Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia - [2015] FCA 785

FEDERAL COURT OF AUSTRALIA

Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2015] FCA 785

Citation:	Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2015] FCA 785
Parties:	**AUSTRALASIAN CENTRE FOR CORPORATE RESPONSIBILITY v COMMONWEALTH BANK OF AUSTRALIA**
File number:	VID 607 of 2014
Judge:	**DAVIES J**
Date of judgment:	31 July 2015
Catchwords:	**CORPORATIONS** – members' resolutions – obligation of directors to put forward resolutions at general meeting under s 249O of the *Corporations Act 2001* (Cth) ("the Act") – validity of certain resolutions proposed by members pursuant to s 249N of the Act – whether resolutions expressing opinion of shareholders as to how a power vested in the board should be exercised constitute an exercise of the board's powers – whether *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517 correctly decided – whether implied power of shareholders in general meeting to express views on the management of

	the company – whether s 249P of the Act empowers shareholders to propose such resolutions – whether such resolutions relate to the business of the company – whether proper notice of resolutions given – whether statements in the Explanatory Memorandum of the Notice of General Meeting expressing the board's views on a resolution were *ultra vires*
Legislation:	*Corporations Act 2001* (Cth) ss 249N, 249O, 249P, 250R, 250S
Cases cited:	*National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517 *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 *Federal Commissioner of Taxation v Commonwealth Aluminium Corporation Ltd* (1980) 143 CLR 646 *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 *Turner v Berner* [1978] 1 NSWLR 66 *Auer v Dressel* (1954) 306 NY 427 *Stanham v The National Trust of Australia (NSW)* (1989) 15 ACLR 87 *Re Molopo Energy Ltd* (2014) 104 ACSR 46; [2014] NSWSC 1864 *Bagga v Sikh Association of Western Australia Inc* [2012] WASC 193 *Queensland Press Ltd v Academy Investments (No 3) Pty Ltd* (1 988) 2 Qd R 575 *National Roads and Motorists' Association Ltd v Bradley* (2002) 42 ACSR 616; [2002] NSWSC 788 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626; [2007] NSWSC 270
Date of hearing:	1 June 2015
Place:	Melbourne
Division:	GENERAL DIVISION

Category:	Catchwords
Number of paragraphs:	44
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IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION **VID 607 of 2014**

BETWEEN: **AUSTRALASIAN CENTRE FOR CORPORATE RESPONSIBILITY**

Applicant

AND: **COMMONWEALTH BANK OF AUSTRALIA**
Respondent

JUDGE: **DAVIES J**

DATE OF ORDER: **31 JULY 2015**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The originating application filed 14 October 2014 be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011* (Cth).

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

VID 607 of 2014

GENERAL DIVISION

BETWEEN: **AUSTRALASIAN CENTRE FOR CORPORATE RESPONSIBILITY**

Applicant

AND: **COMMONWEALTH BANK OF AUSTRALIA**

Respondent

JUDGE: **DAVIES J**

DATE: 31 JULY 2015

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1. The principle question for determination is whether two resolutions proposed by members of the respondent (**"CBA"**) pursuant to s 249N of the *Corporations Act 2001* (**"the Act"**) were resolutions that could validly be moved at an annual general meeting (**"AGM"**) of CBA. The resolutions were in the following terms:

First proposed resolution:

> That, in the opinion of the shareholders it is in the best interests of the company that the Directors provide to the shareholders by the time of the release of the 2015 Annual Report, a report prepared at reasonable cost and omitting any proprietary information outlining:
>
> (a) The quantum of greenhouse gas emissions that the company is responsible for financing calculated, for example, in accordance with the Greenhouse Gas (GHG) Protocol guidance;
>
> (b) The current level and nature of risks to the company from "unburnable carbon"; and
>
> (c) Current approaches that have been adopted by the company to mitigate those risks.

Second proposed resolution:

> That, in consideration of the annual directors' report the shareholders express their concern at the absence in the report of:
>
> (a) An assessment of the quantum of greenhouse gas emissions that our bank is responsible for financing calculated, for example, in accordance with Greenhouse Gas (GHG) Protocol guidance;
>
> (b) An adequate assessment of the current level and nature of the risks climate change and particularly "unburnable carbon" pose to our bank; and
>
> (c) Sufficient description of the strategies our bank has adopted to mitigate these risks.

