to create a barrier between shareholders and company	▪ Option to move precatory (advisory) resolutions exists ▪ Low threshold to move: US$2,000 in stock held for at least 1 year by time of filing and held through shareholder meeting[58] ▪ Informal review by a regulator could be a useful safety valve, not only to exclude resolutions, but also to give time to negotiate a withdrawal based on the company's commitment to meet shareholder requests either partially or in full ▪ A limit of one resolution per shareholder per company (combined with a restriction on refiling an unsuccessful resolution) means shareholders file their 'best' resolution	▪ No option to move advisory resolutions ▪ Special resolution to amend the constitution is binding and flexible in what can be inserted into the constitution ▪ Threshold to move special resolution at GM called by company is 5% of issued capital or 100 shareholders (with no minimum shareholding requirement) means a group of small shareholders can move a resolution
Cons	▪ Uncertain nature of directive resolutions means resolution may end up as an advisory matter ▪ Lack of an informal umpire means court is umpire and company is better resourced to meet any costs ▪ No limits on number filed and no restriction on refiling a failed resolution in a subsequent year means shareholders aren't always careful in drafting resolutions	▪ Very limited rights to move binding resolutions (and mechanisms to thwart the process such as proxy access for director elections) ▪ Detail and highly prescriptive rules shape the practices of companies, shareholders, the SEC and courts ▪ Advisory resolutions must carefully navigate the exclusions and then potentially also survive the informal SEC review ▪ SEC review isn't binding but can be expensive for a shareholder to challenge company's application ▪ Shareholder must physically present the resolution at the meeting, so costs are involved in doing so ▪ Limits on refiling unsuccessful resolutions means shareholders wanting to resubmit may be hamstrung from doing so	▪ No current option to move non-binding resolutions means shareholders must resort to a binding resolution that many shareholders and their advisers disapprove of, so unlikely to ever pass ▪ Seventy-five per cent threshold to pass a special resolution to amend the constitution is a high threshold ▪ With no minimum holding or non-minimum qualifying holding period as eligibility requirements, moving proposals can be deployed by persons with no long-term interest in the financial performance of the company
What happens in practice	▪ Range of shareholder rights and strong engagement culture means these flexible rights are rarely deployed ▪ Successful Aiming for A resolutions adopted the directive form but were filed under s 338 and s 338A, relying on the provisions in the company's articles of association as a source of decision-making rights and by multiple co-filers (a number of shareholders join in on filing the resolution jointly)	▪ Lack of shareholder rights and weak engagement culture means these relatively inflexible rights are routinely deployed ▪ Used to plug gaps in regulatory regime but also for broader purposes seeking changes in company practices around diversity, animal welfare, pay disparity, human rights and trafficking ▪ Broad range of topics ▪ Used by small and large investors alike although proposed changes in 2017 will restrict use by small investors	▪ Lack of scope for non-binding resolutions and views opposing use of binding constitutional resolutions almost assures resolutions won't pass ▪ Relative ease of mechanism to put resolution on agenda indicated by use of this mechanism by NGOs

[58] This provision is currently being amended by the *Financial Choice Act of 2017* to remove the dollar threshold but leave the 1% threshold. See also footnote 45.

ASSESSMENT OF REFORM OPTIONS AND NEXT STEPS

This section examines the rules trade-offs required in any shareholder resolution framework. It then presents four options for reform and assesses each option, drawing upon the discussions at the workshops and one-on-one meetings in late March/early April 2017. Finally, the initial next steps in the reform process are identified.

RULE TRADE-OFFS

Choosing the right set of 'arrows'[59] to create a facilitative framework for shareholder proposals requires the various trade-offs within and between the different rules to be carefully considered. Table 9 highlights the extreme outcomes of choosing the least possible rule versus a highly prescriptive rule for some of the key rule topics required in a shareholder proposal framework.

