

AN ANALYSIS OF ESG SHAREHOLDER RESOLUTIONS IN AUSTRALIA

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This article analyses the recent significant increase in number, prominence and impact of shareholder resolutions focused on environmental, social and governance ('ESG') issues in Australia. The analysis is placed in the context of the legal framework for shareholder resolutions and uses two sources of data: information about shareholder ESG resolutions in listed companies between 2002 and 2019, and interviews with representatives of resolution proponents, institutional shareholders, company directors, governance professionals, and the Australian Securities and Investments Commission. It finds a significant increase in the last three years in ESG shareholder resolutions, particularly climate change resolutions, concentrated in a small number of filers, companies and industries. Against a background of modest average levels of support for shareholder ESG resolutions, examples of companies which have recorded high levels of support are notable. Shareholder ESG resolutions are generally recognised as a valuable corporate stakeholder engagement mechanism, producing positive change in some companies.

I INTRODUCTION

On 30 April 2020, for the first time in Australia, more than 50% of the shareholders of a listed public company voted in support of a climate change resolution put forward by shareholders in the face of opposition from the company's board of directors.¹ The resolution, advanced at Woodside Petroleum Limited ('Woodside'), called for the company to establish hard targets to bring its

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1 Nick Toscano, 'Woodside Warns Renewables "Lack Scale" as Rivals Turn Green Leaf', *The Sydney Morning Herald* (online, 1 May 2020) <<https://www.smh.com.au/business/companies/woodside-warns-renewables-lack-scale-as-rivals-turn-green-leaf-20200501-p54p2u.html>>. For the *Paris Agreement*, see Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015: Addendum*, Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (20 January 2016) annex ('*Paris Agreement*').

own emissions, and the emissions caused by the use of its products globally, in line with the *Paris Agreement* to keep global warming below two degrees.² While this vote has been described as ‘a breakthrough moment [in] investor action [for] climate change in Australia’,³ more broadly it reflects a significant recent increase in shareholder activism around environmental, social and governance (‘ESG’) issues within listed companies in Australia.⁴

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- 2 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1 (n 1) art 2.1(a). The 2020 Woodside shareholder resolutions are discussed further below: see below n 93 and accompanying text.
- 3 Dan Gocher, Director of Climate and Environment, Australasian Centre for Corporate Responsibility (‘ACCR’), quoted in Australasian Centre for Corporate Responsibility, ‘Woodside Shareholders Slam Climate Inaction’ (Media Release, 30 April 2020) <<https://www.accr.org.au/news/woodside-shareholders-slam-climate-inaction/>>.
- 4 See Ruth Williams, ‘How the New Generation of Activists Corners Boards’, *The Sydney Morning Herald* (online, 14 October 2017) <<https://www.smh.com.au/business/markets/shareholder-resolutions-saving-the-world-or-wasting-everyones-time-20171012-gz0115.html>>. For more recent examples, see Cole Latimer, ‘Gas Companies Defend Climate Actions, Defy Shareholder Activists’ Push’, *The Sydney Morning Herald* (online, 2 May 2019) <<https://www.smh.com.au/business/companies/santos-defends-climate-actions-defying-shareholder-activists-push-20190502-p51je0.html>>; Peter Ker, ‘BHP Emissions Target Proposal Sees Off Shareholder Resolution’, *The Australian Financial Review* (Sydney, 12 September 2019) 23; Matthew Stevens, ‘Climate Response Suits Coal Miners’, *The Australian Financial Review* (Sydney, 12 September 2019) 32; Angela Macdonald-Smith, ‘AGL Wedged between Activists and Government on Coal Power’, *The Australian Financial Review* (online, 15 September 2019) <<https://www.afr.com/policy/energy-and-climate/proxy-adviser-adds-clout-to-emissions-pressure-on-agl-20190913-p52r18>>; Angela Macdonald-Smith, ‘Paris Climate Goals “Not Binding on Companies”: AGL’, *The Australian Financial Review* (online, 19 September 2019) <<https://www.afr.com/companies/energy/paris-climate-goals-not-binding-on-companies-agl-20190919-p52t26>>; Pery Williams, ‘AGL Opts to Hold On to Coal Plants’, *The Australian* (online, 20 September 2019) <<https://www.theaustralian.com.au/business/mining-energy/agl-opts-to-hold-on-to-coal-plants/news-story/6badace282439e0704bbb29f1dbb0da9>>; Aaron Patrick, ‘Eco-Activists Target Banks on Climate’, *The Australian Financial Review* (online, 26 September 2019) <<https://www.afr.com/wealth/investing/eco-activists-target-banks-on-climate-20190924-p52uh7>>; Aaron Patrick, ‘How Activists Pushed CBA Out of Coal in Five Years’, *The Australian Financial Review* (online, 26 September 2019) <<https://www.afr.com/companies/financial-services/how-activists-pushed-cba-out-of-coal-in-five-years-20190925-p52upw>>; Angela Macdonald-Smith, ‘Origin Rejects Activist Claims It Is Out of Step on Climate Goals’, *The Australian Financial Review* (online, 26 September 2019) <<https://www.afr.com/companies/energy/origin-beefs-up-rejection-of-activist-resolutions-20190926-p52v47>>; Brad Thompson, ‘Market Forces Maintains the Rage against Rio Tinto’, *The Australian Financial Review* (online, 26 September 2019) <<https://www.afr.com/companies/mining/market-forces-maintains-the-rage-against-rio-tinto-20190926-p52v5e>>; Nick Toscano, ‘From Barricades to Boardrooms: The Climate Activists Targeting Corporate Australia’, *The Sydney Morning Herald* (online, 12 October 2019) <<https://www.smh.com.au/business/the-economy/from-barricades-to-boardrooms-the-climate-activists-targeting-corporate-australia-20191011-p52zpz.html>>; Nick Toscano, ‘Major Super Funds Push BHP to Cut Ties with Lobby Groups’, *The Age* (online, 7 November 2019) <<https://www.theage.com.au/business/companies/major-super-funds-push-bhp-to-cut-ties-with-lobby-groups-20191106-p5381b.html>>; James Fernyhough, ‘Big Investors Won’t Shut Up about Climate Change’, *The Australian Financial Review* (online, 6 January 2020) <<https://www.afr.com/companies/financial-services/big-investors-won-t-shut-up-about-climate-change-20191213-p53jo5>>; Michael Chandler, ‘Easy Does It: Shareholder Activism in Australia’ [2019–20] (Summer) *Listed@ASX* 38; Colin Kruger and Nick Toscano, ‘Qantas, Woodside Chairman Hits Out at Climate Activists Hijacking AGMs’, *The Age* (online, 3 March 2020) <<https://www.theage.com.au/business/companies/qantas-woodside-chairman-hits-out-at-climate-activists-hijacking-agms-20200303-p546cj.html>>; Charlotte Grieve, ‘How the Global Fossil Fuel Divestment Push Is Testing Australia’s Resolve’, *The Age* (online, 7 March 2020) <<https://www.theage.com.au/business/banking-and-finance/how-the-global-fossil-fuel-divestment-push-is-testing-australia-s-resolve-20200305-p5475t.html>>.

This form of activism – shareholders proposing resolutions about ESG issues for consideration at the annual general meetings of companies – has increased in terms of number, prominence and impact. Indeed, the recent Australian experience of ESG-related resolutions proposed by shareholders dwarfs previous experience in the last 20 years.⁵ This recent shareholder activism has principally been concerned with environmental issues.

To an extent, what is happening in Australia reflects developments that are taking place in other jurisdictions, albeit that other jurisdictions have different regulatory environments and traditions of investor activism.⁶ The purpose of this article is to describe the recent Australian experience of ESG shareholder activism and to analyse that experience.

We draw upon two sources of data for the analysis. First, we obtained information about shareholder ESG resolutions proposed in listed Australian

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- 5 For analyses of previous shareholder resolutions involving Australian listed companies, see 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; Kirsten Anderson and Ian Ramsay, ‘From the Picket Line to the Board Room: Union Shareholder Activism in Australia’ (2006) 24(5) *Company and Securities Law Journal* 279; Kirsten Anderson et al, ‘Union Shareholder Activism in the Context of Declining Labour Law Protection: Four Australian Case Studies’ (2007) 15(1) *Corporate Governance: An International Review* 45. See also Ben Jacobsen and Howard Pender, ‘The Controversy Continues: The Case for Regulatory Reform on Members’ Resolutions in Australia’ (2016) 34(4) *Company and Securities Law Journal* 292, 299–303; Jason Harris, ‘Barbarians at the Gate? Activist Investors and s 249N of the *Corporations Act 2001 (Cth)*’ (2016) 34(2) *Company and Securities Law Journal* 151. For an analysis of shareholder resolutions in the 10 years prior to 1998, see Samuel B Graves, Kathleen Rehbein and Sandra Waddock, ‘Fad and Fashion in Shareholder Activism: The Landscape of Shareholder Resolutions, 1988–1998’ (2001) 106(4) *Business and Society Review* 293.
- 6 See, eg, Jody Grewal, George Serafeim and Aaron Yoon, ‘Shareholder Activism on Sustainability Issues’ (Working Paper No 17-003, Harvard Business School, July 2016) 4 <<https://dash.harvard.edu/handle/1/278643660>>; Maximillian Horster and Kosmas Papadopoulos, ‘Climate Change and Proxy Voting in the US and Europe’, *Harvard Law School Forum on Corporate Governance* (Forum Post, 7 January 2019) <<https://corpgov.law.harvard.edu/2019/01/07/climate-change-and-proxy-voting-in-the-u-s-and-europe/>>; ‘Oil Majors Face Shareholder Resolutions on Climate Change’, *The Economist* (online, 30 May 2019) <<https://www.economist.com/business/2019/05/30/oil-majors-face-shareholder-resolutions-on-climate-change>>; Robert G Eccles and Svetlana Klimenko, ‘The Investor Revolution: Shareholders and Getting Serious about Sustainability’ [2019] (May–June) *Harvard Business Review* 106 <<https://hbr.org/2019/05/the-investor-revolution>>; Fraser Tennant, ‘Activism in the ESG Sphere’, *Financier Worldwide* (August 2019) <<https://www.financierworldwide.com/activism-in-the-esg-sphere#.XkXsEC17HXQ>>; Caroline Le Couteur and Howard Pender, ‘Shareholder Resolutions on ESG Issues at Listed Public Companies: Comparative Practice in Australia, the US & the UK’ (Research Paper, Australasian Centre for Corporate Responsibility, November 2015) <https://d3n8a8pro7vhm.cloudfront.net/accr/pages/521/attachments/original/1446421161/ACCR_comp_res_practice_final-1.pdf?1446421161>. The United States (‘US’) has experienced between 300 and 500 ESG shareholder resolutions between 2014 and 2017: Elisabeth Losasso and Adrian Dellecker, ‘Shareholder Activism: Standing Up for Sustainability?’ (Report, Luc Hoffmann Institute, 2018) 10 <<https://luchoffmanninstitute.org/wp-content/uploads/2018/04/Shareholder-activism-report-.pdf>>. In the US in 2019, nearly 400 shareholder resolutions were filed on a broad range of environmental, social and governance (‘ESG’) issues: Fran Teplitz, ‘Own Stocks? You Have Proxy Power!’, *Green America* (Blog Post, 3 April 2019) <<https://www.greenamerica.org/blog/own-stocks-you-have-proxy-power>>; As You Sow, ‘Proxy Review 2019’ (Blog Post, 19 March 2019) <<https://www.asyousow.org/reports/proxy-preview-2019>>.

companies between 2002 and 2019.⁷ Second, we conducted interviews with representatives of six organisations to obtain their views on these resolutions, including those who have proposed the resolutions, organisations representing institutional shareholders and company directors, and the Australian Securities and Investments Commission ('ASIC').

Our analysis finds a significant increase in the last three years in shareholder activism through shareholder resolutions. Between 2002 and 2019, 83 shareholder ESG resolutions were proposed, of which 66 (80%) were advanced in the three years between 2017 and 2019. Moreover, this increase has been concentrated in a small number of companies and industries – only 23 companies operating in only nine industries, with most companies concentrated within only four industries and some companies receiving multiple resolutions. The source of this activism is even more concentrated: the 83 resolutions were filed by only six proponents, with every resolution since 2015 (69 resolutions) being filed by one of only three filers. While the principal subject matter of shareholder ESG resolutions has been climate change, the level of support typically gathered by all types of shareholder ESG resolutions has been small in percentage terms, barely rising above single figures. This support may be increasing over time, although, at this stage, there is insufficient information available to reach definitive conclusions on this. Against the background of modest average levels of support for shareholder ESG resolutions, the atypical cases of a number of companies which have recorded high levels of support is notable.

For reasons that are explained below, substantive resolutions concerning issues such as climate change are typically advanced together with a resolution proposing an amendment to the company's constitution to give shareholders a power to pass advisory resolutions. This allows shareholders to express a view about how they wish the company to manage particular issues. One interesting observation that this process has exposed is that shareholders have little apparent interest in assuming a greater level of democratic authority in Australian listed companies by giving themselves a constitutional power to pass advisory resolutions. These proposals have attracted a lower level of support than the substantive resolutions they facilitate.⁸

Finally, it is observed that the proponents of the shareholder ESG resolutions are able to make progress towards achieving their objectives even if the resolution is not passed by a majority of shareholders, or even if the resolution is withdrawn before the meeting of shareholders at which it was to be considered. There is evidence that some companies respond positively to ESG resolutions, and evidence that some resolutions are withdrawn on the basis of agreements or other actions acceptable to the proponents.

7 Although we obtained information about ESG resolutions up to the end of 2019 for the purpose of our detailed analysis reported in Part III of this article, where appropriate, we have referred to several shareholder resolutions that were voted on by shareholders at annual general meetings in 2020.

