Shareholder resolutions on ESG issues at listed public companies: comparative practice in Australia, the US & the UK

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This paper deals with the practicalities which arise when shareholders wish to engage with companies with a view to lodging shareholder resolutions for consideration at general meetings. Its focus is on listed public companies and environmental and social issues. It should be read in conjunction with a companion paper focused on legal issues - *Shareholder resolutions at listed public companies in major English-speaking countries: comparative arrangements,* Pender, H and Sheppard, J, ACCR March 2014.[2] Shareholders with an interest in company engagement which might include resolution lodgement should also see the manual on this subject produced by the ACCR.[3]

In aggregate, the shareholders' relationship with a board is one of 'principal' and 'agent'. Though the board has an overriding obligation to act in the interests of shareholders, the interests of the board will often diverge from those of shareholders. Shareholder resolutions are just one of the many 'principal monitoring' mechanisms commonly included in company law to check the extent to which the agent, in this case the board, can act in pursuit of its own interests rather than the interests of the principal, in this case the shareholders.[4]

Of course it is very rare there is just one shareholder. Companies are shareholder democracies. So, one basic design issue arising is the extent to which, as part of the 'principal monitoring' mechanisms, these democracies are predominantly 'representative' ('elect directors, leave them to it') or partially participative ('elect directors but also formally consider corporate policy issues'). In regard shareholder resolutions there are some similarities but also significant differences in practice across the US, UK and Australia.

This paper deals with those similarities and differences, it contains 5 sections. Section 1 sets the scene - providing background, definitions and description of the 'actors' involved in the shareholder resolution process and the broader corporate governance context. Section 2 describes interactions with 6 ASX companies in 2014 where shareholders proposed to lodge resolutions (&/or requested distribution of statements). Section 3 contrasts the 2014 experience in Australia with the 2013 season in the US. Section 4 describes arrangements in the UK. Section 5 deals with the

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[2] See http://d3n8a8pro7vhmx.cloudfront.net/accr/pages/79/attachments/original/1395878540/ACCR_intl_cf_sh_res_final.pdf?1395878540.

[3] See A Guide to Shareholder Advocacy in Australia , ACCR, 2015 at http://www.accr.org.au/advocacy .

[4] The focus of much academic discussion of the principal agent relationship in a company is the separation of ownership from management. In fact, that separation comprises two 'gaps' - firstly, the separation of owners (shareholders) from the board, and secondly, the separation of many board members from executive management. The primary focus in this paper is on the first 'gap'. Where, for example, shareholders are concerned the board lacks a focus on long-term value shareholder resolutions may be an appropriate way to express this concern. Of course, failure of board members to oversee executive management in the interests of shareholders may also be the subject of shareholder resolutions.

similarities and differences between Australia and the US and the UK in regard practice.

1. Background and definitions

There are a number of 'players' involved in the corporate governance of a listed company. Figure 1 sets some of them out, alongside their role in the consideration of an environmental or socially- themed resolution which had been proposed by shareholders. Such resolutions are unusual in Australia but, as described in section 3, they are common in the US and, although much less common in the UK, they are subject, there, to a well-defined process. In both countries, sponsors of resolutions are generally drawn from a particular set of shareholders, most commonly from church funds, from specialist ethical or responsible fund managers or from public sector pension funds[5].

In the first instance, in Australia, once a resolution is lodged it is the responsibility of the company secretary to assess whether a resolution is valid in accord with the Corporations Act, the common law and the company's own constitution[6]. The company is obliged to notify the ASX that shareholders have lodged a resolution within two days. Then, if the resolution is valid in the opinion of the company secretary and the board, it will be included on the notice of meeting for all shareholders. They may then vote on it, along with the other resolutions proposed by the board. The proponent shareholders have a right to have a statement in support of their resolution distributed by the company to all shareholders with the notice of meeting.

Proxy advisers who are engaged by institutional shareholders form an attitude to all the resolutions and advise their clients how to vote. At the AGM the resolution is proposed and considered. Shareholder resolutions do not have to get anything like a majority of the vote in order to have an impact, but they do quite often need to be put up in consecutive years. In the US, similar or identical resolutions are often put many years in a row as they slowly gain support. In the first year a resolution needs to attract 3% of the vote to be put again. Support of around 15 to 25% will generally result in the company accommodating the proponent's suggestions.

