

# ACCR V CBA [2015] FCA 785: NONBINDING SHAREHOLDER RESOLUTIONS AND IMPLICATIONS FOR SHAREHOLDER ACTIVISM

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*Davies J's decision in ACCR v CBA [2015] FCA 785 affirmed an important and controversial aspect of corporate law that has significant implications for shareholder activism in Australia. Her Honour held that the Commonwealth Bank of Australia's ('CBA') board was entitled to refuse to put the Australasian Centre for Corporate Responsibility's ('ACCR') proposed nonbinding resolutions to CBA's AGM as it infringed upon the well established 'division of powers' doctrine between the board and the general meeting. Although this doctrine is well established here and overseas, its application to nonbinding shareholder resolutions is questionable as such resolutions have no legal effect and thus arguably do not interfere with the board's powers. In the US, shareholders regularly use nonbinding shareholder resolutions as a tool to formally convey their opinions to the board. However, the Australian authority – namely, the controversial 1980s case of NRMA v Parker – makes it clear that nonbinding resolutions do in fact usurp the board's authority and thus infringe upon the division of powers doctrine. ACCR v CBA provided an opportunity to revisit this point and question the correctness of Parker. This case note will briefly analyse Davies J's decision from a legal and practical standpoint, as well as considering the implications this decision has for shareholder activism in Australia.*

## I INTRODUCTION

Many activist shareholders were watching closely as Davies J handed down the judgment in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia*<sup>1</sup> ('ACCR v CBA') in July 2015. Her Honour affirmed a controversial precedent from the 1980s that has important implications for shareholder rights and, consequently, shareholder activism in Australia.

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<sup>1</sup> *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785.

*ACCR v CBA* involved an act of 'green activism'. ACCR attempted to influence the environmental reporting policy of the Commonwealth Bank of Australia ('CBA') through a nonbinding shareholder resolution. Davies J upheld a controversial authority from the 1980s, *NRMA v Parker*<sup>2</sup> ('Parker'), which stands for the proposition that shareholders cannot make the board of directors put forward a motion, or requisition a general meeting, for the purpose of a nonbinding shareholder resolution. Nonbinding shareholder resolutions, as the name suggests, do not bind the board to act in anyway, rather they simply provide a formal forum for shareholders to give their *opinion* on particular aspects of the company. While such resolutions have no legal effect, they can be an extremely influential tool as board members will generally not be bold enough to act contrary to the wishes of a large portion of shareholders.

Davies J's decision in *ACCR v CBA* seems to be a logical one for the proper functioning of the corporation, however, the legal analysis is lacking. Her Honour appears to read too much into the settled 'division of powers' doctrine and past authority without delving deeper into the reasoning behind the decisions.

Nevertheless, *ACCR v CBA* has many implications for the growing phenomenon of shareholder activism in Australia as it affirms the inability of activists to use this useful tool in their campaigns. Nonbinding shareholder resolutions are a commonplace in other jurisdictions such as the US; the 'home' of shareholder activism.

This case note will analyse the decision in *ACCR v CBA* while also looking at the practical implications of the decision; both for the parties involved in the case, as well as shareholder activism generally. The practical implications are particularly important to analyse here as although ACCR lost the legal battle, in the end, they were able to effectively influence CBA to change its environmental reporting policies due to the public pressure that the case provided.

## II THE DIVISION OF POWERS DOCTRINE

Corporate governance literature tends to define the relationship between shareholders and the board of directors as one of principal and agent.<sup>3</sup> However, the concept of 'agency' is a much narrower concept in law than its traditional use in the field of economics. The fact that directors owe a fiduciary duty to act in the best interests of *the company as a whole*,<sup>4</sup> as opposed to *individual*

<sup>2</sup> *NRMA Ltd v Parker* (1986) 6 NSWLR 517.

<sup>3</sup> See, eg, Michael Jensen and William Mecklin, 'Theory of the firm: Managerial, Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

<sup>4</sup> See *Re Smith & Fawcett Ltd* [1942] Ch 304, 306; *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291; *Corporations Act 2001* (Cth) s 181(1)(a).