8 See discussion in Part III(F)(2).

II LEGAL FRAMEWORK

Management powers within Australian companies are typically vested exclusively in the directors. A company's constitution will provide that it is the directors who have the responsibility of ensuring that the company is properly managed.⁹ Courts have interpreted this directors' power of management to be beyond the control of shareholders, so that directors may exercise their management power even where this is against the wishes of shareholders.¹⁰ Indeed, unless a company's constitution permits it, shareholders have no power to even pass a resolution expressing an opinion on the board's exercise of powers that are vested exclusively in the board.¹¹

The balance of power between directors and shareholders is subject to, and can be altered by amendment of, the company's constitution. For example, shareholders may amend the company's constitution to allow the shareholders to undertake actions that would otherwise be undertaken by directors, or to allow shareholders to pass a resolution expressing an opinion on the board's exercise of powers that are vested exclusively in the board.¹²

In relation to shareholders' resolutions, the *Corporations Act 2001* (Cth) ('*Corporations Act*') gives shareholders a right to propose resolutions for consideration at company annual general meetings ('AGMs') and at extraordinary general meetings ('EGMs').¹³ This right to propose resolutions includes the right to propose amendments to the company's constitution.¹⁴ However, unlike ordinary resolutions which are carried by majority of votes cast by those entitled to vote and who vote on the resolution, amendments to a company's constitution require a special majority of 75% of shareholders entitled to vote and who vote on the resolution.¹⁵

Nevertheless, a resolution proposed by shareholders to amend a company's constitution to allow shareholders to decide a matter that would otherwise be decided

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- 9 The replaceable rule in section 198A(1) of the *Corporations Act 2001* (Cth) ('*Corporations Act*') provides that 'the business of a company is to be managed by or under the direction of the directors'. The replaceable rule in section 198A(2) provides that 'the directors may exercise all [of] the powers of the company except ... powers that [the *Corporations Act*] or the company's constitution ... [require] the company to exercise in general meeting'. The constitutions of many companies contain a provision identical to that in section 198A(2) or a provision to similar effect: see Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 250–2 [7.090]–[7.091].
- 10 *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34, 42–3 (Collins MR), 45 (Hardy LJ); *Quin & Axtens Ltd v Salmon* [1909] AC 442, 443–4 (Lord Loreburn LC). In particular, see *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 837 (Lord Wilberforce for the Privy Council): '[D]irectors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed ... the majority of shareholders cannot control them in the exercise of these power while they remain in office'.
- 11 *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280, 290 [37], 293 [60] (the Court).
- 12 Austin and Ramsay (n 9) 256–8 [7.123].
- 13 *Corporations Act 2001* (Cth) s 249N.
- 14 *Ibid* ss 136(2), 249N.
- 15 *Corporations Act 2001* (Cth) ss 9 (definition of 'special resolution' para (a)), 136(2).

by directors will not be valid if the *Corporations Act* vests the decision-making power in relation to that matter in the board of directors.¹⁶ So, while shareholders:

- have a statutory power to requisition a meeting of shareholders provided these shareholders have at least 5% of the votes that may be cast at the general meeting;¹⁷ and
- have a statutory power to require that a resolution be put to a meeting of shareholders provided these shareholders have at least 5% of the votes that may be cast on the resolution, or the resolution is proposed by at least 100 shareholders who are entitled to vote at a general meeting,¹⁸

these powers cannot be exercised in relation to a matter that is exclusively vested by the *Corporations Act* in the directors.¹⁹

The extent of the directors' exclusive power of management directly impacts the ability of shareholders to propose ESG resolutions. The limitations imposed by the application of these principles operate to severely proscribe the capacity of shareholders to propose or pass resolutions dealing with ESG matters. In the typical company in which management responsibility is the exclusive preserve of the directors, a shareholder who seeks to have the company implement changes to its practices relating to greenhouse gas emissions by proposing a resolution to adopt these changes at the company's AGM will face the hurdle that the directors can refuse to place this resolution on the agenda for the AGM, on the basis that the company's practices relating to greenhouse gas emissions are a management matter that is the responsibility of the directors.

However, drawing upon the principle that the balance of power between directors and shareholders is subject to the company's constitution, and can be altered by amendment of the constitution, in some cases shareholders have pursued proposals to amend the company constitution so that it expressly requires the company to act in a certain way. For example, a proposed amendment may, if passed, require the company to report on its emissions management practices,²⁰ or prepare a business model demonstrating diversification of its power generation and supply activities consistent with achieving a climate change objective,²¹ or require

16 *Re Molopo Energy Ltd* (2014) 294 FLR 13, 29 [81]–[83] (White J), citing *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517, 522 (McLelland J) ('*NRMA v Parker*').

17 *Corporations Act 2001* (Cth) ss 249D, 249F.

18 *Ibid* s 249N.

19 *NRMA v Parker* (1986) 6 NSWLR 517, 522 (McLelland J). See also *Dhami v Martin* (2010) 241 FLR 165, 168 [9] (Barrett J); *Re Molopo Energy Ltd* (2014) 294 FLR 13, 29 [81] (White J).

20 'Notice of Annual General Meeting 2015', *Origin Energy Limited* (Web Page, 18 September 2015) 2 <<https://www.originenergy.com.au/content/dam/origin/about/investors-media/documents/agm-notice-of-meeting-2015.pdf>> ('Origin Notice of 2015 AGM'); Commonwealth Bank of Australia, 'Notice of Meeting: 2014 Annual General Meeting' (Media Release, 15 September 2014) 4–5 <https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/agms/cba_2014_nom.pdf> ('CBA Notice of 2014 AGM').

21 AGL Energy Limited, '2015 Annual General Meeting: Notice of Meeting' (Media Release, 26 August 2015) 7 <<https://www.agl.com.au/-/media/aglmedia/documents/about-agl/investors/annual-general-meeting/2015/2015-notice-of-meeting.pdf?la=en&hash=17EF9C801CA7ACDC4AD4A00762D9F004>> ('AGL Notice of 2015 AGM'). See also Australia and New Zealand Banking Group Limited, 'ANZ Notice of Meeting: 2014 Annual General Meeting' (Media Release, 17 November 2014) 10–11 <https://www.anz.com/content/dam/anzcom/shareholder/anz7380_notice_of_meeting_2014_web.pdf> ('ANZ

the directors to ensure that the business of the company is managed in a manner that is consistent with achieving a specified climate change objective.²²

In other cases, shareholders have proposed resolutions for consideration at AGMs that express the opinion of shareholders on the board's exercise of powers relating to ESG issues. These are advisory resolutions rather than binding resolutions of the type referred to in the preceding paragraph. Because shareholders have no power to pass an advisory resolution where the resolution relates to the exercise of powers vested exclusively in the board, unless this is permitted by the company's constitution, shareholders have adopted a strategy involving two resolutions.

The first resolution is a proposal to amend the company's constitution to allow for shareholders to pass advisory resolutions. This constitutional amendment provides the vehicle for additional advisory resolutions dealing with ESG matters to be proposed for consideration at the same shareholders' meeting, albeit that these advisory resolutions are contingent upon the constitutional amendment being passed.

Proposals for constitutional amendments allowing for advisory resolutions typically propose a provision to the effect that the '[c]ompany in general meeting may by ordinary resolution express an opinion or request information about the way in which a power of the [c]ompany partially or exclusively vested in the [d]irectors has been or should be exercised'.²³ The resolutions are 'advisory' in the sense that they do not bind the directors or the company and this is usually made explicit in the terms of the amendment.

Pursuant to this form of constitutional amendment, the contingent, advisory resolutions may be framed in terms of a request for the company to, for example, disclose its climate change strategies in the company's annual reports.²⁴ The advisory resolution may also be phrased in terms of a recommendation: for example, that the company suspend its membership of lobby groups that have advocated climate

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- Notice of 2014 AGM'); Woodside Petroleum Limited, 'Notice of 2011 Annual General Meeting' (Media Release, 18 March 2011) 1 <<https://www.asx.com.au/asxpdf/20110318/pdf/41xjnjj0t3fzqd.pdf>> ('Woodside Notice of 2011 AGM'); Commonwealth Bank of Australia, 'Notice of Meeting 2003' (Media Release, 12 September 2003) 12 <https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/agms/2003_AGM_notice_of_meeting.pdf> ('CBA Notice of 2003 AGM').
- 22 Downer EDI Limited, 'Notice of Annual General Meeting 2017' (Media Release, 28 September 2017) 3 <http://member.afraccess.com/media?id=CMN:2A1038950&filename=20170928/DOW_01900994.pdf> ('Downer Notice of 2017 AGM'); Commonwealth Bank of Australia, 'Notice of 2017 Annual General Meeting' (Media Release, 18 September 2017) 12 <<https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/2017-asx/2017-notice-of-meeting.pdf>> ('CBA Notice of 2017 AGM').
- 23 National Australia Bank, '2019 Notice of Annual General Meeting' (Media Release, 15 November 2019) 15 <<https://www.nab.com.au/content/dam/nabrwd/documents/reports/financial/nab-2019-notice-of-annual-general-meeting.pdf>> ('NAB Notice of 2019 AGM'). See also Origin Energy Limited, 'Notice of Annual General Meeting 2018' (Media Release, 14 September 2018) 3 <https://www.originenergy.com.au/content/dam/origin/about/investors-media/documents/Origin_2018_Notice_of_Meeting.pdf> ('Origin Notice of 2018 AGM'): 'The shareholders in general meeting may by ordinary resolution express an opinion, ask for information, or make a request, about the way in which a power of the company partially or exclusively vested in the directors has been or should be exercised'.
- 24 See, eg, National Australia Bank, 'NAB Notice of 2019 AGM' (n 23) 15: 'Shareholders request the company disclose in annual reporting from 2020 strategies and targets to reduce exposure to fossil fuel ...'.

policies inconsistent with those of the company, or urged the company to apply a specified practice.²⁵

This strategy has recently been utilised in Australia to enable ESG issues to be agitated at shareholders' meetings. While in all cases so far the initial proposals to amend companies' constitutions have failed, and therefore the contingent ESG advisory resolutions need not have been put to the meeting, the proxy voting information required to be disclosed by companies allows us to know the level of support attracted by the ESG resolutions.²⁶

III THE AUSTRALIAN EXPERIENCE

A Methodology

Data relating to shareholder ESG resolutions proposed in listed Australian companies between 2002 and 2019 was principally obtained from information published by the Australasian Centre for Corporate Responsibility ('ACCR') on the history of shareholder ESG resolutions.²⁷ Other data was obtained from the websites of companies and from the Australian Securities Exchange ('ASX') website. This data allowed us to examine the number of shareholder ESG resolutions per year, the companies and industries in which those resolutions have been advanced, who has filed the resolutions, the subject matter of the resolutions, and the level of support secured for the resolutions.

We also conducted interviews with representatives of six organisations to obtain their views on these resolutions. These organisations included those who have proposed the resolutions,²⁸ an organisation representing institutional shareholders,²⁹ a professional association representing company directors,³⁰ a

25 While expressed to be contingent, the advisory nature of some resolutions is not always obvious: see, eg, Origin Energy Limited, 'Origin Notice of 2018 AGM' (n 23) 3, which resolved that the board commission a review, prepare a report, and set and publish targets.

26 Section 251AA of the *Corporations Act 2001* (Cth) requires the recording and disclosure of proxy votes.

27 'Australian ESG Shareholder Resolutions', ACCR (Web Page) <<https://accr.org.au/shareholder-action/resolution-voting-history/>>. All but one of the ESG resolutions categorised by ACCR as 'governance' resolutions involved proposals to amend company constitutions to allow shareholders to advance advisory resolutions. The exception was a 2003 resolution in the company Boral, which was to allow Global Reporting Initiative ('GRI') style reporting with the company's annual report. In this respect, Australia has not experienced the same level of shareholder governance resolutions relating to executive remuneration and board gender diversity as has been experienced in the US: see, eg, Matteo Tonello, 'Shareholder Voting in the United States: Trends and Statistics on the 2015–2018 Proxy Season', *Harvard Law School Forum on Corporate Governance* (Forum Post, 26 November 2018) <<https://corpgov.law.harvard.edu/2018/11/26/shareholder-voting-in-the-united-states-trends-and-statistics-on-the-2015-2018-proxy-season/>>; Yonca Ertimur, Fabrizio Ferri and Volkan Muslu, 'Shareholder Activism and CEO Pay' (2011) 24(2) *Review of Financial Studies* 535, 536; John Dobson, Denise Hensley and Mahdi Rastad, 'Toward Gender Diversity on Corporate Boards: Evaluating Government Quotas (EU) Versus Shareholder Resolutions (US) from the Perspective of Third Wave Feminism' (2018) 17(3) *Philosophy of Management* 333, 340.

28 Market Forces and ACCR: see below nn 38, 114–15.

29 The Australian Council of Superannuation Investors ('ACSI'): see below n 116.

30 The Australian Institute of Company Directors ('AICD'): see below n 117.

professional association concerned with corporate governance,³¹ and Australia's corporate regulator.³²

B Number of Shareholder ESG Resolutions per Year

The number of shareholder ESG resolutions filed with ASX listed companies per year is shown in Table 1. While one ESG resolution was proposed as early as 2002, the number of shareholder ESG resolutions advanced each year did not rise above merely insignificant levels until 2014,³³ with a further significant increase occurring from 2017. In total, there were 83 ESG resolutions between 2002 and 2019.³⁴ However, 66 of these 83 shareholder ESG resolutions (80%) were advanced in the three years between 2017 and 2019.

31 The Governance Institute of Australia ('GIA'): see below n 118.

32 The Australian Securities and Investments Commission ('ASIC'): see below n 119.

33 In 2015, ACCR described the activity in 2014 as 'very unusual' in comparison with the previous decade: Le Couteur and Pender (n 6). That very unusual year pales in comparison with the activity in the last three years.

34 Eight resolutions were withdrawn between 2002 and 2019: Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions' (n 27). Shareholder voting by proxy on withdrawn governance and human rights resolutions at Woolworths Limited was recorded, notwithstanding their withdrawal: see Woolworths Limited, '2017 Notice of Annual General Meeting' (Media Release, 20 October 2017) <<https://www.woolworthsgroup.com.au/content/Document/ASX%20announcements/2017/2017.10.20%20Woolworths%20Group%20Notice%20of%20Meeting%202017.pdf>> ('Woolworths Notice of 2017 AGM'). On these eight withdrawn resolutions, see below nn 104–9 and accompanying text. The proxy votes for one other resolution were not disclosed – a climate change resolution at Australia and New Zealand Banking Group Ltd ('ANZ'): see Australia and New Zealand Banking Group Ltd, 'ANZ Notice of Meeting: 2015 Annual General Meeting' (Media Release, 16 November 2015) 5 <https://www.anz.com/content/dam/anzcom/shareholder/2015_notice_of_meeting_1.pdf> ('ANZ Notice of 2015 AGM'). Three other resolutions were also not considered (ie, climate change resolutions) at Aquila Resources Limited and Paladin Energy Limited in 2010, and at ANZ in 2011: see Aquila Resources Limited, 'Notice of Annual General Meeting, Explanatory Statement and Proxy Form' (Media Release, 28 October 2010) <<https://www.asx.com.au/asxpdf/20101028/pdf/31t9hf9ksb8bd.pdf>> ('Aquila Resources Notice of 2010 AGM'); Paladin Energy Limited, 'Notice of Annual General Meeting, Proxy Form and Management Information Circular' (Media Release, 11 October 2010) <<https://www.asx.com.au/asxpdf/20101022/pdf/31t9pj51n38stt.pdf>> ('Paladin Energy Notice of 2010 AGM'). The resolutions at Aquila Resources Limited and Paladin Energy Limited were not put to the shareholders' meetings on the ground that the resolutions were management and not shareholder business: see Aquila Resources Limited, 'Aquila Resources Notice of 2010 AGM' (n 34); The Climate Institute, 'Shareholder Climate Change Resolutions Rejected' (Media Release, 5 November 2010), archived at <<https://web.archive.org/web/20180314052259/http://climateinstitute.org.au/articles/media-releases/shareholder-climate-change-resolutions-rejected.html>>. The reason why the 2011 ANZ resolution was not considered was not available.