BACKGROUND

2. By letter dated 4 September 2014, the applicant (**"ACCR"**), which represents over 100 members of CBA entitled to vote at general meeting, gave CBA notice pursuant to s 249N of the Act of the proposed resolutions to move at CBA's next AGM on 12 November 2014. The letter stated that the first proposed resolution was ACCR's "preferred option" but "in the event that for whatever reason" the first proposed resolution was not included in the final notice of the meeting, CBA was

requested "by way of alternative" to include the second proposed resolution. The letter further advised that "in the event that for whatever reason" neither the first or second proposed resolutions were included in the final notice of meeting, CBA was requested to include the following special resolution "by way of alternative":

Third proposed resolution:

> Special Resolution to amend the constitution: At the end of the Clause 9 "General Meetings" insert the following new sub-clause:
>
> > That, each year at about the time of the release of the Annual Report, at reasonable cost and omitting any proprietary information, the Directors Report to shareholders their assessment of the quantum of greenhouse gas emissions we are responsible for financing calculated, for example in accordance with Greenhouse Gas (GHG) Protocol guidance.

3. On 15 September 2014, CBA published its notice of meeting for the 2014 AGM. The notice did not include either the first or the second proposed resolutions but did include the third proposed resolution. CBA notified the Australian Securities Exchange (**"ASX"**) that the third proposed resolution had been requisitioned by shareholders under s 249N of the Act and would be considered at the AGM to be held on 12 November 2014. The announcement contained a statement that the CBA did not consider that the proposed amendment to the company's constitution was in the best interests of the shareholders.

4. By letter dated 16 September 2014, ACCR wrote to CBA inquiring as to the basis on which CBA had declined to put the first and second proposed resolutions. CBA replied by letter dated 23 September 2014, advising that the first and second proposed resolutions were "matters within the purview of the Board and management of the Bank", and accordingly were "not valid and capable of being legally effective".

5. On 2 October 2014, CBA released its notice of meeting for the 2014 Annual AGM to the ASX. The notice contained the third proposed resolution, the members' statement in support of that resolution and an explanatory memorandum which contained statements by the Board of CBA: (1) that it did not consider the third proposed resolution to be in the best interests of CBA; (2) referring to existing initiatives and reporting by the CBA in respect of alternative energy sources and sustainable energy practices; (3) that it was not clear how the Directors would, as a practical matter, be in a position to comply with the third proposed resolution; and (4) recommending that members vote against the third proposed resolution. The notice did not contain any reference to the first or second proposed resolutions. At CBA's 2014 AGM only the third proposed resolution was put to a vote of the members.

RELIEF SOUGHT

6. ACCR seeks declarations that each of the three proposed resolutions could validly be moved at an AGM of CBA. It also seeks a declaration that it gave proper notice of the first and second proposed resolutions under s 249N of the Act , an injunction that CBA "ensure" that the first and second proposed resolutions be considered or moved at its next AGM, and a declaration that the board and/or management of CBA acted outside its powers in:

    (a) publicly commenting on the third proposed resolution;

(b) publicly offering an opinion with respect to the third proposed resolution;

(c) publicly making arguments or offering reasons with respect to its members' decision whether or not to vote for the third proposed resolution; and/or

(d) publicly recommending that members vote against the third proposed resolution.

7. Although the relief sought also included a declaration in relation to the validity of the third proposed resolution, it was not in issue that this resolution could be validly moved at CBA's AGM.

STATUTORY CONTEXT

8. Part 2G.2, Div 4 of the Act governs members' rights to put resolutions at general meetings of a company. Relevantly, s 249N(1) provides that members with at least 5% of the votes that may be cast on the resolution or at least 100 members who are entitled to vote at a general meeting may give a company notice of a resolution that they propose to move at a general meeting.

9. Section 249O relevantly provides that:

(1) **[When resolution is to be considered]** If a company has been given notice of a resolution under s 249N , the resolution is to be considered at the next general meeting that occurs more than two months after the notice is given;

(2) **[Time for giving notice]** The company must give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.

10. Section 249P further provides that members may request the company to give to all its members, a statement provided by the members making the request, about a resolution that is proposed to be moved at a general meeting or any other matter that may be properly considered at a general meeting.

11. Part 2G.2, Div 8 of the Act provides for AGMs of public companies. Relevantly, s 250R provides that:

(1) The business of an AGM may include any of the following, even if not referred to in the notice of meeting:

(a) the consideration of the annual financial report, directors' report, and auditor's report;

(b) ...

(c) ...

