

RETHINKING THE LAW ON SHAREHOLDER-INITIATED RESOLUTIONS AT COMPANY GENERAL MEETINGS

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Recent concerns about the need for improved corporate accountability raise questions about the role of shareholders in corporate governance. One aspect of these discussions is the capacity of shareholders in general meetings to propose non-binding advisory resolutions concerning governance or social matters. Since Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame in 1906, courts have held that if a company's constitution gives directors the power of company management, shareholders cannot interfere with the exercise of that power. The Federal Court affirmed this in Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia. This paper re-examines the case law, particularly in its application to advisory resolutions, and recommends the introduction of a broad statutory authority for non-binding advisory resolutions. The paper argues that this is an important step towards improved corporate accountability and responsible shareholder engagement.

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I INTRODUCTION

What is the role of shareholders in the management and governance of a company, especially when using the mechanism of shareholder-initiated, non-binding advisory resolutions at a general meeting? What is the legal capacity of shareholders to influence or become involved in matters of company management? What capacity should they have? In Australian corporate law the answers to these questions may be thought to be obvious and well-settled, supported by case authority that dates back to the 1906 English Court of Appeal decision in *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* ('*Cuninghame*')¹ which established that in the common situation where a company's constitution vests the power to manage the company with the directors, it is not valid for the shareholders to seek to exercise that power, particularly through the mechanism of resolutions passed at the company's general meeting.

Courts in the United Kingdom and Australia have applied the *Cuninghame* principle for more than a century, often without elaboration or closer analysis. This paper reconsiders the application of this line of cases, prompted by two recent developments. First, there has been a renewal of debate amongst peak corporate governance bodies about the need for greater attention to shareholder views and input. A 2017 study released by the Australian Council of Superannuation Investors reported cautious support for the introduction of a legislative right to move non-binding shareholder resolutions at a company's annual general meeting ('AGM').² In May 2018 the ASX Corporate Governance Council released a consultation paper proposing amendments to its Corporate Governance Principles and Recommendations. The proposals include the addition of statements recognising that

¹ [1906] 2 Ch 34 ('*Cuninghame*').

² Kym Sheehan, Australian Council of Superannuation Investors, *Shareholder Resolutions in Australia: Is There a Better Way?* (Research Report, October 2017) 7 ('*ACSI Report*'). But see Governance Institute of Australia, *Shareholder Resolutions: Is There a Case for Change?* (Green Paper, 2018).

while the focus of many investor relations programs will be on larger investors and financial market participants who service larger investors, listed entities should also seek opportunities to engage with retail investors and the organisations that represent them, to understand the matters of concern or interest to smaller investors.³

The ASX Corporate Governance Council paper adds that ‘where significant comments or concerns are raised by investors, they should be conveyed to the entity’s board and relevant senior executives.’⁴ These proposals were prompted, in part, by ‘a perceived lack of accountability’ in the governance practices of listed entities.⁵ Concerns about the need for greater corporate oversight and accountability, raised by evidence given to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, underline the importance of these proposals.⁶

The second development is the 2016 decision of the Full Court of the Federal Court of Australia in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (*ACCR v CBA*)⁷ in which Allsop CJ, Foster and Gleeson JJ delivered a joint judgment providing a detailed analysis of the law governing shareholder-initiated resolutions, affirming the continued application of the *Cunninghame* decision. Notwithstanding the authority of the Full Court’s decision, this paper proceeds from the premise that there is less clarity about the law governing shareholder-initiated resolutions than is usually assumed, and that this lack of clarity creates an opportunity for some new thinking about how the questions posed above should be answered.

This paper argues that non-binding shareholder advisory resolutions can play an important role in improving accountability within companies, by providing a formal mechanism through which shareholders can give feedback to directors. At the same time, the paper recognises the need for safeguards to prevent misuse of this mechanism: shareholders must exercise their capacities responsibly. Because the case law does not provide a clear platform for such a mechanism, the paper argues the need for legislative reform. At present, the

³ ASX Corporate Governance Council, *Review of the ASX Corporate Governance Council’s Principles and Recommendations* (Consultation Paper, 2 May 2018) 17 (*‘ASX Review’*). See also Financial Reporting Council, *The UK Corporate Governance Code* (July 2018) 4, requiring that ‘the board as a whole has a clear understanding of the views of shareholders’.

⁴ *ASX Review* (n 3) 17.

⁵ *Ibid* 6.

⁶ See generally *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018) vol 1.

⁷ (2016) 248 FCR 280 (*‘ACCR v CBA’*).

Corporations Act 2001 (Cth) (*'Corporations Act'*) recognises advisory resolutions only within the narrow parameters of the adoption of remuneration reports in listed companies.⁸ While those advisory resolutions can, under certain conditions, activate the 'two strikes' process, their substantive scope is limited.⁹ What is needed is a general statutory provision for non-binding advisory resolutions. Australian corporate law is at odds with comparable jurisdictions in not having such a provision; the paper suggests that the advisory resolution mechanism found in the *Companies Act 1993* (NZ) (*'New Zealand Act'*)¹⁰ presents a straightforward model for adoption in Australia.

Lying beneath this analysis are assumptions about the purpose and significance of the division of power in the modern corporation. Like its United Kingdom antecedents, Australian company law operates on the basis that, while solvent, a corporation has two decision-making sites: the board of directors and the general meeting of members.¹¹ The allocation and division of management functions between the board of directors and the general meeting of shareholders is a critical component of a company's formal governance architecture. This is true notwithstanding the usually standardised nature of that division, with most companies adopting the equivalent of the replaceable rule in s 198A of the *Corporations Act* which allocates general managerial power to the directors.¹² It is also true even though there are many ways in which this division does not accurately describe the practical impact that some shareholders can have in matters of corporate governance.¹³ And,

⁸ *Corporations Act 2001* (Cth) s 250R (*'Corporations Act'*).

⁹ See below n 114 and accompanying text for a discussion of the 'two strikes' process.

¹⁰ See below n 138 and accompanying text.

¹¹ The *Corporations Act* (n 8) does not require the formation of a board of directors, although several sections assume its existence (eg ss 201P [board limits], 206K [board to approve remuneration consultants]). The Act does specify matters that must be decided by resolution passed at a meeting of members (eg ss 203C, 203D concerning the removal of directors); s 250N requires a public company to hold an AGM.

¹² The replaceable rule in s 198A of the *Corporations Act* (n 8) states, first, that the business of a company is to be managed by or under the direction of the directors and, secondly, that the directors may exercise all the powers of the company except those that are by the Act or the company's constitution required to be exercised in general meeting.

¹³ An international survey of institutional investors in 2013 found that institutional investors frequently engage in 'behind-the-scenes discussions with management and boards of directors': Joseph A McCahery, Zacharias Sautner and Laura T Starks, 'Behind the Scenes: The Corporate Governance Preferences of Institutional Investors' (2016) 71(6) *Journal of Finance* 2905, 2929.

finally, it is true notwithstanding the fact that company AGMs are typically under-attended by shareholders.¹⁴

The paper proceeds as follows. Part II briefly introduces *ACCR v CBA*, describing a contemporary example of use of an advisory resolution process by shareholders, and its judicial rejection. Part III turns to look at the long history of case law on which that rejection is based, arguing that there is less clarity in that law than is often assumed. This part of the paper offers an analytical scheme to understand the case law, according to which shareholder resolutions can be categorised as usurping, instructing, or advisory. Using this scheme, the paper returns to analyse the reasoning in *ACCR v CBA*, concluding that only one aspect of the decision presents a clear basis to reject advisory resolutions. Part IV then considers appropriate legislative responses to this, suggesting adoption of the New Zealand model. Parts V and VI of the paper explain the normative and policy reasons that support this suggestion, drawing on ideas of corporate accountability and shareholder responsibility. Part VII concludes the paper, noting some caveats.

II THE *ACCR v CBA* CASE IN SUMMARY

The departure point for this analysis is the decision in *ACCR v CBA*, in which the Full Court of the Federal Court of Australia held that the board of the Commonwealth Bank of Australia ('CBA') was not required to place certain resolutions proposed by the Australasian Centre for Corporate Responsibility ('ACCR') on the agenda for the bank's 2014 AGM.¹⁵

CBA's constitution contained the standard provision vesting full responsibility for the management of the company in the directors. Pursuant to s 249N of the *Corporations Act*, ACCR, representing over 100 members of the company, had proposed that one of three alternative resolutions should be moved at the AGM.¹⁶ The first proposed resolution would require the directors of CBA to prepare and provide to shareholders a report about the

¹⁴ See, eg, Corporations and Markets Advisory Committee, 'The AGM and Shareholder Engagement' (Discussion Paper, September 2012) 104.

¹⁵ According to its website, the ACCR is a not-for-profit association which seeks to 'develop and deploy strategies to improve Australian listed companies' performance on environmental, social and governance (ESG) risk indicators': 'What We Do', *Australasian Centre for Corporate Responsibility* (Web Page) <<http://www.accr.org.au/what-we-do>>, archived at <<https://perma.cc/UNU2-H3BC>>.

¹⁶ Section 249N of the *Corporations Act* (n 8) states, in part, that at least 100 members who are entitled to vote at a general meeting may give a company written notice of a resolution that they propose to move at a general meeting.

bank's financing of greenhouse gas emitting activity. In the alternative, and as a second preference, ACCR requested the bank to put forward a resolution expressing shareholder concern about the absence of a report on those greenhouse gas matters. If neither of these resolutions were to be included in the notice of meeting, CBA was requested to include a third resolution proposing an amendment to the company's constitution by inserting a provision that would require the directors to prepare annually a report on certain greenhouse gas emission matters.

The notice of meeting published by CBA did not include either of the first two proposed resolutions but did include the third, accompanied by a statement that the board did not consider that the proposed constitutional amendment was in the best interests of shareholders. At the AGM, a majority of votes were cast against that resolution.

ACCR sought declarations that each of the three proposed resolutions could validly be moved at the general meeting. At first instance, the Court accepted that there was no doubt about the validity of the third resolution (which proposed a constitutional amendment) and so attention focused on the first two alternative proposals.¹⁷

At first instance and on appeal, the Federal Court declined to make the declarations sought. In support of this conclusion, both decisions referred to the long line of authority that has its source in the *Cuninghame* decision.¹⁸ As stated by Davies J at first instance, '[t]he starting point is the general principle that the shareholders in general meeting cannot interfere with the board's exercise of powers which are exclusively vested in the board'.¹⁹

III THE SCOPE OF THE PROSCRIPTION

The *ACCR v CBA* decision can be read as a straightforward application of the principle originating in *Cuninghame* in the contemporary context of shareholder activism, but nevertheless it prompts some questions. Exactly what type of shareholder behaviour is the focus of concern in these cases? Do the cases impose a coherent proscription on what shareholders can and cannot do?