*shareholders*, places the relationship between directors and shareholders outside the realm of pure agency. Corporate law prefers to refer to shareholders and directors as two separate organs of authority through the ‘division of powers’ paradigm.<sup>5</sup> The powers of the company are, unless otherwise stated in the corporate constitution, divided between the board of directors and the general meeting, such that each organ has exclusive and non-hierarchical ‘jurisdiction’ over their respective areas of authority.

The use of the agency concept undoubtedly originates from the early English jurisprudence dating back to the nineteenth century, which regarded the general meeting as the dominant body; intervening in management of the company whenever it saw fit.<sup>6</sup> Before English companies legislation conferred corporate status on joint stock companies, members essentially acted together on behalf of the company, much like partners do for a partnership.<sup>7</sup> However, a change in the English Companies Act at the end of the nineteenth century saw management power firmly delegated to the board of directors.<sup>8</sup> The English Court of Appeal confirmed this approach in the seminal case of *John Shaw & Sons (Salford) Ltd v Shaw*<sup>9</sup> (*John Shaw & Sons*). The English Court of Appeal outlined that shareholders essentially only had two options if they were dissatisfied with the board; change the constitution or change the composition of the board:

If powers of management are vested in the directors’ they and they alone can exercise these powers. The only way in which the general body shareholder can control the exercise of powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot usurp the powers which by the articles are vested in the directors any more than the directors can usurp the power vested by the articles in the general body of shareholders.<sup>10</sup>

The division of powers doctrine is applied strictly in Australia. Section 198A(1) of the *Corporations Act 2001* (Cth) (‘the Act’) provides, as a replaceable rule, that the business of the company is to be managed by or under the direction of

<sup>5</sup> See *NRMA Ltd v Parker* (1986) 6 NSWLR 517.

<sup>6</sup> See, eg, section 90 of the *Companies Clauses Consolidation Act 1845* (UK) which stated that the exercise of the board’s powers ‘shall be subject also to the control and regulation of any general meeting specifically convened for the purpose but not so as to render invalid any act done by the directors prior to any resolution passed by such general meetings’. See also Cotton LJ in *Isle of Wight Railway Co. v Tahourdin* (1883) 25 Ch D 320, 329.

<sup>7</sup> Robert P. Austin, Ian M. Ramsay, *Ford’s Principles of Corporations Law* (16<sup>th</sup> ed, Lexis Nexis Buttersworth, 2015), 244.

<sup>8</sup> See *Automatic Self-Cleansing Filter Syndicate Co. v Cunningham* [1906] 2 Ch 34, 42; *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89.

<sup>9</sup> *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 11.

<sup>10</sup> *Ibid* 134.

the directors.<sup>11</sup> Apart from constitutional or board changes, the Act also requires general meeting approval for a limited number of circumstances that result in large structural changes and other acts that potentially effect shareholders' rights.<sup>12</sup> The ASX Listing Rules also require shareholder approval for certain major transactions.<sup>13</sup> Takeover law is another area where the decision making authority is largely shifted to shareholders.<sup>14</sup> These circumstances are largely on the extreme end of the spectrum. By and large, all business decisions are made by the board of directors (or at least supervised by the board through delegating decisions to management).

In 1986, this principle was taken one step further in the controversial NSW Court of Appeal case of *Parker*; not only were directors not bound to follow direction from shareholders on how to run the company, but shareholders were now not even allowed to formally express an *opinion* about how the board should exercise their management powers through a nonbinding shareholder resolution.<sup>15</sup> *Parker* importantly stands for the proposition that members cannot use their statutory powers to requisition a general meeting (ss 249D, 249F) or demand a motion be put to a general meeting (s 249N) if the subject is a matter of management exclusively vested in the board.<sup>16</sup>

*John Shaw & Sons* clearly states that shareholders cannot 'usurp the powers which by the articles are vested in the directors'.<sup>17</sup> However, it is easy to see the argument one might pose in response to *Parker* concerning nonbinding shareholder resolution; how do shareholders 'usurp' the board's powers if they are merely expressing an *opinion* that the board is not bound to follow? The board's powers are wholly unaffected by such resolutions.