Advisory resolution for adoption of remuneration report

(2) At a listed company's AGM, a resolution that the remuneration report be adopted must be put to the vote.

(3) The vote on the resolution is advisory only and does not bind the directors or the company.

12. Section 250S provides that:

(1) **[Reasonable opportunity]** The chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company.

(2) **[Strict liability offence]** An offence based on subsection (1) is an offence of strict liability.

THE SUBMISSIONS

13. ACCR accepted that the members of a company cannot, under ordinary constitutional arrangements, usurp the powers of its directors. As a matter of general principle, a shareholder resolution purporting to direct the board in the exercise of powers that are vested exclusively in the board cannot validly be moved.

14. ACCR's primary contention was that a non-binding resolution which expresses an opinion does not, however, usurp the powers of the directors, as the expression of an opinion by members of a company: (1) is not an exercise of the company's powers; or (2) is an exercise of power that impliedly is not conferred by the constitution on the board and does not purport to compel the board to exercise its express powers in any particular way; or (3) does not constitute the "business of the company". ACCR contested the correctness of *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517 (**"*Parker*"**). *Parker* stands as authority that shareholders cannot by resolution express an opinion as to how a power vested by the company's constitution in the directors should be exercised. ACCR argued that *Parker* was wrongly decided and should not be followed. ACCR alternatively contended that the members could validly move the second proposed resolution as the expressions of opinion contained in that resolution constituted an exercise of the express powers vested in the general meeting by s 250R of the Act .

15. CBA argued that the shareholders do not have any power vested in them by the company's constitution or the Act to move advisory resolutions concerning the way in which directors should exercise their management powers. It was further submitted that both proposed resolutions are concerned with the business of CBA and that the shareholders in general meeting cannot interfere with the exercise of the powers of management entrusted to the board by cl 12.1 (a) of CBA's constitution. It was submitted that *Parker* was correctly decided and supported by the well settled principle that a power vested exclusively in the directors under the constitution of the company cannot be exercised by a resolution of members in general meeting.

CONSIDERATION

16. **Following paragraph cited by:**

Aveo Group Limited v State Street Australia Ltd in its capacity as custodian for the Retail Employees Superannuation Pty Limited as trustee of the Retail Employees Superannuation Trust (09 September 2015) (Beach J)

> 57. More recently, in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785, Davies J at [16] reiterated the principle "that the shareholders in general meeting cannot interfere in the board's exercise of powers which are exclusively vested in the board". In *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 it was held that:
>
> > ... a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholder as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles.

The starting point is the general principle that the shareholders in general meeting cannot interfere in the board's exercise of powers which are exclusively vested in the board. The principle was stated in *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 as follows:

> ... a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholder as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles.

Similarly, in *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (***"John Shaw & Sons"***) at 134 Greer LJ said:

> A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

This limitation on shareholder power means that if the company's constitution gives to the board the power to manage the company's business, the directors are exclusively responsible for the management of the company and shareholders cannot control the directors in the exercise of that

power or direct the board by resolution to exercise that power in a particular way (save for any matters that are within the power of the company in general meeting): see also *Federal Commissioner of Taxation v Commonwealth Aluminium Corporation Ltd* (1980) 143 CLR 646 at 660-1 ; *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 at 42 ; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 837 ; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 ("***Winthrop Investments***") at 682 .

Whether the resolutions constitute an exercise of the board's powers

17. In the present case, cl 12.1(a) of the CBA constitution vests responsibility for the management of the company in the directors as follows:

> **Directors to manage company**
>
> The business of the company shall be managed by or under the direction of the directors, who may exercise all such powers of the company as are not, by the Corporations Act or this constitution, required to be exercised by the company in general meeting.

18. Clause 12.1(a) is materially indistinguishable from the replaceable rule in s 198A of the Act , which relevantly provides:

> (1) **[Management of business]** The business of a company is to be managed by or under the direction of the directors.
>
> (2) **[Exercise of powers]** The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting.

19. ACCR accepted that clauses such as cl 12.1(a) empower the directors within their management powers to make decisions against the wishes of a majority of shareholders and that the majority of shareholders cannot control them in the exercise of those powers while the directors remain in office. ACCR also accepted that a company may omit from a notice of meeting a resolution that seeks to control the directors in that way as that resolution would be legally ineffective: *Turner v Berner* [1978] 1 NSWLR 66 at 72 ("***Turner v Berner***"). ACCR contended, however, that the first and second proposed resolutions may be validly passed by the shareholders in general meeting notwithstanding cl 12.1(a) and relied heavily on *Winthrop Investments* in support of its contention.