It is useful to compare the range of descriptors that have been used in the case law to define what it is that shareholders are not permitted to do in

¹⁷ *Australasian Centre for Corporation Responsibility v Commonwealth Bank of Australia* (2015) 325 ALR 736, 739 [7] (Davies J) ('*ACCR v CBA (Trial)*').

¹⁸ These authorities are discussed throughout this paper.

¹⁹ *ACCR v CBA (Trial)* (n 17) 741 [16].

relation to management of a company where the corporate constitution gives full power of management to the directors. A reading of cases decided since *Cunninghame*²⁰ tells us that the general meeting of shareholders cannot ‘usurp the powers’ of the directors;²¹ ‘interfere with the exercise of those powers’;²² ‘interfere in the conduct of the company’s business’;²³ ‘impose its will upon the directors’;²⁴ ‘control the exercise of the powers vested ... in the directors’;²⁵ ‘direct the board by resolution to exercise that power in a particular way’;²⁶ ‘transact the company’s business’;²⁷ ‘exercise ... the powers [of the directors]’;²⁸ ‘have [any] part to play in the actual exercise of the powers’;²⁹ ‘determine matters of management’;³⁰ ‘manage the business’ of the company;³¹ or ‘express an opinion as to how a power vested by the company’s constitution in the directors should be exercised’.³²

The corporate law literature usually combines these various proscriptions in a discussion about the division of power in a company and the independ-

²⁰ I exclude *Marshall’s Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267 from this analysis because it is generally regarded as being inconsistent with the principles set out in *Cunninghame*, and of doubtful authority: see KA Aickin, ‘Division of Power between Directors and General Meeting as a Matter of Law, and as a Matter of Fact and Policy’ (1967) 5(4) *Melbourne University Law Review* 448, 457–8; RP Austin and IM Ramsay, *Ford, Austin and Ramsay’s Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 260–1 [7.140].

²¹ *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, 134 (Greer LJ) (*John Shaw & Sons*); *ACCR v CBA (Trial)* (n 17) 740 [13] (Davies J).

²² *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89, 98 (Fletcher Moulton LJ) (*Gramophone & Typewriter*). See also *National Roads & Motorists’ Association v Parker* (1986) 6 NSWLR 517, 521 (McLelland J) (*NRMA v Parker*).

²³ *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 683 (Samuels JA) (*Winthrop*). See also *ACCR v CBA (Trial)* (n 17) 741 [16] (Davies J).

²⁴ *Gramophone & Typewriter* (n 22) 105 (Buckley LJ).

²⁵ *John Shaw & Sons* (n 21) 134 (Greer LJ). See also *NRMA v Parker* (n 22) 521 (McLelland J); *ACCR v CBA (Trial)* (n 17) 741 [16] (Davies J).

²⁶ *ACCR v CBA (Trial)* (n 17) 741 [16] (Davies J). See also *Winthrop* (n 23) 683 (Samuels JA); *Gramophone & Typewriter* (n 22) 105–6 (Buckley LJ).

²⁷ *Winthrop* (n 23) 683 (Samuels JA).

²⁸ *NRMA v Parker* (n 22) 522 (McLelland J). See also *Taiqi Investments (Aust) Pty Ltd v Winlyn Developments Pty Ltd* (2011) 86 ACSR 197 (Supreme Court of New South Wales) (*Winlyn Developments*).

²⁹ *NRMA v Parker* (n 22) 522 (McLelland J).

³⁰ *Winthrop* (n 23) 684 (Samuels JA).

³¹ *Quin & Axtens Ltd v Salmon* [1909] AC 442, 443 (Lord Loreburn LC) (*Salmon (House of Lords)*).

³² *ACCR v CBA (Trial)* (n 17) 740 [14] (Davies J).

ence of directors in company management. The general import of the cases is clear: a concern to restrict shareholder involvement and to protect the role of the directors. But looking closely at the list above, it is not clear that all of these proscriptions have the same scope or refer to the same type of shareholder behaviour. For example, is it necessarily the same thing to exercise the power of the directors as it is to interfere in the conduct of the company's business, or to express an opinion about how directors should exercise their power?

In the next part of the paper, I pursue this inquiry by considering three broad types of shareholder-initiated resolution that have attracted the prohibitions set out in the *Cuningham* line of cases. The overall purpose of the analysis is to show that the post-*Cuningham* case law does not coherently deal with the possibility of shareholder advisory resolutions. Again, the assumption in the analysis is that the company's constitution has granted the directors the power to manage the company in the terms set out in s 198A of the *Corporations Act*.³³

A *Three Types of Shareholder-Initiated Resolution*

On a close reading, the *Cuningham* line of cases has dealt with three different types of shareholder-initiated resolution. In summary, these are: the usurping resolution, where shareholders seek to take over some or all of the directors' managerial power; the instructing resolution, in which shareholders tell the directors how to exercise their power; and the advisory resolution, by which the directors are informed of the views of shareholders regarding aspects of company management.³⁴ The difficulty in the case law is that the differences between these three categories have often been overlooked or ignored, with the result that considerations that are relevant to (say) usurping resolutions have been applied (without explanation) to advisory resolutions. The following analysis considers each type more closely.

1 *Usurping Resolution*

The first situation arises where the shareholders put a resolution that purports to do, or undo, the work of the directors. In effect, the shareholders attempt, by resolution, to push the directors to one side and to assume the role of company managers, at least for the purposes of the matters covered by the

³³ See above n 12.

³⁴ This analysis leaves aside resolutions to amend the corporate constitution, remove directors, or other matters expressly permitted by the *Corporations Act* (n 8).

resolution. I will call this a ‘usurping resolution’. A key feature of such a resolution is the attempt by the shareholders to blur or merge the roles of the two formal decision-making organs of the company, namely the general meeting and the board of directors.

None of the resolutions proposed by the plaintiffs in *ACCR v CBA* was a usurping resolution, but it was the focus of concern in *Cunninghame*.³⁵ There, a company was formed to acquire certain inventions relating to the filtration and purification of liquids. The company’s memorandum of association stated that the company could sell its undertaking to another company having similar objects. The company’s articles of association gave the directors the general power to manage the company, and a specific power to sell the property of the company on terms that they deemed fit. At a general meeting a shareholder proposed a resolution to sell the company’s assets to a new company.³⁶ The resolution was passed by a majority vote of 55%, with most of the votes in favour being cast by the proponent shareholder. The courts at first instance and on appeal held that the directors could not be compelled to comply with the resolution. The modern English (and Australian) law on the division of managerial power in a company was laid down here. *Cunninghame* reversed the previously settled view, decided under a different legislative framework, that the shareholders in a general meeting did have the power to direct and control the actions of directors.³⁷

The *Cunninghame* decision did not rest on any single doctrinal or policy basis. Over the course of the litigation, three rationales were given to support the conclusion. At first instance, Warrington J noted that under the company’s articles of association, the directors could only be removed by special resolution. His Honour reasoned that this removal mechanism would become irrelevant if the shareholders could simply ‘overrule the discretion of the directors’ by a resolution passed by an ordinary majority.³⁸ In Australia today this argument has no application to public companies registered under the *Corporations Act*, because s 203D permits removal of directors by an ordinary

³⁵ See *Cunninghame* (n 1) 34–7 for an outline of the facts.

³⁶ The reported facts do not disclose whether the proponent shareholder had an interest in the other company.

³⁷ See, eg, *Isle of Wight Railway Co v Tahourdin* (1883) 25 Ch D 320 (‘*Tahourdin*’). Austin and Ramsay (n 20) suggest this change was due to a shift in commercial opinion: at 252–3 [7.110]. The pre-*Cunninghame* case history is described in Aickin (n 20) 451–3. See generally Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009) 180–2 (on the changing role of shareholders prior to *Cunninghame*).

³⁸ *Cunninghame* (n 1) 38.

resolution.³⁹ The broader idea that shareholders should not seek by ordinary resolution a result that requires amendment of the constitution by special resolution is settled in Australian corporate law.⁴⁰ Secondly, and in the same vein, his Honour also described the clause that vested powers of management solely in the directors as being ‘for the protection of a minority of the shareholders’, noting that the clause could only be altered by special resolution.⁴¹ This argument was repeated in *Salmon v Quin & Axtens Ltd* (*‘Salmon (Court of Appeal)’*) three years later, where Farwell LJ held that any other construction would be ‘disastrous’, because ‘it might lead to an interference by a bare majority very inimical to the interests of the minority who had come into the company on the footing that the business should be managed by the board of directors’.⁴²

When *Cuninghame* reached the Court of Appeal, Cozens-Hardy LJ added a third rationale for rejecting the usurping resolution, holding that the provisions of the articles were a contract between the members of the company *inter se*:

[I]t seems to me that the shareholders have by their express contract mutually stipulated that their common affairs should be managed by certain directors ... If you once get a stipulation of that kind in a contract made between the parties, what right is there to interfere with the contract, apart, of course, from any misconduct on the part of the directors?⁴³

The nature of the contract was analogous to that found in ‘ordinary partnership’ arrangements, where, by mutual arrangement between partners, the partnership deed provides for the business to be managed by just one of the partners.⁴⁴

2 *Instructing Resolution*

The second type of resolution occurs where the shareholders put a resolution that purports to tell the directors how they should exercise their powers but

³⁹ Section 203C makes the same provision for removal of directors in a proprietary company, although this is a replaceable rule.

⁴⁰ See, eg, *Capricornia Credit Union Ltd v Australian Securities and Investments Commission* (2007) 159 FCR 69, 86 [59] (Dowsett, Edmonds and Besanko JJ).

⁴¹ *Cuninghame* (n 1) 38.

⁴² [1909] 1 Ch 311, 319–20 (*‘Salmon (Court of Appeal)’*).

⁴³ *Cuninghame* (n 1) 44. Of course, a special resolution of the members could now also amend the contract: *Corporations Act* (n 8) s 136(2).

⁴⁴ *Cuninghame* (n 1) 44.

stops short of the shareholders seeking to exercise those powers themselves. This can be called an ‘instructing resolution’. While the case law often merges consideration of this type of resolution with the usurping resolution (and in practice it can sometimes be difficult to distinguish between the two types),⁴⁵ there is a difference: an instructing resolution does not try to merge the roles of the general meeting and the board. In the case of an instructing resolution, the general meeting is, in effect, saying to the directors, ‘you exercise managerial power in the company on our behalf; here is how we want you to exercise it’.