[5] These groups play an important initiating role in the process. They are often described as being 'prepared to put their head above the parapet' and risk antagonising powerful corporate interests.

[6] In Australia and the UK the onus is on the proponent shareholders to go to court if they wish to contest the interpretation of the company secretary of the law and the Constitution. By contrast in the US, the SEC acts as an instant arbitrator. It has a set of well-developed administrative rules which deal with the validity of resolutions. It is is only in the event of a dispute with the SEC a party needs to seek a court declaration.

It is important to understand the shareholder resolution process in comparison with other countries in the context of broader governance arrangements. Figure 2 compares arrangements in the US, Australia and the UK on a number of corporate governance-related criteria.[7] Assessment of the pros and cons of the various arrangements from the perspective of public policy needs to be cognisant of the broader context. For example, each of these three countries has mandatory arrangements for shareholder resolutions dealing with executive remuneration.

Australia has 'strong' arrangements whereby a board spill can be triggered by a failure of 25% of voting shareholders to support the remuneration report for two consecutive years (the 'two strikes' rule). Neither the US nor the UK has similar arrangements. However it is not possible in Australia for the shareholders to support the overall remuneration report so far as the statutorily-required resolution goes, but also to put and consider a resolution to seek redesign on a particular dimension of executive pay arrangements. This practice is commonplace in the US and would be perfectly feasible in the UK. Shareholders in the US put remuneration resolutions long before statutory arrangements were introduced but this did not happen in Australia.

Figure 1: Shareholder resolutions – Dramatis Personae

Board of Directors:	organ of the company responsible for supervising its management. The board is responsible to the shareholders in accord with arrangements set out in the Corporations Act, the company's own constitution and the common law;
Company Secretary:	officer of the company appointed by the board and responsible for production and distribution of the notice of a shareholders meeting;
Institutional share owners:	such as superannuation funds, can vote at the AGMs of companies in which they hold shares to elect/re-elect Directors, approve the remuneration report etc. They often base their vote on the advice of proxy advisors. It is rare that they lodge their own resolutions on environmental or social issues but generally they will vote on all resolutions lodged by shareholders and the board. Sometimes they abstain from voting to alert the board to their concerns;
Proxy advisors:	consulting firms engaged by institutional share owners to assess how the latter should vote. Eg, to support the board's remuneration report or the re-election of particular directors.

http://www.cfainstitute.org/learning/products/publications/ccb/Pages/ccb.v2009.n2.1.aspx .

Figure 2: Corporate governance arrangements pertinent to the context of the shareholder resolution process in Australia, the US and the UK

Country Criterion	Australia	US	UK
1. Shareholder rights to 'Free Speech', ie to propose resolutions	Unclear	Excellent, well used	Well defined right to put resolutions, sparingly used
2. Adjudication of shareholder/board disputes over AGM resolutions	Court	Rapid response provided by regulator (SEC)	Court
3. Extent of entrenchment of incumbent Directors	Moderate	Can be extreme	Similar to Australia
4. Specific remuneration - related provisions	Disclosure, mandatory advisory resolution and 2 strikes rule. Resolution only deals with approval of remuneration report.	Disclosure, mandatory 'say on pay' resolution. Shareholders can also file specific resolutions seeking amendments to executive pay arrangements.	Disclosure, mandatory resolution.

2. Engagement and shareholder resolutions on environmental and social issues in Australia in 2014

In Australia in 2014 shareholders engaged with 6 companies with a view to lodgement of resolutions and/or filing a request the board distribute a statement to all shareholders dealing with a matter of concern to the proponents. Figure 3 below sets out some detail on each of these interactions. The four bank interactions which involved the ACCR are described further in appendix A. Five out of the six interactions involved the ACCR. Undoubtedly, there were additional private engagements

undertaken in Australia[8]. 2014 was a very unusual year in the context of recent history for shareholder engagements. In the previous decade there were fewer than one resolution per year.[9]

Figure 3: Interactions with ASX companies seeking distribution of a statement or lodgement of a resolution on an environmental or social issue in 2014