Table 9: Extreme positions on key rules

Rule topic	'Least possible' rule or no rule	'Dense rule'
Who can file	▪ Low threshold to allow anyone to file, so individuals and special interest groups with no real economic investment can lodge resolution	▪ Requiring 5% ownership making it unlikely that retail investors would submit resolutions
Timing of notice in advance of meeting	▪ Short lead time means resolutions can be used to respond to emerging issues	▪ Long lead time to file before the meeting means resolutions have to address structural issues and known risks, not new issues
Status of rule	▪ Non-binding means company can ignore it	▪ Binding status means the topics on which resolutions are likely to be curtailed via legislation so as not to infringe the board's broad power of management
Shareholders resolutions can be excluded because of the topic of the resolution (no exclusions versus detailed and multiple exclusions)	▪ Having no limits on topics can mean a free for all and could lead to companies challenging the inclusion on other grounds ▪ Alternatively, it could lead to investor frustration if resolutions viewed as without substance routinely appear on AGM agenda	▪ Detailed and multiple exclusions can create opportunities to wriggle out of including a resolution as companies seek to recast the resolution as 'off limits' ▪ Could increase likelihood of court involvement and thus costs for shareholders
Informal umpire review	▪ Having no review means low value resolutions won't be precluded from the meeting agenda (subject to threshold to file)	▪ Informal umpire review adds to time and cost of a resolution while the review occurs. Could mean only 'valuable' resolutions are included on the meeting agenda
Limits on refiling an unsuccessful resolution at subsequent meetings	▪ Having no limits means each meeting might feature the same resolution, although there are already many other resolutions shareholders consider each AGM	▪ Limits mean shareholders pay attention to form and substance of rule but restriction on resubmission could be viewed as arbitrary

[59] Julia Black, 'Which arrow? Rule types and regulatory policy' [1995] *Public Law* (Summer) 94.

There is also a need to consider the relationship between the various rules and to consider other possible trade-offs such as:

- **Timing and informal umpire review and topics**: need to allow adequate lead time before meetings for umpire review to occur, which may then impact on proposed topics for proposals.
- **Who can file and status of rule**: unlikely that a rule would allow for anyone to move a binding resolution, but if a non-binding resolution is sound (which resolutions can be excluded based on topic), small shareholders should be able to file and other shareholders will support it.
- **Informal umpire review and limits on topics**: informal umpire review is not necessary if there are no limits on topics but if the rules to limit topics are detailed, informal umpire review can put a barrier between shareholders and the company, as the company will run to the umpire to seek exclusion rather than trying to reach agreement with shareholders. This will be moderated by how healthy the engagement culture is between the company and its shareholders.
- **Low threshold and informal umpire review**: can mean the latter is used to help shareholders work out how to word a resolution to make it through umpire review. Could lead to an over-emphasis on 'form'.

Ultimately, legislators and policy makers need to consider how these rules would work in practice, selecting from a range of solutions to resolve these rule tensions. While overseas jurisdictions provide evidence of how the rules in those jurisdictions work, they are not a clear guide as to how the rules would work here as key parts of the regulatory framework and engagement culture differ. Furthermore, the solutions to these challenges need not be legal rules: 'market solutions' could be more effective than legal rules in ensuring the mechanism works as intended.

It is also worth noting that companies do not 'like' receiving shareholder resolutions, even though they acknowledge the right of shareholders to move them. There is history in Australia of companies using legal avenues to avoid placing resolutions on the agenda, evidenced by the case law identified earlier in this report. This suggests that any avenues to allow for companies to exclude shareholder resolutions are a key issue to be addressed in the facilitative framework.

WHAT DOES SUCCESS LOOK LIKE?

Is 'success' only achieved when a resolution passes? The experience of overseas voting, particularly in the US, indicates that other measures of success must also be relevant to shareholders. If this was not the case, shareholders would be unlikely to continue filing resolutions in ever increasing numbers when most do not pass. As one interviewee said:

> Many times, people have a sense that 50% should be the goal. Many companies are going to pay attention to you if you get a 20% vote because they see it's an issue of the day, it may be growing. So we've had votes of 60% and the company's ignored it. And we've had votes of 15% where the company said, "Let's talk. This is a serious issue" (*US fund manager).*

Achieving less than a simple majority (>50%) on a non-binding vote can be seen by shareholders as a 'win' because it raises awareness and can lead to engagement with the board. Decisions to withdraw resolutions likely indicate that the investor has received some commitment from the company to change or at least it is prepared to engage with the investor on what that change looks like. The high level of withdrawn resolutions in the US suggests shareholders see merit in filing a resolution to start a dialogue, yet are open to withdrawing it if the desired change (which may be a workable compromise and not necessarily the exact degree of change envisaged by the shareholder) is achieved.