In *ACCR v CBA*, the first resolution proposed for the AGM — requiring directors to provide the greenhouse gas emissions report — was an instructing resolution. At first instance, Davies J held that a resolution of this type was not valid, relying on the authority of *Gramophone & Typewriter Ltd v Stanley* (‘*Gramophone & Typewriter*’)⁴⁶ and *John Shaw & Sons (Salford) Ltd v Shaw* (‘*John Shaw & Sons*’)⁴⁷ to support this conclusion.⁴⁸

The UK Court of Appeal decided *Gramophone & Typewriter* in 1908, only two years after that Court’s decision in *Cuninghame*.⁴⁹ Interestingly, there was no issue in *Gramophone & Typewriter* with either a usurping or an instructing resolution. Indeed, the facts of the case did not involve any shareholder resolution at all, and nor was there any dispute about the division of power inside the company. Instead, the case was concerned with protecting the controlling shareholder of a company from having profits earned by the company attributed to that shareholder for taxation purposes. The *Cuninghame* case was relied on to reinforce the point that the operations of the company, as managed and determined by its directors, are separate from the wishes or actions of the company’s shareholders. Having referred to *Cuninghame*, Buckley LJ emphasised that

[t]he directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispo-

⁴⁵ See, eg, *Scott v Scott* [1943] 1 All ER 582 (England and Wales High Court) (concerning a proposed resolution that, in the Court’s view, either declared a dividend or directed the board to pay of a dividend).

⁴⁶ *Gramophone & Typewriter* (n 22).

⁴⁷ *John Shaw & Sons* (n 21).

⁴⁸ *ACCR v CBA (Trial)* (n 17) 745–6 [30]–[33]. In dismissing ACCR’s appeal the Full Court did not deal specifically with this point: *ACCR v CBA* (n 7).

⁴⁹ See *Gramophone & Typewriter* (n 22) 89–92 for an outline of the facts.

essed from that control only by the statutory majority which can alter the articles.⁵⁰

The Court's statement about the inability of shareholders to control directors was not aimed at protecting the directors from shareholder interference. The concern was quite the opposite: protecting the shareholder from having the effect of the directors' decisions attributed directly to them. This difference seems to have been lost rather quickly in subsequent cases. One year later the Court of Appeal, in *Salmon (Court of Appeal)* (a case involving a usurping resolution), simply quoted from *Gramophone & Typewriter* to support the application of the *Cuningham* principle.⁵¹

By contrast, *John Shaw & Sons* did involve an instructing resolution.⁵² A company claimed to be owed money by two of its directors and, pursuant to a resolution of the rest of the board, had commenced action to recover those sums. In defending the action, the two directors (who were also shareholders in the company) argued, in part, that there was no proper authority to bring the action. In their capacity as shareholders, they relied on a resolution passed at an extraordinary general meeting that directed the chair of the board to instruct the company's solicitors to discontinue the action. Greer LJ rejected this part of the argument. In a well-known passage, his Lordship said:

If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.⁵³

This aspect of the *John Shaw & Sons* decision prompts two observations. First, it is apparent that by 1935 it was the third of the rationales used in the *Cuningham* decision (the binding force of the corporate contract) that had developed into accepted orthodoxy, although neither *Cuningham* nor *Gramophone & Typewriter* were expressly referred to in the *John Shaw & Sons*

⁵⁰ Ibid 105–6.

⁵¹ *Salmon (Court of Appeal)* (n 42) 319 (Farwell LJ), quoting *Gramophone & Typewriter* (n 22) 105–6 (Buckley LJ). This decision was affirmed in *Salmon (House of Lords)* (n 31).

⁵² See *John Shaw & Sons* (n 21) 113–19 for an outline of the facts.

⁵³ Ibid 134.

judgment. Greer LJ's judgment did not pursue the partnership analogy that had been emphasised by Cozens-Hardy LJ in *Cunninghame*, but it did emphasise the fundamental importance of adhering both to the agreed division of power set out in the company's constitution and to the agreed means of altering that division via amendment of the company's constitution (noting the alternative option of refusing to re-elect directors). In practical terms, this deference to the division of managerial power allows for certainty and efficiency in the everyday processes of corporate decision-making. It can be supported by reference to ideas about the binding nature of contractual agreements, as expressed by Cozens-Hardy LJ in *Cunninghame*.⁵⁴ Section 140 of the *Corporations Act* underlines this point, stating, in part, that a company's constitution has effect as a contract between the company and each member. It can also be justified by reference to constitutional theory, in which a key purpose of the company constitution is to confer decision-making power and to impose structures and processes on the exercise of that power. On this view, the company constitution is more than a contractual agreement: it is 'separate from and set against' the powers of the directors and shareholders alike.⁵⁵

The second observation from *John Shaw & Sons* is that, in the passage just quoted, Greer LJ appears to merge the idea of shareholders exercising the power of directors (a usurping resolution) with that of shareholders seeking to control the exercise of that power by the directors (an instructing resolution). As noted above, while the effect can be the same, there is a formal distinction between these two situations. An instructing resolution — like a usurping resolution — seeks to make the board subservient to the general meeting, but at the same time, the instructing resolution assumes the separate formal identity of the two decision-making organs. This distinction becomes more important when we look at the third type of shareholder-initiated resolution.

3 *Advisory Resolution*

In the third type of resolution, the shareholders tell the directors what the shareholders think about the way in which the directors are exercising their powers, or they offer suggestions about how the directors might exercise those powers. This is usually referred to as an 'advisory resolution'. This was the nature of the second resolution in *ACCR v CBA*, by which the shareholders

⁵⁴ *Cunninghame* (n 1) 44.

⁵⁵ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 837 (Lord Wilberforce for the Court). See also Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Ashgate, 2007) 84–5.

sought to express concern about the absence of a report from the directors on greenhouse gas matters. An advisory resolution recognises and preserves the separate operations of the board and the general meeting, and to that extent is similar to an instructing resolution. But, unlike an instructing resolution, the shareholders are now simply advising or alerting the board to the views of the members, leaving it to the directors — exercising their powers of management in the context of their fiduciary and statutory duties — to decide what, if anything, to do in response. Thus, while an advisory resolution may, at a distance, look like an instructing resolution, the two have quite different background assumptions. Strictly conceived, an advisory resolution is not binding on the directors: it does not attempt to do the work of the directors or remove, curtail, or bind the exercise of their managerial power. Accordingly, it is not clear why advisory resolutions should be caught by the same proscriptions that apply, appropriately, to usurping and instructing resolutions. This question can be explored further by returning to the *ACCR v CBA* decision.

B *The Reasoning in ACCR v CBA*

As noted, *ACCR v CBA* held that the board was not required to put the proposed advisory resolution to the AGM. While this was the decision at first instance and on appeal, there is a difference in the reasoning given in the two judgments.

At first instance, Davies J cited the *Cuninghame* line of cases to support the conclusion. In particular, her Honour relied on the decision in *National Roads & Motorists' Association v Parker* ('*NRMA v Parker*').⁵⁶ That case involved two sets of proposed resolutions. The first set was contained in a requisition by a group of shareholders for the directors to convene an extraordinary general meeting. The object of the meeting would be to consider 'instructing resolutions' whereby, for example, the shareholders sought to direct the directors about whom to appoint as a returning officer in upcoming board elections. Citing *John Shaw & Sons* and *Salmon (Court of Appeal)* (amongst other cases), McLelland J held that these were not resolutions that could be validly passed at a general meeting, and so the directors could properly refuse to convene the general meeting.⁵⁷ This is undoubtedly correct, as the defendant shareholder conceded. The second set of proposed resolutions was advisory; on the assumption that the extraordinary general meeting would be called, the

⁵⁶ *NRMA v Parker* (n 22).

⁵⁷ *Ibid* 521.

resolutions sought to convey the ‘meeting’s opinion’ that more consideration should be given to certain matters, and that certain procedures for selecting a returning officer were preferable over others. McLelland J ruled that this second group of resolutions was also invalid, and so could not provide support for the calling of the general meeting. In disposing of the advisory resolutions, his Honour stated simply that:

In my view it is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that other body or person.⁵⁸

Notwithstanding its acceptance in subsequent case law, this is a surprising proposition. There is no explanation in McLelland J’s judgment as to *why* it is no part of the function of the general meeting to express an opinion about company management, and no authority was cited to support the statement. Nothing in the *Cunninghame* line of cases compels such a conclusion. It is possible that McLelland J’s statement was based on a blurred distinction between instructing and advisory resolutions: at the end of the paragraph from which the quotation above is taken, his Honour added that ‘in their organic capacity in general meeting they [the members] have no part to play in the actual exercise of the powers [of the directors]’.⁵⁹ However, while this latter statement is correct, it has nothing to do with a non-binding resolution by members about how the directors are exercising their powers.

In *ACCR v CBA* the plaintiff shareholders argued that *NRMA v Parker* was wrongly decided on the point of advisory resolutions, and that McLelland J had ‘conflated the expression of an opinion in respect of the exercise of a power with the exercise of the power itself’.⁶⁰ Davies J disagreed with that submission, holding that ‘the well-established principle stated in *Gramophone & Typewriter* and *John Shaw*’ meant that members could not ‘move a resolution expressing an opinion as to how a power vested in the board by the constitution should be exercised by the board’.⁶¹ With respect, neither of those cases said anything about this type of resolution. While, as noted already, *Gramophone & Typewriter* did not involve any actual resolution, the consideration in that case about the possibility of shareholder resolutions was clearly

⁵⁸ Ibid 522.

⁵⁹ Ibid.

⁶⁰ *ACCR v CBA (Trial)* (n 17) 745 [26].

⁶¹ Ibid 745–6 [30].

concerned with either usurping or instructing resolutions (for example, Buckley LJ's earlier-quoted statement that directors are not servants or agents who are bound to obey the shareholders' directions).⁶² Similarly, *John Shaw & Sons* was concerned with an instructing resolution, with additional reference to the invalidity of usurping resolutions.

Davies J also stated that McLelland J's approach to advisory resolutions was consistent with earlier remarks in *Winthrop Investments Ltd v Winns Ltd* ('*Winthrop*'), where Samuels JA said: 'The general meeting is not, I think, the proper forum to determine matters of management, however critical they may be. The area of management is one in which the shareholders have no directly effective will.'⁶³ Again, this remark does not appear to be applicable to an advisory resolution, where the shareholders are not seeking to 'determine matters of management' but, instead, are indicating a non-binding opinion about how powers of management are being, or might be, exercised.⁶⁴

As noted above, the joint judgment of the Full Court of the Federal Court of Australia dismissed ACCR's appeal. In particular, the Full Court held that in the absence of specific authority found in either statute or a company constitution, 'the shareholders in general meeting did not have a role to play in the exercise of powers vested exclusively in the board by passing a resolution which would express an opinion on the exercise of those powers.'⁶⁵ While it came to the same conclusion as Davies J at first instance regarding the invalidity of advisory resolutions, the Full Court supplied a different and more detailed set of reasons. It justified its conclusion on three grounds, holding that advisory resolutions cannot be put because:

- 1 they are ineffective (I will call this 'the ineffectiveness argument');⁶⁶
- 2 they represent only the opinion of the majority of voting shareholders (which I describe as 'the opinion argument');⁶⁷ and
- 3 they require either legislative or constitutional authority ('the authority argument'), which was absent in this case.⁶⁸

⁶² See above n 50 and accompanying text.