Company	Action requested	Coordinating proponent	Vote in support	Assessed impact on company conduct
ANZ	Resolution to improve disclosure of 'financed emissions'	ACCR	2.8% with 3.5% abstentions	Improved disclosure, see Appendix A.
CBA	Resolution to improve disclosure of 'financed emissions'	ACCR	3.1% with 1.2% abstentions	Improved disclosure, see Appendix A.
Bougainville Copper[10]	Resolution that it join 'good corporate citizenship' initiatives and also commission a report on war crimes issues.	ACCR	1.1.5% 2.1.6%	Minimal.[11]
NAB	Resolution to improve disclosure of 'financed emissions'	ACCR	Resolution withdrawn	after commitment to improve disclosure.
Santos	Resolution seeking withdrawal from Narrabri gas project	TWS	0.8% with 0.8% abstentions	Minimal public impact as yet[12]
Westpac	Distribution of congratulatory statement to WBC on its disclosure, but flagging need for improvement	ACCR	NA	Statement distributed with notice of meeting.

[8] But by their nature it is difficult to know much about them.

[9] See http://www.accr.org.au/australia for a listing of shareholder resolutions on environmental and social issues during the period 2002 to 2013.

[10] Note that Bougainville, though it is ASX listed, is PNG registered. PNG permits shareholders a much wider capacity to consider resolutions than Australia does.

[11] Note Bougainville is 54% owned by Rio Tinto and 19% by the PNG government. Rio opposed both motions though it is, itself, a member/signatory of the corporate citizenship initiatives suggested and in one case coverage of subsidiaries is obligatory. The PNG government failed to vote. Both resolutions would have passed if Rio had not opposed them.

[12] Evidently, this is a difficult judgement to make. Resolutions, even if they fail to result in any variation in corporate conduct can pave the way for easier subsequent political action. The ALP (currently in opposition) in NSW made a commitment that if they were elected in March 2015, to legislate they would prevent this project going ahead.

3. Engagement and resolution activity in the US

Figure 4 sets out some relevant statistics on resolutions on ESG issues in the US during the first six months of 2013. The figures are typical for a US 'season'.

Figure 4: Shareholder proposals in the US in the 2013 season[13]

Subject	Number lodged	Percentage withdrawn	Average vote in support
Compensation design	90	6%	27%
Environmental and social issues	375	52%	21%
Governance – board related issues	128	2%	49%

Shareholder resolutions on environmental and social issues have been commonplace at US companies since a test case in 1970 resulted in current SEC arrangements. What has changed in more recent years is the average level of shareholder support - it has increased steadily from between 5 to 10% in the early 2000s to current levels which have been in the vicinity of 20%. Resolution themes included disclosure of lobbying and political contributions, sustainability reporting, bank lending practices, climate change, hydraulic fracturing, fugitive emissions and human rights. [14]

4. Engagement and resolution activity in the UK

Shareholder resolutions on environmental and social issues are fairly rare in the UK. This rarity, however, is not the result of any legal obstacle. UK shareholders have a clear right to put a resolution proposing to direct the board how they should act on a matter.[15] More generally the UK approach to shareholder/board relations explicitly makes this relationship a responsibility of the whole board and this has resulted in a culture characterised by high levels of engagement.[16]

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[13] Source: the figures in this table are derived from the Institutional Shareholder Services 2013 proxy season review.

[14] See http://www.ceres.org/investor-network/resolutions .

[15] See http://www.shareaction.org/sites/default/files/uploaded_files/whatyoucando/ShareholderResolutionGuide.pdf p 17.

[16] The UK Corporate Governance code states 'There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place.'

It is important to note that this rarity of shareholder resolutions in the UK does not signal any absence of campaigning activity by shareholders on environmental and social issues. Rather, resolutions are used fairly sparingly in the context of significant levels of dialogue. This ensures that there will always be a credible threat that shareholder concerns might escalate to resolutions if they are not addressed.

To our knowledge, no resolutions were considered at large listed public company AGMs in the UK in 2014. However, in late 2014/early 2015, climate change-related resolutions were lodged with Shell and BP for consideration in April/May 2015. Over 150 investors, known as the 'Aiming for A' coalition, and including the UK Environment Agency pension fund, UK and US local authorities and the Church of England, filed resolutions requiring these companies to assess and manage the risk of climate change. Co-filers ClientEarth and ShareAction co-ordinated the resolutions. [17] Reflecting the UK enthusiasm for dialogue, both boards are recommending that shareholders support the resolution!

5. Similarities and differences – UK, Australian and US approaches - environmental and social engagement and resolution activity

The main similarities:

- Within all three countries, the various segments of the funds management industry play their parts. The specialist ethical, church and environmental fund management organisations, generally aided by or in association with activist NGOs, winnow potentially significant issues and initiate engagement. The 'coordinating bodies' organise, lead co-filers and follow through with resolutions. The growing, now nearly mainstream, responsible investment segment might support resolutions but rarely do they initiate them. The non-responsible investment segment rarely supports them.
- In the US and in the UK, in comparison with Australia, there is the long-term involvement of the analogous secular and religious coordinating organisations – ICCR/ECCR and CERES/Share Action
- In Australia and the US, in contrast with the UK situation, there is the legal relevance of a distinction between management and shareholder purview in the drafting of valid resolutions. In the US, SEC rules allow shareholders to comment on policy but not on management matters. In Australia a similar line is drawn, though in such a way as to much more severely circumscribe shareholder

[17] See http://www.clientearth.org/news/press-releases/shareholder-resolutions-150-investors-challenge-bp-and-shell-to-face-climate-change-risk-2759

purview. Arguably, in Australia at present, the only 'company policy' shareholders can address is the Constitution.[18] In the UK shareholders can explicitly direct the board how to act on any matter.

The main differences between the three countries include:

- the legal arrangements and involvement of the state. The process in the US is a creature of SEC administrative rule-making. There is nothing similar in Australia or the UK.
- the magnitude of resolution activity which is by far the highest in the US. Our impression is that this does not reflect any higher level of public engagement in the US as opposed to the UK (quite possibly the reverse). Public engagement in both these countries is significantly higher than it is in Australia.
- involvement of public sector bodies. To our knowledge no Australian public sector fund manager has ever filed or co-filed a resolution on an environmental or social issue. By contrast there are quite a number of regular public sector filers in the US. In the UK, theEPA's pension fund is a co-filer of the forthcoming BP and Shell resolutions

6. Conclusion

This paper has compared the practice of shareholder-proposed resolutions at listed public companies on environmental and social issues in the UK, the US and Australia. In the US, both the law and the regulator support the activity. The practice is well-developed and it is occurs on an industrial scale, making it a healthy dimension of US corporate democracy. In the UK the law supports the activity, the 'steps in the dance' are well-known to participants so that resolutions are used more sparingly but engagement is vigorous nevertheless. In Australia, the law is unclear, the practice is under-developed and, until 2014, resolutions have been uncommon.

[18] The current situation in Australia is quite unclear and verges on the bizarre. If the board is minded to permit it, shareholders will be allowed to consider an ordinary resolution, as, for example, happened in the Santos resolution in 2014. But if the board is not so minded, shareholders may only be able to address the matter if they propose to amend the Constitution or successfully obtain a court order.

Appendix A: Assessment of the impact of ACCR 2015 'disclose financed emissions' resolutions on the big 4 banks

Prior to the bank AGMs, ACCR contemplated putting resolutions to each bank. This appendix describes our interactions and the outcomes. Our proposed first and second preference ordinary resolutions sought 3 actions:

(a) disclosure of the quantum of greenhouse gas emissions that the bank is responsible for financing calculated, for example, in accordance with the Greenhouse Gas (GHG) Protocol guidance;
(b) disclosure of the current level and nature of risks to the company from 'unburnable carbon'; and
(c) current approaches that have been adopted by the company to mitigate those risks.

We also drafted and (with the exception of WBC) lodged an alternative third preference special resolution framed seeking to change the Constitution because this is the only framework which we were certain would be accepted without court intervention.

Our research paper identified WBC & NAB as leaders and ANZ & CBA as laggards in regard preparedness and transparency on these issues. Each of the banks was given to opportunities to comment on this research report before it was launched on 14 October at the MLC Centre in Sydney.

1. WBC

Prior to October 2014 we identified WBC as the least exposed and best prepared. We made it clear we were considering lodging a resolution/requesting they distribute a statement well prior to the deadline for lodgement. They made commitments to us on condition we kept (some of) them confidential until release of their Annual Report. The commitments included improved risk disclosure, improved portfolio disclosure of extent of carbon intensive industry involvement and benchmarked disclosure of the portfolio emissions intensity of their financed infrastructure and utilities portfolio.