In the UK, shareholders appear to apply a similarly pragmatic definition of success:

> We understand that often it's difficult to get majority support for these resolutions and especially when you haven't allowed other shareholders [to join you in filing the proposal]. But that's also not the main key performance indicator of success. It's often about getting onto the ballot; getting enough public dialogue; getting other shareholders to use your resolution as a hook for the board and then to have a discussion. So that's one positive collateral that comes from using this method of protecting shareholder rights, of trying to advance the rights for yourself and for other shareholders (*UK pension fund investor).*

If success is only achieved when the company changes its practices, it may not be that one shareholder resolution that changes everything. It may be the campaign for specific changes that is 'won' over time. This has been the US experience, where individuals and institutional investors conduct thematic campaigns (single issue, multiple companies). Other investors then pick up a resolution and run with it at further companies over many years (subject to the limits in the SEC rules on refiling unsuccessful proposals). Investors can use evidence of other companies changing practices in response to the resolution to influence company boards to make similar changes.

The Aiming for A coalition's campaign for climate-related disclosure is an example of a thematic campaign. It is notable in the UK for its success in garnering board support for the resolution:

> Up to that point [Shell AGM in 2015], there had never been a social or environmental resolution that had been adopted by the board or recommended or supported. This was always the aim; the aim was to construct a resolution that was so sensible and so reasonable that it would ridiculous not to support it.
>
> Prior to this, management would always want to be seen, "Look, don't worry about this: we've got it covered; you don't' need this because we're already doing it." I can remember very clearly getting the call from Shell to tell us that the board will be supporting the resolution and I was genuinely surprised. I mean, that was the aim, but I think that was a watershed moment. But, once that watershed moment had happened, it was quite easy then for other companies to follow suit (*UK fund manager).*

Where institutional investors agree with the issue, the size of the shareholder proposing the resolution is irrelevant to perceptions of legitimacy, as these two Australian fund managers noted:

> Now when the Chairman said to me "Oh, it's only 0.1% of shareholders [who put up the resolution]", I said to him, "I don't care, that's a technical issue (*Australian fund manager).*
>
> The thinking around those sorts of resolutions is not that they're going to get passed. It was more part of drawing attention to the issue *(Australian fund manager).*

However, just as a small shareholding is not a barrier to a shareholder resolution receiving majority support, a larger or high-profile shareholding does not guarantee a resolution will pass. This needs to be appreciated by institutional investors who have not yet attempted to file shareholder resolutions:

> There is a downside risk also for the one who files the proposal that you don't get a majority in the end *(EU fund manager).*

OPTIONS FOR REFORM

Four options for reform were identified from the research. Where relevant, these options rely on existing Australian practices. The features of each option are described in Table 10.