20. In *Winthrop Investments* , the Court of Appeal considered the power of the general meeting to validate breaches of directors' duties. In that case, the articles of association of Winns Ltd, the defendant company, placed the management of the company's business in the hands of its directors. Upon the directors becoming aware that Winthrop had made a takeover offer to the shareholders, the directors, with the object of defeating the takeover, entered into negotiations for a merger between Winns and a third company involving the purchase by Winns of certain retail stores from subsidiaries of the third company and the issue of shares in Winns to those subsidiaries in part payment. Winthrop was granted an injunction restraining Winns from proceeding with the proposal. Subsequently, the shareholders of Winns, at an extraordinary general meeting convened by the directors for that purpose, passed resolutions approving the entry by Winns into a contract to purchase the stores and the issue of shares in part payment. The injunction was dissolved on the application of Winns and Winthrop appealed. The Court of

Appeal by majority (Samuels and Mahoney JJA, Glass JA dissenting) allowed the appeal, holding that the resolutions were ineffective because the directors had not made adequate disclosure to the shareholders of all the material facts.

21. Each of the judges considered the power of the shareholders in general meeting to validate breaches of directors' duties and gave differing reasons. Mahoney JA held that the grant of the management power to the board under art 120 of the company's constitution did not, as a matter of construction, exclude the exercise by the shareholders of the power to approve a transaction which was in breach of the directors' duties. Glass JA held that the resolutions were an exercise of the reserve power. Samuels JA was prepared to assume that shareholders had the power to ratify the transaction.

22. In the course of reasoning, one of the issues considered by Samuels JA was the power of the shareholders in general meeting to give effective directions about its management. His Honour referred to *John Shaw & Sons* and stated at 683 :

> The shareholders may have ultimate control, because they can alter the articles or remove the directors; but they cannot interfere in the conduct of the company's business where management, as here, is vested in the board ... they have no general power to transact the company's business or to give effective directions about its management.

Samuels JA went on to state:

> Here of course there was no question of any explicit contest between the directors and shareholders. The directors themselves referred the matter to the general meeting. They sought the shareholders' approval of the course which the directors had otherwise determined to follow. They asked for the shareholders' advice; and undertook to act in accordance with the shareholders' opinion. But that advice did not represent any exercise of power, because the directors were not bound to take it. They said that they would: but voluntary acquiescence is not the same as submission. **If, therefore, these resolutions are regarded as the expression by the shareholders of their approval of the transaction which the directors contemplated, they do not involve the exercise of power at all**. They were not acts in law, and could have no effect.
>
> (Emphasis added.)

ACCR relied on this passage relied to submit that *Parker* was wrongly decided. ACCR contended that this passage provides authority that shareholder resolutions containing non-binding expressions of opinion do not impinge on the exercise of powers of other organs of the company and, it was submitted, can therefore be validly made.

23. ACCR also relied on the *Auer v Dressel* (1954) 306 NY 427 ("***Auer v Dressel***"), a decision of the New York Court of Appeals. In that case, the company's president had failed to call a meeting which stockholders had requisitioned and Mr Auer, one of the stockholders, sought a writ of mandamus to compel the president to call the meeting. One of the proposed resolutions was a resolution endorsing the administration of Mr Auer, who had been removed as president by the directors, and demanding that he be reinstated as president. By majority the Court held that the fact that the resolution of the general meeting could not effect a change in officer holders did not make the expression of opinion invalid, and the general meeting was entitled to put the directors on notice of their views.

24. In Australia, *Parker* stands as authority that the general meeting cannot by resolution express the members' opinions as to how the board should exercise powers exclusively vested in it by the constitution of the company. In that case, the articles placed the control and management of the business and affairs of the company in the board. The articles also made provision for the procedure to be followed in the election of the board, involving the selection by the board of the person to act as returning officer, and a discretionary power in the returning officer with respect to the procedure to be adopted for the preparation, dispatch and utilisation of ballot papers. At least 100 members requisitioned for an extraordinary general meeting at which it was proposed to move a resolution that the board be directed in respect of the procedure to be adopted in the election of the board of directors. Parker (a member of the company) relied on art 16 of the company's constitution and s 241 of the *Companies (New South Wales) Code* (**"the Code"**) to convene the meeting. Article 16 of the constitution and

    s 241 of the Code required the directors to convene a general meeting within a period after the date of receipt of a requisition signed by the appropriate number of members. Parker also gave notice of his intention to put forward resolutions at the meeting which provided in terms that the board "be informed of this meeting's opinion" in relation to the selection of the returning officer and the balloting methods. Article 17 provided that "[t]he secretary shall, in giving notice of a meeting, include in such notice any resolution of which he has had due notice from any member".