Table 1: Shareholder ESG Resolutions per Year

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of Resolutions	1	3	0	0	0	0	0	0	2
Number of Withdrawn Resolutions	0	0	0	0	0	0	0	0	0
Number of Companies	1	3	0	0	0	0	0	0	2
Year	2011	2012	2013	2014	2015	2016	2017	2018	2019
Number of Resolutions	3	1	0	3	4	0	14	20	32
Number of Withdrawn Resolutions	1	0	0	0	0	0	3	2	2
Number of Companies	3	1	0	3	3	0	7	9	12

The relative increase in activity experienced between 2017 and 2019 is best illustrated by Figure 1, which indicates not only an increase in the number of companies facing shareholder ESG resolutions, but also an increase in the number of resolutions directed at those companies.

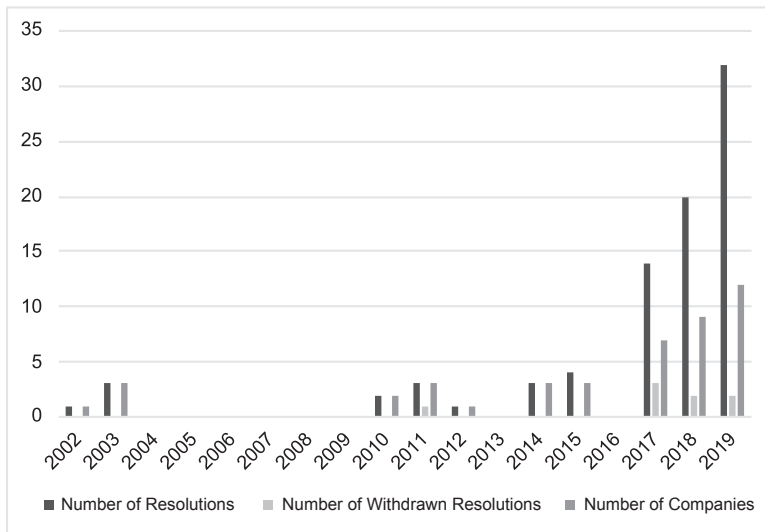


Figure 1: ESG Resolutions 2002–19

C Shareholder ESG Resolutions by Company

While there were 83 ESG resolutions between 2002 and 2019, as shown in Table 2, these resolutions were concentrated within only 24 companies.

Thirteen of the 24 companies were subjected to campaigns in more than one year, with most of these representing ongoing campaigns over the same issues. The company Origin Energy Limited ('Origin') stands out, having attracted 15 resolutions in four separate years. Australia and New Zealand Banking Group Limited ('ANZ') attracted seven resolutions over four different years, and Woolworths Group Limited ('Woolworths') and Santos Limited ('Santos') both attracted five resolutions over three different years.³⁵ Apart from these four companies, Rio Tinto Limited ('Rio Tinto') was the target of five resolutions in two years, with none of the other companies that attracted multi-year campaigns attracting more than four resolutions in the period examined.³⁶

Prior to 2017, no more than three companies received ESG resolutions from shareholders in any one year. No companies received ESG resolutions in 2016, but in 2017, ESG resolutions were proposed in seven companies, increasing to nine companies in 2018 and then 12 companies in 2019. Activity in 2019, in fact, extended beyond 12 companies. In addition, ESG resolutions were proposed in relation to the Commonwealth Bank of Australia ('CBA') but were withdrawn following agreement between the proponent and the bank.³⁷ Two other companies, Santos and Woodside, also received shareholder ESG resolutions in 2019, but declined to put the resolutions to their shareholders on the basis that they did not meet the requirements of the *Corporations Act* and were therefore invalid.³⁸

The attempts to have ESG resolutions considered by these companies continued, with further resolutions proposed in 2020.³⁹

35 Santos Limited also attracted three further resolutions in 2019, which it refused to put to shareholders: see below n 38.

36 The total for the Commonwealth Bank of Australia ('CBA') would also be five resolutions if the two resolutions received by the company in 2019 but subsequently withdrawn were included: see *ibid*.

37 Market Forces, 'Three Major Banks Face Shareholder Resolutions on Climate Action' (Media Release, 10 October 2019) <<https://www.marketforces.org.au/media-release-three-major-banks-face-shareholder-resolutions-on-climate-action/>>.

38 These resolutions filed by ACCR are not included in the table. The two substantive resolutions filed in respect of each company were identical, one calling on the companies to disclose their strategies to reduce their emissions in line with the *Paris Agreement* and the other calling on the companies to review their membership of industry associations. A third resolution was also filed with each company proposing amendments to the companies' constitutions to allow for shareholders to pass advisory resolutions and thereby permitting the substantive resolutions to be put forward. The companies declined to put the resolutions to meetings on the basis that the 'requisition notice received [did] not meet the requirements for requisitioned resolutions under the [*Corporations Act*]', although the defect in the resolutions was not disclosed: 'Resolutions under Section 249N of the *Corporations Act* at AGM', Santos (Web Page, 4 March 2019) <<https://www.santos.com/news/resolutions-under-section-249n-of-the-corporations-act-at-agm/>>. ACCR advised that there was a technical defect in the form of an incorrect date in the agency appointment forms used by the organisation: Interview with Brynn O'Brien, Executive Officer, ACCR (Ian Ramsay and Lloyd Freeburn, 13 May 2020) pt 2, 11. On these resolutions, see Australasian Centre for Corporate Responsibility, 'ACCR Files Shareholder Resolutions to Santos and Woodside' (Media Release, 1 March 2019) <<https://accr.org.au/2019/03/01/accr-files-shareholder-resolutions-to-santos-and-woodside/>>; King & Wood Mallesons, 'Deep Dive into ASX 200 AGMs in 2019' (Report, 28 February 2020) 10 <<https://www.kwm.com/~media/library/Files/Knowledge/Downloads/au/2020/asx-200-agm-report-v2.ashx?la=en>>.

39 See 'Resolutions under Section 249N of the *Corporations Act*', Santos (Web Page, 30 January 2020) <<https://www.santos.com/news/resolutions-under-section-249n-of-the-corporations-act-3/>>; Nick Toscano, 'Santos Investors to Turn Up Heat on Climate Change Targets', *The Age* (online, 1 April 2020) <<https://www.theage.com.au/business/companies/santos-investors-to-turn-up-heat-on-climate-change->

Table 2: Shareholder ESG Resolutions by Company

Company	Industry	ESG Resolutions		ESG Resolutions Withdrawn
		Year	Number	Number
AGL	Utilities	2019	3	0
		2015	1	0
ANZ	Banking	2019	3	0
		2015	2	0
		2014	1	0
		2011	1	0
Aquila Resources	Energy	2010	1	0
BHP	Materials	2019	2	0
		2017	2	0
Boral	Materials	2003	1	0
CBA ⁴⁰	Banking	2017	1	0
		2014	1	0
		2003	1	0
Coles	Food and Staples Retailing	2019	2	0
Downer/EDI	Commercial and Professional Services	2017	1	0
Gunns	Timber Production	2003	1	0
IAG	Insurance	2019	2	0
NAB	Banking	2019	3	0
		2002	1	0
Oil Search ⁴¹	Energy	2017	2	1
		2011	1	1

targets-20200331-p54fii.html>; Woodside Petroleum Limited, ‘Resolutions under Section 249N of the Corporations Act’ (Media Release, 27 February 2020) <<https://hotcopper.com.au/threads/ann-resolutions-under-section-249n-of-the-corporations-act.5253262/>>.

40 In 2019, CBA reached an agreement with the proponent of a proposed ESG resolution which avoided that resolution being formally filed: see above nn 36–7. This proposed resolution is not included in the table.

41 Oil Search Limited is listed on the ASX. However, it is registered in Papua New Guinea: see ‘Oil Search Limited’, ASX (Web Page) <<https://www2.asx.com.au/markets/company/OSH>>.

Origin	Energy	2019	6	1
		2018	4	0
		2017	4	0
		2015	1	0
Paladin	Energy	2010	1	0
Qantas	Transportation	2019	2	0
		2018	2	0
QBE	Insurance	2019	2	0
		2018	2	0
Rio Tinto	Materials	2019	3	1
		2018	2	0
Santos ⁴²	Energy	2018	2	0
		2017	2	0
		2014	1	0
Suncorp	Insurance	2019	2	0
Wagners Holding Company	Materials	2018	1	0
Westpac	Banking	2019	2	0
		2018	2	2
Whitehaven	Energy	2018	3	0
Woodside ⁴³	Energy	2011	1	0
Woolworths	Food and Staples Retailing	2018	2	0
		2017	2	2
		2012	1	0

D Shareholder Resolutions by Industry

A further concentration in this shareholder ESG activity may be observed in that, as shown in Table 3, the 24 companies in which shareholders advanced ESG resolutions were confined to only nine industries.⁴⁴ Four industries (Energy, Banking, Insurance and Materials) accounted for 66 of the 83 resolutions (80%).

42 In 2019, Santos declined to put an ESG shareholder resolution to its annual general meeting ('AGM'): see above n 38 and accompanying text. This resolution is not included in the table.

43 In 2019, Woodside declined to put an ESG shareholder resolution to its AGM: see above n 38 and accompanying text. This resolution is not included in the table.

44 ASX Global Industry Classification Standard industry groups.

Table 3: Resolutions by Industry

	Industry	Number of Resolutions	Number of Resolutions Withdrawn
1	Banking	18	2
2	Commercial and Professional Services	1	0
3	Energy	29	3
4	Food and Staples Retailing	7	2
5	Insurance	8	0
6	Materials	11	1
7	Timber Production	1	0
8	Transportation	4	0
9	Utilities	4	0
	Total	83	8

E Shareholder ESG Resolution Proponents/Filers

Table 4 identifies the proponents of shareholder ESG resolutions. The pool of filers of the shareholder ESG resolutions in Australia is particularly concentrated. Not including co-filers, the 83 resolutions were filed by only seven proponents.⁴⁵ Even this statistic tends to overstate the position as, other than two resolutions filed by Galilee Blockade, every resolution since 2015 (70 resolutions) has been filed by one of only two filers – either ACCR or Market Forces.⁴⁶

However, six resolutions included institutional co-filers.⁴⁷

45 The filers of three early resolutions, each relating to deforestation, were unable to be identified: National Australia Bank Limited, ‘Notice of Annual General Meeting 2002’ (Notice, 18 November 2002) 2–3 <<https://www.asx.com.au/asxpdf/20021118/pdf/00330577.pdf>> (‘NAB Notice of 2002 AGM’); Commonwealth Bank of Australia, ‘CBA Notice of 2003 AGM’ (n 21) 10–12; Gunns Limited, ‘Notice of Extraordinary General Meeting’ (Notice, 29 August 2003) 3 <<https://www.asx.com.au/asxpdf/20030731/pdf/3hl0qk8cfrjx5.pdf>> (‘Gunns Notice of 2003 EGM’). Gunns Limited was a major forestry business operating in Tasmania that was placed into liquidation in March 2013. Where resolutions were filed by individuals on behalf of organisations, the organisation is treated as the filer.

46 ACCR is a member-based, not-for-profit organisation formed in 2012 whose objective is to further corporate democracy. It implements strategies aimed at improving listed companies’ performance in relation to ESG issues: ‘About Us’, ACCR (Web Page) <<https://www.accr.org.au/about/>>. Market Forces is an affiliate project of the organisation Friends of the Earth Australia that was formed in March 2013. It advocates environmentally sustainable behaviour from the finance world: see ‘About Us’, Market Forces (Web Page) <<https://www.marketforces.org.au/about-us/>>. The existence of another group, Climate Action 100+, also needs to be noted. Climate Action 100+ represents 400 investors with \$50 trillion under management and was launched in December 2017 with the aim of targeting the world’s top 100 carbon-emitting companies, including Australian companies BHP and Wesfarmers. It has not yet filed any shareholder proposals in Australia: see Fernyhough (n 4).

47 The resolutions with institutional co-filers were: (i) Coles Group Limited resolution regarding workers’ rights: Coles Group Limited, ‘2019 Notice of Annual General Meeting’ (Notice, 23 September 2019) 3–4

Table 4: Shareholder ESG Resolution Proponents

Filer	Number of Resolutions	Number of Resolutions Withdrawn
Australasian Centre for Corporate Responsibility	37	6
Market Forces	33	1
Ethinvest	1	0
GetUp	1	0
The Wilderness Society	1	0
Australian Ethical Investment ('AEI') ⁴⁸	4	1
Galilee Blockade ⁴⁹	2	0
Transport Workers Union ⁵⁰	1	0
N/A	3	0
Total	83	8

<<https://www.colesgroup.com.au/investors/?page=annual-general-meeting>> ('Coles Notice of 2019 AGM'), with co-filers LUCRF Super, St Columban's Mission and Mercy Investment Services; (ii) BHP resolution regarding climate change: BHP Group Limited, 'BHP Group Limited: Notice of Meeting 2019' (Media Release, 5 September 2019) 9 <https://www.bhp.com/-/media/documents/investors/annual-reports/2019/bhpnoticeofmeeting_ltd_2019.pdf?la=en> ('BHP Notice of 2019 Meeting'), with co-filers Church of England, Vision Super, MP Pension, ACTIAM and Grok Ventures; (iii) Qantas resolution regarding human rights: Qantas Airways Limited, 'Qantas Notice of Meeting 2019' (Media Release, 30 August 2019) 4 <https://investor.qantas.com/FormBuilder/_Resource/_module/doLLG5ufYkCyEPjF1tpgyw/file/agm/notice-of-meeting-2019.pdf> ('Qantas Notice of 2019 Meeting'), with co-filer Mercy Investment Services; (iv) Woolworths 2018 resolution regarding human rights: Woolworths Group Limited, '2018 Notice of Annual General Meeting' (Media Release, 8 October 2018) 4–5 <https://www.woolworthsgroup.com.au/icms_docs/195432_2018-notice-of-meeting.pdf> ('Woolworths Notice of 2018 AGM'), with co-filer LUCRF Super; (v) Rio Tinto 2018 resolution regarding political lobbying: Rio Tinto Limited, 'Addendum to 2018 Notice of Annual General Meeting: Resolutions Requisitioned by Members' (Media Release, 14 March 2018) <<https://www.asx.com.au/asxpdf/20180314/pdf/43sf7h344xgrbd.pdf>> ('Addendum to Rio Tinto Notice of 2018 AGM'), with co-filers Local Government Super, Church of England Pensions Board and Seventh Swedish National Pension Fund (AP7); and (vi) Woolworths Limited, 'Woolworths Notice of 2017 AGM' (n 34) resolution regarding human rights at 3, with co-filers LUCRF Super and National Union of Workers.