Table 10: Reform options summary

Element	Option 1	Option 2	Option 3	Option 4
General description	▪ General purpose right to move non-binding resolutions at AGM	▪ Non-binding vote on the annual report (director's report, financial statements, auditor's report)	▪ Non-binding vote on a new sustainability/ESG report	▪ Directive resolution at AGM
Minimum threshold to file a resolution	▪ Five per cent of capital and/or 100 shareholders	▪ Not Applicable	▪ Not Applicable	▪ Five per cent of capital and/or 100 shareholders
Notice method	▪ Written notice in advance of AGM ▪ Include text of resolution ▪ Include statement in support of up to 1,000 words	▪ Mandate in legislation to occur each year at AGM	▪ Mandate in legislation to occur each year at AGM	▪ Written notice in advance of AGM ▪ Include text of resolution ▪ Include statement in support of up to 1,000 words
Notice timing	▪ 2 months in advance of AGM notice being released ▪ Company to advise to shareholders via ASX of closing date for submission of resolutions	▪ Not Applicable	▪ Not Applicable	▪ 2 months in advance of AGM notice being released ▪ Company to advise to shareholders via ASX of closing date for submission of resolutions
Formal report required?	▪ No reporting in current year's annual report (but follow-up required in subsequent year) as per 'Obligation to report…' in the last row of this table.	▪ Annual report = directors report plus financial report plus auditor's report already mandated by *Corporations Act 2001* (Cth)	▪ For this option, the reform would also seek to strengthen disclosure requirements for ESG into a defined report within the director's report and have director sign-off[60]	▪ No reporting in current year's annual report unless resolution received prior to date of the directors' report ▪ (but see below re follow up in subsequent year)
Voting requirement	▪ Ordinary resolution with >50% threshold to pass	▪ Ordinary resolution with >50% threshold to pass	▪ Ordinary resolution with >50% threshold to pass	▪ Special resolution with 75% threshold to pass
Status of rule – make express in legislation	▪ The decision on the voting matter moved by shareholders under is advisory only and does not bind the directors of the company.	▪ Use remuneration report vote as model and adapt	▪ Use remuneration report vote as model and adapt	▪ The decision on the directive resolution is binding.
Limits on subject matter	▪ No limit	▪ Not Applicable	▪ Not Applicable	▪ No limits, but consider whether shareholders should be able to direct the board to act if the board has decided on the matter and there is no evidence to suggest the board has not acted within the scope of its powers, or else is not in compliance with the duties imposed on director, or is otherwise acting against the law.
Informal umpire review	▪ While this could be one mechanism of identifying resolutions of less merit, a 'market solution' should be considered first	▪ Not Applicable	▪ Not Applicable	▪ While this could be one mechanism of identifying resolutions of less merit, a 'market solution' should be considered first
Restrictions on resubmission	▪ No restrictions	▪ Not Applicable	▪ Not Applicable	▪ No restrictions
Obligation to report back in next annual report on actions taken	▪ Any resolution receiving votes above a certain threshold (could be 25% or higher) requires company to report back on any decisions taken by board in response to the proposal and any actions taken	▪ Only if vote against exceeds a certain threshold (e.g. 25%)	▪ Only if vote against exceeds a certain threshold (e.g. 25%)	▪ Only if vote passes and, then, the board will be responding to the direction

[60] This could be along the lines of s 414CA and s 414CB in the *Companies Act 2006* (UK) per the December 2016 reforms.

OPTION 1: A GENERAL PURPOSE NON-BINDING SHAREHOLDER RESOLUTION

This option involves legislative reform to introduce a right to move non-binding shareholder resolutions on a range of topics at a company's AGM.[61] The wording of the legislation would make it clear that the company was not required to act on the resolution.[62] The wording of the proposal should also be clear on the status of the resolution to ensure shareholders are not mislead on its effect: this can be achieved by a requirement for the status of the resolution to be identified in a note under the resolution, as currently occurs with the advisory vote to adopt the remuneration report.

It is envisaged that this option could be used to move the types of resolutions already seen at Australian AGMs, such as requests for disclosure of sustainability risks, or other business risks. As such, Option 1 resolutions would implicitly seek a change in corporate practices, even though this cannot be directed.

Threshold to file a resolution

Participants indicated that they would be comfortable for the 5% or 100 members threshold already found in s 249N to be used for this option. They did not believe it was appropriate to impose a length of shareholding requirement, as this would be difficult to establish. To explain the perceived difficulties of the length of shareholding requirement, several participants flagged the challenges they experienced in working with custodians to identify their shareholdings. Some participants also noted the ambiguity surrounding a length of shareholding requirement: would this mean holding the same shares or could investors have traded in and out of the stock but maintained a shareholding over the period?

Managing the risk of spurious, frivolous or vexatious resolutions

The most contentious aspect of Option 1 for participants was the risk that it would bring about spurious, frivolous or vexatious resolutions. A related question was who would be likely to use this option to move shareholder proposals.