25. The question for determination in *Parker* was whether, in consequence of the requisition for meeting and notice of the proposed resolutions, the board was obliged to convene an extraordinary general meeting pursuant to art 16 of the company's constitution or s 241 of the Code. McLelland J held that it was not obliged to do so, applying the principle referred to in *John Shaw & Sons* . His Honour stated at 521 :

> It is clear that, in general, a power vested by the constitution of a company exclusively in the directors cannot be effectively exercised, nor can its exercise by the directors be effectively controlled or interfered with, by a resolution of members in general meeting, and that a power of control and management of the business and affairs of a company vested in directors ... is within this principle: see, eg, *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 NSWLR 68 at 79; [1974] AC 821 at 837 ; *Federal Commissioner of Taxation v Commonwealth Aluminium Corporation Ltd* (1980) 143 CLR 646 at 660-1 ; *John Shaw and Sons (Salford) Limited v Shaw* [1935] 2 KB 113 at [134] ; *Salmon v Quin & Axtens Ltd* [1909] 1 Ch 311; affirmed sub nom *Quin & Axtens Ltd v Salmon* [1909] AC 442 ...
>
> It follows from this that the proposed resolution ... which is in the form of directions to the Council in relation to matters in respect of which neither the *Companies (New South Wales) Code* nor the constitution of the plaintiff confer any authority on a general meeting, is not a resolution which can be effectively passed by the members in general meeting.

    McLelland J concluded that the directors were entitled to decline to act on the requisition for the meeting by reason that the object of the requisition (ie to move the proposed resolution) could not be lawfully effectuated at the meeting, citing *Turner v Berner* at 72 .

26. McLelland J also dealt with Mr Parker's argument that the portion of the requisition containing that proposed resolution might be severed and the balance of the requisition (ie relating to the

proposed resolutions expressing the members' opinions as to certain matters) treated as valid and effective, creating the obligation to convene the meeting. McLelland J rejected that submission, relevantly reasoning as follows:

> I am unable to accept this latter submission. In my view it is no part of the function of the members of a company in general meeting by resolution, i.e 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. The power to decide whether the procedures in pars (j) and (k) of art 36 should be applied in lieu of those in pars (c) and (d) is vested exclusively in the returning officer, and the power to select a returning officer is vested exclusively in the Council. The members of the plaintiff no doubt have a legitimate interest in how these powers are exercised, but in their organic capacity in general meeting they have no part to play in the actual exercise of the powers.

It was argued for ACCR that McLelland J was clearly wrong in that analysis because his Honour conflated the expression of an opinion in respect of the exercise of a power with the exercise of the power itself. With respect, I disagree.

27. I consider that *Parker* was correctly decided and neither *Winthrop Investments* nor *Auer v Dressel* co mpel a difference answer.

28. The dictum of Samuels JA in *Winthrop Investments* on which ACCR relied must be considered in the context of the question being addressed by his Honour: that is, whether the subject resolutions in that case were effective to bind the company. The judge below, in dissolving the injunction, had reasoned, amongst other things, that if the directors referred the matter to a general meeting, the general meeting had the capacity to decide whether the transaction should be effected. Samuels JA stated that the court below had not correctly stated the law and that it was not sufficient to regard the resolutions as effective "merely because they may be said to have expressed the will of the general meeting". As Samuels JA pointed out, the company's articles vested the management of the company's business exclusively in the directors and the shareholders in general meeting could not interfere with the exercise of those powers and had no general power to transact the company's business or to give effective directions about its management. His Honour further pointed out that the directors had referred the matter to the general meeting and sought the shareholders' approval of the course of action that they had determined to follow. Whilst the directors undertook to act in accordance with the shareholders' opinion, they were not bound to take it. In that context, his Honour went on to observe that if the resolutions were regarded as an expression of opinion by the shareholders of their approval of the transaction, the resolutions "[did] not involve the exercise of power at all. They were not acts in law and could have no effect". His Honour concluded that the only way in which the resolutions could be effective was to regard the resolutions as the exercise by the shareholders of their power to ratify directors' acts.