⁶³ *Winthrop* (n 23) 684.

⁶⁴ In *Aveo Group Ltd v State Street Australia Ltd* [2015] FCA 1019, Beach J cited the statement of McLelland J in *NRMA v Parker* (n 22) (see above n 58) and observed that '[i]n my view, this may be too broad a statement': at [56].

⁶⁵ *ACCR v CBA* (n 7) 293 [60] (Allsop CJ, Foster and Gleeson JJ).

⁶⁶ *Ibid* 287–9 [26]–[33].

⁶⁷ *Ibid* 291–2 [49]–[52].

In what follows, I analyse each of these arguments to see how well they support the Full Court's conclusion against advisory resolutions.⁶⁹ Foreshadowing the result of the analysis, I conclude, with respect, that only the authority argument carries weight.

1 *The Ineffectiveness Argument*

As described by the Full Court, the argument submitted by ACCR was that because the proposed resolutions were not binding on the directors and would have no legal effect, the shareholders should have the power to pass them.⁷⁰ In response, the Court held that there is no power vested in shareholders 'to pass an ineffective resolution.'⁷¹ In support of this conclusion, the Court cited Fry LJ in the 1883 decision *Isle of Wight Railway Co v Tahourdin* ('*Tahourdin*'): 'If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it.'⁷² The Full Court noted that this principle has been applied or cited with approval in many subsequent cases, and the judgment specifically referred to a number of them. The following analysis examines the cases cited by the Full Court in support of the ineffectiveness argument. Before doing so, the general point is this: the Full Court's judgment appears to blur the difference between an advisory resolution's legal effectiveness and its effectiveness in corporate governance terms. While there is no doubt, as was conceded by the appellants in *ACCR v CBA*, that an advisory resolution cannot bind the directors and, in that sense, has no legal effect, that is not its intended purpose. Instead, the intention of such a resolution is to advise the directors of the views or opinions held by the shareholders who vote in support of the resolution. In short, an advisory resolution can be effective while having no intended legal effect. The cases referred to by the Full Court are, with one exception, directed at the question

⁶⁸ Ibid 289–90 [34]–[38].

⁶⁹ In the judgment these arguments are presented in a different order, with the ineffectiveness argument first, the authority argument second, and the opinion argument third. For the purposes of this present analysis, nothing turns on this re-ordering.

⁷⁰ *ACCR v CBA* (n 7) 287 [26] (Allsop CJ, Foster and Gleeson JJ). Note that the judgment refers to 'the proposed resolutions' (plural), whereas in strict terms only the second proposed resolution was advisory.

⁷¹ Ibid 288 [27].

⁷² Ibid 288 [28], quoting *Tahourdin* (n 37) 334. Note that the Full Court also cited *Clifton v Mount Morgan Ltd* (1940) 40 SR (NSW) 31 ('*Clifton*') in support of the absence of a power to pass ineffective resolutions, but that case goes more to the authority argument, discussed later in this paper: *ACCR v CBA* (n 7) 289–90 [34]–[38] (Allsop CJ, Foster and Gleeson JJ).

of the *legal* effectiveness of proposed resolutions.⁷³ Additionally, none of them directly address the question of advisory resolutions.

In *Tahourdin*, shareholders had requisitioned an extraordinary general meeting of the company to: first, appoint a committee to inquire into the working and general management of the company, remove any of the officers of the company and appoint others, and authorise and require the directors to carry out the recommendations of the committee; and second, remove (if necessary) any of the directors and elect others to fill vacancies. The notice of meeting issued by the directors dealt only with the appointment of the committee, and this was not supported at the meeting. The requisitioning shareholders then issued their own notice of meeting setting out all of the matters just described. The directors sought a declaration that shareholders were not entitled to summon or hold a meeting of the company for such purposes. While an injunction was granted at first instance, this was unanimously overturned on appeal. Fry LJ's judgment included the passage cited above, but it is interesting to note his subsequent observations. As quoted above, his Lordship noted that: 'If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it.'⁷⁴ His Lordship then added:

But if the object stated in the requisition be such that by any form of resolution or by any machinery sanctioned by the Act, it can be carried into effect, then it is the bounden duty of the directors to call the meeting. I am bound to say that in this case the directors have, in my opinion, been very ill-advised in not summoning a meeting to consider the whole of the objects which the requisitionists desired to lay before the meeting.⁷⁵

To similar effect, in his concurring judgment Lindley LJ said:

I can conceive a case in which a meeting might be called under such a notice that nothing legal could be done under it. Possibly in that case an injunction to restrain the meeting might be granted. ... It seems to me a very strong thing to

⁷³ The exception is *Ex parte Bond; Re Junee District Hospital* (1940) 40 SR (NSW) 420 where Jordan CJ referred in passing to Fry LJ's statement in a judgment that was otherwise focused on finding that the hospital directors had no authority to make a by-law governing the process for requisitioning special meetings: at 424, cited in *ACCR v CBA* (n 7) 288 [29] (Allsop CJ, Foster and Gleeson JJ).

⁷⁴ *Tahourdin* (n 37) 334.

⁷⁵ *Ibid* 334-5.

say that the meeting shall not be held, because the notice is so wide that, according to its terms, illegal resolutions might be passed.⁷⁶

There are two observations from the *Tahourdin* case. First, the judgments were concerned with proposed resolutions that were intended to have a specific legal effect. The question before the Court of Appeal was whether directors were entitled to disregard a requisition if that intended legal effect could not be realised. The second observation is that the statement of Fry LJ quoted by the Full Court is less categorical when read in the context of his Lordship's full judgment and of the other judgments delivered in the case. The case does not categorically state that directors could not put the resolution to the meeting, only that they were justified in not doing so.

As the Full Court in *ACCR v CBA* noted, Fry LJ's first-quoted statement was cited in *Windsor v National Mutual Life Association of Australasia Ltd* ('*Windsor*') in a joint judgment by Black CJ and Beaumont J (Ryan J concurring).⁷⁷ The focus of that case was a requisition to call a meeting to consider a resolution to alter the status of the company from one limited by shares and guarantee to one limited by guarantee (thereby reversing an earlier change of the company's status). As the Court noted, a change in company status could only occur in terms permitted by s 69 of the then *Companies (Victoria) Code*, and the statute did not permit a change of the type proposed.⁷⁸ Having cited Fry LJ in *Tahourdin*, as well as *NRMA v Parker*, the Court held that 'the requisition was wholly ineffective and its deposit at the registered office of the company imposed no obligation upon National Mutual ... to convene a meeting'.⁷⁹

Similarly, *Turner v Berner* ('*Turner*')⁸⁰ (another of the cases cited by the Full Court) held that shareholders could not put a resolution that the directors were in breach of their statutory duties.⁸¹ Needham J accepted the argument that whether a director had breached the statute was a judicial decision, and not one for the company or either of its organs: 'a determination of the director's guilt ... is, in my opinion, not a right given to the company'.⁸²

⁷⁶ Ibid 333–4.

⁷⁷ *ACCR v CBA* (n 7) 288 [29], citing *Windsor v National Mutual Life Association of Australasia Ltd* (1992) 34 FCR 580, 590 (Black CJ and Beaumont J, Ryan J agreeing at 591) ('*Windsor*').

⁷⁸ *Windsor* (n 77) 588.

⁷⁹ Ibid 591.

⁸⁰ [1978] 1 NSWLR 66 ('*Turner*').

⁸¹ Ibid 72 (Needham J), cited in *ACCR v CBA* (n 7) 288 [29] (Allsop CJ, Foster and Gleeson JJ).

⁸² *Turner* (n 80) 71.

The next case cited by the Full Court in *ACCR v CBA* (after noting *NRMA v Parker*, discussed earlier) is *Stanham v National Trust of Australia (New South Wales)* ('*Stanham*'),⁸³ which dealt with a proposed motion of no confidence in the directors.⁸⁴ Young J observed that there was neither any substantive law nor established convention regarding no-confidence motions in the corporate law context. Having cited judicial opinion that such motions should not be allowed, Young J held that 'it does not appear to me that a motion of no confidence would be a motion which could be validly passed by the appropriate meeting.'⁸⁵ *Stanham* did not deal with a company incorporated under corporations legislation. In that context, the availability of statutory mechanisms for the removal of directors by the general meeting would, presumably, also be grounds to invalidate a proposed no-confidence motion.⁸⁶ Interestingly, however, Young J made the following observation: 'I have assumed that it is competent for a company to hold a meeting for its members to discuss matters which the directors think may be of mutual interest even though there is no resolution that is going to flow out of such a meeting.'⁸⁷ This seems to recognise that not everything that occurs at a general meeting must be directed at an outcome that has legal effect, noting that in Young J's view it is a matter for the directors to decide.

The next cited decision, *Queensland Press Ltd v Academy Investments No 3 Pty Ltd*,⁸⁸ is an uncontroversial application of the principle in *Cuninghame*, invalidating a proposed 'instructing resolution' which sought to have the directors refer — to the shareholders — a decision about how the company should deal with its major asset (shares in another company).⁸⁹ Again, nothing in this decision addresses the particular question of non-binding advisory resolutions.

The final Australian case cited in support of the 'ineffectiveness argument' is *Taiqi Investments (Aust) Pty Ltd v Winlyn Developments Pty Ltd* ('*Winlyn Developments*').⁹⁰ Again, this was a company in which management was vested in the directors. Shareholders had proposed that three resolutions should be put to a general meeting. One resolution would allow the general

⁸³ (1989) 15 ACLR 87 (Supreme Court of New South Wales) ('*Stanham*').

⁸⁴ *Ibid* 91 (Young J), cited in *ACCR v CBA* (n 7) 288 [29] (Allsop CJ, Foster and Gleeson JJ).

⁸⁵ *Stanham* (n 83) 92.

⁸⁶ See, eg, *Corporations Act* (n 8) ss 203C (proprietary companies), 203D (public companies).

⁸⁷ *Stanham* (n 83) 92.

⁸⁸ [1988] 2 Qd R 575.

⁸⁹ *Ibid* 578 (Ryan J), cited in *ACCR v CBA* (n 7) 288 [29] (Allsop CJ, Foster and Gleeson JJ).