The SEC's informal review mechanism was explained to Australian investors during the interviews. Each interviewee was then asked whether they thought this approach would be needed here as part of a right to move non-binding proposals. Their views on this issue were mixed:

> I think it would be critical, obviously not exactly that, but it'd be absolutely critical because that minimizes the possibility of extraneous resolutions, so while it doesn't complete mitigate against that, it would be an important control (*Australian fund manager).*

> I'd be keener to let the shareholders run. The more intervention and filtering you get between things and the outcome, the more it muddies the water and the more you need to throw resources at the problem. I don't think ASIC is well-equipped to do this, and the ASX is conflicted. So absent creating a new regulatory body which is expensive, I would just create a reasonably robust rule that allows X, Y and Z to happen, and if it's not part of X, Y or Z then it falls outside (*Australian fund manager).*

> We'd need mechanisms to achieve a couple of things: one is that spurious resolutions don't get up; second is making sure that what they're asking the company to do is reasonable and shareholders aren't interfering operationally. But whether it's like an SEC or whoever or how that happens, I think it's really important and requires a lot of thought (*Australian fund manager).*

[61] In other words, a shareholder with 5% could not use section 249D to requisition a meeting to move a non-binding proposal.
[62] *Corporations Act 2001* (Cth), s 250R(3) is a model for how to achieve this.

Workshop participants were open to having an informal review mechanism to place some limits on topics but acknowledged that implementation would be a challenge under the current regulatory settings. While ASIC was identified as the appropriate regulator within the Australian context to perform this role, participants agreed it would need additional resources to do so. Some participants thought this approach may lead to adversarial issues between shareholders and a board and expressed a concern on how this would impact the existing engagement culture.

An alternative to an informal review mechanism could be to adopt a formulation that proscribes characteristics of the proposal. The Act already provides that a company need not give notice of a shareholder resolution moved under s 249N if the resolution is defamatory.[63] One limit could be that the proposal is 'not frivolous or vexatious'. A different formulation could be a requirement that the shareholder lodging the resolution is 'acting in good faith'.[64] These concepts are well understood in Australian law; they would be open to interpretation by a court and be fact specific. Given these factors, they may not be the ideal mechanism to limit resolutions.

Another concept identified by participants during the workshops was that of 'materiality' – requiring shareholder resolutions to be material to the business. What this would mean would need to be determined, arguably on a company-specific basis. It presents an alternative way to restrict the proposals going onto the meeting agenda to those likely to be of greater interest to shareholders due to their perceived impact on the company. Unlike frivolous or vexatious, materiality may be easier to establish by reference to the scope and size of the company's operations and risk profile. A court need not be involved in making this determination.

The consensus ultimately emerging from the workshop discussions was that legislation should not impose a limit on subject matter, as the existing market system could provide the discipline necessary to deal with unmeritorious resolutions. Any limits within the wording of the legislation could provide an avenue for boards to put the matter before the court and this was seen as undesirable.

Overall assessment

Supporters of this approach noted the aim of this option was in keeping with the existing engagement culture, a culture that has developed over time and continues to evolve. A non-binding proposal mechanism would complement the 'engagement first' approach and provide a mechanism to escalate issues where engagement had failed to achieve a commitment from the company to undertake meaningful change. While these supporters acknowledged the need to find a way to minimise the chance of ill-conceived resolutions making their way onto the meeting agenda, they had faith that a combination of market discipline and regulatory drafting could manage this risk.

If legislative reform is undertaken in Australia to permit shareholder proposals along the lines of this option, it is likely that NGOs and special interest groups would be the first to take up the opportunity to undertake a thematic campaign, as they have sought to do over the past four years by bringing binding special resolutions to amend the constitution.

OPTION 2: AN ANNUAL MANDATORY BUT NON-BINDING VOTE ON ANNUAL REPORT

This option borrows from observed practice in the UK where this item is a routine matter on the AGM agenda. Under this option, the format of the current non-binding vote on remuneration reports in s 250R of the Act would be adopted. A vote to adopt the annual report would be a mandatory item on the AGM agenda and non-binding in status.

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[63] Section 249O(5).