48 'AEI' is described as 'AIE' in the data published by ACCR.

49 The ACCR resolution voting history data lists the 2017 shareholder resolution in Downer EDI as being 'N/A': see Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions' (n 27). However, the proponent of the resolution appears to have been the group Galilee Blockade: 'Downer Refuses to Shed Any Light on Chinese Involvement in Adani Mine', *Market Forces* (Web Page, 2 November 2017) <<https://www.marketforces.org.au/downer-agm-2017/>>. Galilee Blockade is a group whose objective is to protect the Galilee Basin from coal and gas extraction, focusing on opposition to the Adani mine: see *Galilee Blockade* (Web Page) <<https://galileeblockade.net>>.

50 Again, the ACCR resolution voting history data lists the 2003 resolution proposed within Boral as 'N/A': Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions' (n 27). However, this resolution appears to have been filed by the Transport Workers Union: Anderson and Ramsay (n 5) 289–92.

While emanating from a smaller pool, the practice in Australia reflects that in the United States ('US') where resolutions are drawn from a particular set of shareholders.⁵¹

It is also noted that proponents of ESG resolutions in Australia have typically only held a small proportion of the total shares of the respective companies. While this factor has no bearing on the validity of the resolutions proposed, perhaps as an attack on the legitimacy of the resolutions, the relatively small shareholding of the filers of ESG resolutions is frequently noted by the directors of the companies when they recommend that shareholders vote against the resolutions.

F Subject Matter of Australian ESG Resolutions

1 ESG Issues

Of the 83 shareholder resolutions advanced in listed Australian companies between 2002 and 2019, 48 concerned climate change, as shown in Table 5. A further 26 resolutions, at least notionally, related to governance. The other resolutions related to workers' rights, human rights, free and informed consent, and gambling.

Table 5: Subject Matter of Resolutions

Resolution Subject Matter	Number of Resolutions
Climate change-related total	48
Climate change	40
Deforestation	3
Methane	2
Political lobbying	3
Governance	26
Workers' rights	1
Human rights	5
Free, prior and informed consent	2
Gambling	1

2 Governance Issues

In relation to the governance resolutions, 25 of those 26 governance resolutions proposed an amendment to the companies' constitutions permitting the shareholders in general meeting by ordinary resolution to express an opinion or request information about the way in which a power of the directors has been or

51 See Le Couteur and Pender (n 6) under the heading 'Background and Definitions'.

should be exercised.⁵² It is feasible that the shareholder activists responsible for the surge in ESG resolutions in Australia in recent years were pursuing the issue of shareholders having the right to pass advisory resolutions as an independent objective, and certainly these proposals for constitutional amendments were justified on grounds of corporate democracy.⁵³ However, in no case was such a resolution pursued as an objective of itself, and independently of contingent advisory resolutions relating to substantive ESG matters.⁵⁴

As has been discussed, the legal regime in Australia means that resolutions about ESG matters, such as those relating to climate change for example, can only be advanced when accompanied by proposed constitutional amendments. The climate change resolutions were contingent upon the advisory resolution constitutional amendments. The inference is therefore open that 25 governance-related resolutions proposing a constitutional amendment to allow for advisory resolutions by shareholders were facilitative or machinery-type resolutions; that is, such resolutions may not have been advanced as independent issues of corporate governance were such resolutions not required for other, substantive ESG resolutions to be voted on at shareholders' meetings.

3 Climate Change

Climate change has been the predominant subject matter of shareholder ESG resolutions in Australia.⁵⁵ It has already been observed that 48 of the 83 shareholder

52 Note that amendments to company constitutions must be approved by special resolutions that require approval by at least 75% of the votes cast on the resolution. The only governance-related resolution that did not involve an amendment to the company's constitution to allow for advisory resolutions was the resolution put forward in 2003 in Boral Limited. That resolution called for the introduction of GRI style reporting: see Global Reporting Initiative, 'Welcome to GRI', *Global Reporting* (Web Page, 2021) <<https://www.globalreporting.org>>.

53 See, eg, the statements provided by the requisitioning shareholders in relation to the constitutional amendment put forward for the 2019 Rio Tinto annual general meeting: Rio Tinto Limited, 'Addendum to 2019 Notice of Annual General Meeting' (Media Release, 15 March 2019) 3–4 <<https://www.listcorp.com/asx/rio/rio-tinto/news/addendum-to-2019-notice-of-annual-general-meeting-2071575.html>>. It is observed that the advisory resolution strategy was not adopted solely in relation to climate change issues. For example, the resolution regarding workers' rights advanced at the 2019 Coles Group Limited annual general meeting was also preceded by a resolution proposing an amendment to the company's constitution to allow for advisory resolutions: see Coles Group Limited, 'Coles Notice of 2019 AGM' (n 47).

54 The Australian Council of Superannuation Investors has called for the introduction of an ordinary non-binding shareholder resolution framework in Australia to avoid the need for shareholders who wish to raise an issue from being required to simultaneously propose a constitutional amendment (or to vote against the re-election of directors): Governance Institute of Australia, 'ACSI Calls for Non-binding Shareholder Resolutions' (2017) 69(11) *Governance Directions* 644. See also Kym Sheehan, 'Shareholder Resolutions in Australia: Is There a Better Way?' (Research Paper, Australian Council of Superannuation Investor, October 2017) <<https://acsi.sparkgreen.com.au/wp-content/uploads/2020/02/Shareholder-resolutions-in-Australia.Oct17.pdf>>; Stephen Bottomley, 'Rethinking the Law on Shareholder-Initiated Resolutions at Company General Meetings' (2019) 43(1) *Melbourne University Law Review* 93.

55 Apart from the three shareholder resolutions relating to deforestation that were advanced in 2002 and 2003, climate change shareholder campaigns began in earnest in Australia in 2010 with campaigns by the group Australian Ethical Investing ('AEI'). In 2010 and 2011, AEI launched four climate change resolutions in the companies Aquila Resources Limited, Paladin Energy Limited, Woodside Petroleum Limited and Oil Search Limited. One of the founders of AEI was Howard Pender, who subsequently became an office holder in ACCR: Australasian Centre for Corporate Responsibility, 'About Us' (n 46). Similarly, climate change

resolutions advanced in listed Australian companies between 2002 and 2019 concerned climate change. This understates the proportion of resolutions that were climate related if the 25 governance resolutions advocating constitutional amendments to allow for shareholder advisory votes are viewed as merely having been facilitative of the other substantive motions. If these constitutional amendment resolutions are excluded, then 48 of 58 substantive shareholder resolution proposals (83%) involved climate change. In addition, two further resolutions about free and informed consent were indirectly related to a climate change issue (fracking). The resolutions targeting political lobbying were also climate change-related in that they recommended that companies suspend their membership of industry associations where those associations have a lobbying record that is inconsistent with the goals of the *Paris Agreement*.⁵⁶

The subject matter of the climate change resolutions that have been advanced in recent years includes calls for companies to disclose in their annual reporting their strategies and targets to reduce their exposure to fossil fuel assets in line with the climate goals of the *Paris Agreement*, including the elimination of exposure to thermal coal.⁵⁷ Other resolutions requested reviews of public health risks of coal-fired power generation,⁵⁸ and sought that information produced by companies about their climate change-related risks comply with the recommendations of the Financial Stability Board's Task Force on Climate-Related Financial Disclosures.⁵⁹ Specific resolutions have been proposed regarding the climate change risks of methane emissions.⁶⁰

Some proposals have called for companies to adopt constitutional amendments that directly commit the companies to climate change-related actions, rather than taking the form of contingent, advisory resolutions. In 2017, resolutions proposing

has been the principal issue in the US: Heidi Welsh and Michael Passoff, 'Proxy Review 2018' (Research Report, As You Sow, 2018) 7 <<https://static1.squarespace.com/static/59f0ef404c326d3b5a4cf6a0/t/5aa2cf838165f56d578afce0/1520619414334/Proxy-Preview-2018-Final.pdf>>.

- 56 See BHP Group Limited, 'BHP Notice of 2019 Meeting' (n 47); Rio Tinto Limited, 'Addendum to Rio Tinto Notice of 2018 AGM' (n 47) 1–2; Origin Energy Limited, 'Origin Notice of 2018 AGM' (n 23).
- 57 Concern about the risks of climate change is now shared by Australia's prudential regulator, the Australian Prudential Regulation Authority ('APRA'). APRA recently announced plans to require major Australian financial institutions to advise the regulator on their preparedness for climate change financial risks: Rob Harris, 'Big Banks and Super Funds to Face Climate Change Risk Checks', *The Age* (online, 24 February 2020) <<https://www.theage.com.au/politics/federal/big-banks-and-super-funds-to-face-climate-change-risk-checks-20200224-p543w8.html>>.
- 58 See, eg, Origin Energy Limited, 'Notice of Annual General Meeting 2019' (Media Release, 13 September 2019) 3 <<https://www.originenergy.com.au/content/dam/origin/about/Origin-NOM-FINAL.pdf>> ('Origin Notice of 2019 AGM').
- 59 'Task Force on Climate-Related Financial Disclosures', *Task Force on Climate-Related Financial Disclosures* (Web Page) <<https://www.fsb-tcfd.org>>. See, eg, Whitehaven Coal Limited, 'Notice of Annual General Meeting' (Media Release, 24 September 2018) 2 <<https://whitehavencoal.com.au/wp-content/uploads/2020/04/2018-Notice-of-Meeting.pdf>> ('Whitehaven Notice of 2018 AGM'); QBE Insurance Group Limited, 'Notice of Annual General Meeting' (Media Release, 28 March 2018) 3 ('QBE Notice of 2018 AGM').
- 60 See, eg, Santos Limited, 'Notice of Annual General Meeting' (Media Release, 28 March 2018) 3 ('Santos Notice of 2018 AGM'); Origin Energy Limited, 'Notice of Annual General Meeting 2017' (Media Release, 14 September 2017) 3 <<https://www.originenergy.com.au/content/dam/origin/about/investors-media/AGM-Notice-of-meeting-2017.PDF>> ('Origin Notice of 2017 AGM').

constitutional amendments in the same terms were put forward at Downer EDI Limited and CBA that would have required the directors of those companies to ‘ensure the business of the company is managed in a manner consistent with the objective of holding global warming to below two degrees Celsius above preindustrial levels’.⁶¹ Also in 2017, Origin received a proposal to amend its constitution to require annual reporting on climate change issues.⁶² In 2015, a resolution for a constitutional amendment was put forward at AGL Energy Limited (‘AGL’) that would have required the board to prepare a business model that addressed climate change issues.⁶³

Resolutions for constitutional amendments were also proposed at ANZ and CBA in 2014 that would have required the companies to report ‘their assessment of the quantum of greenhouse gas emissions [they were] responsible for financing’.⁶⁴

4 Other Issues

There is an overlap in the matters covered by the resolutions described as relating to workers’ rights and human rights. The sole workers’ rights resolution was directed at retailer Coles Group Limited (‘Coles’) and urged the company to adopt ethical sourcing policies and supplier requirements to protect workers in the company’s supply chains from modern slavery and labour abuses.⁶⁵ In 2018, a resolution was put to the Woolworths AGM that principally related to issues of workers’ rights, but which was phrased in terms of those rights as human rights.⁶⁶ The resolution relating to human rights put to the preceding 2017 Woolworths AGM was expressed differently and called on the company to report on its processes for assessing the human rights impacts of its operations and supply chains.⁶⁷

Other resolutions advanced concerning human rights included proposals at Qantas Airways Limited (‘Qantas’) requesting that the company review its policies and processes relating to the involuntary transportation of asylum seekers based on the United Nations Guiding Principles on Business and Human Rights.⁶⁸ Reporting on compliance with those United Nations Principles was also the subject matter of a resolution advanced in the company Oil Search Limited (‘Oil Search’) in relation to the company’s operations in the Southern Highlands of Papua New Guinea.⁶⁹

61 See Downer EDI Limited, ‘Downer Notice of 2017 AGM’ (n 22); Commonwealth Bank of Australia, ‘CBA Notice of 2017 AGM’ (n 22).

62 Origin Energy Limited, ‘Origin Notice of 2017 AGM’ (n 60).

63 AGL Energy Limited, ‘AGL Notice of 2015 AGM’ (n 21).

64 Australia and New Zealand Banking Group Limited, ‘ANZ Notice of 2014 AGM’ (n 21) 5; Commonwealth Bank of Australia, ‘CBA Notice of 2014 AGM’ (n 20) 4.

65 Coles Group Limited, ‘Coles Notice of 2019 AGM’ (n 47).

66 Woolworths Group Limited, ‘Woolworths Notice of 2018 AGM’ (n 47) 5.

67 Woolworths Limited, ‘Woolworths Notice of 2017 AGM’ (n 34) 3.

68 Similar resolutions were advanced in 2018 and 2019: Qantas Airways Limited, ‘Qantas Notice of Meeting 2018’ (Media Release, 31 August 2018) 4 <https://investor.qantas.com/FormBuilder/_Resource/_module/doLLG5ufYkCyEPjF1tpgyw/file/aggm/QAN-2018-AGM-Notice-of-meeting.pdf> (‘Qantas Notice of 2018 Meeting’); Qantas Airways Limited, ‘Qantas Notice of 2019 Meeting’ (n 47).