⁹⁰ *Winlyn Developments* (n 28), cited in *ACCR v CBA* (n 7) 288 [30].

meeting to issue shares in the company. The other resolutions were possibly directed at the appointment of a director to the board, but the intention and meaning of the proposal was ‘obscure in the extreme.’⁹¹ Barrett J rejected the proposed share issue resolution on the standard basis that ‘functions assigned to the company in general meeting are not exercisable by the board of directors and likewise those given to the board of directors are not exercisable by the company in general meeting’⁹² On this basis, Barrett J then referred to ‘the undesirability of allowing legally meaningless resolutions to go forward lest those who have proposed them rely on them, once passed, as if they were legally meaningful.’⁹³ The Full Court in *ACCR v CBA* cited this statement in support of its disapproval of advisory resolutions. Note, however, that the proposed resolutions were intended (so far as could be discerned) to have some binding outcome on the board and the company (eg the issuing of shares, the appointment of a director). The concern in *Winlyn Developments* was that either the resolutions clearly sought to usurp the board’s power (and so were legally ineffective in *Cuninghame* terms) or were poorly framed and unclear (and so were ineffective in achieving their apparently intended outcome). But again, none of this touches on the question of whether a clearly worded proposal for a non-binding advisory resolution can validly be put to a general meeting.⁹⁴

Having cited these cases, the Full Court returned to Fry LJ’s dictum in *Tahourdin*, observing that his Lordship was ‘drawing a distinction between effective and ineffective resolutions, rather than between resolutions that did or did not seek to usurp the power of the directors.’⁹⁵ Because the proposed advisory resolution in *ACCR v CBA* ‘would be ineffective in any legal sense’,⁹⁶ then it could not validly be put to the meeting. With respect, what emerges from a consideration of *Tahourdin* and the ensuing case law is a slightly

⁹¹ *Winlyn Developments* (n 28) 199 [9].

⁹² *Ibid* 200 [19], citing *Gramophone & Typewriter* (n 22), *Cuninghame* (n 1), *Salmon (House of Lords)* (n 31).

⁹³ *Winlyn Developments* (n 28) 201 [30].

⁹⁴ Two United Kingdom cases cited by the Full Court do not add anything further. *Rose v McGivern* [1998] 2 BCLC 593 concerned two proposed resolutions, one of which was disallowed because it was an instructing resolution (and so was contrary to the *Cuninghame* line of cases), the other lacking sufficient detail to be put to the meeting (and so raised the same concern about effectiveness that was discussed in *Winlyn Developments* (n 28)): at 593–4. *PNC Telecom Plc v Thomas* [2002] EWHC 2848 (Ch) cited but did not actually apply *Tahourdin* (n 37): at [27] (Morritt V-C).

⁹⁵ *ACCR v CBA* (n 7) 289 [33].

⁹⁶ *Ibid*.

different point: if a proposed resolution is intended to have some legal effect, then it need not be put to the meeting if that effect cannot be achieved, whether because of illegality (for example, the facts in *Windsor*), inconsistency with statute (for example, seeking to remove or appoint directors outside the statutory provisions), or inconsistency with the agreed distribution of management power in the company (the *Cuninghame* line of cases). There is nothing in *Tahourdin*, or the other cases considered, requiring that all resolutions must have a legal effect. The point, instead, is that if a resolution is intended to have some legal effect then it must be achievable.

2 *The Opinion Argument*

I have just argued that nothing in the case law prior to *ACCR v CBA* requires that a resolution put to a general meeting must have a legal effect. This proposition received further attention from the Full Court in what I describe as ‘the opinion argument’, whereby the Court held that an advisory resolution cannot be put to a general meeting because it represents only the opinion of the majority of voting shareholders.

The opinion argument was the Full Court’s response to the appellant’s submission that a general meeting may pass an advisory resolution relying on the company’s plenary power. The Full Court’s argument can be summarised in five propositions:⁹⁷

- 1 A company has the legal capacity and powers of an individual (this plenary power is set out in s 124(1) of the *Corporations Act*).
- 2 A resolution is ‘a formal act of the company’, adopting McLelland J’s statement in *NRMA v Parker*.⁹⁸ In the absence of a substantive definition of the word ‘resolution’ in the *Corporations Act*, and there being no authority cited in *NRMA v Parker*, the Full Court turned to secondary sources on the law of meetings to support the propositions that ‘when a resolution has been passed, a legally binding decision has thereby been made’,⁹⁹ and a resolution is ‘a formal determination by an organised meeting’.¹⁰⁰ In light

⁹⁷ The judgment does not use this format; this is my summary of the argument presented in the Full Court’s judgment.

⁹⁸ *NRMA v Parker* (n 22) 522, cited in *ACCR v CBA* (n 7) 284 [8] (Allsop CJ, Foster and Gleeson JJ).

⁹⁹ *ACCR v CBA* (n 7) 287 [22] (Allsop CJ, Foster and Gleeson JJ), quoting AD Lang, *Horsley’s Meetings: Procedure, Law and Practice* (LexisNexis Butterworths, 7th ed, 2015) 118 [10.3].

¹⁰⁰ *ACCR v CBA* (n 7) 287 [23] (Allsop CJ, Foster and Gleeson JJ), quoting NE Renton, *Guide for Meetings and Organisations* (Thomson Reuters, 8th ed, 2005) 62 [4.1].

of its conclusion in *ACCR v CBA* it is interesting that the Full Court also cited, without further comment, the proposition that '[a] resolution is a decision or *an expression of opinion or intention* by a meeting'.¹⁰¹

- 3 A resolution passed at a general meeting is therefore an expression of the company's legal capacity and power. To be accurate, the Full Court judgment does not put this proposition expressly, but it is necessarily implicit in the Court's reasoning.
- 4 Expressing an opinion 'ordinarily does not involve the exercise of any legal power or capacity'.¹⁰² While shareholders are 'free to express their opinions concerning the management of the company, individually and collectively', there is no legal power or capacity to do so by resolution.¹⁰³
- 5 Therefore, an advisory resolution cannot be an act of the company relying on its plenary power.¹⁰⁴

The critical step in this argument is the fourth proposition: the expression of an opinion does not involve the exercise of a legal power or capacity. The Court's reasoning on this point derives from the way in which the appellant shareholders framed their argument, namely that an advisory resolution was an exercise of the company's plenary power. Noting that this plenary power is, in law, that of an individual,¹⁰⁵ the Full Court reasoned that because an opinion expressed by an individual does not rely on any particular legal power or capacity,¹⁰⁶ then so too the expression of an opinion by the company does not involve the exercise of such a power or capacity.

Stepping back from the framework of argument put by the appellants, however, a slightly different proposition can be formulated (acknowledging that this was not the argument put to the Court). While an individual's expression of an opinion need not involve the exercise of any legal power or capacity, the same is not necessarily true when the opinion relates to the

¹⁰¹ *ACCR v CBA* (n 7) 287 [23] (Allsop CJ, Foster and Gleeson JJ), quoting SR Brown, *Company Resolutions: Precedents for Use in Drafting Resolutions at Meetings of Members and Directors* (Lawbook, 4th ed, 1982) 3 (emphasis added).

¹⁰² *ACCR v CBA* (n 7) 292 [50] (Allsop CJ, Foster and Gleeson JJ).

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* 292 [52].

¹⁰⁵ Section 124(1) of the *Corporations Act* (n 8) states that a company 'has the legal capacity and powers of an individual'.

¹⁰⁶ Although the Full Court qualified this by saying 'ordinarily': *ACCR v CBA* (n 7) 292 [50] (Allsop CJ, Foster and Gleeson JJ).

actions or performance of another person who owes legal duties to the opinion-expresser and the opinion concerns the exercise of those duties. In expressing an opinion, via resolution, about the actions or performance of the directors, the shareholders are surely exercising their unique capacity as the individual bearers of voting rights and also as the collective beneficiary of duties owed by the directors to the company as a whole (which, while the company is solvent, is taken to mean the shareholders as a whole).¹⁰⁷ Put another way, if putting an advisory resolution does not involve the exercise of a legal power or capacity, it nevertheless involves the use or ‘enjoyment’ of a unique legal position. Shareholders, and shareholders alone, have the capacity to vote and in that way to speak formally to the company’s directors. And while it is the case that shareholders need not use the forum of a company general meeting to voice their views, it is the formality of that process, together with its ability to produce a collective viewpoint, that is important. Indeed, it is not clear — despite the Full Court’s claim (noted in step 4 above) — how shareholders can express a collective opinion if it is not by resolution.¹⁰⁸

3 *The Authority Argument*

In summary, the authority argument is that in the absence of any specific legislative or constitutional authority, shareholders have no capacity to pass an advisory resolution at a general meeting of the company. In fact, the Full Court decision puts the proposition more broadly:

[T]he shareholders in general meeting have no authority to speak or act on behalf of the company except to the extent and in the manner authorised by the company’s constitution or any relevant statute, and to an extent and in a manner consistent with constitution or statute. ... Any source of authority must be found in the constitution of the company or in statute.¹⁰⁹

The Full Court quoted the judgment of Jordan CJ in *Clifton v Mount Morgan Ltd* (*Clifton*) as authority for this proposition.¹¹⁰ While the facts of *Clifton* did not involve an advisory resolution (although, as the Full Court noted, Jordan CJ did refer to the actions of the shareholders in that case as expressing

¹⁰⁷ *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291 (Evershed MR, Asquith and Jenkins LJ agreeing).

¹⁰⁸ A point recognised in *ACSI Report* (n 2) 11.

¹⁰⁹ *ACCR v CBA* (n 7) 290 [37]–[38] (Allsop CJ, Foster and Gleeson JJ).

¹¹⁰ *Ibid*, citing *Clifton* (n 72).

‘a wish’),¹¹¹ the Full Court held that the need for a source of authority, in statute or company constitution, applies to any proposed resolution, including those of a non-binding advisory nature.

The authority argument is consistent with the idea of the company as a constitutionally structured entity in which principles such as accountability, responsibility, proper process, and the legitimate exercise of power are paramount.¹¹² And so, with respect, the authority argument represents the strongest of the three strands of reasoning put forward by the Full Court in *ACCR v CBA* against the capacity of shareholders to put an advisory resolution. Equally, it also suggests the most straightforward solution.

As noted in the introduction to this paper, there is continued debate in Australia about the need for, and extent of, shareholder participation in corporate governance. In stark terms, the argument is between those who prioritise the importance of improving company financial performance by ‘letting the managers manage’ and minimising shareholder involvement, and those who regard some degree of shareholder participation as necessary for good corporate governance or improved social responsibility (or both). The remainder of this paper puts an argument that aligns, broadly, with the second group of arguments. The argument has three parts. I begin by suggesting that advisory resolutions should have broad statutory recognition. I then justify this on the policy basis that advisory resolutions are a necessary ingredient for improved corporate accountability and, finally, they are important for developing the idea of shareholder responsibility.