[64] Restrictions on applications for leave to commence an action on behalf of the company (statutory derivative action) require the applicant to be 'acting in good faith' under s 237(2)(b). The courts have held this to mean the applicant is not acting for some collateral purpose "as would amount to an abuse of process". *Swansson v R A Pratt Properties Pty Ltd & Another* 2002) 42 ACSR 313, 320-21 [36]-[43]. *Goozee & Another v Graphic World Group Holdings Pty Ltd & Others* (2002) 42 ACSR 534, 546-8 [59]-[69]; *Coeur de Lion Investments Pty Ltd (ACN 006 334 782) v Kelly & Others* (2013) 95 ACSR 43, 55-7 [57]-[53], 6103 [76]-[80]. Including this requirement in the legislation for non-binding resolutions would be somewhat ironic. Case law indicates that if shareholders have the right to move a resolution, their motivation for doing so is irrelevant: *NRMA Ltd v Scandrett* (2002) 171 FLR 232, 243 [53].

It builds on the current AGM practice of tabling reports with management presentations and shareholder questions, but brings the exchange of views to a climax in a formal, but non-binding, vote. It could enable broader discussions than currently possible with the remuneration report, as it includes the directors' report, the financial statements and the auditor's report. The advantage of this option is familiarity, being based on an already accepted and understood format in Australia for a non-binding vote.

Interviewees did not support this option for a variety of reasons, although the main reason for rejecting it was the view that the meaning of a 'no' vote was unclear. They acknowledged this to also be a problem with the existing remuneration report vote: it is not always readily apparent why shareholders voted against the report of a company. Participants also observed that strikes against a remuneration report did not always send a consistent message to the market on remuneration practices. In a similar way to the remuneration report being passed 'on balance', participants identified the potential for investors tending to support the resolution to adopt the annual report 'on balance', thus blunting the message to companies about the need for change.

Some workshop participants thought that such a vote could have merit but, based on their experience of the advisory vote on the remuneration report, believed a two-strike mechanism would be necessary to ensure boards paid attention to the outcome. They noted it would look incongruous to attach a two strikes mechanism to the remuneration report, but to not also attach a similar mechanism to the overall annual report. In other words, adopting Option 2 would require a rethink of the current two strikes regime based on the remuneration report.

Participants did note that Option 2 was a potentially useful complement to Option 1. Option 2 votes would occur routinely at the AGM, whereas Option 1 votes would be ad hoc and would target any emerging issues not already captured by the reporting requirements in the Act. For example, if company practices on disclosing climate change risks were a concern, a vote against the annual report could be used to voice that concern. If company practices on managing climate change risks were a concern, shareholders could choose between using the annual report vote (vote against the resolution to adopt the annual report) to voice concern, or to file a non-binding shareholder proposal targeted specifically to the issue of how climate change risks are managed.

Overall assessment

There was not a lot of support for Option 2 on its own largely due to a perceived lack of clarity of about what the vote would signal. However, participants believed that a combination of Options 1 and 2 is worth considering further.

OPTION 3: AN ANNUAL MANDATORY BUT NON-BINDING VOTE ON A SUSTAINABILITY/ESG REPORT

As noted above in Table 1, a recurring theme in recent shareholder resolutions in Australia has been a request to companies for a report that discloses how they are managing risks relating to climate change. Mandatory sustainability reporting of ESG has been the subject of inquiries by CAMAC,[65] the PJC on Corporations and Financial Services,[66] and in 2017 the Senate Standing Committee on Economics (on carbon risk disclosure).[67] International developments, such as the final recommendations of the Task Force on Climate-related Financial Disclosures in June 2017, also inform any discussion of disclosure of climate-change related risk.[68]

As with Option 2, Option 3 builds on existing acceptance of non-binding resolutions for a specified report. This option would require two legislative reforms: firstly to mandate ESG or sustainability reporting to be made in a particular format at a particular time (for example, as part of the annual report); and secondly to attach a non-binding vote to that report.