29. The question decided by the Court in *Winthrop Investments* was whether the shareholders in general meeting had the power to validate breaches of duty by the directors. The case is authority that the members in general meeting can ratify directors' acts. It is not authority that shareholders can use their statutory power under s 249N of the Act to express an opinion by resolution on matters of management within the exclusive power of the board without infringing the principle that shareholders cannot direct or control the board in the exercise of its management power. The remark by Samuels JA that the resolutions in that case did not involve an exercise of power by the

shareholders "if regarded as the expression by the shareholders of their approval of the transaction which the directors contemplated" is to be read and understood by reference to the issue with which the Court was concerned in that case and not as a statement of general principle. The dictum of Samuels JA is not authority for any broader proposition about shareholders' resolutions.

30. The reasoning of McLelland J in *Parker* did not, as ACCR contend, conflate the expression of opinion about the exercise of company powers with the exercise of the company powers itself. In *Parker* the members sought to use their statutory power to requisition a members' meeting to move the proposed resolutions. The decision was consistent with the well-established principle in stated in *Gramophone & Typewriter Ltd* and *John Shaw* and McLelland J applied settled principle to hold that members cannot use their statutory power to move a resolution expressing an opinion as to how a power vested in the board by the constitution should be exercised by the board. Moreover, the view expressed by McLelland J that it is no part of the function of the members of a company in general meeting to express an opinion by resolution as to how a power vested in the board by the constitution should be exercised by the board is consistent with Samuels JA's concluding remark in *Winthrop Investments* at 684 that:

> The general meeting is not, I think, the proper forum to determine matters of management, however critical they may be. The area of management is one in which the shareholders have no directly effective will.

See also *Stanham v The National Trust of Australia (NSW)* (1989) 15 ACLR 87 ("***Stanham v National Trust***") where Young J agreed with the statement by McLelland J in *Parker* that shareholders in their organic capacity in general meeting have no part to play in the actual exercise of the directors' management powers. McLelland J's approach in *Parker* recognises that shareholders have a real interest in the way in which those vested with the powers exercise those powers, but that the allocation of powers between the organs of the company (ie the board and the members in general meeting) determines the extent to which, and the ways in which, shareholders may express their views.

31. More recently, in *Re Molopo Energy Ltd* (2014) 104 ACSR 46; [2014] NSWSC 1864, White J applied *Parker* as authority to hold that the directors are not required to convene a general meeting to consider a proposed resolution by members that the general meeting "approves" a reduction of capital where the company's power to undertake a capital reduction is vested in the directors. The proposed reduction that the shareholders were asked to approve "must be one that the company, through its directors, proposes to make, not one that is merely proposed by a shareholder that the directors would not be minded to make". I agree, with respect, also with the decision in that case.

32. The US case of *Auer v Dressel* does not compel any different conclusion. Although in *Auer* the majority held that the president was required to call a special meeting to vote on resolutions containing the members' expression of opinion, there is a wealth of authority in Australia that directors are not required to convene a general meeting requisitioned by members if the only resolutions to be put to the meeting are resolutions that deal with matters of management that are within the directors' exclusive powers: *Turner v Berner* ; *Bagga v Sikh Association of Western Australia Inc* [2012] WASC 193; *Stanham v National Trust* ; *Queensland Press Ltd v Academy Investments (No 3) Pty Ltd* (1988) 2 Qd R 575. Likewise, directors may refuse to act on a members' notice under s 249N of the Act if the resolution is one that is within the exclusive power of the directors: *National Roads & Motorists' Association Ltd v Bradley* (2002) 42 ACSR 616; [2002] NSWSC

788 at [8] . This is not to say that boards cannot seek the views of shareholders on management issues but, rather, that shareholders cannot, by the exercise of their statutory powers, require resolutions to be put at general meeting expressing their opinion on matters as to how a power vested in the board ought to be exercised by the board.

33. In the present case therefore, if the first and second proposed resolutions are not referrable to any power other than to the power of management vested exclusively in the CBA board, it follows, in my view, that the CBA board is not required to put those resolutions to the AGM. This is notwithstanding the mandatory terms of s 249O of the Act : *Turner v Berner.*

Whether there is an implied power of shareholders in general meeting to express views on the management of the company

34. ACCR's submission that shareholders have the implied power to express views on the way in which the business of the company is managed should also be rejected. As Samuels JA noted in *Winthrop Investments* at 683, shareholders do not have some general supervisory power in general meeting and the cases where the Court found some reserve or default power in shareholders are, to use Samuel JA's expression, "remote from the present situation". In this case, the CBA constitution vests all powers concerning the business of CBA in the board (or in management under the board's direction). The only powers that shareholders have are those which the Act "req uires" be exercised by the company in general meeting and none of those powers include a power to pass non-binding advisory resolutions. The terms of the constitution, which make clear that management of the company is vested exclusively in the directors, preclude the implication of any power in the general meeting to pass resolutions proffering opinions on the way in which the board exercises its powers.