IV STATUTORY RECOGNITION OF ADVISORY RESOLUTIONS

At present, the use of a non-binding advisory shareholder resolution is recognised expressly in s 250R of the *Corporations Act*, which requires a resolution to be put to the AGM of a listed company concerning the adoption of the remuneration report.¹¹³ Subsection (3) emphasises that ‘[t]he vote on the resolution is advisory only and does not bind the directors or the company’. Although it is advisory, if more than 25% of votes cast are against adoption of the report, this counts as a ‘first strike’ which, if repeated at the next AGM, can lead to a resolution to ‘spill’ the board.¹¹⁴

¹¹¹ *ACCR v CBA* (n 7) 289 [36] (Allsop CJ, Foster and Gleeson JJ), quoting *Clifton* (n 72) 50.

¹¹² Bottomley (n 55) 85.

¹¹³ The remuneration report is required to be included in the directors’ report for a listed public company: *Corporations Act* (n 8) ss 300A(1), (1A).

¹¹⁴ This is the combined effect of *Corporations Act* (n 8) ss 249L(2), 250V, 250W.

This requirement for ‘say on pay’ advisory resolutions was inserted into the Act by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) as part of a package of reforms intended to address concerns about high levels of remuneration being paid to directors and executives.¹¹⁵ The Explanatory Memorandum that accompanied the Bill emphasised that the section was ‘not intended to detract from the responsibility of directors to determine executive remuneration.’¹¹⁶

This is the only express reference to an advisory resolution in the *Corporations Act* and, as noted, its operation is limited to consideration of the remuneration report in a listed public company. Notwithstanding its confined scope, there was opposition to the introduction of s 250R. Prior to the passage of the 2004 reforms, the Parliamentary Joint Committee on Corporations and Financial Services received submissions that remuneration advisory resolutions would be ‘of negligible value’, ‘of little utility’, and would have ‘no meaningful or lasting effect.’¹¹⁷ Research indicates that these predictions about lack of impact have not been borne out. A study of 237 ‘first strike’ advisory resolutions in Australian companies from 2011–12 found that shareholder dissent against remuneration resolutions was targeted at sustained poor company performance, rather than excessive CEO remuneration, but nevertheless companies responded by decreasing the discretionary bonus component of CEO pay.¹¹⁸

It is not clear how much of the concern about the introduction of s 250R was directed at the prospect of shareholders having a voice on executive remuneration and how much was about the introduction of the advisory

¹¹⁵ The United States has also legislated for a mandatory, non-binding ‘say on pay’: *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 951, 124 Stat 1899, 1899–1900 (2010). By comparison, the United Kingdom, ‘say on pay’ resolutions are mandatory and binding: *Companies Act 2006* (UK) s 439 (‘*UK Companies Act*’).

¹¹⁶ Explanatory Memorandum, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) 170 [5.436].

¹¹⁷ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *CLERP (Audit Reform and Corporate Disclosure) Bill 2003: Part 1* (Report, June 2004) 84–5 [5.33] (‘*CLERP Report*’).

¹¹⁸ Matthew Grosse, Stephen Kean and Tom Scott, ‘Shareholder Say on Pay and CEO Compensation: Three Strikes and the Board Is Out’ (2017) 57(3) *Accounting and Finance* 701, 701–2. See also Liam Byrnes and Larelle Chapple, ‘How Should Regulators Deal with Entrenched Company Executives?’ (2015) 33(4) *Company and Securities Law Journal* 266. A review of international studies also notes evidence that boards do respond to ‘say on pay’ votes; however, there is no clear evidence that ‘say on pay’ has had a major impact on firm value: Fabrizio Ferri, ‘Say on Pay’ in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar, 2015) 319, 330–1.

resolution mechanism to give effect to that voice. Certainly, there had been earlier concerns about introducing broader statutory recognition of advisory resolutions.

The Companies and Securities Advisory Committee ('CASAC') canvassed the possibility of broad statutory recognition of non-binding advisory resolutions in its 2000 report on shareholder participation in public companies.¹¹⁹ CASAC introduced its final recommendation on this point with the proposition that

shareholders may only pass resolutions on matters within their power under the Corporations [Act], the Listing Rules of the relevant Exchange or the company's constitution. They have no power to pass valid resolutions on any other matters, particularly those within the exclusive jurisdiction of the board of directors.¹²⁰

More specifically, CASAC referred to 'the general principle' that 'shareholders cannot pass advisory resolutions on matters outside their power'.¹²¹ As already noted, the judgment in *ACCR v CBA* confirmed this proposition. At first instance, Davies J stated that '[t]he only powers that shareholders have are those which the Act "requires" [to] be exercised by the company in general meeting and none of those powers include a power to pass non-binding advisory resolutions'.¹²² On appeal, the Full Court elaborated this point in what I describe as the authority argument.

From this basis, the CASAC report went on to recommend that non-binding resolutions should not be permitted. To do otherwise, it argued, would 'blur the fundamental distinction between the role of the board of directors and that of the general meeting', enable directors to avoid responsibility for their actions by pointing to non-binding resolutions, put pressure on directors to disclose confidential commercial information to shareholder proponents of such resolutions, and 'broaden the scope of what courts may consider to be a proper purpose of a company meeting'.¹²³

The CASAC report listed these objections without further explanation, and they are debatable. It is not clear how non-binding advisory resolutions would blur the distinction between the board and the general meeting, given that, as

¹¹⁹ Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company* (Final Report, June 2000) ('*Shareholder Participation Report*').

¹²⁰ *Ibid* 35 [3.51] (citations omitted).

¹²¹ *Ibid* 35 [3.52]. The report does not cite any authority for this.

¹²² *ACCR v CBA (Trial)* (n 17) 747 [34].

¹²³ *Shareholder Participation Report* (n 119) 37 [3.56].

explained earlier, they seek to preserve that distinction (unlike usurping resolutions). Nor does it follow that the passing of an advisory resolution would allow directors to disregard their wider duties and responsibilities to the company as a whole, including those regarding the use of confidential information. Finally, the reference to what the courts consider to be the proper purpose of a company meeting is unclear. The cases considered earlier in this paper show that judicial consideration of general meetings has tended to focus on the scope of power available to shareholders. There has been little examination of the wider purpose of the meeting.

Despite the historical opposition to introducing a broadly framed legislative provision for advisory resolutions, it is interesting to contemplate one possible argument that the *Corporations Act* already makes such an allowance. As already noted,¹²⁴ s 249N(1) allows members who have the necessary numbers or voting power to give a company ‘notice of a resolution that they propose to move at a general meeting’. The wording of the section does not specify or qualify the scope of resolutions that may be proposed; nor is any limitation imposed by the word ‘resolution’ because, as the Full Court noted in *ACCR v CBA*, the Act does not define the term. Nevertheless, the Full Court held that the section does not give scope for advisory resolutions. In particular, as noted above, the Court held that advisory resolutions require some foundation in either legislation or the corporate constitution (the authority argument). In the Court’s analysis, s 249N does not supply that authority. However, *ACCR v CBA* did not consider the history of the section. Section 249N was introduced as part of a wide package of reforms made by the *Company Law Review Act 1998* (Cth).¹²⁵ In an important respect, the wording of s 249N differs from the section that it replaced. Previously, s 252 of the *Corporations Act 1989* (Cth) had permitted the requisite number of members to give ‘notice of any resolution *that may properly be moved*’.¹²⁶ Indeed, this qualifying clause was found in equivalent sections dating back to the uniform companies legislation in the 1960s.¹²⁷ The removal of this clause in the 1998 reforms was not explained in the Explanatory Memorandum that accompanied the Bill and it was not referred to in any of the parliamentary

¹²⁴ See above n 16 and accompanying text.

¹²⁵ This Act was an outcome of the Commonwealth Government’s Corporate Law Simplification Program in the mid-1990s: see generally *Shareholder Participation Report* (n 119) 7–8 [2.2]–[2.3].

¹²⁶ Emphasis added.

¹²⁷ *Companies Act 1981* (Cth) s 247(1)(a); *Companies Act 1961* (NSW) s 243(1)(a).

reports that preceded and followed the reforms.¹²⁸ Discussion focused largely on other aspects of the reforms that had the effect of giving the new section wider application than its predecessor (for example, expanding the section's operation beyond AGMs to all general meetings, and removing the threshold requirement for shareholders to have a minimum paid-up capital). In its subsequent inquiry into shareholder participation, CASAC did consider the possibility of amending the *Corporations Act* to provide expressly that directors may refuse to circulate a shareholder resolution if this would not be a proper purpose of the meeting. The final report noted views both in favour of and against this proposal, but made no recommendation, focusing instead on tightening the voting and shareholding thresholds necessary to put a resolution.¹²⁹

In the context of the other amendments introduced by s 249N, the excision of the longstanding qualifying clause could be interpreted as evincing a parliamentary intention to give the section a wider operation by permitting shareholders who meet the necessary voting or shareholding threshold to propose advisory resolutions. However, the lack of express discussion about this particular change presents a difficulty for this argument. Presumably, the previous legislative reference to resolutions 'that may properly be moved' embodied the common law doctrine found in the *Cunninghame* line of cases (now underlined by *ACCR v CBA*). There is a legal presumption that if legislation is to override the common law it must clearly be shown that this was the legislature's intention.¹³⁰ In the absence of a clear expression of legislative statement, there is no conclusive argument that s 249N was intended to encompass advisory resolutions. Statutory recognition of advisory resolutions requires clear and unambiguous drafting. Comparisons with other common law jurisdictions provide useful examples.

¹²⁸ Parliamentary Joint Committee on Corporations and Securities, Parliament of Australia, *Report on the Draft Second Corporate Law Simplification Bill 1996* (Report, November 1996); Parliamentary Joint Committee on Corporations and Securities, Parliament of Australia, *Report on the Company Law Review Bill 1997* (Report, March 1998); Parliamentary Joint Committee on Corporations and Securities, Parliament of Australia, *Report on Matters Arising from the Company Law Review Act 1998* (Report, October 1999) ('1999 Report'). The last-mentioned report did discuss the separate requirement, found in s 249Q of the *Corporations Act* (n 8), that a meeting must be held for a proper purpose: *1999 Report* (n 128) 161–2 [15.8].

¹²⁹ *Shareholder Participation Report* (n 119) 26–30 [3.13]–[3.27].

¹³⁰ Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 236–7 [5.27].