On the other hand, the counter argument is that one cannot simply look to the legal effect of such resolutions, it is important to consider the practical effect as well. The ability to propose nonbinding resolutions at will has the *practical effect* of 'usurping' the board's powers as they are constantly receiving

<sup>11</sup> These powers do not include those limited by the Corporations Act or the company's corporate constitution. *Corporations Act 2001* (Cth) s 198A(2).

<sup>12</sup> Eg, The *Corporations Act 2001* (Cth) requires general meeting approval for: reducing the company's issued share capital (ss 256B, 256C), altering rights attached to shares (Pt 2F.2), altering the company's status (Pt 2B.7), selective buy-backs (s 257D), and consolidating or subdividing the company's shares (s 254H).

<sup>13</sup> Eg, The ASX Listing Rules require general meeting approval where: the company's main undertaking is being sold (LR 11.2), the company is making significant change to its activities (LR 11.1) the company proposes to issue new share capital in excess of 15% of its capital in any period of 12 months, and the new issue is not *pro rata* among members (LR 7.1).

<sup>14</sup> See *Corporations Act 2001* (Cth) Chapter 6.

<sup>15</sup> Ibid 522; It follows that the s 249Q requirement that a general meeting is requisitioned for a 'proper purpose' must be for a purpose of which shareholders are legally entitled to vote on. *NRMA Ltd v Snodgrass* (2001) 39 ACSR 260.

<sup>16</sup> *NRMA Ltd v Parker* (1986) 6 NSWLR 517.

<sup>17</sup> *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 11, 134.

direction on how to exercise those powers. This is especially so when, in Australia, it is easy, relative to countries such as the US, to remove directors.

This difficult question was the central issue of *ACCR v CBA*.

### III *ACCR v CBA*

#### A *Facts*

The Australasian Centre for Corporate Responsibility ('ACCR') advocates for sustainable and ethical investments by large corporations.<sup>18</sup> ACCR, on 4 September 2014, on behalf of 100 members of the Commonwealth Bank of Australia ('CBA') gave notice of certain non-binding resolutions it proposed to move at CBA's next annual general meeting ('AGM') on 12 November 2014.<sup>19</sup> CBA listed three alternative resolutions in order of preference.<sup>20</sup>

The first proposed resolution stated that, in the opinion of the shareholders, it would be in the best interests of the company for the directors to provide a report on CBA's greenhouse emissions, the level and risk to the company of 'unburnable carbon' and CBA's approach to tackling these issues.<sup>21</sup> The second proposed resolution was simply an expression of concern from the shareholders that the matters in the first resolution were not being addressed.<sup>22</sup> And lastly, the third resolution proposed to amend the constitution so that CBA had to make a yearly report of the greenhouse gas emissions it produced that year.<sup>23</sup>

The first two proposed resolutions were therefore 'nonbinding' resolutions that simply expressed the opinion of shareholders, but did not actually compel directors to complete those acts. Only the third resolution (the constitutional amendment) was included on the notice of CBA's 2014 AGM.<sup>24</sup> It was accompanied by a recommendation from the board of directors that they did not consider it in the best interests of the company.<sup>25</sup>

CBA, in a letter to ACCR, stated that the first and second resolutions were not included on the meeting notice as they were matters within the powers of the board and were thus not legally valid or capable of being legally effective.<sup>26</sup>

<sup>18</sup> As stated on Australasian Centre for Corporate Responsibility website, <<http://www.accr.org.au/>>.

<sup>19</sup> *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785, [2].

<sup>20</sup> *Ibid* [1]-[2].

<sup>21</sup> *Ibid* [1].

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* [2].

<sup>24</sup> *Ibid* [3].

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* [4].