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[65] Corporations and Markets Advisory Committee, *The social responsibility of corporations* (December 2006).
[66] Parliamentary Joint Committee on Corporations and Financial Services (Commonwealth), *Corporate responsibility: Managing risk and creating value* (June 2006).
[67] Senate Standing Committee on Economics (Commonwealth), *Carbon risk: a burning issue* (April 2017).
[68] Task Force on Climate-change Related Financial Disclosures, *Final Report: Recommendations of the Task Force on climate-related financial disclosures* (June 2017).

Only one Australian investor interviewed for the project was in favour of formalising the existing requirements for ESG reporting:

> I'd love it [sustainability report] synchronized and signed off by the directors. That's what I'd love to see to bring this stuff much more into the scope of the board, and that would actually reduce the issues around that constitutional resolution. I know a lot of directors would not be very comfortable with that. Yet one swallow does not a spring make. Reporting is just the end of it. You want them to be trying to really understand the risk and the consequences *(Australian fund manager).*

Overall assessment

Option 3 was overwhelmingly rejected by participants. The stated reasons for its rejection include a belief that the 'if not, why not' disclosure approach of the ASX Corporate Governance Council's *Principles of Corporate Governance* provided a better avenue for changing behaviour than mandatory disclosure requirements. Like Option 2, a vote against the report would not be sufficiently specific on the reasons why investors voted against the report. These would emerge only from engagement between the company and the particular investor. For this reason, it was seen as weak. Similar logic applies to the existing remuneration report and to Option 2 noted above: a vote against the report cannot tell the company why it was no. It does, however, create a platform for dialogue.

Participants noted the range of resources they would need to effectively analyse company disclosures and practices to reach a voting decision, including voting recommendations from proxy advisers. Unlike some governance features for which established and agreed indicators exist, participants expressed the view that E&S indicators are not yet at the same stage of agreed acceptance.

As one US interviewee noted, there is a vast difference in approach required to analyse various governance factors such as independence or gender identity, and the depth of analysis required to assess E&S risks. The lack of any requirement to routinely vote on these items might be one reason why an agreed list of indicators has not yet emerged. It is likely the market would respond to investor needs for better analysis; and agreement on indicators is not an impossibility.

OPTION 4: A GENERAL PURPOSE DIRECTIVE (BINDING) SHAREHOLDER RESOLUTION

This final option would mirror the rights of many UK shareholders to move binding directive shareholder resolutions. However, unlike many UK companies that have included this right in their constitutions, legislative reform would be necessary to implement this option in Australia.

It is also likely to be highly contentious with company boards because it modifies their broad power of management, reflected in s 198A of the Act, a replaceable rule that is mirrored in company constitutions.

Two interviewees expressed a strong preference for a binding vote, with one interviewee offering the following explanation:

> There needs to be the right balance between the amount of share ownership and the ability to be able to put a resolution forward…once that objective is met and the shareholder is able to put a resolution forward, I believe it needs to be of a mandatory nature, rather than an advisory nature. If it receives majority support, then it needs to be actioned by the company (*Australian fund manager).*

Participants were mixed in their views of this option. While acknowledging that Option 1 and Option 4 were 'bookends' and complementary, participants observed that one advantage of Option 4 was to provide a 'shadow threat'. Threatening to use this power to publicly move a resolution may create an incentive for the board to begin engaging with shareholders or take their existing engagement further. Those in favour of this option suggested that shareholders would use this right sparingly.

Participants opposed to this option believed it was too much of a change from the existing framework and were therefore unwilling to support it. They questioned whether the benefits of this option would be outweighed by its costs. They debated whether this option to move directive resolutions would make engagement more combative and have a negative impact on the prevailing engagement culture. Some participants felt that Option 4 was essentially 'second guessing the board' and shareholders could instead vote directors off the board if they were unhappy, an argument canvassed many times in previous law reforms.

An alternative reform approach discussed with participants is to combine Options 1 and 4, which would allow for either non-binding resolutions or binding directives. Consider the issue of climate risk disclosure: Option 1 could be used to file a non-binding shareholder resolution on this issue. Concerns following from the company's response to that initial proposal could then be addressed by another non-binding resolution or alternatively raised in the form of a directive resolution under Option 4.