The *Canada Business Corporations Act* permits advisory proposals by which a shareholder may submit notice of ‘any matter’ that the person proposes to raise at an annual meeting of shareholders.¹³¹ While there is no substantive limitation on the topics that may be included in a proposal, directors can reject a proposal if (inter alia):

- its primary purpose appears to be concerned with enforcing a personal claim against the corporation, its directors, officers, or security holders;
- it ‘does not relate in a significant way to the business or affairs of the corporation’; or
- the ‘rights conferred by this section are being abused to secure publicity’.¹³²

The Act does not require that a proposal be put to a vote at the meeting and nor does it impose any obligation on directors to be bound by the outcome of the discussion or vote (if there is one).¹³³

There is a similar mechanism in the United Kingdom, where members of a listed public company may request that the business to be dealt with at an AGM should include ‘any matter (other than a proposed resolution)’.¹³⁴ The only specified restrictions on what may properly be included are matters that are defamatory, frivolous, or vexatious.¹³⁵ There is separate provision for members of a public company to require circulation of a proposed resolution.¹³⁶ Along with the restrictions on defamatory, frivolous, or vexatious matters, this section also excludes a proposed resolution that would, if passed, ‘be ineffective (whether by reason of inconsistency with any enactment or the company’s constitution or otherwise)’.¹³⁷ Neither provision states whether such matters are binding on the directors.

A stronger provision is found in the *New Zealand Act*, which permits a shareholder to give notice of a matter the shareholder proposes to raise for

¹³¹ *Canada Business Corporations Act*, RSC 1985, c C-44, s 137(1) (*‘Canada Corporations Act’*). The shareholder must have held shares that represent 1% of the corporation’s voting shares with a total market value of \$2,000 for at least six months: *Canada Business Corporations Regulations*, SOR/2001-512, s 46.

¹³² *Canada Corporations Act* (n 131) s 137(5).

¹³³ Evaristus Oshionebo, ‘Shareholder Proposals and the Passivity of Shareholders in Canada: Electronic Forums to the Rescue?’ (2012) 37(2) *Queen’s Law Journal* 623, 647, 652.

¹³⁴ *UK Companies Act* (n 115) s 338A(1). Requisitions must come from members holding at least 5% of the voting shares, or 100 members with an average paid up capital of at least £100 each: at s 338A(3).

¹³⁵ *Ibid* s 338A(2).

¹³⁶ *Ibid* s 339.

¹³⁷ *Ibid* s 338(2)(a). This section has the same membership requirements as s 338A: at s 338(3).

discussion or resolution at the next meeting of shareholders.¹³⁸ Section 109, headed ‘Management review by shareholders’, then provides that ‘[n]otwithstanding anything in this Act or the constitution of the company ... a meeting of shareholders may pass a resolution under this section relating to the management of [the] company.’¹³⁹ The section adds that unless the company’s constitution says otherwise, such a resolution is not binding on the board. The New Zealand provision presents a useful model for reform in Australia: it clearly identifies company management as a legitimate focus for advisory resolutions, and it clearly underlines the non-binding nature of these resolutions.

The inclusion in the *Corporations Act* of a provision similar to the New Zealand section should be in addition to the existing s 250S, which requires members at an AGM to be given a reasonable opportunity to ask questions about or comment on company management. While s 250S forms part of a wider shareholder engagement matrix, it is by itself insufficient, for three reasons. First, s 250S is expressed as a right for shareholders to ask questions, not to receive answers or explanations. In companies with large numbers of shareholders, general meetings are often carefully managed affairs; shareholders may be limited in the number of questions they can ask and in their capacity to ask follow-up questions. While, on paper, s 250S appears to be about two-way communication, in practice this is often not the outcome. Secondly, to the extent that answers or explanations are provided, these do not have the same legal status as a formal resolution passed by the meeting; they are not, to use the language of *ACCR v CBA*, a formal act of the company. Thirdly, any discussion under the auspices of s 250S involves only those shareholders present at the meeting, whereas a vote on a resolution can have a wider reach through the proxy voting mechanism.

The New Zealand provision was introduced as part of a broad review of that country’s company law statute in 1989. The New Zealand Law Commission explained the need for this section:

Since the Act confers exclusive powers of management on the directors of the company (subject to explicit variation by the constitution), it is arguable that shareholders do not have any rights in general meeting to pass resolutions affecting the management of the company. We think they should and that *they should be able to call management to account*. Such resolutions will, of course,

¹³⁸ *Companies Act 1993* (NZ) sch 1 cl 9(1).

¹³⁹ *Ibid* s 109(2). This excludes resolutions that are defamatory, frivolous, or vexatious: at sch 1 cl 9(6).

under the standard constitution not be binding on the directors but their persuasive and monitory effect may be considerable. [The new section] makes it explicit that any shareholder can discuss the management of a company at a general meeting and can vote on non-binding resolutions relating to the management of the company.¹⁴⁰

The next part of this paper picks up on the Commission's emphasis on the value of advisory resolutions in the wider framework of corporate accountability.

V ADVISORY RESOLUTIONS AND ACCOUNTABILITY

Advisory resolutions can play an important role in processes of corporate accountability.¹⁴¹ It is important to be clear about what 'corporate accountability' means here. Given that the context of this paper is the company general meeting, the focus is on the accountability of directors to the company and, in particular, to the shareholders as a whole. Within these parameters we can distinguish between two types of accountability: 'accountability as disclosure' and 'accountability as explanation.'¹⁴² The former requires directors to provide accurate information about their decisions and actions, on the occasions and in the form stipulated by various regulatory requirements. A standard example is the annual directors' report.¹⁴³ The second type of accountability encourages directors to explain, or give an account of, their actions: more than a description of *what* has been done, shareholders are given reasons for *why* it has been done. In theory, this type of accountability underlies s 250S of the *Corporations Act*.

These two types of accountability are premised on different conceptions of the relative roles of the board and the general meeting. Disclosure-based accountability tends to see the division of power between the directors and the general meeting as a hierarchy. The board of directors, having been granted general managerial power, is regarded as superior, in governance terms, to the general meeting. The directors have specialised skills and knowledge that makes it unworkable and unnecessary for the general meeting

¹⁴⁰ New Zealand Law Commission, *Company Law: Reform and Restatement* (Report No 9, June 1989) 111 [468] (emphasis added).

¹⁴¹ I deliberately say 'can', not 'will'. Much depends on how responsibly the advisory resolution mechanism is used. I elaborate on this later in the paper: see below Part VI.

¹⁴² Bottomley (n 55) 78.

¹⁴³ *Corporations Act* (n 8) s 298 requires a company to prepare an annual directors' report. The Act also specifies the content of that report for different types of companies: at ss 299–300B.

of shareholders to be involved in the exercise of that power.¹⁴⁴ On this functional view of the division of power, the accountability relationship between directors and shareholders operates primarily in one direction: the board provides information to the shareholders as determined by legal requirements. In this model, the general meeting tends to be regarded more as an event rather than as a decision-making organ.

A different way of thinking about the governance relationship between directors and shareholders begins with the premise that the board and the general meeting are the two formal decision-making organs of the company. While, in the typical case, directors have the power to manage the company, neither organ is superior to the other. The board represents the broader corporate interest, which includes (but transcends) the interests of individual shareholders. The general meeting represents the diverse interests of the shareholders. To discharge their roles, each of these bodies must be informed about the interests and concerns of the other, so far as is consistent with the directors' duties to the company. This is the purpose of explanatory accountability. Borrowing from Mashaw's analysis of reason-giving by public officials, we can say that the provision of explanations by directors may assist in obtaining shareholder cooperation and in avoiding complaints and, simultaneously, it is a way of facilitating monitoring by shareholders of directors' behaviour.¹⁴⁵ Adapting Mashaw's observation, the legitimacy of corporate managerial decision-making

flows primarily from a belief in the specialized knowledge that ... decisionmakers can bring to bear on critical policy choices. And the only evidence that this specialized knowledge has in fact been deployed lies in [directors'] explanations or reasons for their actions.¹⁴⁶

Explanatory accountability can be one-way, but it is more effective if directors are informed about what shareholders want to have explained. This is where advisory resolutions, along with the requirements of s 250S, have a critical role. Advisory resolutions offer an accountability mechanism that is visible and open to deliberation. Despite some reported views, it is not clear how it

¹⁴⁴ In the US corporate governance context, see generally Stephen M Bainbridge, 'Preserving Director Primacy by Managing Shareholder Interventions' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar, 2015) 231.

¹⁴⁵ Jerry L Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance' (2007) 76(1) *George Washington Law Review* 99, 103.

¹⁴⁶ *Ibid* 117. To be clear, Mashaw does not discuss the application of his arguments to the corporate context.

can be ‘of negligible value’ or ‘of little utility’ for the board to receive feedback from the key constituency to which they owe their duties.¹⁴⁷ As noted by the Parliamentary Joint Committee on Corporations and Financial Services in 2004, ‘[a] non-binding vote presents shareholders with an opportunity to place on the record their views to guide directors and inform them of their expectations.’¹⁴⁸ Four years later, the same Committee argued that: ‘Shareholder engagement through dialogue, disclosure and voting ensures the accountability of company boards and management, providing an important check on their power that serves to improve corporate governance standards.’¹⁴⁹ The Committee added that ‘the willingness and capacity of shareholders to engage, question, form opinions and vote on company matters is essential’ to good corporate governance.¹⁵⁰ Similarly, the Productivity Commission, in its 2009 inquiry into executive remuneration and the operation of s 250R,¹⁵¹ noted that ‘the non-binding vote had encouraged increased engagement of companies with (mainly institutional) shareholders.’¹⁵²

On the simple disclosure-based approach to accountability, the board can make assumptions — even accurate ones — about what is in the interests of the shareholders. This is part of the managerial discretion granted to the directors. On the second explanation-oriented approach, the board needs to hear from the shareholders and to be informed about what shareholders want. This means that shareholders need to have the means to express those views.

It is of course possible that advisory resolutions will not receive majority support; indeed, that may be a frequent outcome, but that does not mean that they have no accountability role:

By generating debate and raising the level of discourse within the corporation, [advisory] proposals play an educational function and can cause otherwise passive shareholders to rethink their sometimes uncritical support of management.

¹⁴⁷ *CLERP Report* (n 117). See also above n 117 and accompanying text.

¹⁴⁸ *CLERP Report* (n 117) 87 [5.43].

¹⁴⁹ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Better Shareholders — Better Company: Shareholder Engagement and Participation in Australia* (Report, June 2008) 8 [2.23].

¹⁵⁰ *Ibid* 8–9 [2.23].

¹⁵¹ Productivity Commission, *Executive Remuneration in Australia* (Inquiry Report No 49, 19 December 2009).

¹⁵² *Ibid* 281.

Of primary importance is the fact that management is compelled to put forth a defense of its position.¹⁵³

The airing of minority concerns is still a valid part of corporate governance. After all, directors are required to have regard to the interests of the company as a whole, not simply to those shareholders who control the majority of the voting shares.

VI ADVISORY RESOLUTIONS AND SHAREHOLDER RESPONSIBILITY

The general assumption behind the laws relating to corporate governance is that it is the job of directors, not shareholders, to be responsible. The principle of shareholder non-interference, commencing with the decision in *Cunninghame*, reinforces this. The *Cunninghame* line of cases has operated as a justification for limited shareholder involvement with, and responsibility for, corporate affairs.