## B Submissions

ACCR accepted the division of powers doctrine but argued it did not prevent a nonbinding proposal being put to shareholders as such a resolution was not an exercise of the company's powers and thus did not usurp the powers of the board.<sup>27</sup> To do this, ACCR had to argue *Parker* was wrongly decided. ACCR also argued in the alternative that the two resolutions were an exercise of power that was impliedly not conferred on the board.<sup>28</sup>

ACCR sought declarations that the first two proposed resolutions could be validly moved at an AGM of CBA and that the directors acted outside their powers in publicly commenting on the third proposal in the way that they did, as well as an injunction to make the board put forward the first and second proposed resolutions at CBA's next AGM.<sup>29</sup>

CBA, of course, argued that ACCR's contentions were wrong and that *Parker* clearly established the precedent that shareholders cannot force the board to allow them to express an opinion by resolution as to how a power vested by the company's constitution in the directors should be exercised.<sup>30</sup>

## C Decision

Davies J found in favour of CBA on all issues and, in doing so, upheld Australia's strict division of powers doctrine in its application to non-binding resolutions, as expressed in *Parker*. Davies J held that;

- resolutions constitute an exercise of the board's powers;<sup>31</sup>
- *Parker* was decided correctly and ACCR's suggested authorities (*Winthrop Investments* and *Auer v Dressel*) compelled no different answer;<sup>32</sup> and
- There is no implied or statutory power from ss 249P, 250R or otherwise for shareholders in a general meeting to express views on management through a resolution.

Davies J restated the fundamental division of powers doctrine from the early English cases of *Gramophone & Typewriter Ltd v Stanley*<sup>33</sup> and *John Shaw & Sons*.<sup>34</sup> Her Honour went on to consider the more recent Australian case, *Winthrop Investments*,<sup>35</sup> which formed the basis for ACCR's argument.

<sup>27</sup> Ibid [13]-[14].

<sup>28</sup> Ibid [14].

<sup>29</sup> Ibid [6].

<sup>30</sup> Ibid [15].

<sup>31</sup> Ibid [17]-[18].

<sup>32</sup> Ibid [27]-[32].

<sup>33</sup> *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89.

<sup>34</sup> [16].

<sup>35</sup> *Winthrop Investments* [1975] 2 NSWLR 666.

*Winthrop Investments* concerned the power of the general meeting to validate a breach of directors' duties. ACCR relied on a statement by Samuels JA which elaborated on the principles enunciated in *John Shaw & Sons* by stating that the resolution to approve the directors' breach of duty in that instance was not binding and thus this expression of opinion by the shareholders *did not involved any exercise of power*.<sup>36</sup> ACCR argued that if such an expression of opinion did not involve any exercise of power, it therefore could not impinge on the exercise of the board's powers. Davies J rejected this argument, pointing out that *Winthrop Investments* must be understood in context.<sup>37</sup> It was a case about ratifying directors breaches in which the directors themselves referred a question to shareholders at a general meeting. Her Honour stressed that Samuels JA's dictum must be understood in the context of that case and should not be taken as a statement of a general principle regarding shareholder resolutions.<sup>38</sup>

Davies J also rejected the submission that the New York Court of Appeals case of *Auer v Dressel*<sup>39</sup> warranted a departure from the principles in *Parker*. Her Honour simply dismissed this case as it did not follow the line of authority in Australia. Her Honour concluded that neither *Auer v Dressels* nor *Winthrop Investments* warranted a departure from the decision in *Parker*, which should be followed in this instance.<sup>40</sup>

Davies J also rejected ACCR's ancillary arguments that used interpretive principles to read down a power of shareholders to propose non-binding resolutions through an implied power or through certain sections of the Act such as ss 249P<sup>41</sup> and 250R(1)(a).<sup>42</sup> Her Honour dismissed these arguments largely on the basis that the existence of s 250S, which allows shareholders to ask questions and comment on the management of the company at an AGM, was not consistent with ACCR's construction.<sup>43</sup>

#### IV LEGAL ANALYSIS

Davies J's decision leaves a lot lacking in legal analysis. Her Honour seems to rely mostly on *Parker* without really delving into the reasoning behind it. The crucial English authoritative statements in *Gramophone & Typewriter* and *John Shaw & Sons* repeated in her Honour's judgment make no mention of non-

<sup>36</sup> Ibid 683.

<sup>37</sup> *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785, [29].

<sup>38</sup> Ibid.

<sup>39</sup> *Auer v Dressel* (1954) 306 NY 427.

<sup>40</sup> *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785, [27].

<sup>41</sup> [35]-[36].

<sup>42</sup> Ibid [38]-[39].

<sup>43</sup> Ibid [36], [39].

binding resolutions. Those English cases are authority for the broader division of powers doctrine. It therefore difficult to understand how such statements evolved into a principle that prohibited the mere expression of opinion concerning the exercise of the board's management power, or at least the power to put such a proposal to the general meeting. This can only be understood by looking more closely at the decision in *Parker*; and therein lies the problem.

*Parker* has even less legal analysis of this proposition. McLelland J appears to spend only one paragraph on the discussion of whether a non-binding resolution can be put to a general meeting.<sup>44</sup> In this paragraph, his Honour authoritatively states;

In my view it is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that other body or person.<sup>45</sup>

McLelland J, while perhaps correct, provides no legal reasoning for this proposition and appears simply to be giving his opinion on what shareholders, 'in his view', should have the power to do. This would appear an ample case to resort to overseas persuasive authority to inform such an important part of corporate law.

Davies J also fails to give an adequate explanation of Samuels JA's statement in *Winthrop Investments*. Her Honour simply states that Samuels JA's dictum was confined to its context and should not be read as a general principle, when in fact Samuels JA's statement was made in rather general terms. Perhaps a more helpful explanation may have been to distinguish *Winthrop Investments* on the basis that directors had voluntarily asked for shareholders' opinion to ratify a breach of directors' duties, whereas in *ACCR v CBA*, shareholders sought to force the board to place this resolution on the notice for the upcoming AGM.

Davies J disposes of the ACCR's US authority without further explanation as it conflicts with the precedent in Australia. This may seem obvious and a point that 'goes without saying', however, this is not necessarily always the case. Courts in the latter part of the twentieth century, especially in the area of corporate law, have increasingly looked overseas to jurisdictions such as the US for guidance on difficult and unclear areas of law and policy. This was no more apparent than in the 1986 NSW Court of Appeal case, *Advance Bank v FAI Insurance*,<sup>46</sup> in which Kirby P cited numerous US cases and academic writings

<sup>44</sup> *NRMA Ltd v Parker* (1986) 6 NSWLR 517, 522.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Advance Bank Australia Ltd v FAI Insurance Ltd* (1987) 9 NSWLR 464.

to come to his decision.<sup>47</sup> It may have been appropriate to dig slightly deeper into the reasoning behind *Auer v Dressel*, as well as contrasting this to McLelland J's reasoning in *Parker*. Nevertheless, it is no surprise Davies J rejected the New York Court of Appeals case here as it directly conflicted with the Australian authority.

Overall, Davies J made a safe judgment and followed the authority in *Parker*. Departing from *Parker* may have resulted in a significant change in the corporate legal landscape and overturned a seemingly settled principle in corporate law. While her Honour is not necessarily incorrect, it may have been of greater benefit if her Honour dug deeper into the reasoning behind why exactly nonbinding shareholder resolutions infringe upon the division of powers doctrine. As a result, *ACCR v CBA* simply serves to further entrench the brief and underwhelming judgment in *Parker*.

## V PRACTICAL ANALYSIS: IMPLICATIONS FOR SHAREHOLDER ACTIVISM

It is important not only to analyse Davies J's decision from a legal standpoint, but also to consider the practical ramifications on this particular scenario, as well as more generally for shareholder activism. Indeed, while *ACCR* may have lost court, *ACCR* would consider the case a victory in reality as *CBA* eventually implemented many of their suggestions to varying degrees due to the publicity the case generated.

### A *Practical implications for CBA*

Although *ACCR* lost the legal battle with *CBA*, the Federal Court case created a lot of media attention around the issue. This attention likely shone a negative light on *CBA* as it appeared to be insensitive to the highly publicised issue of climate change, when in fact *CBA* was simply adhering to a seemingly settled principle of corporate governance in rejecting *ACCR*'s proposed resolutions. The media attention generated from the court case undoubtedly played a part in *CBA* improving its emission reporting after the resolution was proposed.<sup>48</sup> Green activists such as *ACCR* are usually not expecting, or even aiming for, substantial support from shareholders for their proposals. Their biggest weapon is publicity and in this case *ACCR* certainly achieved the publicity and effect they were hoping for. This begs the question of whether it is desirable for green activists to use publicity and company resources to influence the board into

<sup>47</sup> See *ibid* at 476-478 where Kirby P refers to *Lawyers' Advertising Co v Consolidated Ry Lighting & Refrigerating Co* 80 NE 199; 187 NY 395 (1907) and Professor M A Eisenberg in "Access to the Corporate Proxy Machinery (1970) 83 *Harvard Law Review* 1489, 1496.

<sup>48</sup> See Commonwealth Bank of Australia, Environmental, Social & Governance (ESG) Lending Commitments – Implementation and Reporting, <<https://www.commbank.com.au/content/dam/commbank/assets/about/who-we-are/sustainability/ESG-lending-commitments-implementation-reporting.pdf>>.

making a decision, of which only approximately 3% of shareholders approved of in this case.<sup>49</sup>

Another interesting point from this case is the use of a constitutional amendment as an apparent 'loophole' in which a shareholder can repackage their nonbinding resolution into a constitutional amendment so the board is legally required to put the proposed resolution to a general meeting. ACCR used this tactic by submitting their third resolution to the AGM in the form of a constitutional amendment. This tactic can be effective for green activism, which aims predominantly for publicity, however, it would likely be less effective for the traditional activist who seeks to influence board decisions for economic reasons. This is because of the difficulty in condensing the activist's demands into a constitutional amendment<sup>50</sup> and the fact that constitutional amendments require a special majority.

### B *Practical implications for shareholder activism generally*

Shareholder activism has become commonplace among the world's developed markets. Some consider activists as 'capitalism's unlikely heroes',<sup>51</sup> while others see shareholder activism as 'directly responsible for the short termist fixation that led to the [2008] financial crisis.'<sup>52</sup> Recent years have seen shareholder activism take place at major Australian companies such as Qantas Airways,<sup>53</sup> Fairfax Media,<sup>54</sup> Brickworks,<sup>55</sup> Billabong International<sup>56</sup> and Infigen Energy.<sup>57</sup>

<sup>49</sup> This was the approval rate for the third resolution at the AGM.

<sup>50</sup> Karen Evans-Cullen, Rod Halstead and John Elliott, '2014: The year of the shareholder activist?' *Clayton Utz Insights*, 6 February 2014, <[http://www.claytonutz.com/publications/edition/6\\_february\\_2014/20140206/2014\\_the\\_year\\_of\\_the\\_shareholder\\_activist.page](http://www.claytonutz.com/publications/edition/6_february_2014/20140206/2014_the_year_of_the_shareholder_activist.page)>.

<sup>51</sup> 'Capitalism's unlikely heroes', *The Economist* (London), 7 February 2015.

<sup>52</sup> Martin Lipton, Jay W. Lorsch, Theodore N. Mirvis, 'Schumer's Shareholder Bill Misses the Mark' *The Wall Street Journal* (New York), 12 May 2009.

<sup>53</sup> A consortium of investors, including former managers and activist investor, Mark Carnegie, sought to challenge CEO, Alan Joyce's corporate strategy. However, in early 2013, after major institutional shareholders failed to rally behind the group, the activist consortium sold their holdings in Qantas. Sarah Thompson and James Chessell, 'Dixon Group Sells Qantas Holding', *Australian Financial Review* (Sydney), 30 January 2013.

<sup>54</sup> Gina Rinehart, along with John Singleton and Mark Carnegie, worked together in attempting influence the direction of Fairfax Media in 2012. Rinehart failed in an attempt to secure a seat on the board due to refusing to sign a charter of editorial independence. Rick Feneley, 'Mark Carnegie: landing big fish with a small lure', *The Sydney Morning Herald* (Sydney), 5 January 2013; Ruth Williams, 'Gina Rinehart sells entire Fairfax stake', *Australian Financial Review* (Sydney), 7 February 2015.

<sup>55</sup> In late 2013, Mark Carnegie and Perpetual attempted to unlock the cross-shareholding structure between Brickworks and Washington H. Soul Pattinson. Philip Podzebenko, 'Activists take aim at Soul Pattinson-Brickworks cross-shareholding set-up', *The Australian* (Sydney), 28 October 2013.

However, Australia has not seen a large amount of shareholder activism by international standards.

Australia's 'shareholder friendly' regulatory environment has caused some to proclaim Australia as 'fertile soil' for a wave of activism.<sup>58</sup> The tools in the Australian activist's arsenal include, inter alia, the 'two strikes' rule,<sup>59</sup> the right to requisition a general meeting<sup>60</sup> and replace directors,<sup>61</sup> restrictions on directors' ability to campaign using corporate funds<sup>62</sup> and the prohibition of many anti-takeover defences.<sup>63</sup> These tools are generally not available in the US – the hub of shareholder activism.<sup>64</sup> Equally, there are some who think 'Australia's legal system favors companies over shareholders, presenting more obstacles for activist investors to navigate...'.<sup>65</sup> The inability to propose non-binding shareholder resolutions to a general meeting is certainly one of these obstacles. *ACCR v CBA*'s affirmation of the proposition that shareholders cannot formally express their opinion regarding the exercise of the board's management powers takes away an important weapon in the activist shareholder's arsenal.

The position in *ACCR v CBA* is in contrast to the US where shareholders

<sup>56</sup> US-based Coastal Capital International, in 2013, pressed for a general meeting to oust most of Billabong International's board amid its debt crisis. Gillian Tan, 'Activist Shareholder Takes Aim at Billabong's Board', *Wall Street Journal* (Online), 2 September 2013 <<http://blogs.wsj.com/moneybeat/2013/09/02/activist-shareholder-takes-aim-at-billabongs-board/>>.

<sup>57</sup> London-based activist hedge fund, The Children's Investment Master Fund, forced the resignations of the chairman and a director of Infigen Energy in 2010. Tracy Lee, 'UK investor TCI forces Infigen directors out', *The Australian* (Sydney), 13 November 2013.

<sup>58</sup> See, eg, Friedlander et al's claim that Australia is 'fertile soil' for an influx of shareholder activism in David Friedlander, Medard Fischer, Michael Ting, 'Economic activism: Re-thinking directors' duties and governance structures in the activist context' (Presented at Supreme Court of New South Wales Annual Corporate Law Conference, Sydney, 8 August 2014), 6.

<sup>59</sup> *Corporations Act 2001* (Cth) s 300A.

<sup>60</sup> *Ibid* s 249N.

<sup>61</sup> See Replaceable Rule s 201G in *Corporations Act 2001* (Cth); *Worcester Cosetry Ltd v Witting* [1936] Ch 640, 650. Typically, a company's constitution makes provision for shareholders ability to appoint directors. Robert P. Austin, Ian M. Ramsay, *Ford's Principles of Corporations Law* (15<sup>th</sup> ed, Lexis Nexis Buttersworth, 2013), 242.

<sup>62</sup> See Gummow J in *Fraser v NRMA Holdings Limited* (1994) 124 ALR 548, 565 citing the principles in *Advance Bank v FAI* [1987] 9 NSWLR 464 to support the finding that the use of corporate funds by directors to distribute proxy papers to members, explaining and advocating the recommendations of the directors, may be improper.

<sup>63</sup> See Takeovers Panel, *Guidance Note 12: Frustrating Action*, 18 July 2014.

<sup>64</sup> King & Wood Mallesons, 'Directions 2015: Current issues and challenges facing Australian directors and boards'

<<http://www.companydirectors.com.au/~media/resources/director%20resource%20centre/cgei/directions%20report%202015.ashx>>, 17.