69 Oil Search Limited, ‘Resolutions under Schedule 2 of the *Companies Act 1997* of Papua New Guinea’ (Media Release, 7 April 2017).

The resolutions concerning informed consent sought a review by Origin of the process previously engaged in to obtain the consent of Aboriginal native title holders to fracking activities in the Northern Territory.⁷⁰

The sole gambling-related resolution was advanced at Woolworths in 2012 by the GetUP organisation and it sought to amend the company’s constitution to exclude Woolworths from owning or operating electronic gambling machines.⁷¹

G Shareholder Support for ESG Resolutions

The level of shareholder support for ESG resolutions may be examined over time (Table 6) and by reference to the subject matter of the resolutions (Table 7).

Table 6: Shareholder Support for ESG Issues Over Time

Year	Average % of Shareholder Votes in Support per Resolution ⁷²	Number of Resolutions
2002	20.5	1
2003	10.43	3
2010	N/A ⁷³	2
2011	5.7	3
2012	2.5	1
2014	2.55	3
2015	7.33	4
2017	6.31	14
2018	12.74	20
2019	9.95 ⁷⁴	32

While there were no ESG resolutions in 2013 or 2016, the eight-year hiatus in ESG resolutions from 2003 to 2011, during which no ESG resolutions were voted on by shareholders at AGMs, is notable. It may be that, with more data from additional years of experience, it will make more sense to consider the pre- and

70 Origin Energy Limited, ‘Origin Notice of 2018 AGM’ (n 23); Origin Energy Limited, ‘Notice of 2019 AGM’ (n 58).

71 Woolworths Limited, ‘Notice of Extraordinary General Meeting’ (Media Release, 5 October 2012) 1 (‘Woolworths Notice of 2012 EGM’).

72 Withdrawn resolutions and resolutions where voting results are not known or where resolutions were not voted on at a meeting have not been included in the calculation of the average levels of support.

73 The two resolutions in 2010 were received by Aquila Resources Limited and Paladin Energy Limited. These companies refused to put the resolutions to shareholder meetings: see above n 34.

74 The 2019 average result includes the proxy votes and direct votes recorded at proxy close for the contingent climate change shareholder resolutions received by Insurance Australia Group Limited (‘IAG’), Suncorp Group Limited and Westpac Banking Corporation, which were not voted on at the companies’ AGMs. The voting results recorded at BHP Group’s London shareholder meetings are not included for 2017 or 2019.

post-2011 years in Australia as discrete periods, with the resolutions of 2002 and 2003 as exceptions within the prior period. At this stage, for the purposes of this review, the entire period is considered.

The average level of shareholder support for all ESG resolutions over the period was 9.71%.⁷⁵

Table 7: Shareholder Support for ESG Issues by Subject Matter

Resolution Subject Matter	Average Support per Resolution
Climate change-related total	12.16% ⁷⁶
Climate change	10.57%
Deforestation	15.36%
Methane	7.33%
Political lobbying	24.78%
Governance	6.10% ⁷⁷
Workers' rights	12.79%
Human rights	12.77%
Free, prior and informed consent	8.67%
Gambling	2.5%

It is difficult to observe any particular trend over time in the level of shareholder support for ESG resolutions. The number of resolutions in 2002 and 2003 was very small and the levels of support attracted by resolutions in those years may not be typical. Since 2014, a trend of increasing levels of support can be observed. However, there were only small numbers of resolutions prior to 2017 and the level of support declined in 2019. Early experience in 2020 has indicated high levels of shareholder support for ESG resolutions at several AGMs.⁷⁸

Accordingly, while the average level of support for shareholder resolutions on environmental and social issues in the US has increased over the last 20 years,⁷⁹ it is perhaps too early to identify any definite trend over time in the level

75 This average was calculated by dividing the cumulative value of the levels of support recorded at AGMs for ESG resolutions in the period by the number of these resolutions for which voting results at AGMs is known.

76 Note that 13 climate change resolutions were not voted upon because they were withdrawn or not considered at the meeting and are not included in the calculation of the average.

77 Note that two governance resolutions were withdrawn and not voted upon and are not included in the calculation of the average.

78 See below nn 91–4 and accompanying text.

79 Kosmas Papadopoulos, 'The Long View: US Proxy Voting Trends on E&S Issues from 2000 to 2018', *Harvard Law School Forum on Corporate Governance* (Forum Post, 31 January 2019) <<https://corpgov.law.harvard.edu/2019/01/31/the-long-view-us-proxy-voting-trends-on-es-issues-from-2000-to-2018/>>. In 1999, the typical level of support for shareholder ESG resolutions in the US was about 8%. This

of shareholder support for ESG resolutions in Australia. Certainly, the level of shareholder support for climate change resolutions increased in 2018 and 2019 from levels experienced since 2011. However, more data would be required before identifying definite trends over time, particularly as the level of support declined in 2019 as compared with 2018.⁸⁰ This is illustrated in Figure 2.

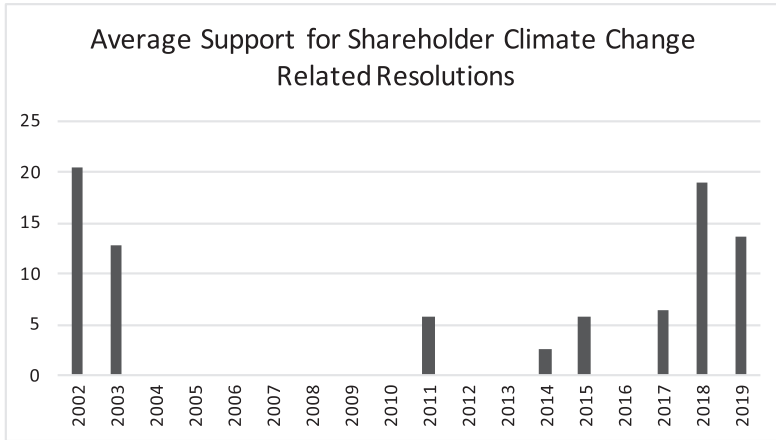


Figure 2: Climate Change Resolutions – Level of Shareholder Support by Year

It is possible that support for climate change-related resolutions may increase as a result of the recent debates in Australia regarding the appropriateness of Australia’s industry superannuation funds maintaining investments in coal and other fossil fuel developers, and criticisms of the low levels of support given by those superannuation funds to climate-related shareholder resolutions.⁸¹ Again,

increased to about 21% in 2013: Grewal, Serafeim and Yoon (n 6) 35. In the US, shareholder ESG proposals attracted support of 25% in 2018 and 29% in 2019: Jackie Cook, ‘ESG Proxy Resolutions Find More Support in 2019’, *Morningstar* (Web Page, 28 February 2020) <<https://www.morningstar.com/articles/967699/esg-proxy-resolutions-find-more-support-in-2019>>. See also Le Couteur and Pender (n 6) under the heading ‘Engagement and Resolution Activity in the US’. There is a long tradition of shareholder activism in the US: Janette Rutterford, ‘The Shareholder Voice: British and American Accents, 1890–1965’ (2012) 13(1) *Enterprise & Society* 120.

80 There were only three resolutions in 2002 and 2003, all of which were about deforestation. These resolutions were related to climate change, albeit that they were expressed in more general terms, referring to ‘environmental risks and opportunities’ rather than climate change specifically. All shareholder resolutions related to climate change including deforestation, methane and political lobbying are included in the data in Figure 2.

81 See ‘Super Funds Continue to Block Climate Action’, *Market Forces* (Web Page, 23 April 2020) <<https://www.marketforces.org.au/super-funds-block-climate-action/>>; Charlotte Grieve, ‘Super Giants Funnel Billions into Fossil Fuels, Vote Down Climate Push’, *The Age* (online, 13 February 2020) <<https://www.theage.com.au/business/banking-and-finance/super-giants-funnel-billions-into-fossil-fuels-vote-down-climate-push-20200211-p53zt1.html>>; Charlotte Grieve, ‘“Drive from Within”: AMP Boss Weighs into Divestment Debate’, *The Age* (online, 13 February 2020) <<https://www.theage.com.au/business/banking-and-finance/drive-from-within-amp-boss-weighs-into-divestment-debate-20200213-p540hy.html>>; Charlotte Grieve, ‘Prominent Doctors Urge Super Fund HESTA to Divest Itself of Fossil Fuel Stocks’, *The Age* (online, 24 February 2020) <<https://www.theage.com.au/business/banking-and-finance/prominent-doctors-urge-super-fund-hesta-to-divest-itself-of-fossil-fuel-stocks-20200224-p543ne.html>>;

Australia is not alone in this: this is a criticism that has also been levelled at overseas-based institutional investors.⁸² Nevertheless, it is likely that the positions of superannuation funds and other institutional investors on ESG matters will continue to attract scrutiny.⁸³

The small number of resolutions in relation to issues other than climate change and governance also makes it difficult to draw conclusions from comparisons of levels of shareholder support as between different subject matters – for example, to ascertain whether some issues are more supported than others. Noting this, while the subject of only three resolutions, political lobbying as a subject matter has attracted relatively high levels of support (24.78%). In contrast, on their own, climate change-specific proposals have attracted an average of only 10.72% support.

There does appear to be a slightly lower level of support for climate change resolutions when they are put forward as mandatory or binding constitutional prescriptions rather than as advisory resolutions.⁸⁴ However, as most of these resolutions for constitutional change were put forward prior to 2017, it is not clear whether this lower level of support can be attributed to the form of the resolution (mandatory constitutional amendment rather than advisory resolution) or to a lower level of support for climate change issues in the period prior to 2017.

Another issue to note is that the governance proposals to allow for shareholder advisory resolutions have attracted only slightly more than 6% support, a lower level of support than that attracted by any other issue (excluding the sole gambling-related resolution).⁸⁵ When issues such as political lobbying are included, resolutions relating to climate change issues have attracted approximately double

Charlotte Grieve, '10,000 Academics Sign UniSuper Divestment Petition', *The Age* (online, 26 February 2020) <<https://www.theage.com.au/business/banking-and-finance/10-000-academics-sign-unisuper-divestment-petition-20200225-p5448s.html>>.

82 Edward Helmore, 'Wall Street Investment Giants Voting against Key Climate Resolutions', *The Guardian* (online, 17 September 2019) <<https://www.theguardian.com/environment/2019/sep/17/wall-street-asset-management-climate-change-blackrock-vanguard>>; 'Climate in the Boardroom: How Asset Manager Voting Shaped Corporate Climate Action in 2019', *Majority Action* (Web Page) <<https://www.majorityaction.us/asset-manager-report>>; Attracta Mooney, 'Fund Groups Accused of Being "Too Cosy" with Company Bosses', *Financial Times* (online, 15 December 2018) <<https://www.ft.com/content/d5ab2391-bb82-3114-bfbf-48f3c348e9a7>>.

83 Research on the voting behaviour of Australian superannuation funds over the three-year period from 2017–19 has been conducted by ACCR. That research is reported to indicate a strong trend towards more support from industry superannuation funds for ESG-related shareholder resolutions over that period: Interview with O'Brien (n 38) 3, 5.

84 The average support attracted by climate change-related constitutional amendments was 4.32%: Downer EDI Limited, 'Downer Notice of 2017 AGM' (n 22); Commonwealth Bank of Australia, 'CBA Notice of 2017 AGM' (n 22); Commonwealth Bank of Australia, 'CBA Notice of 2014 AGM' (n 20); AGL Energy Limited, 'AGL Notice of 2015 AGM' (n 21); Origin Energy Limited, 'Origin Notice of 2015 AGM' (n 20) 2; Australia and New Zealand Banking Group Limited, 'ANZ Notice of 2014 AGM' (n 21); Woodside Petroleum Limited, 'Woodside Notice of 2011 AGM' (n 21). This does not include the 25% support for the CBA deforestation constitutional amendment resolution in 2003. As noted, the average support for climate change-related resolutions (climate change, deforestation, methane and political lobbying resolutions) was 12.13%.

85 This level of support for governance resolutions is less than that secured for the substantive climate change resolutions in circumstances where the governance-related constitutional amendment required 75% support as a special resolution.

the level of support garnered by the governance resolutions upon which the climate resolutions are contingent. This may indicate that there is no significant appetite amongst shareholders to give themselves more democratic power within listed corporations, at least with respect to amending company constitutions to allow shareholders to pass advisory resolutions.

The relatively modest level of average support for shareholder resolutions of all subject matters makes the experience of some companies worth highlighting. For example, in 2019, 30.33% of AGL's shareholder votes were in support of a resolution requesting the disclosure of strategies to reduce the company's exposure to climate change risks. In the same year, shareholder support of between 12% and 17% was recorded at NAB and ANZ for a number of climate change resolutions.⁸⁶ Also in 2019, approximately 20% of proxy votes recorded by Westpac Banking Corporation ('Westpac') supported a resolution calling for the company to disclose strategies and targets for the reduction in the bank's fossil fuel exposure.⁸⁷

In 2018, over 40% of shareholders in the company Whitehaven voted in support of a resolution to require the company to report on its climate change risks.⁸⁸ An even greater number – 46.32% – of Origin's shareholders voted in favour of a resolution calling on the company to review its membership of lobby groups that displayed a lobbying record that is inconsistent with the goals of the *Paris Agreement*. According to ACCR, this vote was, at the time, the highest vote for any shareholder proposal without board support in Australian corporate history.⁸⁹ In 2019, 29.58% of BHP's shareholders voted in favour of a similar resolution.⁹⁰

The relatively high level of shareholder support for climate change resolutions appears to be continuing into 2020, with 43.39% of the shareholders of Santos supporting a climate change resolution and 46.35% supporting a climate-related

86 For the content of the resolutions, see AGL Energy Limited, 'Notice of 2019 Annual General Meeting of Shareholders' (Media Release, 8 August 2019) 6 <<https://www.agl.com.au/-/media/aglmedia/documents/about-agl/asx-and-media-releases/2019/1956295.pdf?la=en&hash=2669A9D035CA9EF74E0B47D57B8625C8>> ('AGL Notice of 2019 AGM'); National Australia Bank, 'NAB Notice of 2019 AGM' (n 23); Australia and New Zealand Banking Group Limited, 'Notice of Meeting: 2019 Annual General Meeting' (Media Release, 11 November 2019) 6 <<https://www.anz.com/content/dam/anzcom/shareholder/ANZ-2019-Notice-of-Meeting.pdf>> ('ANZ Notice of 2019 AGM'). For a report of the voting outcome, see Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions' (n 27).