Calls for increases in shareholder rights and for shareholders to engage more with corporate matters are answered with concerns about the risk of shareholder abuse of those rights and powers. While that risk is susceptible to overstatement, it also cannot be discounted. However, the answer is not to reduce or deny shareholder rights and powers, thereby consigning shareholders to a passive investor role. Instead, the goal should be to ensure that those rights and powers are exercised responsibly. I elaborate this argument in this final part of the paper.

I argued above that a non-binding advisory resolution is a formal mechanism by which shareholders can give feedback to the board, and that it can therefore play an important part in giving effect to explanatory accountability in the company. Like all accountability mechanisms, however, it is open to misuse, and there should be safeguards. For one thing, the capacity to propose an advisory resolution should be subject to the same threshold limitations imposed by s 249N of the *Corporations Act*, so that notice of the resolution requires the support of members with at least 5% of the votes that may be cast, or at least 100 members who are entitled to vote. But it is also important that

¹⁵³ Aaron A Dhir, 'Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability' (2006) 43(2) *American Business Law Journal* 365, 403. Management responses to shareholder resolutions are a key factor. According to an Australian study, managers of listed companies recommended against 81% of shareholder resolutions: Hui Xian Chia and Ian Ramsay, 'An Analysis of Shareholder Resolutions Involving Australian Listed Companies from 2004 to 2013' (2016) 34(8) *Company and Securities Law Journal* 618, 620.

the capacity be exercised responsibly and not capriciously. The advisory resolution can be a means whereby shareholders can openly demonstrate the responsible exercise of their rights within the company.

The term 'responsibility' is used here not as a synonym for 'liability', but, instead, to describe the idea that (wherever possible) shareholders should be encouraged to recognise that they are members of the company, not merely investors in the company. While they are responsible to themselves (and to their own stakeholders) and their financial position, at the same time each shareholder should be encouraged to exercise their governance responsibilities to their company and to the other shareholders, to the extent that they are able.

Shareholders are more than beneficiaries of duties owed to them by the directors and officers of the corporation; shareholders also have various rights and privileges regarding the company's management and accountability structures. Even though those rights and privileges are circumscribed by legislation and the company's constitution, the essential point remains: simply by virtue of their status as shareholders they are owed duties and, related to this, they enjoy rights and privileges exclusive of anyone else who is connected to the company's operations. Shareholders are functionally part of the company's accountability structures and processes, not simply because they are owed an account of the directors' management of the company, but also because they can call those directors to account. It is the shareholders, and no one else, who are granted specific powers over a range of substantive matters, including approving the adoption, modification, or repeal of a company's constitution,¹⁵⁴ approval of certain forms of share capital reduction and share buy-back,¹⁵⁵ and the appointment and removal of directors.¹⁵⁶ Additionally, as has been noted, shareholders also have certain procedural rights in relation to company management, including the right to ask questions or make comments at an AGM,¹⁵⁷ to require the company to distribute a statement to all members prior to a general meeting,¹⁵⁸ to put a resolution at a general meeting,¹⁵⁹ or to require directors to call a general meeting.¹⁶⁰ If the share-

¹⁵⁴ *Corporations Act* (n 8) s 136.

¹⁵⁵ *Ibid* ss 256C, 257C, 257D.

¹⁵⁶ *Ibid* ss 201G, 203C, 203D.

¹⁵⁷ *Ibid* s 250S.

¹⁵⁸ *Ibid* s 249P.

¹⁵⁹ *Ibid* s 249N.

¹⁶⁰ *Ibid* s 249D.

holders do not exercise these rights and powers, no one else can.¹⁶¹ The argument, then, is that along with their rights to participate in the company's accountability processes, shareholders have commensurate responsibilities regarding those processes. This accords with Waldron's idea of 'responsibility-rights'.¹⁶² These are rights that have the 'dual character of right and responsibility' in that they designate important tasks (here, electing directors and voting on resolutions) to a privileged group of actors because of the particular interest that those actors have in the matter, and where the exercise of those rights is protected from interference by others, except in extreme cases (eg actions for oppression).¹⁶³

The actions of responsible shareholders can guard against managerial complacency. Through mechanisms such as advisory resolutions, they can remind the company's directors and managers that 'we are here, and we are watching'. It also serves to avoid the risk of directors relying on overly simplified assumptions about what the shareholders expect from them.

An important feature of the advisory resolution mechanism is that it gives shareholders who wish to formally communicate their views about the company's management an option between, on the one hand, the blunt and disruptive (and often futile) mechanism of seeking constitutional amendment or removal of directors, or, on the other hand, doing nothing or exiting the company.¹⁶⁴ In this way, the advisory resolution can foster shareholder responsibility by offering a mechanism for the open and visible exercise of 'voice' rather than the less visible options of exiting the company, taking informal action 'behind the scenes', or simply doing nothing.¹⁶⁵ Put another way, it can provide a 'safety valve' for shareholder concerns.¹⁶⁶

¹⁶¹ Additionally, the ASX Listing Rules require that certain transactions and matters must be put to shareholders for approval. For example, for changes in capital and new issues of securities: ASX, *Listing Rules* (at 19 December 2016) r 7.1.

¹⁶² Jeremy Waldron, 'Dignity, Rights, and Responsibilities' (2011) 43(4) *Arizona State Law Journal* 1107.

¹⁶³ *Ibid* 1116. Not all shareholder rights take this form; the right to receive a dividend, for example, does not carry responsibilities in the sense described. Note that Waldron does not consider shareholder rights in his paper.

¹⁶⁴ A similar point is made in *ACSI Report* (n 2) 5.

¹⁶⁵ See generally Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States* (Harvard University Press, 1970). Thanks to Paul Redmond for emphasising this point.

¹⁶⁶ Donald E Schwartz and Elliott J Weiss, 'An Assessment of the SEC Shareholder Proposal Rule' (1976) 65(2) *Georgetown Law Journal* 635, 635.

To be clear, the responsible use of the advisory resolutions should entail that the mechanism is not invoked capriciously, for the sole pursuit of personal claims, or to propose actions that are meaningless, plainly unworkable, or unable to be implemented for legal or constitutional reasons.¹⁶⁷ It also means that wherever possible the formality of an advisory resolution ought to be invoked only where other mechanisms such as questions and comments to the board under s 250S have been exhausted. As expressed by the Australian Council of Superannuation Investors, a legislatively recognised advisory resolution should be a mechanism for escalation of issues where other means of engagement are not working (or not feasible).¹⁶⁸

VII CONCLUSION

The law on shareholder-initiated resolutions is clear in parts, and much less clear in others. It is clear about the invalidity of usurping and instructing resolutions — even though, on close examination, the underlying case law does not offer the single, clear foundation that is often assumed. It is unclear, however, about advisory resolutions. To the limited extent that they have been dealt with expressly, the case law rules out this type of resolution, but without a clear policy basis for doing so. The *Corporations Act* rules them in, but only for one particular topic.

In this paper I have argued that advisory resolutions can play an important part in fostering effective accountability within the company, and they are a mechanism by which shareholders can demonstrate their role as responsible corporate members. To achieve those benefits, I suggest that the law on advisory resolutions in Australia needs a clear statutory basis, with s 109 of the *New Zealand Act* providing a simple model.

Some final caveats are necessary. First, there are costs associated with advisory resolutions. There is the direct cost to the company of dealing with shareholder advisory resolutions. In effect, this mechanism ‘operates essentially as a tax on all shareholders to facilitate the voice of all shareholder proposals’ proponents.¹⁶⁹ This, I suggest, is a necessary price of improved corporate accountability. There is also the potential negative impact on a company’s share value when there is internal dispute about support for, or

¹⁶⁷ See, eg, *Winlyn Developments* (n 28) (an example of meaningless usurping resolutions).

¹⁶⁸ *ACSI Report* (n 2) 32.

¹⁶⁹ Randall S Thomas and James F Cotter, ‘Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction’ (2007) 13(2–3) *Journal of Corporate Finance* 368, 370.

implementation of, an advisory resolution. Interestingly, the evidence from the United States is that stock market reactions to shareholder proposals, though sometimes negative, are generally insignificant.¹⁷⁰

Secondly, it is important not to overstate the role that advisory resolutions can play. For some shareholders, the non-binding nature of these resolutions could work against greater involvement in company governance. This has been noted in the context of ‘say on pay’ advisory resolutions; in *Nair v Arturus Capital Ltd*,¹⁷¹ the Court observed that

[t]he knowledge by the members that a resolution was advisory only might influence their approach to the resolution and the care that they might be expected to give to the remuneration report that they were being asked to vote upon in a way that did not bind the company.¹⁷²

Finally, it is not possible to predict how much use would be made of a broad-based statutory mechanism. There is no comprehensive data about the usage of the advisory resolution mechanism in New Zealand, although a casual internet search suggests that shareholders do not ignore it.¹⁷³ One factor that will affect usage is the pattern of shareholding and the type of shareholders in a company. For example, where a company is closely held, or has one or more institutional shareholders, the practice may be to address concerns internally, outside the formal process of a general meeting. There is international evidence that institutional investors prefer to ‘engage in various forms of “soft” activism — exerting influence through private persuasion and public criticism.’¹⁷⁴ It is also likely that different types of shareholders will engage in different ways with the opportunity to propose advisory resolutions. As the *ACCR v CBA* litigation shows, shareholders with an interest in environmental, social, or governance issues will likely take advantage of this mechanism. Conversely, shareholders with short-term investment strategies would, presumably, have little interest in formal mechanisms for expressing their concerns, preferring to withdraw their investment instead. As a hypothesis,

¹⁷⁰ Ibid 371–2.

¹⁷¹ (2010) 78 ACSR 43 (Supreme Court of New South Wales).

¹⁷² Ibid 55 [40].

¹⁷³ See, eg, Tamsyn Parker, ‘Shareholders Demanding More Info’, *The New Zealand Herald* (online, 14 June 2017) <https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11875586>, archived at <<https://perma.cc/Q6KX-FT87>>.

¹⁷⁴ John C Coates IV, ‘Thirty Years of Evolution in the Roles of Institutional Investors in Corporate Governance’ in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar, 2015) 79, 84.

we could expect that shareholders with a long-term investment horizon, for whom the option of exiting the company is not viable, would be attracted to the additional option for the exercise of ‘voice’ that is presented by non-binding advisory resolutions.¹⁷⁵

Taking these caveats into account, the argument in this paper remains: introducing statutory authority for non-binding shareholder advisory resolutions would provide the necessary legal clarity to a mechanism that allows for visible and responsible shareholder engagement.

¹⁷⁵ Thanks to Paul Redmond for suggesting this point.