On this basis we lodged no resolutions but simply requested they distribute our statement with their notice of meeting. The statement congratulated the WBC board but also flagged the need for targeted financed emission reductions. WBC responded to our statement in their notice of meeting noting their continuing involvement in the project to develop guidance for financed emissions disclosure.

WBC has maintained its position as a leader. (Though, the CBA has made commitments to match the WBC current level of energy sector portfolio disclosures by August 2015 and exceed the breadth of WBC's current exposure by February 2016).

ACCR representatives met with the chairman of Westpac prior to the meeting and our ED Caroline attended the AGM and asked a question about disclosure of emissions due to wealth management activities.

2. CBA

Our interactions with the CBA prior to lodgement date were less constructive than with WBC.

In their ASX announcement of 10 September immediately upon receipt of our resolution the CBA said it was all too hard "… It is not clear how the directors would, as a practical matter, be in a position to comply with the resolution…".

The CBA notice of meeting of 15 September continued with this line stating "As a practical matter, it is not possible for the group to obtain information, from the many thousands of organisations to which the group provides financing each year, as to the quantum of greenhouse gas emitted…".

Contrary to our request but in accord with our expectations the CBA included our special resolution on the notice of meeting. We initiated court action seeking a declaration the ordinary resolution format was valid.

Between the release of the notice and the actual meeting date it appears institutional shareholders put considerable pressure on CBA, presumably threatening to vote in favour of the resolution in the absence of commitments from CBA.

On 29 October the CBA amended its 'ESG lending commitments document on its website to include the following.

"Reporting of emissions (Principle 7)

• 2015 half year reporting (February 2015): assessed carbon emissions arising from our project finance exposure to the energy sector;

• 2015 full year reporting (August 2015): assessed carbon emissions arising from our project finance and business lending exposure to the energy sector;

• 2016 half year reporting (February 2016): assessed carbon emissions arising from the business lending portfolio, with focus on larger entities.

We will seek to carry out the assessments in accordance with best practice guidance (e.g. Greenhouse Gas Protocol). However, we recognise that there is currently limited international agreement in the finance sector on approaches to emissions assessment. We will continue to participate in international and local initiatives to seek clarity on approaches to measuring financed emissions."

ACCR office bearers met with the CBA Chair prior to the meeting and our resolution was put by Bishop Browning at the AGM on 12 November.

The resolution got the support of 3.2% of the vote. (We understand one very large shareholder, >1%, apparently lodged a proxy in favour of the resolution but sent a

corporate representative to vote against it, presumably because of the commitments made by CBA prior to the meeting.)

The odd thing about the CBA commitments was that they extend solely to on balance sheet finance. They have made no mention of disclosure of financed emissions in regards their wealth management activities despite the fact that progress on that area appears to be more rapid at the international level.

CBA really only responded to the content of the special resolution which dealt solely with disclosure of financed emissions rather than the broader content of the proposed ordinary resolutions.

Our court action against CBA seeking a declaration the ordinary resolution format is valid is scheduled for June 2015.

3. NAB

We had some constructive discussions with NAB prior to lodgement of the resolutions but they were inconclusive in so far as NAB made no commitments to improve disclosure. So, we lodged a request that NAB place resolutions on their agenda and distribute our statement.

On 13 October NAB announced the resolutions to the market including the statement we had requested be distributed with the notice.

After a meeting with NAB staff NAB made a number of disclosure commitments and we agreed to withdraw the resolution.

On 31 October NAB announced the withdrawal of our resolution.

NAB has incorporated these commitments on their website page dealing with carbon risk. See http://cr.nab.com.au/what-we-do/carbon-risk-disclosure .

4. ANZ

Interaction with ANZ was minimal after the lodgement of the resolutions. They agreed to place the special resolution and accompanying statement on their notice of meeting. The content of their response in their notice of meeting was very similar to the initial response of the CBA – "it's all too hard".

Rumours circulated prior to the meeting that they had made private commitments to improve financed emissions disclosure. These turned out to be accurate. At the meeting they disclosed the GHG intensity of their project finance lending for electricity generation - in line with the Australian average but significantly above WBC.

Stephen Mayne – a finance journalist and former CEO of the Australian Shareholders Association spoke to our resolution at the ANZ AGM. It attracted just shy of 3% support but with 3.5% abstentions. The ANZ meeting and resolution attracted considerable more media interest than the CBA AGM.