Whether s 249P of the Act empowers shareholders to propose resolutions relating to the management of the company

35. ACCR put the further submission that the power, if not reposed in the constitution, is reposed in s 249P of the Act . Section 249P(1) relevantly provides as follows:

> **Members' statements to be distributed**
>
> (1) Members may request a company to give to all its members a statement provided by the members making the request about:
>
> (a) a resolution that is proposed to be moved at a general meeting; or
>
> (b) any other matter that may be properly considered at a general meeting.

36. ACCR argued that s 249P(1) (read with ss 249N and 249O) should be construed consistently with the explanatory memorandum to the Company Law Review Bill 1997 (Cth) (which introduced the new rules regulating company meetings, including s 249P). The explanatory memorandum states at para 10.40:

> Under the new rules, a statement may be provided for each matter to be considered at the meeting and for any other matter that may be properly considered. If the meeting is an AGM, the statement may relate to the management of the company or the conduct of the audit and the preparation of the auditor's report.

It was submitted therefore that the legislative intent was that shareholders can propose resolutions that relate to the management of the company. I do not accept that such a legislative intent can be inferred. It is not supported by the text of s 249P or a consideration of the wider statutory context of that provision which, specifically, includes s 250S . As French CJ and Hayne J cautioned in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [25] :

> The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead. "[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have" (emphasis added). And as the plurality went on to say in *Project Blue Sky* (at [78]):
>
> > Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. (Footnotes omitted.)
>
> ...
>
> The search for legal meaning involves the application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.

Specifically, the Act , by s 250S , makes provision for the shareholders to convey their views concerning the management of the company. Section 250S provides that the chair of an AGM must allow reasonable opportunity "for the members as a whole at the meeting" to ask questions about or make comments on the management of the company. A breach of s 250S(1) is a strict liability offence: s 250S(2) . The explanatory memorandum to the Company Law Review Bill 1997 (Cth) stated at para 10.78 that the words "as a whole" in s 250S(1) were included to confirm that each individual does not have the right to ask a question. Section s 250S is not consistent with the construction of s 250P urged by ACCR.

Whether the resolutions relate to the business of the company

37. I also do not consider that there is substance in the submission on behalf of ACCR that the expression of an opinion by members is not a matter constituting the "business of the company" within the terms of cl 12.1(a) of the CBA constitution concerning the powers of the board. ACCR had submitted that the expression of views by members is an intra-company act which falls outside the directors' powers conferred by cl 12.1(a). It was submitted that such a reading of the CBA constitution was consistent with interpretative principles which require a company's constitution to be read so as to give it reasonable business efficacy. Further, it was submitted that there is business efficacy in putting the directors on notice of the shareholders' views, as *Auer v Dressel* showed. It was said that avoiding such drastic remedies and allowing companies to deal with particular issues on their individual merits has a number of practical benefits for the company, notably the retention of corporate knowledge within the company and the progressive evolution of company business practices in relation to the matter as desired by members. The submission, however, ignores s 250S of the Act , which gives members in general meeting the statutory right to express views on the company's management. In view of s 250S , there is no warrant to read down

cl 12.1(a).

Whether the second resolution was an exercise of power under s 250R(1)(a) of the Act

38. ACCR put the alternative submission in relation to the second proposed resolution that this resolution can validly be put in general meeting pursuant to s 250R(1)(a) of the Act . That subsection provides that the business of an AGM may include consideration of the directors' report, amongst other things, even if not referred to in the notice of meeting. It was submitted that the power to consider directors' reports at the AGM gives members the power to pass a resolution expressing an opinion about the contents of the report. I am unable to agree.