87 For the resolution, see Westpac Banking Corporation, '2019 Annual General Meeting: Notice of Meeting' (Notice, 4 November 2019) 11 <https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/ic/2019_Westpac_Note_of_Annual_General_Meeting.pdf> ('Westpac Notice of 2019 AGM'). The vote outcome is reported in Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions' (n 27); Westpac Banking Corporation – Results of 2019 Annual General Meeting' (Results, 12 December 2019) 2 <<https://www.asx.com.au/asxpdf/20191212/pdf/44cjl6ljsywq0.pdf>>.

88 This resolution was accompanied by a proposal for a constitutional change to allow shareholders to pass advisory resolutions or to request particular types of information: Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions' (n 27). See also Whitehaven, 'Notice of 2018 AGM' (n 56).

89 'Origin Energy', ACCR (Web Page) <<https://accr.org.au/2019/07/29/origin/>>; Cole Latimer, 'Activist Shareholders Make History in Anti-lobby Resolution at Origin AGM', *The Sydney Morning Herald* (online, 17 October 2018) <<https://www.smh.com.au/business/companies/activist-shareholders-make-history-in-anti-lobby-resolution-at-origin-agm-20181017-p50a4u.html>>.

90 See BHP Group Limited, 'BHP Notice of 2019 Meeting' (n 47); Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions' (n 27).

lobbying resolution at an online AGM held on 3 April 2020.⁹¹ This ‘world first’ level of support was soon eclipsed when, as noted in Part I, over 50% of Woodside shareholders voted in support of a resolution proposed by ACCR to set emissions targets consistent with the *Paris Agreement*.⁹² A resolution for the company to review its links to lobby groups that adopt positions inconsistent with addressing climate change achieved support of 42%.⁹³

Shortly after the 2020 Woodside AGM, 37% of shareholders in Rio Tinto supported a shareholder resolution put forward by Market Forces at the company’s AGM held on 7 May 2020, calling on the company to set ‘Paris-aligned targets to reduce its greenhouse gas emissions’ (up from only 6% support for a similar resolution in 2019).⁹⁴ On the same day, in contrast to the extraordinary levels of support recorded for shareholder resolutions at the 2020 Santos, Woodside and Rio Tinto AGMs and whilst nevertheless higher than the historical average, only 13% of shareholders voted in support of a resolution put forward by Market Forces at insurance company QBE’s AGM.⁹⁵ The resolution called for short, medium and long-term targets to reduce QBE’s investments in and underwriting exposure to oil and gas assets. It is important to note that three institutional fund managers were amongst the shareholders who supported the resolution at QBE.⁹⁶

Finally, on the issue of specific company experiences, it is noted that the Qantas human rights resolution in 2019 attracted the support of 23.56% of that company’s shareholders, up from 6.43% support in 2018, and a human rights resolution at

91 Angela Macdonald-Smith, ‘Climate Shock at Santos as Shareholders Weigh in’, *Australian Financial Review* (online, 3 April 2020) <<https://www.afr.com/companies/energy/climate-shock-at-santos-as-shareholders-weigh-in-20200403-p54gsw>>; Australasian Centre for Corporate Responsibility, ‘Australian ESG Shareholder Resolutions’ (n 27). This level of support is inflated to 66% if the votes of Santos’ two major Chinese shareholders are excluded. Consistent with the pattern established in previous years, these resolutions were not put to a vote at the meeting as they were contingent on a preceding resolution to change the company’s constitution to allow for advisory resolutions. That resolution attracted the apparently now standard level of support of around 6% (6.8% in this case). It is also noted that proxy advisors ACSI, Glass Lewis, Institutional Shareholder Services, Pensions and Investment Research Consultants (UK) and Regnan all recommended support for the substantive resolutions: Australasian Centre for Corporate Responsibility, ‘Santos Shareholders Repudiate Board’s Climate Direction in World First Vote’ (Media Release, 3 April 2020) <<https://www.accr.org.au/news/santos-shareholders-repudiate-boards-climate-direction-in-world-first-vote/>>.

92 See above nn 1–4 and accompanying text.

93 Nick Toscano, “‘Breakthrough Moment’: Woodside Investors Revolt on Climate Change”, *The Age* (online, 30 April 2020) <<https://www.theage.com.au/business/companies/breakthrough-moment-woodside-investors-revolt-on-climate-change-20200429-p54oe8.html>>. As has been typical, the resolution to amend the company’s constitution to provide for advisory resolutions, upon which the other two resolutions depended, was defeated, attracting only 6% support.

94 ‘Huge Gains in Investor Support for Real Climate Action at Rio Tinto’, *Market Forces* (Web Page, 7 May 2020) <<https://www.marketforces.org.au/huge-gains-in-investor-support-for-real-climate-action-at-rio-tinto/>>. See also Ben Butler, ‘One in Three Shareholders Vote for Rio Tinto to Adopt Binding Emissions Target’, *The Guardian* (online, 8 May 2020) <<https://www.theguardian.com/business/2020/may/08/one-in-three-shareholders-vote-for-rio-tinto-to-adopt-binding-emissions-target>>.

95 Charlotte Grieve, ‘QBE Shareholders Push for Greater Transparency on Oil and Gas Projects’, *The Sydney Morning Herald* (online, 7 May 2020) <<https://www.smh.com.au/business/banking-and-finance/qbe-shareholders-push-for-greater-transparency-on-oil-and-gas-projects-20200507-p54qn7.html>>.

96 The institutional funds that supported the resolution were Australian Ethical, Future Super and VicSuper: *ibid.*

Woolworths in 2018 attracted 14.92% shareholder support, down slightly from 15.55% support for a similar resolution in 2017.⁹⁷

H The Impact of Shareholder ESG Resolutions

Globally, the norm is for social and environmental shareholder resolutions to fail to be passed.⁹⁸ Nevertheless, companies may react positively when targeted by shareholder resolutions on environmental issues.⁹⁹ These resolutions ‘spark publicity and attention; winning votes is, of course, only part of the point. [In Australia,] [t]he groups lodging the resolutions argue their activism is pushing boards, boosting awareness and leading to tangible change’.¹⁰⁰ For example, ACCR claims that its lobbying work relating to companies whose industry associations engage in adverse climate lobbying ‘has led to BHP exiting the World Coal Association, significant changes at the Minerals Council of Australia, and lobbying becoming a key point of engagement by investors’.¹⁰¹

It is clear that the apparent modest level of support achieved by most ESG resolutions in Australia is not necessarily regarded as a failure by the proponents. The shareholder resolution proponent Market Forces considers a vote of close to

97 Australasian Centre for Corporate Responsibility, ‘Australian ESG Shareholder Resolutions’ (n 27). The 2017 resolutions put forward at the Woolworths AGM by ACCR were withdrawn prior to the meeting as a result of agreement with the company. Proxy votes of 5.85% and 15.5% in support of the governance and human rights resolutions respectively were nevertheless recorded.

98 Gary J Cundill, Palie Smart and Hugh N Wilson, ‘Non-financial Shareholder Activism: A Process Model for Influencing Corporate Environmental and Social Performance’ (2018) 20(2) *International Journal of Management Reviews* 606, 614. Most of the research analysed was conducted in the US and the United Kingdom: at 607.

99 Grewal, Serafeim and Yoon (n 6); Caroline Flammer, Michael W Toffel and Kala Viswanathan, ‘Shareholder Activism and Firms’ Voluntary Disclosure of Climate Change Risk’ (Working Paper No 20-049, Harvard Business School, March 2021) 24–7 <https://www.hbs.edu/ris/Publication%20Files/20-049_90d4fcb5-4d13-4ebe-92e9-8d0f086785b8.pdf>; BlackRock and Ceres, ‘21st Century Engagement: Investor Strategies for Incorporating ESG Considerations into Corporate Interactions’ (Report, 2015) 16 <<https://www.ceres.org/sites/default/files/reports/2017-03/21st%20Century%20Engagement%20-%20Investor%20Strategies.pdf>>; ‘Shareholder Resolutions’, *US SIF* (Web Page) <<https://www.ussif.org/resolutions>>; ‘Shareholder Activity’, *As You Sow* (Web Page) <<https://archive.asyousow.org/about-us/theory-of-change/shareholder-advocacy/>>; ‘Shareholder advocacy efforts have resulted in an unprecedented paradigm shift in the behaviour of both shareholders and company management that is creating a new environmentally sustainable economy. Over \$3 trillion – nearly \$1 of every \$8 under professional management – is invested using ESG criteria, shareholder advocacy, and community investing strategies’.

100 Ruth Williams, ‘How the New Generation of Activists Corners Boards’ (n 4).

101 ‘Climate & Environment’, ACCR (Web Page) <<https://accr.org.au/climate/>>. On the success of the BHP shareholder resolution, see Michael Slezak, ‘BHP Agrees to Rethink Its Links to Minerals Council of Australia’, *The Guardian* (online, 19 September 2017) <<https://www.theguardian.com/business/2017/sep/19/bhp-agrees-to-rethink-its-links-to-minerals-council-of-australia>>. ACCR also cites examples elsewhere of shareholder activism involving shareholder resolutions as being successful in promoting changed behaviour at the companies Delta Air Lines, Bristol Myers Squibb and ExxonMobil: EJA Comms, ‘ACCR Shareholder Resolution Case’ (Media Release, 14 October 2014) <<https://www.envirojustice.org.au/media-briefer-accr-shareholder-resolution-case/>>.

6% (including abstentions) to be ‘an achievement’ that would ‘not go unnoticed in the investment community’.¹⁰² Le Couteur and Pender consider that:

Shareholder resolutions do not have to get anything like a majority of the vote in order to have an impact, but they do quite often need to be put up in consecutive years ... In the first year a resolution needs to attract 3% of the vote to be put again. Support of around 15 to 25% will generally result in the company accommodating the proponent’s suggestions.¹⁰³

Similarly, the withdrawal of a resolution does not necessarily signal failure on the part of the proponent. Often, it appears, resolutions are withdrawn on the basis of agreements or other actions acceptable to the proponents. For example, in the period analysed, eight resolutions were withdrawn. These eight resolutions were: two resolutions at Oil Search in 2011 and 2017; two resolutions at Woolworths in 2017; two resolutions at Westpac in 2018; one resolution at Rio Tinto in 2019; and one resolution at Origin in 2019.¹⁰⁴ Of the eight withdrawn resolutions, the 2018 Westpac resolutions were withdrawn after Westpac announced that it would review the advocacy of the Business Council of Australia.¹⁰⁵ The 2011 Oil Search shareholder resolution was withdrawn following the company’s announcement of plans to manage its carbon risk.¹⁰⁶ The 2017 Oil Search resolution was withdrawn on the basis of commitments made by the company, and the 2017 Woolworths resolutions were withdrawn as the result of an agreement with the company.¹⁰⁷ The 2019 Rio Tinto shareholder resolution advanced by ACCR was withdrawn when ACCR, following engagement with the company, was satisfied with actions taken by Rio Tinto to address the issue of industry association lobbying which had been raised by ACCR in its resolution.¹⁰⁸ The withdrawal of the 2019 Origin resolution appears to also have been based on positive engagement between the proponent and the company.¹⁰⁹

Where agreements have been reached, in the absence of alternative explanations, it would appear to be reasonable to assume that it was the filing of the resolutions that led, at least in part, to the companies involved entering into

¹⁰² Market Forces (n 49).

¹⁰³ Le Couteur and Pender (n 6) under the heading ‘Background and Definitions’. US-based organisation As You Sow notes that shareholder resolutions are often successful in leading to dialogue which addresses the concerns of the resolution, that, where resolutions proceed to a vote, it is difficult for companies to ignore resolutions with more than 10% support, and that votes of 20% or more send a ‘clear message’: ‘Shareholder Resolutions’, *As You Sow* (Web Page) <<https://archive.asyousow.org/about-us/theory-of-change/shareholder-advocacy/>>.

¹⁰⁴ Australasian Centre for Corporate Responsibility, ‘Australian ESG Shareholder Resolutions’ (n 27).

¹⁰⁵ ACCR, ‘Westpac to Scrutinise Business Council of Australia’s Climate Lobbying’ (Media Release, 15 October 2018) <<https://accr.org.au/2018/10/15/westpac-to-scrutinise-business-council-of-australias-climate-lobbying/>>; Ruth Williams, ‘Westpac to Review Lobby Group Memberships after Shareholder Campaign’, *The Sydney Morning Herald* (online, 15 October 2018) <<https://www.smh.com.au/business/banking-and-finance/westpac-to-review-lobby-group-memberships-after-shareholder-campaign-20181015-p509ph.html>>.

¹⁰⁶ Australian Ethical, ‘Oil Search Moves on Emissions Target’ (Blog Post, 18 April 2011).

¹⁰⁷ Australasian Centre for Corporate Responsibility, ‘Australian ESG Shareholder Resolutions’ (n 27). See also Interview with O’Brien (n 38) 10.

¹⁰⁸ Interview with O’Brien (n 38) 9.

¹⁰⁹ Interview with Brynn O’Brien, Executive Officer, ACCR (Ian Ramsay and Lloyd Freeburn, 6 May 2020) pt 1, 15–16.

the agreements and undertaking other actions consistent with the objectives of the resolutions filed. Supporting this is the fact that in 2019, CBA was spared from being subjected to shareholder resolutions by Market Forces after agreeing to end all financing of coal used in electricity generation by 2030 and only finance new oil, gas or metallurgical coal mining projects if they are demonstrated to be compatible with the goals of the *Paris Agreement*.¹¹⁰ This was not the case for the other banks Westpac, NAB and ANZ.¹¹¹

The view that shareholder resolutions are effective in positively impacting on corporate ESG performance even though such proposals fail to achieve majority support is supported by US studies.¹¹² This view, however, is not unanimous either in Australia or in the US.¹¹³

I Interviews

The authors conducted interviews with representatives of Market Forces,¹¹⁴ ACCR,¹¹⁵ the Australian Council of Superannuation Investors ('ACSI'),¹¹⁶ the

110 'NAB, ANZ and Westpac Hit with Climate Risk Shareholder Resolutions', *Market Forces* (Web Page, 10 October 2019) <<https://www.marketforces.org.au/nab-anz-and-westpac-hit-with-climate-risk-shareholder-resolutions/>>.

