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ClientEarth Investor Briefing

Shareholder resolutions: the Australian and UK positions compared

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Background

The legal rights of shareholders to propose an advisory shareholder resolution for consideration at a listed company's AGM differ significantly between Australia and the United Kingdom. This briefing has been prepared to explain the differences between Australian and UK law on this topic, as well as why it is that Australian shareholder resolutions relating to environmental, social and governance (ESG) issues must be preceded by a request for a 'special' resolution that amends the company's constitution.

Unequal Shareholder Rights

Shareholders in UK listed companies have successfully proposed resolutions directing the board to provide additional information in routine annual reporting on the impact of climate change on the company in question[1]. Known as the 'Aiming for A' shareholder resolutions,[2] each was supported by management and a large group of institutional investors, and accordingly passed with near unanimous support from shareholders with voting rights.[3] The success of the 'Aiming for A' resolutions has inspired investors around the world to exercise their legal rights to drive better governance on climate change. In 2017, the Australasian Centre for Corporate Responsibility (**ACCR**) assisted a group of Australian shareholders to file a resolution in the Australian listed BHP Billiton Limited (**BHP**) regarding the activities of certain trade associations of which it is a member.[4]

Australian legislation and its interpretation in case law means that shareholders are unable to directly propose a resolution similar to the Aiming for A resolutions for consideration by Australian companies. In Australia, sections 249D and 249N of the *Corporations Act 2001* (Cth) provide that 100 shareholders (or those with at least 5% of the votes that may be cast on the resolution) may request that the company propose a resolution at its AGM. However, section 198A specifically provides that "[t]he business of a company is to be managed by or under the direction of the directors", and that "[t]he directors may exercise all the powers of

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[1] The text of the Aiming for A resolution as well as an analysis of Shell's implementation of its requirements can be found in this report ShareAction, 'Two Years After 'Aiming for A': Where Are We Now (Oct 2017) at https://shareaction.org/wp-content/uploads/2017/10/InvestorReport-AimingForA-Shell.pdf

[2] Filed with Royal Dutch Shell and BP in 2015 and Anglo American, Rio Tinto and Glencore in 2016. As Rio Tinto is dual listed it also included the Aiming for A resolution on the ballot at its 2016 Australian AGM, held in Brisbane. Although this was not technically required, the company stated that it did so in order to ensure equality of rights between all of its shareholders.

[3] Each resolution passed with well above the 75% threshold required to make the resolution a 'special resolution' that now forms part of each company's constitution (section 17 Companies Act 2006).

[4] http://www.accr.org.au/bhp

the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting."

Case law in Australia has determined that this provision, together with the common law, means that shareholders can not by resolution either direct that the company take a course of action, or express an opinion as to how a power vested by the company's constitution in the directors should be exercised (*National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517: *ACCR v CBA* [2015] FCA 785). *Parker* turned on whether the resolution would be legally effective, and the decision in *ACCR* followed this precedent on the basis that the shareholder's expression of an opinion by way of resolution would be legally ineffective as it would usurp the power of the directors to manage the corporation vested in them by section 198A.

Shareholders wishing to have a resolution considered at an Australian company's AGM have dealt with this constraint by proposing two part resolutions, with the first being a 'special resolution' that amends the company's constitution to allow advisory resolutions, and the second containing the substance of the matter the shareholders wish to raise. A special resolution requires 75% support to be effective, and as no resolution of this kind has ever been supported by management or any institutional investors, none have succeeded. Although Australian boards may have concerns that such a mechanism could 'open the floodgates' to a large number of frivolous resolutions, the risk appears to be low given the difficulty in engaging 100 shareholders. We note that, in order to address this concern, the drafting adopted by ACCR for the special resolution proposed at BHP limited the scope of any subsequent advisory resolutions to those related to "an issue of material relevance to the company or the company's business as identified by the company."[5]

In the UK, sections 338 and 338A of the *Companies Act 2006* provide shareholders with equivalent rights to propose both shareholder resolutions and "matters" of business at AGMs. However, there is no equivalent provision to s198A in the *Companies Act*. As the drafting of shareholder resolutions on governance issues has not been challenged in a UK court, there is no relevant case law on either the scope and extent of the wording of shareholder resolutions, or on the ability of shareholder resolutions to purport to 'direct' the board, or to express an opinion. The only limitation on the scope of resolutions under the *Companies Act 2006* is that they must not be:

- ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise);
- defamatory of any person; or
- frivolous or vexatious (s338(2)).[6]

Given the above differences between legislation and case law in the UK and Australia, it is difficult to predict how a UK court would determine a legal challenge to a resolution. The outcome of any such challenge would depend on the facts and circumstances in issue and it is futile to speculate on what a UK court may decide in such a case. More relevantly, UK law as it presently stands allows advisory shareholder resolutions, and the Aiming for A experience demonstrates that they can be an effective tool for better corporate governance and responsible investor activism.

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[5] https://d3n8a8pro7vhmx.cloudfront.net/accr/pages/546/attachments/original/1505781125/ACCR_BHP_resolution_FINAL.pdf?1505781125

[6] In principle, under UK company law, the board is the directing mind of the company with responsibility for management decisions: *Isle of Wight Railway Co v Tahourdin* (1883) 25 Ch D 320. However, there has been no case law on whether shareholder resolutions on ESG matters breach this common law rule. There has been no suggestion that the Aiming for A resolutions are presently *ineffective* under UK law, which was the determining factor in *Isle of Wight*.