

Legal points

Under the *Corporations Act 2001* (Cth), shareholders with at least 5% of the votes or at least 100 members may propose a member's resolution at a general meeting.

Case law has confirmed that shareholders in Australia do not have general power to propose non-binding advisory resolutions on ESG matters like climate change, unlike in the US: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2015) 325 ALR 736; *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280

Shareholders have managed this restriction by bringing resolutions on climate change in two parts:

- (1) **Special resolution** to amend company constitution to allow for non-binding advisory resolutions
- (2) **Ordinary resolution**, contingent on the first, with the substantive request relating to climate change

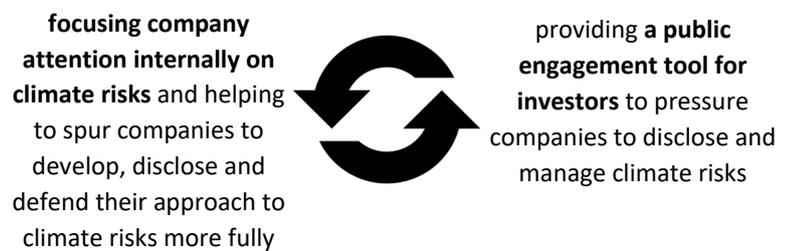
This approach means that the Board is legally required to put the proposed special resolution to the general meeting, but not the ordinary resolution. Nevertheless, Boards have allowed voting on the ordinary resolution as well and recorded the vote.

The role of shareholder resolutions

Australia is widely seen to have a strong culture of institutional investor engagement with company boards. This behind-the-scenes engagement and generally very good access for investors to company directors means that shareholder resolutions have, in the past, been viewed as more exceptional measures.

Over the last decade, there has been a **steady increase in the number of resolutions brought** to Australian companies that address environmental, social and governance (ESG) issues, and a particular, more recent surge in resolutions addressing climate change specifically.

These shareholder resolutions can affect corporate energy transition by:



Resolutions are often **organised by civil society groups** (ACCR, Market Forces) and **sometimes co-filed with ethical investment funds**. For example, in 2019, the ACCR co-filed resolutions at BHP's annual general meetings (AGMs) in London and Sydney with Australian-based Vision Super and Grok Ventures, and Danish pension fund MP Pension, Church of England Pensions Board and Dutch fund ACTIAM.

These resolutions have increased in **sophistication and diversity** over time. While earlier resolutions focused especially on **requests for disclosure of information on how the company was managing climate-change risks**, more recent resolutions, especially from late-2019 onwards, have called for **companies to take substantive action**, for example, through the closure of thermal coal mines.

Support over time

While votes in favour of constitutional change have remained relatively low, **support for the substantive resolutions on climate change has increased over time**. In 2020, new highs were reached, for example, resolutions relating to Paris goals and targets received 43.39% and 50.16% of the vote at Santos and Woodside's AGMs.

“even...five per cent of shareholders voting against management is significant...when you start getting up around that 10 to 15 per cent mark, things get very serious for a board” –interviews, 2018

Climate change is becoming a **significant area of focus for investor engagement in Australia**, with **expectations of investors and companies shifting significantly**. Shareholder resolutions are increasingly viewed as an important escalation tool for engagement with companies on climate risks. Moreover, they are seen as having led to tangible changes in the approaches taken by target companies to climate risks (interviews, 2018).

Themes in resolutions

Emerging trends in shareholder resolutions in Australia and other jurisdictions that might be further developed to strengthen the contribution of shareholder resolutions to energy transition goals include resolutions seeking:

- Reporting on **short-, medium- and long-term targets** to reduce scope 1, 2 and 3 emissions in line with the Paris Agreement's temperature goals and how exploration/ expenditure is aligned with the Paris Agreement, and disclosure of strategies and targets to reduce exposure to fossil fuel assets in line with the Paris Agreement. This would include reporting on progress over time.
- Review and disclosure of **direct and indirect lobbying activities** on climate, energy and/or resources, as well as **suspending membership of industry associations** with a history of lobbying inconsistent with the Paris Agreement.
- Linking **executive remuneration and director pay to climate targets to incentive progress** towards these targets. Several companies have already linked executive pay to such targets, including committing to disclosing the weighting and mechanisms behind these incentives.
- Targeting **specific issues raised by the practices of certain companies** such as strategies to accurately measure, report and reduce fugitive methane emissions, disclose expenditure required for pollution controls at certain coal-fired power stations, and resolutions calling for fossil fuel wind-up plans and the closure of certain coal-fired power stations.
- Requiring **climate competence** for a director(s) on a company board, and/ or creating an environmental and/or sustainability advisory council.

A survey of shareholder resolutions from 2010 to July 2020 identified 54 substantive resolutions addressing climate change and 24 special resolutions to amend the company constitution to allow for non-binding advisory resolutions brought to Australian listed companies. Consistent themes have emerged especially since 2017 and are summarised below.

	Mining/ energy	Banks	Insurance
Amend company constitution to permit non-binding advisory resolutions	<i>E.g. "The shareholders in general meeting may by ordinary resolution express an opinion, ask for information, or make a request, about the way in which a power of the company partially or exclusively vested in the directors has been or should be exercised. However, such a resolution must relate to an issue of material relevance to the company or the company's business as identified by the company, and cannot either advocate action which would violate any law or relate to any personal claim or grievance. Such a resolution is advisory only and does not bind the directors or the company" (Woodside 2020)</i>		
Requests for disclosure of targets/ transition planning	<p>Disclose short-, medium-, long-term targets to reduce scope 1+2+3 emissions in line with Paris Agreement temperature goals</p> <p>How exploration/ expenditure aligned with Paris Agreement goals</p> <p>How remuneration will incentivise progress towards targets</p>	<p>Disclose strategies & targets to reduce exposure to fossil fuel assets in line with the Paris Agreement's goals, including eliminating exposure to thermal coal in OECD countries by no later than 2030</p>	<p>Disclose short-, medium-, long-term targets to reduce investment/ underwriting exposure to fossil fuel assets</p> <p>Disclose plans and progress to achieve these targets, in line with the Paris Agreement's temperature goals</p>
Climate-related lobbying	<p>Review and report on direct and indirect lobbying activities relating to climate, energy and/or resources</p> <p>New iteration: Suspend membership of industry associations where history of climate/ energy lobbying inconsistent with Paris Agreement's goals (BHP 2019)</p>	<p>Suspend membership of industry associations where history of lobbying re climate/ energy policy inconsistent with Paris Agreement's goals (NAB, ANZ 2019)</p>	
Disclosure in line with TCFD	<p>Disclose risks and opportunities in line with TCFD</p>		<p>Disclose risks and opportunities in line with TCFD</p>
Non-GHG related emissions	<p>Disclose strategy to accurately measure, report and reduce fugitive methane emissions</p> <p>Review processes to obtain native title owners' consent for fracking in NT</p>		
Public health risks of coal operations	<p>Disclose assessment of expenditure required for pollution controls at certain coal-fired power stations to mitigate health risks</p>		