111 See above n 37.

112 Grewal, Serafeim and Yoon (n 6) 36–7; Flammer, Toffel and Viswanathan (n 99); Jiaying Wei, 'Environmental, Social, and Governance Proposals and Shareholder Activism' (2020) 46(3) *Journal of Portfolio Management* 49. For an early analysis, see Robert Monks, Anthony Miller and Jacqueline Cook, 'Shareholder Activism on Environmental Issues: A Study of Proposals at Large US Corporations (2000–2003)' (2004) 28(4) *Natural Resources Forum* 317. See also Sakis Kotsantonis, Chris Pinney and George Serafeim, 'ESG Integration in Investment Management: Myths and Realities' (2016) 28(2) *Journal of Applied Corporate Finance* 10, who also observe the following in an abstract available at 'Faculty & Research, Publications: ESG Integration in Investment Management', *Harvard Business School* (Web Page) <<https://www.hbs.edu/faculty/Pages/item.aspx?num=51511>>: 'Companies committed to ESG are finding competitive advantages in product, labour, and capital markets, and portfolios that have integrated "material" ESG metrics have provided average returns to their investors that are superior to those of conventional portfolios, while exhibiting lower risk'. See also Mozaffar Khan, George Serafeim and Aaron Yoon, 'Corporate Sustainability: First Evidence on Materiality' (2016) 91(6) *Accounting Review* 1697.

113 Companies claim that climate change issues are being addressed as part of the companies' existing strategies rather than as a reaction to shareholder resolutions: Ruth Williams, 'How the New Generation of Activists Corners Boards' (n 4). Cundill, Smart and Wilson consider the literature on the success of the outcomes of shareholder proposals on environmental and social issues to be ambiguous: Cundill, Smart and Wilson (n 98) 614–15. See also David Blackman, 'New Study Finds Climate Change Shareholder Resolutions Have No Impact', *Forbes* (online, 24 June 2018) <<https://www.forbes.com/sites/davidblackmon/2018/06/24/new-study-finds-climate-based-shareholder-resolutions-have-no-impact/#613619915dd1>>, citing a US study conducted by economist Joseph Kalt and funded by the National Association of Manufacturers.

114 Interview with William van de Pol, Asset Manager, Campaigner and Legal Analyst, Market Forces (Ian Ramsay and Lloyd Freeburn, 24 April 2020).

115 Interview with Brynn O'Brien (n 109); Interview with Brynn O'Brien (n 38). Note that the two parts of the authors' interview with Brynn O'Brien have been cited separately.

116 Interview with Ed John, Executive Manager, Governance, Engagement and Policy and Kate Griffiths, Executive Manager, Public Policy and Advocacy, ACSI (Ian Ramsay and Lloyd Freeburn, 1 May 2020). ACSI represents 36 Australian and international asset owners and institutional investors on ESG issues and, collectively, ACSI members own on average 10% of every ASX200 company: see 'About Us', *ACSI* (Web Page) <<https://acsi.org.au/about/what-we-do/>>.

Australian Institute of Company Directors ('AICD')¹¹⁷ and the Governance Institute of Australia ('GIA').¹¹⁸ In addition, the Australian Securities and Investments Commission ('ASIC') provided written responses to questions.¹¹⁹ Our objective was to obtain the views of the representatives of these organisations on issues including the merits and disadvantages of ESG shareholder resolutions, the factors that influence the levels of support for these resolutions, and the process followed by the proponents of these resolutions to obtain the support of other shareholders.

1 Merits and Disadvantages of ESG Shareholder Resolutions

ASIC considers that a key function of shareholder resolutions is to provide an avenue for shareholder engagement. Non-binding shareholder resolutions also allow boards to gauge shareholder sentiment, both regarding the issues that are of concern and the degree to which these concerns are held by the broader shareholder body. ASIC observed that an effect of shareholder ESG resolutions has been to elevate ESG issues. This has involved some positive progress by companies, particularly around climate disclosure, an issue that ASIC has been encouraging companies to improve on. As possible disadvantages, ASIC observed the potential for shareholder resolutions to 'blur the fundamental distinction between the role of the board of directors and that of the shareholders', and that a potential resolution may not be aligned with the long-term interests of all the company's shareholders.¹²⁰

AICD referred to an evolving expectation for companies to take stakeholders' interests into account. It commented that, at a high level, 'the concept that shareholders should be able to express their view to the board is a really good and important one'.¹²¹ The value of shareholder resolutions in requiring boards to think about broader stakeholder impacts and flushing out risks that boards or management may not be as aware of as they would like was recognised. AICD referred to ESG shareholder resolutions being part of a broader debate 'about the role of business in society and stakeholder capitalism' which 'requires boards to continue to show they are taking into account stakeholder interests'.¹²²

However, concerns identified by AICD with the shareholder resolution process included that some proponents of ESG shareholder resolutions had a narrow

117 Interview with Louise Petschler, General Manager Advocacy, AICD and Christian Gergis, Head of Policy, AICD (Ian Ramsay, 5 May 2020). AICD is a national organisation with over 45,000 members who are company directors and senior leaders from business, government and the not-for-profit sectors. The mission of AICD is 'to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society': see 'Who We Are and What We Do', *Australian Institute of Company Directors* (Web Page) <<http://aicd.companydirectors.com.au/about>>.

118 Interview with Catherine Maxwell, General Manager, Policy and Advocacy, GIA (Ian Ramsay and Lloyd Freeburn, 23 April 2020). GIA is an independent, membership-based, professional association focused on governance: see 'Who We Are', *Governance Institute of Australia* (Web Page) <<https://www.governanceinstitute.com.au/about-us/who-we-are/>>.

119 Written Response from Suneeta Sidhu, Senior Executive Leader, Governance, ASIC to Ian Ramsay and Lloyd Freeburn, 18 May 2020, held on file by the authors. ASIC is Australia's corporate, markets and financial services regulator: see 'About ASIC', *ASIC* (Web Page) <<https://www.asic.gov.au/about-asic/>>.

120 Ibid 1.

121 Petschler, Interview with Petschler and Gergis (n 117) 5.

122 Gergis, Interview with Petschler and Gergis (n 117) 18.

interest, in contrast to the responsibility of directors to act in the best interests of all shareholders. The resolutions also require companies to devote time and resources to these issues, potentially distracting the company from other issues, in circumstances where shareholder resolutions only require a relatively low threshold for the resolution to be placed on the agenda for a meeting of shareholders. In addition, shareholder resolutions may undercut the principle ‘that boards are responsible for the oversight and management of the organisation ... Directors have that obligation to act in the best interests of the corporation and shareholders don’t obviously have that same consideration and nor should they’.¹²³

Some of these views were shared by ACSI: there is a real value to shareholder resolutions, which are one tool in shareholders’ toolkits,¹²⁴ giving shareholders an opportunity to provide their views and companies an opportunity to understand how widely held those views are. Shareholder resolutions increase companies’ focus on issues, raising the level of importance or priority attached to those issues within the companies. Even where resolutions did not achieve a majority vote, they frequently led to strong investor engagement on the relevant issues and, in some cases, led to changes within companies that either would not have happened or would not have happened as quickly. A high degree of investor support for an issue encourages a company to act at a swifter pace than it might otherwise have acted. On the other hand, shareholder resolutions are time-consuming on both sides, and the current requirement for substantive resolutions to be accompanied by a proposal to amend the company’s constitution has led to an unnecessary and distracting focus on the constitutional change rather than the substance of the issue.¹²⁵

GIA also advised that its members accept the shareholder resolution process as an increasing part of the corporate landscape. However, concerns were held by members of GIA about resolutions being advanced by a relatively small number of shareholders, owning small parcels of shares and who are not long-term shareholders.¹²⁶

A representative of AICD was not convinced that ESG resolutions were the best way to shift corporate focus, but noted that they are part of a range of strategies and techniques. It was observed that ‘a real shift [was] happening anyway’.¹²⁷

GIA considers that shareholder ESG resolutions are probably achieving outcomes but that these outcomes are highly company specific.¹²⁸ GIA also observed that its members (who are governance professionals working in companies) find proponents sometimes difficult to deal with, where often a ‘company will see itself as taking a good, solid stance and being quite proud of its work, particularly in the environmental space, but that not being sufficient for the purposes of some of the investors’.¹²⁹

123 Petschler, Interview with Petschler and Gergis (n 117) 7.

124 This ‘tool’ metaphor was also employed by ACCR: Interview with O’Brien (n 109) 18.

125 John, Interview with John and Griffiths (n 116) 5, 11–12; Griffiths, Interview with John and Griffiths (n 116) 3, 5.

126 Interview with Maxwell (n 118) 3, 9.

127 Petschler, Interview with Petschler and Gergis (n 117) 14.

128 Interview with Maxwell (n 118) 8, 11.

129 *Ibid* 8.

From the perspective of the proponents of shareholder resolutions, Market Forces considers that shareholder ESG resolutions are principally beneficial. They provide individual shareholders with the ability and power to band together to raise issues of importance with the companies they are shareholders in. This leads to the flow-on benefits of the issue being debated right up to senior management and board level, and conversations between the company and its major investors. Those major investors, including the big three international asset managers BlackRock, Vanguard and State Street, ‘all have to engage on an issue, when it’s up for a vote on the AGM’.¹³⁰ Those investors will engage with the company and the proponents to understand the issues and where the problems are. Similarly, Market Forces sees itself as advocating on behalf of superannuation fund members where those funds are often major investors in companies that are facing ESG resolutions to ensure that the funds are acting in their members’ best long-term interests in relation to climate change issues.¹³¹

Market Forces observed that shareholder resolutions are only one component of a broader campaign, and that some of its biggest achievements have come without a resolution actually going to a vote. Examples cited included the CBA’s adoption of a new climate policy and BHP committing to set emission targets.¹³²

Reflecting some of these views, ACCR also is of the view that shareholder resolutions create space for ESG issues that otherwise would not get the attention of management and the board, bring urgency and formality to an issue, and are a very effective mechanism for drawing attention to some systemic problems of corporate conduct in Australia.¹³³ As an example of this effectiveness, ACCR’s shareholder resolutions on the issue of labour exploitation in the fresh food supply chain have, in combination with effective labour organising, brought that issue to the forefront, where it is now being more effectively addressed by Australia’s major supermarket chains.¹³⁴ Shareholder resolutions relating to lobbying by industry associations is another example of where ACCR’s shareholder resolutions have placed industry bodies under more scrutiny than ever before.¹³⁵

The principal objective of ACCR in putting forward shareholder resolutions is not necessarily to obtain large votes in support of its resolutions, but instead, because shareholder resolutions are a very powerful tool, to attempt to have the power of corporations exercised in a more responsible way: ‘[W]e don’t have any interest in just getting very large votes, because we don’t think that very large votes alone will change things’.¹³⁶

Citing the example of human rights related resolutions at Qantas, ACCR noted that in some cases companies were prepared to tolerate high shareholder votes without acting in accordance with the shareholder resolution because the company

130 Interview with van de Pol (n 114) 2.

131 *Ibid* 2–3.

132 *Ibid* 4–5, 6. On the CBA position, see above n 37; n 110 and accompanying text.

133 Interview with O’Brien (n 109) 5–7.

134 *Ibid* 6, 7.

135 *Ibid* 6, 8.

136 *Ibid* 13. See also at 16: ‘But a strong voting result ... and a positive outcome are not necessarily correlated ... we’ve been able to achieve strong results in some areas with lower votes’.

saw a greater risk to their business in complying with the resolution than in not doing so.¹³⁷

In summary, while criticisms were directed at the current process for submitting shareholder resolutions, almost all of those interviewed – and not just the proponents of shareholder resolutions – see merit in these resolutions as a valuable part of the corporate stakeholder engagement process. The shareholder resolutions have also had the effect of increasing the focus within companies on ESG issues, particularly on the response of companies to climate change. Disadvantages identified included a potential blurring of the distinction of the roles of the directors of a company and its shareholders, and that shareholder resolutions can operate as a distraction and divert company resources.

2 Factors Affecting Levels of Support for ESG Shareholder Resolutions at Individual Companies

The interviews indicated that the factors behind atypically high levels of shareholder support for some resolutions were generally considered to be company-specific, often influenced by the history of corporate engagement on an issue, with investors increasingly interested in company responses to climate change risks. For example, the abnormally high level of support attracted by some shareholder ESG resolutions was attributed by the AICD representatives to factors such as the resolution's framing, the identity of the proponent and the topic of the resolution. It was noted that climate change as an issue was a growing area of interest, including with institutional investors:

I think that nexus between what's expected of corporates, the evolving community debate, much more comparable and meaningful disclosure emerging in the market anyway, providing a path for it, and really big contemporary political debates around it, all feature in terms of what drives that support.¹³⁸

The focus of the shareholder resolutions on climate change, and particular companies affected by climate change, was noted by ASIC: '[C]ompanies who have the greatest asset exposure to climate change or who are less responsive in addressing the concerns of proponents will be targeted to a greater degree than others'.¹³⁹

Similarly, the ACSI representatives observed that outcomes were most heavily influenced by case-specific circumstances, with the content of particular resolutions and the history of engagement on the relevant issue being important factors in determining the level of support that resolutions attract: '[Institutional] shareholders are quite discerning about what is being asked for and whether or not it's in their interests'.¹⁴⁰ Support from shareholders for resolutions may be low where the resolution seeks something that is not feasible or possible for the company to do or where the company has already indicated that it would take

137 Ibid 10–11. According to ACCR, Qantas did not wish to damage its relationship with the federal government.

138 Petschler, Interview with Petschler and Gergis (n 117) 10.

139 Written Response from Sidhu (n 119) 2.

140 John, Interview with John and Griffiths (n 116) 2. See also John, Interview with John and Griffiths (n 116) 6, 8; Griffiths, Interview with John and Griffiths (n 116) 8.

action in relation to an issue.¹⁴¹ Higher levels of support may be experienced where there has been a long history of engagement on an issue but investors do not see any major progress from the company on the issue,¹⁴² or where a resolution is co-filed by an institutional investor.¹⁴³ This factor was also noted by ASIC.¹⁴⁴

GIA also considered that outcomes were company-specific, often depending upon the history of engagement between the company and investors.¹⁴⁵ The case-specific nature of voting outcomes was supported by ASIC who observed that a resolution put to different companies in the same industry and in the same year may receive markedly different levels of support.¹⁴⁶

ACCR identified a range of factors that it considered contributed to resolutions attracting high levels of shareholder support.¹⁴⁷ These factors included where proponents can demonstrate salience, urgency and investor familiarity with the issue.¹⁴⁸ The novelty of a resolution regarding corporate reputation advertising put forward at the 2020 Woodside AGM was cited as a reason for the low level of support for that resolution in comparison with the majority support achieved for a climate change resolution at the same meeting.¹⁴⁹ ‘I think a good part of it is persistence over years. Just going back, having the same conversations about the same issues with the same people and listening to their feedback if you think it’s being given genuinely and in good faith, and refining over time’.¹⁵⁰ Having an institutional co-filer is likewise a factor that creates momentum in support for resolutions.¹⁵¹ Similarly, support from overseas investors and proxy advisors is very important and influential.¹⁵² It is also important for resolutions not to be seen by investors as overly burdensome for companies.¹⁵³

Market Forces attributed the reasons for the atypical level of support achieved for some ESG shareholder resolutions to, amongst other factors, the position adopted by the target companies. Companies that were recalcitrant in their approach to the ESG issue being raised, belligerent in defence of their position, unwilling to yield any ground, or unwilling to admit that what they were doing was not in line with what was expected of them or not best practice led to higher levels of support

141 John, Interview with John and Griffiths (n 116) 6–9; Griffiths, Interview with John and Griffiths (n 116) 7–8.

142 John, Interview with John and Griffiths (n 116) 7, citing Woodside as an example.

143 Ibid 8.

144 Written Response from Sidhu (n 119) 1–2.

145 Interview with Maxwell (n 118) 8.

146 Written Response from Sidhu (n 119) 2. An example cited was the different levels of support achieved in 2019 for a resolution relating to climate transition planning disclosure put by Market Forces at Origin (30.33% support) and AGL (5.35% support).