<sup>65</sup> Ross Kelly, 'Shareholder Activism Rises Down Under', *The Wall Street Journal* (New York), 3 December 2013 quoting activist investor, Mark Carnegie.

regularly make non-binding proposals<sup>66</sup> to formally express their opinion to management and gauge the level of support from fellow shareholders.<sup>67</sup> Although studies in the US have shown nonbinding voting is generally ineffective in conveying the expectations of shareholders to managers when the shareholders and manager's interests are not aligned,<sup>68</sup> the power of nonbinding resolutions would likely be significantly more powerful in Australia. This is because, unlike in the US, shareholders have the power to requisition a meeting and spill the board at any point (as long as they meet the statutory prerequisites), and therefore, if a director of an Australian company did not implement a nonbinding proposal that receives significant support from shareholders, there is a real risk that they may lose their job because of it.

Nevertheless, whether nonbinding shareholder resolutions are desirable in Australia is a deeper question within the wider debate over shareholder empowerment. This 'desirability' can be measured on many scales, such as, whether it improves corporate governance, shareholder value or corporate social responsibility. Austin and Ramsay, two of the leading scholars on Australian corporate law, tend to agree with McLelland J's approach in *Parker*.<sup>69</sup> They cite practical reasons for their opinion; although, legally, the board are not bound to follow shareholders, because of the threat of a board spill, the power of a shareholder to continually express their opinion formally could have the practical effect of eroding the director's management powers.<sup>70</sup> Austin and Ramsay also cite the unnecessary financial burden for circulating such proposals and convening meetings.<sup>71</sup> Austin and Ramsay's first reason holds more weight and is undoubtedly what Davies J and McLelland J were alluding to in their respective judgments, albeit not particularly clearly.

#### VI Conclusion

Overall, Davies J's judgment in *ACCR v CBA* is an important affirmation of the principles from *Parker*; ie, the proposition that shareholders do not hold the statutory power to demand a nonbinding shareholder resolution be put to a general meeting. While this may be the correct decision based on the Australian

<sup>66</sup> There were approximately 943 shareholder proposals for 2015 shareholder meetings reported as of 17 July 2015. Elizabeth Ising, 'Shareholder Proposal Developments During the 2015 Proxy Season' on *Harvard Law School Forum on Corporate Governance and Financial Regulation* (17 July 2015) <<http://corpgov.law.harvard.edu/2015/07/17/shareholder-proposal-developments-during-the-2015-proxy-season/>>.

<sup>67</sup> Under Rule 14a-8 a shareholder with 1% or \$2,000 worth of shares may make a non-binding shareholder proposal at an annual or special meeting of shareholders. Security Exchange Commission, *Code of Federal Regulations*, § 240.14a-8 (2013).

<sup>68</sup> Doron Levitt and Nadya Malenko, *Nonbinding Voting for Shareholder Proposals* (2011) 66(5) *Journal of Finance* 1579.

<sup>69</sup> Robert P. Austin, Ian M. Ramsay, *Ford's Principles of Corporations Law* (16<sup>th</sup> ed, Lexis Nexis Buttersworth, 2015), 248.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

authority, Davies J's judgment lacks substance and a persuasive argument why a nonbinding shareholder resolution would infringe the division of powers doctrine. It further serves to entrench the even less substantiated judgment in *Parker*.

Nevertheless, the author finds the practical arguments support Davies J's decision. While in a strict legal sense a nonbinding decision does not 'usurp' the exercise of the board's management powers, the practical effect is, in the Australian legal environment where shareholders can spill the board at any time, that the board's powers will in fact be undermined. Furthermore, such resolutions that are used by green activists for purely publicity purposes are a waste of company resources – such queries are better left to a question or comment at an AGM, or informal discussion with the board and other shareholders.

Whichever way you fall in the debate over shareholder empowerment, there is no doubt that *ACCR v CBA* has serious implications for shareholder activists in Australia. While many feel Australia is 'fertile soil' for shareholder activism, the strict interpretation of the division of powers doctrine dilutes this claim by taking away a useful weapon available in most other jurisdictions where shareholder activism is more proliferate.