Overall assessment

While participants acknowledge that Option 4 has some merit, most participants agreed with the view that moving such a proposal would be seen as second guessing the board and that was not something they wanted to do. Participants felt it was more appropriate for shareholders to vote directors off the board if they were unhappy with their performance. Of all the options considered, participants believed this option would be the most likely to receive vigorous pushback from companies, boards and organisations such as the Australian Institute of Company Directors and the Governance Institute of Australia. In other words, participants saw there was a high risk that this option would not be adopted.

NEXT STEPS

The aim of this report is to provide evidence and a framework of reform options to restart the discussion on shareholders' rights to move resolutions on a range of topics at a meeting of members. This discussion necessarily involves a range of stakeholders beyond the participants in this research study and ACSI's members: it includes the companies who would be subject to these proposals (including the company secretaries who would have to administer these arrangements), the non-executive director community, other investors in these companies (both retail and institutional investors), government, and civil society stakeholders.

As evident from the 2017 resolutions noted in Table 1 above, some investors, NGOs and civil society groups are likely to continue to use the options available to them to move shareholder proposals on issues of concern. This suggests the issue of shareholder rights to propose resolutions on a wide range of topics is not going away. If anything, the time for restarting the conversation is now.

TERMS AND DEFINITIONS

ACCR	Australasian Centre for Corporate Responsibility
ACTU	Australian Council of Trade Unions
AICD	Australian Institute of Company Directors
Aiming for A	The 'Aiming for A' coalition includes the £150bn Local Authority Pension Fund Forum and the largest members of the £15bn Church Investors Group. The coalition was convened by CCLA Investment Management in 2011/12.
As You Sow	Non-profit foundation founded in US in 1992 that promotes environment and social corporate responsibility via shareholder advocacy, coalition building, and 'innovative legal strategies'.
ASIC	Australian Securities & Investments Commission
CALPERS	California State Public Employees Retirement System
CalSTRS	California State Teachers Retirement System
CAMAC	Companies and Markets Advisory Committee
CASAC	Companies and Securities Advisory Committee
CLERP 9	Corporate Law Economic Reform Program 9 was about audit law reform, continuous disclosure, financial report, executive remuneration, shareholder rights. It introduced the non-binding shareholder vote on the remuneration report.
Constitutional amendment resolution	A special resolution moved under section 136 of the *Corporations Act 2001* (Cth) to insert a clause/rule into the company's constitution.
CSA	Chartered Secretaries Australia, now Governance Institute of Australia
E&S	Environmental and Social
ESG	Environmental Social and Governance
First strike	Vote of 25% or more against the remuneration report where either (i) no first strike at the prior year's AGM; or (ii) board spill resolution voted on at prior year's AGM.
ICCR	Interfaith Center for Corporate Responsibility
ISS	Institutional Shareholder Services
NGO	Non-government organisation
NYC Proxy Access	New York City Pension Funds' campaign of shareholder proposals seeking access for shareholder nominated candidates onto the proxy voting card issued by the company for the AGM.
NYSCRF	New York State Common Retirement Fund
Philadelphia PERS	City of Philadelphia Public Employees Retirement System
PJC	Parliamentary Joint Committee on Corporations and Financial Services
Precatory	Advisory resolutions
Proxy Access	US Shareholder resolutions seeking proxy access are asking for all candidates for election as directors to be included on the one proxy statement issued by the company.
S 136 resolution	Special resolution to amend the constitution
S 203D resolution	Resolution to remove a director
S 249D requisition	Shareholder with >5 % of capital requests the company call a meeting of members. Requisition will frequently feature s 203D resolutions.
S 249N requisition	Shareholder with ≥5% of capital or 100 shareholders request the company place an item on the AGM agenda.
SEC	Securities and Exchange Commission USA
Spill resolution	A resolution to hold a general meeting to re-elect the directors following a second strike against the remuneration report.
Two strike regime	Voting regime under the Corporations Act 2001 (Cth) where a vote of 25% or more against the remuneration report is a 'strike'. Two strikes against the remuneration report at consecutive AGMs triggers the board Spill resolution.

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