147 ACCR referred favourably to E James and M Gifford, ‘Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience’ (2010) 92(1) *Journal of Business Ethics* 79; Interview with O’Brien (n 109) 11, 13.

148 Interview with O’Brien (n 109) 11–12, 13.

149 Ibid 4, 12.

150 Ibid 13.

151 Ibid 12–13. Building relationships with institutional investors who then may become co-filers of resolutions is a key strategy of ACCR: Interview with O’Brien (n 38) 1–3.

152 Interview with O’Brien (n 38) 6.

153 Interview with O’Brien (n 109) 13.

for shareholder resolutions. Market Forces also observed that, where an important proxy advisor recommends a vote in support of an ESG resolution, other proxy advisors may follow suit. This influences individual investors to vote similarly.¹⁵⁴

Market Forces observed that superannuation funds, for example, were more likely to support resolutions framed around increasing disclosure focused on the companies' exposure to climate change. However, there has been less support for resolutions that, in the words of Market Forces, demonstrate 'real risk management' by companies, such as resolutions supporting disclosure of metrics and targets that demonstrate company action to manage its risk down over time.¹⁵⁵ It may be that some of these resolutions are viewed as too 'novel' by shareholders.¹⁵⁶

ACCR considered that one of the reasons it achieved such a high level of support for its climate change resolution at the 2020 Woodside AGM was the support of proxy advisory firms.¹⁵⁷ ACCR also observed that active investment funds, particularly industry superannuation funds, are more likely than passive investment funds to support its ESG shareholder resolutions.¹⁵⁸

3 The Advisory Resolution Process

One of the issues explored in the interviews was whether the current process for shareholders to submit a resolution is appropriate and, if not, what type of change might be required. As we have noted, the current process requires shareholders to submit a resolution proposing an amendment to the company's constitution that allows shareholder advisory resolutions and also the substantive advisory resolution dealing with the ESG matter that is of concern to the shareholders. The shareholders proposing the resolutions must have at least 5% of the votes that may be cast on the resolution, or the resolution must be proposed by at least 100 shareholders who are entitled to vote at a general meeting.

Recourse to a mechanism such as an advisory resolution for shareholders to be able to express an opinion on an issue was generally supported, with the existing legal framework in Australia that requires substantive resolutions to be proposed with a supporting proposal for an amendment to the company's constitution being described by several interviewees as an artifice. There was agreement among those interviewed that the current process is flawed. However, there was no consensus on the form of an alternative process.

AICD expressed concerns about the appropriateness of the mechanism of seeking a constitutional amendment permitting advisory resolutions in order for a shareholder to advance an advisory resolution about a substantive issue. It considered the Australian framework to be relatively 'shareholder friendly in terms of opportunities to engage with companies'.¹⁵⁹ Nevertheless, the concern of activist shareholders as to the lack of other channels 'to really direct shareholders

154 Interview with van de Pol (n 114) 8.

155 Ibid 11.

156 Ibid 12.

157 Interview with O'Brien (n 109) 3.

158 Interview with O'Brien (n 38) 5.

159 Gergis, Interview with Petschler and Gergis (n 117) 6.

as a group to a guidance position for the board' was also noted.¹⁶⁰ The AICD representatives favoured a more effective, less adversarial mechanism for ESG shareholder resolutions. Regulatory approaches requiring focus on ESG issues like modern slavery and climate change, and which guided governance practice and disclosure expectations, would be a more productive form of engagement than the current situation.¹⁶¹

ACSI observed significant inefficiencies in the constitutional amendment requirement,¹⁶² which it described as an 'artifice'.¹⁶³ The current regime requires unnecessary time and energy to be focused on the process rather than the issues of substance.¹⁶⁴ While investors value the opportunity to have input through shareholder votes on resolutions, the low level of support for constitutional amendment resolutions was explained by the fact that a change to the law to allow advisory resolutions would be more effective. At this stage, investors do not feel obligated to support constitutional changes because they know that they can vote on the advisory resolutions, which is the more important issue of substance. Given the general approach to publishing the results of proxy votes, there is appropriate transparency on the advisory vote: 'So, it's not like [shareholders' views are] ignored just because the first leg fails'.¹⁶⁵ Perhaps consistent with this, ACCR noted an increase in the number of abstentions in the voting on proposals to amend company constitutions to provide for advisory resolutions.¹⁶⁶

ACSI noted that the advisory nature of the resolutions is very important as it is consistent with the expectation that companies are managed by their boards and management who are accountable accordingly, but at the same time, the resolutions provide a mechanism for companies and their directors to be made aware of shareholders' views.¹⁶⁷

The GIA representative also commented that the process of proposing a constitutional amendment in order to advance a proposal for an advisory resolution is an 'artifice' and 'clunky'.¹⁶⁸ While some members of GIA consider that reform is required, there is no consensus amongst the members that there is a need for reform of the shareholder resolution process or as to what form that reform should take.¹⁶⁹ ACSI similarly noted a high level of interest in reform but no unified agreement on the nature of a reform,¹⁷⁰ including no consensus on an appropriate threshold for shareholders to file an advisory resolution.¹⁷¹ ACSI observed that shareholder

160 Petschler, Interview with Petschler and Gergis (n 117) 5.

161 Gergis, Interview with Petschler and Gergis (n 117) 15–16.

162 John, Interview with John and Griffiths (n 116) 13.

163 *Ibid* 21.

164 Griffiths, Interview with John and Griffiths (n 116) 14–15.

165 John, Interview with John and Griffiths (n 116) 15.

166 Interview with O'Brien (n 109) 2.

167 Griffiths, Interview with John and Griffiths (n 116) 4.

168 Interview with Maxwell (n 118) 3, 9.

169 On the position of GIA, see also Governance Institute of Australia, 'Shareholder Resolutions: Is There a Case for Change?' (Green Paper, 2018) 11 <<https://www.governanceinstitute.com.au/advocacy/thought-leadership/shareholder-resolutions-is-there-a-case-for-change/>>.

170 Griffiths, Interview with John and Griffiths (n 116) 16.

171 John, Interview with John and Griffiths (n 116) 21–2.

resolutions are an important shareholder right and the real question is ‘[H]ow do we have a more efficient system?’¹⁷² ACCR described the current process as ‘cumbersome’¹⁷³ and out of step with other jurisdictions.¹⁷⁴

In contrast to the view that the threshold for shareholders to be able to propose a shareholder resolution should be higher than the current requirement, proponents of shareholder resolutions have a different perspective. Market Forces considers the current process to be so ‘arduous’ that it needs to be very strategic in the way that it uses shareholder resolutions:¹⁷⁵ ‘[W]e wouldn’t be at that point [of submitting a resolution] if we didn’t think that the resolution was a really important step towards achieving our broader objectives’.¹⁷⁶ It is supportive of reform that would make it easier for advisory resolutions to be lodged by shareholders without the need for a special resolution to amend the company constitution.¹⁷⁷

ACCR similarly observed that the existing threshold of 100 shareholders or 5% is actually ‘quite difficult’.¹⁷⁸ While supportive of an advisory resolution process that does not require the simultaneous advancement of a proposal to amend a company’s constitution, ACCR considers that the current threshold for shareholders’ resolutions ‘strikes the right balance’.¹⁷⁹

While noting that the issue of law reform is a matter for Treasury and the Parliament, ASIC observed that, based on experience in other jurisdictions such as the United Kingdom, provided they remain non-binding and not directive, permitting advisory resolutions without the need for an accompanying resolution to amend the company constitution may be a valid mechanism for shareholders to engage on issues while preserving the responsibility of the board.¹⁸⁰

4 Shareholder Resolution Proponent Processes

It was documented in Part III of this article that the 83 ESG shareholder resolutions analysed in that Part were filed by only six proponents, and every resolution since 2015, other than two, has been filed by either ACCR or Market Forces. Given the dominant role of these two organisations, we were interested to explore the processes they follow when considering whether to submit an ESG resolution. Both ACCR and Market Forces described the processes they adopt in deciding whether to submit shareholder resolutions as being focused on policy outcomes rather than simply the pursuit of high levels of support for ESG resolutions.

Market Forces submits shareholder ESG resolutions where this would best achieve the mission of the organisation: to ensure that finance and investment are delivered in a way that promotes positive environmental outcomes. Market Forces is focused on the finance industry and target companies are selected on a case

172 Ibid 23.

173 Interview with O’Brien (n 109) 16; Interview with O’Brien (n 38) 12.

174 Interview with O’Brien (n 38) 12.

175 Interview with van de Pol (n 114) 9, 13.

176 Ibid 13.

177 Ibid 10.

178 Interview with O’Brien (n 109) 13.

179 Ibid.

180 Written Response from Sidhu (n 119) 4.

by case basis according to which companies need to change the most – ‘which company is recalcitrant and needs the most investor pressure’.¹⁸¹

ACCR’s approach is informed by its research on particular companies. Where this research shows that there is a solid basis to engage with a company, ACCR attempts engagement with that company. Then, where it considers that the issue cannot be adequately advanced through those ongoing discussions and where there is some level of urgency around action, ACCR will consider submitting a shareholder resolution. Other influential factors relevant to the decision to submit a shareholder resolution include whether there is an active civil society or trade union campaign happening in relation to the company on the issue and the likelihood of a resolution achieving breakthrough change at the company.¹⁸² ACCR observed that there is a process of refinement of resolutions as resolutions are drafted and submitted to companies over time.¹⁸³ The refinement of resolutions can assist in gaining the support of shareholders. This observation regarding the refinement of resolutions over time was also noted by ACSI.¹⁸⁴

ACCR views the outcomes of its campaigning as falling within a spectrum of responses by companies, progressing from an incrementalistic or greenwashing approach, to legitimate, modest change, with the spectrum culminating in ‘breakthrough change’.¹⁸⁵ The minimum objective of ACCR is a legitimate, modest level of change. ACCR notes that it is not an organisation focused on having shareholders withdraw their investment from companies where there is disagreement about the activities of those companies. Divestment is viewed as ‘that last stop where you say, well there is no influence here for me to [exercise] other than to withdraw my capital to protect the interests of my members or my clients’.¹⁸⁶

Significantly, ACCR expressed the view that if companies ignore the recent large votes on shareholder ESG resolutions simply because the votes are not legally binding, then this may lead to a number of effects. There could be stronger support for proposals to amend company constitutions, shareholders may start voting against the reappointment of those directors with some sort of responsibility for the issue involved, and shareholders may also choose to vote against company remuneration reports.¹⁸⁷

IV CONCLUSION

Particularly in the last three years of the period studied, there has been a significant increase in shareholder activism around ESG issues within listed companies in Australia. Increases have been experienced in both the number of

181 Interview with van de Pol (n 114) 9.

182 Interview with O’Brien (n 38) 7–9.

183 Interview with O’Brien (n 109) 12.

184 John, Interview with John and Griffiths (n 116) 9.

185 Interview with O’Brien (n 109) 14.

186 Ibid 14. See also Interview with O’Brien (n 38) 17: ‘Our toolbox is engagement. It is not divestment’.

187 Interview with O’Brien (n 38) 13–14.

companies where resolutions have been advanced and in the number of resolutions directed at those companies. This increased shareholder activism has principally concerned climate change.

These resolutions have been concentrated within a limited number of companies operating in a small number of industries. Factors that explain this include the degree to which companies are exposed to the risk of climate change and the history of engagement by companies on the issue the subject of the resolution. Moreover, the number of proponents is even more concentrated, with the vast bulk of resolutions proposed by ACCR and Market Forces.

Shareholder ESG resolutions typically attract modest levels of support from shareholders. Against this background, the atypical cases of those companies which have recorded high levels of support for these resolutions are notable. These examples include, for the first time in Australia, a majority of shareholders supporting a shareholder resolution on climate change despite the opposition of the board of directors to the resolution. Overall, it may be that base levels of support for shareholder ESG resolutions in Australia are increasing. However, the company-specific circumstances of voting outcomes mean that more data is required before identifying definite general trends.

Notwithstanding that an ESG resolution may garner only modest support, a high level of support for shareholder ESG resolutions is neither the principal objective of the proponents of the resolutions, nor a necessary determinant of success of the proposal. From the point of view of the proponents, some companies respond positively to ESG resolutions even where levels of support are low. There is also evidence that some resolutions are withdrawn because of agreements or other actions acceptable to the proponents. Moreover, a high level of support for a non-binding, advisory resolution does not necessarily guarantee substantive change sought by the resolution.

Finally, the absence in Australia of a regulatory framework that allows specifically for shareholders within listed companies to vote on advisory resolutions requires the adoption of a strategy involving a supporting constitutional amendment, which is recognised as artificial. Nevertheless, despite the widely acknowledged limitations of the current framework in which shareholder ESG resolutions are proposed, the research we have conducted – both the interviews with representatives of a range of organisations and the analysis of the data on ESG shareholder resolutions – indicates that these resolutions are generally recognised as a valuable corporate stakeholder engagement mechanism and one that has resulted in positive change in some of the companies which have been the subject of those resolutions.