39. Section 250R must be read as a whole, together with the provisions that govern the content of the annual directors' reports (ss 298-300B) and s 250S which, as already discussed above, gives shareholders the right to ask questions about and comment on the management of the company at the AGM. Relevantly, whilst s 250R(1)(a) prescribes that the business of an AGM may include "the consideration" of the directors' report, s 250R(2) provides that at the AGM of a listed company, a resolution that the directors' remuneration report be adopted (which is to form part of the directors' report for listed companies: see s 300A) must be put to the vote. Section 250R(3) rel evantly provides that the vote on the resolution is advisory only and does not bind the directors or the company. Construed together, these provisions have the effect that the general meeting is empowered to pass non-binding advisory resolutions on the remuneration report but not as to the balance of the directors' report. In respect of matters concerning the management of the company, shareholders have the statutory right at the AGM to ask questions about or comment on the management of the company but such a right does not carry by implication a power for shareholders to convey their views by way of advisory resolutions.

Whether proper notice of the resolutions was given

40. In case I am wrong in my conclusion that the board is not required to place either the first or second proposed resolution on the agenda for the AGM, I will also deal with the question of notice under s 249N . Assuming that either or both of the first or second proposed resolution can validly be put, I would not, in any event, have declared that ACCR gave proper notice of those

resolutions such as to require those resolutions to be moved at the AGM. The letter plainly put forward each of the proposed resolutions, including the third resolution, as alternatives. The letter expressly stated that if "for whatever reason" the first resolution was not included in the notice of meeting, the second resolution was to be included and, likewise, that if "for whatever reason" the first and second resolutions were not included, the third resolution was to be included. In the circumstances, it was open to CBA to include only the third on the basis of its view (rightly or wrongly) that the first and second proposed resolutions could not be validly put.

Whether statements concerning the third resolution were ultra vires

41. The final issue is whether the directors acted in excess of their powers in regards to the statements which they made in the explanatory text of the notice of general meeting. The explanatory memorandum accompanying the notice addressed each of the listed resolutions and contained statements expressing the board's views regarding the third proposed resolution. Those statements expressed that the third proposed resolution was not endorsed by the board, recommended that members vote against that resolution and gave notice that the chairman intended to vote available proxies against the resolution.

42. CBA contended in written submissions that the power of directors to make such statements derives from the constitution, specifically cls 9.4 and 12.1(a), and from the duty of directors to provide such material as will fully and fairly inform shareholders of the matters to be considered at a meeting to enable them to make a properly informed decision: *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626; [2007] NSWSC 270 at [14]-[22] . CBA also referred to the ASX Guidelines on Notices of Meeting which state that voting forms should be drafted in a way so as to ensure that shareholders clearly understand how the chairperson of the meeting intends to vote undirected proxies and that companies should ensure that notices give clear guidance on directors' recommendations on resolutions.

43. Although this issue was raised by ACCR in its Fast Track Statement, it was only addressed by ACCR in its written reply submissions. No oral submissions were advanced at the hearing. ACCR in its reply submissions contended that the board's recommendation was "patently not confined to advising the members as to how the Chairman would vote proxies, nor to enable a properly informed judgment of the members". Rather, ACCR argued, "the recommendation constituted a partial view on the proposed amendment and nothing more". No elaboration was provided and the basis upon which ACCR puts its contention is not entirely clear. If, and in so far as, ACCR was making a claim other than that the directors were not acting within the scope of their power, such a claim was not pleaded and ACCR is bound by the claim as pleaded. On the claim as pleaded, I accept CBA's submissions that the power of the directors to make such statements is derived from cls 9.4 and 12.1(a) of the constitution and the duty to inform the shareholders.

CONCLUSION

44. Accordingly, the application should be dismissed.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 31 July 2015

Cited by:

Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2016] FCAFC 80 (10 June 2016) (Allsop CJ, Foster and Gleeson JJ)

> 6. The primary judge rejected the appellant's application for relief including a declaration that the disputed resolutions were resolutions that "could validly be moved" at an annual general meeting of the Bank: See *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785 .

Aveo Group Limited v State Street Australia Ltd in its capacity as custodian for the Retail Employees Superannuation Pty Limited as trustee of the Retail Employees Superannuation Trust [2015] FCA 1019 (09 September 2015) (Beach J)

> *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785
> *Australian Hydrocarbons NL v Green*

Aveo Group Limited v State Street Australia Ltd in its capacity as custodian for the Retail Employees Superannuation Pty Limited as trustee of the Retail Employees Superannuation Trust [2015] FCA 1019 (09 September 2015) (Beach J)

> 57. More recently, in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785, Davies J at [16] reiterated the principle "that the shareholders in general meeting cannot interfere in the board's exercise of powers which are exclusively vested in the board". In *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 it was held that:
>
> > ... a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholder as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles.