

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2025-231389

In the matter between:

JUST SHARE NPC	First Applicant
AEON INVESTMENT MANAGEMENT (PTY) LTD	Second Applicant
FOSSIL FREE SOUTH AFRICA	Third Applicant

and

THUNGELA RESOURCES LIMITED	First Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

- 1 In the 1980s, shareholders in the United States tabled hundreds of resolutions at general meetings, calling on companies to divest from apartheid South Africa. These resolutions forced the debate into the open, requiring multinational companies to reckon with their complicity in apartheid crimes.¹
- 2 More recently, shareholders around the world have proposed resolutions urging greater corporate transparency and action on a threat that President Ramaphosa has described as “*the most pressing issue of our time*”²: climate change.³
- 3 In this way, shareholder resolutions have been used globally as a tool for promoting corporate democracy, transparency, accountability, and the protection of human rights.
- 4 The issue to be determined in this case is whether South African shareholders have similar rights to propose non-binding resolutions on climate change and related environmental, social, and governance (ESG) issues.

¹ FA para 122, CL 001-43; and annexure TD44, CL 001-359 (Philip Broyles ‘The Impact of Shareholder Activism on Corporate Involvement in South Africa during the Reagan Era’ (1998) 28 *International Review of Modern Sociology* 1).

² FA para 47, CL 001-23.

³ FA para 42, CL 001-22.

5 This is a crisp question of law, turning on the proper interpretation of shareholders' rights under sections 65(3) and 62(3)(c) of the Companies Act 71 of 2008.⁴

5.1 Section 65(3) provides that “[a]ny two shareholders of a company .. may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights”.

5.2 Section 62(3)(c) further requires that the written notice of shareholders meetings “*must include ... a copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting...*”.

6 This dispute arose after the respondent, Thungela Resources Limited (Thungela), blocked three non-binding resolutions on climate-related issues proposed by the applicants ahead of its annual general meetings (AGMs) in 2023, 2024 and 2025. As a result, none of these resolutions were circulated, tabled, debated, or put to a vote. In broad terms, those resolutions called for better reporting and transparency on Thungela's climate lobbying activities (2023), its emission-reduction targets (2024), and its progress towards meeting its net-zero commitments (2025).

7 Thungela has made it clear that it will reject all similar resolutions in future. It contends that shareholders have no right to propose resolutions on climate change or any other ESG issues. It rejects the very concept of a non-binding,

⁴ FA para 10, CL 001-10; AA para 158, CL 003-69.

advisory resolution. It further insists that its board has a unilateral veto, giving it the right to prevent any proposed resolution from being circulated to its shareholders.

8 The applicants submit that Thungela's stance is plainly wrong. It seeks to rewrite the expansive rights afforded to shareholders under sections 65(3) and 62(3)(c) of the Act. It undermines corporate democracy and the free expression of shareholders' views. It fails to promote the progressive purposes and values that underpin the Companies Act and our Bill of Rights. And it would have the effect of making our law on shareholder-proposed resolutions among the most restrictive in the world.

9 The applicants therefore approach this court for declaratory relief in two parts:

9.1 First, declaring that Thungela breached its obligations and the applicants' rights under sections 65(3) and 62(3)(c) of the Companies Act by refusing to circulate and table the 2023, 2024 and 2025 resolutions; and

9.2 Second, declaring the applicants' rights and Thungela's corresponding obligations under section 65(3) and 62(3)(c) of the Companies Act, to ensure that Thungela complies with its obligations in future.

10 There is no dispute that this court has jurisdiction to determine the matter.⁵ There is also no dispute that the applicants have standing, in their own interest, as

⁵ AA para 159, CL 003-69.

Thungela shareholders.⁶ The material facts are also largely common cause. Accordingly, this matter presents a clean question of legal interpretation of the provisions of the Companies Act.

11 In what follows, we demonstrate why the applicants' interpretation is correct and why they are entitled to declaratory relief. We address the following issues in turn:

11.1 First, the legal framework.

11.2 Second, the factual background to the dispute.

11.3 Third, the applicants' public interest standing.

11.4 Fourth, the proper interpretation of section 65(3).

11.5 Fifth, responses to Thungela's mistaken interpretation.

11.6 Sixth, why declaratory relief is appropriate and necessary.

12 We mention, as a preliminary note, that Thungela filed a rejoinder affidavit after the applicants' heads of argument were filed.⁷ The applicants dispute that Thungela has any right to file a further affidavit, but out of caution filed a brief supplementary affidavit in response, if that affidavit is admitted.⁸ The applicants

⁶ AA para 161, CL 003-69.

⁷ Rejoinder affidavit, CL 005-2.

⁸ Applicants' supplementary affidavit (SA), CL 005-61.

have made limited additions to their original heads of argument to address the rejoinder and supplementary affidavits, where appropriate.

THE LEGAL FRAMEWORK

- 13 The new Companies Act took effect in 2011. It introduced sweeping reforms, with the express objectives to “*balance the rights and obligations of shareholders and directors within companies*” and to “*promote compliance with the Bill of Rights ... in the application of company law*”.⁹
- 14 Consistent with these objectives, shareholders now enjoy enhanced legal rights, including expanded rights to propose and vote on shareholder resolutions.
- 15 Chapter 2, Part F of the Companies Act, headed “Governance of companies” regulates shareholders meetings and resolutions. This Part encompasses sections 57 to 78.
- 16 Section 62(1)(a) requires that a public company deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company, at least 15 business days before the meeting is to begin.¹⁰ A company’s memorandum of incorporation (MOI) may provide for a different notice period, in terms of section 62(2).

⁹ Sections 7(i) and (a) of the Companies Act.

¹⁰ The Johannesburg Stock Exchange (JSE) Listings Requirements provide (10.11(b)) that shareholders must be notified of a resolution at least 15 business days before the AGM.

- 17 Section 65(3) empowers shareholders to propose resolutions in expansive terms. In full, the provision provides that:

“Any two shareholders of a company -

(a) may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights; and

(b) when proposing a resolution, may require that the resolution be submitted to shareholders for consideration—

(i) at a meeting demanded in terms of section 61 (3);

(ii) at the next shareholders meeting; or

(iii) by written vote in terms of section 60.” (Emphasis added)

- 18 This is an “unalterable provision”, meaning that the rights it confers may not be negated or restricted by a company’s MOI, rules, or conduct.¹¹

- 19 Section 65(4) of the Companies Act requires that a proposed shareholder resolution meet certain basic formal requirements. It must be:

“(a) expressed with sufficient clarity and specificity; and

(b) accompanied by sufficient information or explanatory material,

to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.”

- 20 Section 65(5) of the Companies Act provides a dispute-resolution mechanism through which directors or shareholders may object to any non-compliance with section 65(4). It provides that:

“At any time before the start of the meeting at which a resolution will be considered, a shareholder or director who believes that the form of the resolution does not satisfy the requirements of subsection (4) may seek leave to apply to a court for an order—

¹¹ See the definition of ‘unalterable provision’ in section 1, read together with sections 6(1) and 15(2)(a)(iii) of the Companies Act.

(a) restraining the company from putting the proposed resolution to a vote until the requirements of subsection (4) are satisfied; and

(b) requiring the company, or the shareholders who proposed the resolution, as the case may be, to—

(i) take appropriate steps to alter the resolution so that it satisfies the requirements of subsection (4); and

(ii) compensate the applicant for costs of the proceedings, if successful.”

21 Notably, this provision does not give directors or boards any unilateral power to block shareholder-proposed resolutions, even where they are non-compliant with the formal requirements of section 65(4). The prescribed remedy is to go to court.

22 The generally appreciated principle is that where the legislature prescribes a particular remedy for an alleged breach, a party complaining of non-compliance is confined to that remedy.¹²

FACTUAL BACKGROUND

23 This dispute arises from a stark contradiction. On the one hand, Thungela admits that climate change poses serious, material risks to its business and its shareholders' investments.¹³ On the other hand, Thungela insists that its shareholders have no right to propose resolutions addressing those very risks or requesting the company to explain how it is managing them.¹⁴

¹² *Madrasa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 727; *Steenkamp and Others v Edcon Ltd* 2016 (3) SA 251 (CC) at paras 145 - 146.

¹³ FA para 57, CL 001-26.

¹⁴ AA para 198, CL 003-79.

Climate risks and Thungela's business

- 24 Thungela is a major producer and exporter of thermal coal,¹⁵ a fossil fuel that the International Energy Agency identifies as the single largest contributor to global climate change.¹⁶
- 25 There is no dispute over the science of climate change and the severe risks it poses to the environment, lives, and businesses. It is common cause that this is an existential threat that calls for urgent action.¹⁷
- 26 There is also no dispute that climate change poses a direct threat to Thungela's business and its shareholders' investments. Thungela's own 2023 Climate Change Report describes climate change as a "*material issue that can affect our business through regulations to reduce emissions, carbon pricing mechanisms, extreme weather events or chronic changes to the climate, access to capital and permitting risks.*"¹⁸ It further acknowledges that climate change affects its employees, host communities, and suppliers, and that the "*strategic, effective and appropriate management of these risks is critical*".¹⁹

¹⁵ FA para 55, CL 001-26.

¹⁶ FA para 56, CL 001-26. Admitted AA para 193, CL 003-78.

¹⁷ FA paras 47 - 53, CL 001-23 to 001-24; Not denied AA paras 184 – 189, CL 003-75 to 003-77. AA paras 28 – 29, CL 003-11.

¹⁸ FA para 57, CL 001-26.

¹⁹ Id.

- 27 Thungela has also made public commitments to achieving net-zero emissions by 2050, and has adopted a climate strategy.²⁰ In its answering affidavit, Thungela further affirms that environmental stewardship and climate-risk management are central pillars of its ESG framework.²¹
- 28 In this application, the applicants do not ask this Court to assess the adequacy of Thungela's climate change commitments and actions. Nor do the applicants ask this Court to adjudicate the merits of their proposed resolutions. These tasks ought to have been left to the shareholders, through open debate and voting on the proposed resolutions at Thungela's AGMs.
- 29 Rather, the question is whether Thungela's shareholders have the right to propose and table resolutions addressing these material risks to Thungela's business.

Global and South African trends in climate-related shareholder engagement

- 30 Around the world, shareholders have increasingly used resolutions to address climate change, environmental governance, and broader ESG issues. In 2024 alone, shareholders in the United States filed more than 600 ESG-related resolutions. Nearly 120 focused specifically on climate change, the single largest category of shareholder proposals that year. Similar patterns have emerged in the United Kingdom, the European Union, and Canada.²²

²⁰ AA paras 29 - 30, CL 003-11 to 003-12.

²¹ AA para 28, CL 003-11.

²² FA para 42, CL 001-22.

- 31 South Africa mirrors these developments. Since 2017, shareholders have successfully filed climate-related resolutions at multiple JSE-listed companies.²³ Importantly, boards have tabled climate-related resolutions (both binding and non-binding) at companies such as Nedbank, Investec, ABSA, and Sasol.²⁴ When put to a vote, many of these resolutions have passed with overwhelming shareholder support, often exceeding international averages.²⁵
- 32 The applicants are longstanding participants in these efforts to drive shareholder participation on climate-related issues. They have co-filed resolutions at major South African companies, including Standard Bank, FirstRand, ABSA, Nedbank, and Investec.²⁶ Just Share was a co-filer of the first successful climate resolution in South Africa, tabled at Standard Bank's 2019 AGM, which passed with 55% of the vote. Subsequent climate resolutions at major banks passed with over 99% support.²⁷

The applicants' engagements with Thungela

- 33 The applicants filed three non-binding shareholder resolutions ahead of Thungela's 2023, 2024, and 2025 AGMs. Each resolution addressed important issues relating to climate-risk governance, disclosure, and oversight, which Thungela itself identifies as central to its long-term sustainability.

²³ FA paras 43 and 44, CL 001-22.

²⁴ FA paras 45 - 46, CL 001-22 to 001-23.

²⁵ FA para 46, CL 001-23.

²⁶ FA para 44, CL 001-22.

²⁷ FA para 46, CL 001-23.

- 33.1 **The 2023 resolution** requested annual reporting on the alignment between Thungela's lobbying and policy engagement and the climate goals of the Paris Agreement.²⁸
- 33.2 **The 2024 resolution** sought enhanced transparency on Thungela's climate-risk governance and disclosure.²⁹
- 33.3 **The 2025 resolution** sought further disclosure on Thungela's progress toward its net-zero 2050 commitment.³⁰
- 34 The applicants satisfied all of the formal and procedural requirements under section 65(3) and Thungela's MOI:³¹
- 34.1 each resolution was supported by at least two Thungela shareholders;³²
- 34.2 each resolution was filed, in writing, more than 15 business days before the AGM, in full compliance with clause 30.4 of Thungela's MOI and section 62(1)(a) of the Companies Act;³³

²⁸ FA annexure TD14, CL 001-215.

²⁹ FA annexure TD20, CL 001-236.

³⁰ FA annexure TD25, CL 001-252.

³¹ FA paras 105 - 109, CL 001-38 to 001-39; Procedural compliance is not denied: AA paras 202 – 203, CL 003-80 to 003-81 ("The contents of these paragraphs are denied inasmuch as the applicants contend that they satisfy the requirements imposed in terms of section 65(3) of the Act and that Thungela has breached this section.")

³² The applicants' shareholding is not denied: FA para 21, CL 001-15; No denial: AA CL 003-69.

³³ FA para 109, CL 001-39; Not denied AA paras 202 - 203, CL 003-80 to 003-81.

34.3 each resolution was accompanied by succinct and clear explanatory memoranda;

34.4 Thungela did not contend that any resolution failed to meet the clarity, specificity, or information requirements of section 65(4);

34.5 Thungela did not invoke section 65(5) by going to court to block the resolutions; and

34.6 Thungela did not raise any procedural objection at the time the resolutions were filed.

35 However, Thungela refused to circulate or table these resolutions. It set out its reasons for doing so in a series of letters,³⁴ which asserted that, “as a matter of company law”, shareholders have no right to propose non-binding resolutions under section 65(3) on any matter that is not expressly provided for in the Companies Act or its MOI. As a consequence, the resolutions were never presented to shareholders, never discussed, and never put to a vote.

36 In its answering affidavit, Thungela claims, for the very first time, that these resolutions were filed too late to be included in its notice to shareholders.³⁵ That is an after-the-fact invention as Thungela did not raise any such logistical

³⁴ See FA Annexures TD18 (2023), CL 001-229; TD22 - TD24 (2024), CL 001-244, 001-236, and 001-250; TD28 (2025), CL 001-276.

³⁵ AA paras 51 - 65, CL 003-21 to 003-34.

concerns at the time in its reasons for rejecting the proposed resolutions.³⁶ Its refusals were squarely based on its (incorrect) interpretation of shareholders' substantive rights under the Companies Act, said to be based on legal advice. In any event, Thungela's newly invented excuses are based on a simple miscalculation of statutory filing dates.³⁷ In the circumstances, Thungela cannot deny that the proposed resolutions satisfied all of the procedural requirements prescribed in the Act and Thungela's MOI. Newfound complaints about logistical difficulties and costs to the company, raised for the first time in this litigation, cannot stand in the way of statutory rights and duties.

Attempts to resolve the dispute

37 After Thungela refused to table the 2023 and 2024 resolutions, the applicants lodged a formal complaint with the Companies and Intellectual Property Commission (CIPC)³⁸, alleging that Thungela's refusal breached sections 65(3) and 62(3)(c). CIPC investigated and referred the matter to alternative dispute resolution before the Companies Tribunal. The Tribunal subsequently issued a

³⁶ See FA Annexures TD18 (2023) , CL 001-229; TD22 - TD24 (2024) , CL 001-244, 001-236, and 001-250; TD28 (2025), CL 001-276. RA paras 31 – 64, CL 004-15 to 004-23.

³⁷ RA paras 37 – 38, CL 004-16. In Thungela's Rejoinder Affidavit (at para 25, CL 005-10), Thungela doubles down on its after-the-fact attempt at justification. It now contends that Regulation 7 read with Table CR3 of Annexure 3 has the effect that a notice of AGM must be delivered seven days prior to the 15-business day period and, as such, the applicants' calculation of time periods is wrong. However, this does not alter the express provision in the Act and Thungela's MOI: a shareholder-proposed resolution need only be filed no less than 15 business days before the meeting is to begin. The deadline for the company's delivery of the notice of AGM is an entirely separate issue and does not alter this provision.

³⁸ FA annexure TD29, CL 001-278.

certificate confirming that the mediation process had failed. CIPC then advised the applicants to approach the High Court for relief.³⁹

- 38 Despite three years of engagement, three resolutions, a formal complaint to the CIPC, and a failed mediation before the Companies Tribunal, Thungela has maintained its position that shareholders have no right to propose non-binding resolutions on climate-related matters, and that the Board may unilaterally block such resolutions. The applicants therefore approach this Court seeking clarity on their rights under the Companies Act and the corresponding obligations of Thungela.

PUBLIC INTEREST STANDING

- 39 There is no dispute that the applicants, as Thungela shareholders, have own-interest standing to seek relief.⁴⁰ The only dispute is whether they also have public interest standing to do so under section 157(1)(d) of the Companies Act,⁴¹ which provides:

“When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person ... acting in the public interest, with leave of the court.”

- 40 Given that standing is established, this debate has little to no practical significance for this case, beyond perhaps the question of costs. Nevertheless,

³⁹ FA paras 85 – 102, CL 001-33 to 001-37.

⁴⁰ AA para 161, CL 003-69: “It is admitted that, as shareholders in Thungela, the applicants have own interest standing to bring this application.”

⁴¹ AA para 162, CL 003-69.

we submit that the applicants have amply demonstrated grounds for leave to proceed in the public interest under section 157(1)(d).⁴²

41 The relevant factors for public interest standing include:⁴³ the nature of the relief sought; the extent to which the relief sought is of general and prospective application; the range of persons who may be affected, directly or indirectly, by any order made; and the consequences of the infringement of the right.⁴⁴

42 The applicants' public interest standing is clearly established, on the common cause and undisputed facts.⁴⁵ Thungela accepts that the proper interpretation of sections 65(3) and 62(3) raises questions of law of broader significance for other companies and shareholders.⁴⁶ Thungela further accepts that the first and third applicants are non-profit entities.⁴⁷ Thungela also does not dispute that climate change is a matter of pressing public concern.⁴⁸ The applicants have clearly exhausted all other legal avenues for addressing this dispute over the meaning of these statutory provisions. And the infringement of the section 65(3) and

⁴² This leave can be sought at the hearing of the matter, without requiring a prior application: *Organisation Undoing Tax Abuse NPC and Another v Myeni and Another* [2019] ZAGPPHC 957 (12 December 2019) at paras 20 – 25.

⁴³ *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* [2019] ZASCA 1; [2019] 2 All SA 1 (SCA); 2019 (3) SA 251 (SCA) at paras 133 – 134, applying the well-established test for public interest standing under section 38 of the Constitution.

⁴⁴ For a restatement of this test, see: *Freedom of Religion South Africa v Minister of Justice and Others* 2020 (1) SA 1 (CC) at para 15.

⁴⁵ FA para 22.3, CL 001-16.

⁴⁶ AA para 31, CL 003-12.

⁴⁷ AA para 210, CL 003-83.

⁴⁸ AA para 28, CL 003-11.

62(3)(c) rights has broader consequences for corporate democracy and shareholders' rights, including their rights to freedom of expression and freedom of association, as discussed below.

THE PROPER INTERPRETATION OF SECTION 65(3)

43 Section 65(3) of the Companies Act was enacted to expand, not restrict, shareholder participation in corporate governance. Properly interpreted, it confers a broad, substantive right on shareholders to propose non-binding resolutions on climate change and related ESG matters.

44 We start with the relevant principles of interpretation before addressing six interpretive factors that reinforce the applicants' interpretation of section 65(3):

44.1 The expansive text of section 65(3);

44.2 The wider text of the Act;

44.3 The legislative history;

44.4 The objectives of the Companies Act;

44.5 The implicated constitutional rights; and

44.6 The comparative law perspective.

The principles of interpretation

- 45 The principles of statutory interpretation are well-established. The Constitutional Court recently restated these principles in interpreting provisions of the Companies Act,⁴⁹ affirming once again that this is a “*unitary exercise*”, requiring simultaneous consideration of text, context, purpose, and constitutional rights and values. Section 39(2) of the Constitution specifically requires that when interpreting any legislation, a court must promote the spirit, purport, and objects of the Bill of Rights.⁵⁰
- 46 These general principles are reinforced by the interpretive guidance provided in sections 5(1) and 7 of the Companies Act.⁵¹ These provisions call for an interpretation that is consistent with the objectives of the Act, which include promoting compliance with the Bill of Rights.⁵²
- 47 This generous, rights-promoting interpretation is further underlined by section 158(b) of the Companies Act. It provides that “*if any provision of this Act ... read in its context, can be reasonably construed to have more than one meaning*” then a court “*must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.*”

⁴⁹ *Centaur Mining South Africa (Pty) Ltd v Moodliar NO and Others* [2026] ZACC 20 (18 May 2026) at paras 79 - 81.

⁵⁰ *Id.*

⁵¹ Companies Act, sections 5(1) and 7.

⁵² Companies Act, section 7(a).

48 Section 5(2) of the Companies Act further permits reference to foreign law in interpreting the Act's provisions, providing that “[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law.”

The text of section 65(3) is deliberately expansive

49 Starting with the text, the language of section 65(3) is itself expansive and rights-affirming. The provision uses unqualified language, providing that “[a]ny two shareholders... may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights...” (Emphasis added).

50 As the SCA held in *Nova Property Group*, the use of unqualified language in the Companies Act reflects an intentional legislative decision to expand rights, and generally leads to unqualified results.⁵³

51 The legislature could have limited this right to specific types of resolutions or specific subject matter. It chose not to do so. Instead, it used the widest possible language – “any matter” – subject only to the requirement that the shareholders are “each” entitled to exercise voting rights on that matter. Unlike more restrictive shareholder proposal laws in other countries (addressed below), there is no closed list of permissible subjects, no minimum thresholds of shareholding, and no onerous procedural requirements.⁵⁴

⁵³ *Nova Property Group Holdings v Cobbett* 2016 (4) SA 317 (SCA) paras 27 and 32, in the context of section 26(2) of the Companies Act, regulating public access to shareholder registers.

⁵⁴ See Appendix II, for a more detailed discussion of this comparative law.

The textual context

The meaning of “voting rights”

- 52 The only restriction on shareholder rights in section 65(3) is that “*each*” of the two or more shareholders proposing the resolution should be “*entitled to exercise voting rights*” on the matter. That qualification must be seen in light of sections 36 and 37 of the Companies Act.
- 53 Section 36(1) provides that a company’s MOI may prescribe different classes of shares, with different preferences, rights and limitations attached to that class. Section 37(2) of the Companies Act establishes the default position that each issued share has “*one general voting right*,” except to the extent provided otherwise by the Act or by the company’s MOI in terms of section 36.
- 54 That is further reinforced by section 37(3)(b)(i) of the Act, which provides that “*despite anything to the contrary*” in the MOI, if a company has established only one class of share, then “*those shares have a right to be voted on every matter that may be decided by shareholders of the company*”.
- 55 It follows that it is left to individual companies, if they so wish, to impose limits in their MOIs on the subject matter of shareholder resolutions by establishing different classes of shares and by imposing appropriate limitations on the voting rights of those classes. In the absence of any express limitation on voting rights in the MOI or the Act, shareholders are ordinarily entitled to exercise voting rights on any resolution that is tabled at a shareholders’ meeting.

56 In this case, Thungela has established only one class of shares in its MOI.⁵⁵ It has not imposed any express limitations on the voting rights attached to those shares or the matters that its shareholders may vote on. In fact, clause 11.2 of its MOI states, in the clearest terms, that each share entitles its holder to vote “on any matter to be decided by shareholders of the Company”.⁵⁶

57 It follows that Thungela cannot seek to exclude its shareholders from voting on or proposing resolutions concerning climate change and related ESG issues.

58 Properly interpreted then, the requirement in section 65(3) that “*each*” of the shareholders be entitled to exercise voting rights on the matter is an eligibility requirement, determining which classes of shareholders may propose resolutions based on the restrictions imposed by the Act or MOI, rather than a blanket restriction on the content of resolutions.

59 Where the Companies Act itself seeks to limit the general voting right, the limitation is generally contingent on the identity of the holder of the share, and not on the subject matter of the vote. For example, the Act provides that voting rights associated with shares held in trust generally may not be exercised,⁵⁷ that voting rights attached to shares held by a subsidiary may not be exercised in relation to its holding company,⁵⁸ and that voting rights controlled by an acquiring

⁵⁵ Thungela MOI clause 11.2 and Schedule 1, annexure TD2, CL 001-65.

⁵⁶ Thungela MOI clause 11.2, CL 001-65.

⁵⁷ Section 40(6)(a).

⁵⁸ Section 48(2)(b)(ii).

party must not be included in resolutions relating to a fundamental transaction.⁵⁹

Nowhere does it proscribe shareholders from voting based solely on the subject matter of the resolution.

The reinforcing provisions

60 This reading of section 65(3), as an expansive and facilitative provision, is further reinforced by its surrounding provisions.

61 Section 65(4) of the Act imposes only the most minimal restrictions on the form of expression used in a shareholder-proposed resolution: it must be clear, specific, and informative. And even where a resolution breaches these formal requirements, a company cannot simply exclude the resolution. Instead, it must go to court under section 65(5) to seek an order permitting it to do so. Self-help is not permitted.

62 Section 62(3)(c) further obliges companies to include in the notice of a meeting “any proposed resolution” to be considered at the meeting, without qualification. This provision does not give the company a unilateral discretion to choose which proposed resolutions to include in its notice.

63 In the circumstances, Thungela was obliged to include the 2023, 2024, and 2025 resolutions in the notices of AGM. Because the resolutions met the formal requirements in section 65(4), the company had no power to exclude them. Even if it believed the requirements in section 65(4) were not met it would not have

⁵⁹ Section 115(4).

been entitled to unilaterally block the resolutions as it did: Thungela would have had to go to court to seek permission to exclude the resolutions from the notices.

The meaning of a resolution

64 Section 65(1) distinguishes between “*ordinary resolutions*”, which require at least 50% of the voting rights on the matter, and “*special resolutions*”, which require at least 75% support.⁶⁰

65 While the Companies Act sets different thresholds of support for these resolutions, it does not prescribe the content of a resolution, its subject matter, or its legal effect. The Act specifically does not distinguish between binding and non-binding resolutions, nor does it purport to outlaw resolutions that are framed in exclusively non-binding, advisory terms. Once again, the Act adopts an expansive and permissive approach to ensure flexibility.

66 This flexibility has meant that non-binding, advisory resolutions have become common in South Africa.⁶¹ Listed companies, including Thungela,⁶² have for years tabled non-binding “say on pay” resolutions at AGMs affording shareholders an opportunity to register a non-binding vote on proposed executive remuneration.

⁶⁰ See the section 1 definitions of “ordinary resolution” and “special resolution”, read with sections 65(7) and 65(9): “For an ordinary resolution to be approved by shareholders, it must be supported by more than 50% of the voting rights exercised on the resolution”; “For a special resolution to be approved by shareholders, it must be supported by at least 75% of the voting rights exercised on the resolution.” Voting rights are further defined in section 1 as meaning: “*with respect to any matter to be decided by a company ... the rights of any holder of the company’s securities to vote in connection that matter...*”.

⁶¹ FA para 120, CL 001-42; RA paras 104 – 111, CL 004-33 to 004-35.

⁶² See, for example, FA annexure TD27, CL 001-270.

The legislative history

67 The expansive interpretation of section 65(3) is consistent with the historical development of South Africa's companies legislation, including the new Companies Act and its transformative aims. It is now well-established that courts may have regard to legislative history,⁶³ including explanatory memoranda and drafting materials,⁶⁴ as interpretive aids.

68 This history shows that our company laws have consistently progressed towards more expansive shareholder rights over time. This evolution began decades ago,⁶⁵ and remains ongoing.⁶⁶

69 In an unconcealed design, the explanatory memorandum accompanying the 2008 Companies Bill included among its objectives the desire to “*protect shareholder rights*” and to “*advance shareholder activism*”.⁶⁷

⁶³ *Mutsila v Municipal Gratuity Fund and Others* (CCT 228/23) [2025] ZACC 17; 2025 (10) BCLR 1139 (CC); 2026 (1) SA 1 (CC) (8 August 2025) at para 29.

⁶⁴ *Thistle Trust v Commissioner, South African Revenue Service* [2024] ZACC 19; 2024 (12) BCLR 1563 (CC); 2025 (1) SA 70 (CC) at paras 64 - 68.

⁶⁵ See, for example, *Hopkinson v Bloemfontein District Creamery* 1966 (1) SA 159 (O) at 166A-C, addressing amendments introduced in the 1950s to expand shareholders' rights, noting that: “*the purpose of the Legislature was to confer greater voting power on shareholders... Clearly the purpose of the amending Act is to give ordinary shareholders a greater say in the control of the company than they had prior to 1952*”.

⁶⁶ The most recent amendments to the Companies Act demonstrate that the legislature is still expanding shareholders' say in the control of a company, particularly in the sphere of social and ethical matters: since recent amendments came into effect in 2024, the shareholders of a public company at an AGM elect the company's social and ethics committee. See Companies Act, sections 61(8)(c)(iii) and 72(9A).

⁶⁷ FA annexure TD5 clause 1.2.4(c), CL 001-104.

- 70 Thungela readily accepts that, in line with that purpose, the new Companies Act has afforded shareholders a host of new and expanded rights. The right to propose shareholder resolutions is a clear example.
- 71 Under the old Companies Act 61 of 1973, shareholders' rights to propose resolutions were subjected to significant barriers.⁶⁸ Section 185 of the old Act imposed high threshold requirements, requiring proposals to be supported by one twentieth of total voting rights or at least 100 shareholders. Shareholders were also obliged to cover full costs to the company of giving notice to shareholders. It is therefore unsurprising that these rights were infrequently exercised.⁶⁹
- 72 Section 65(3) has done away with these procedural limitations and hurdles, reflecting a deliberate effort to lower the barriers to shareholder participation. This is obviously the mischief the legislature intended to remedy.⁷⁰
- 73 It is also telling that section 65(3) has jettisoned a prominent qualification attached to shareholder proposals under the old Act. Section 185 provided that a company was obliged to circulate notice of a resolution only if that resolution "*may properly be moved*" at the meeting. The removal of that qualification in section 65(3) reflects the clear preference to leave decisions on the substantive

⁶⁸ See Appendix I for the full text of section 185 of the old Act.

⁶⁹ Rehana Cassim 'An Analysis of Trends in Shareholder Activism in South Africa' (2022) 30(2) *African Journal of International and Comparative Law* 149.

⁷⁰ Cf *Mamasedi v Chief, South African National Defence Force and Others* 2025 (2) SA 354 (CC) at para 36; *Optivest Health Services (Pty) Ltd v Council for Medical Schemes and Others* 2024 (6) SA 106 (SCA) at paras 39 - 41.

validity of proposed resolutions to the shareholders and, if challenged, to the courts. As in all cases, a change in wording signifies a change in meaning.⁷¹

The objectives of the Act

74 This aim to expand shareholder participation is echoed in the objectives of the new Companies Act. The Act seeks to “*encourage transparency and high standards of corporate governance as appropriate*” recognising the “*significant role of enterprises within the social and economic life of the nation*”;⁷² to “*balance the rights and obligations of shareholders and directors within companies*”;⁷³ and to “*encourage the efficient and responsible management of companies*”.⁷⁴

75 Shareholder-proposed resolutions support these objectives.⁷⁵ They are a formal, structured, and clear mechanism through which shareholders can register their views on matters of significance to the company, including environmental, social, or governance issues. Unlike informal engagements, these resolutions must be circulated to all shareholders under section 62(3)(c), accompanied by a clear explanatory statement, ensuring that every shareholder receives the same information at the same time. Because they are tabled at a shareholders’

⁷¹ *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947 (2) SA 1269 (A) at 1279 – 1280; *R v Sisilane* 1959 (2) SA 448 (A) at 453.

⁷² Section 7(b)(iii).

⁷³ Section 7(i).

⁷⁴ Section 7(j)).

⁷⁵ FA para 54, CL 001-25.

meeting, they trigger structured debate, transparent disclosure, and a vote that reflects the considered views of the shareholder body.

76 In this way, the right to put forward shareholder proposed-resolutions facilitates shareholder participation and corporate accountability. This right has been recognised and strongly protected in the United States for decades, as an instrument of “*corporate democracy*”. In 1970, the US Court of Appeals (District of Columbia) held,⁷⁶ in respect of the equivalent provision in the Securities Exchange Act,⁷⁷ that it was “*obvious to the point of banality*” that the right to propose shareholder-resolutions seeks to “*give true vitality to the concept of corporate democracy*”. The court added that “*[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.*”

77 This is not to negate the role that management plays in running the affairs of a company. However, enhanced shareholder participation, through non-binding resolutions, and the board’s management powers are not mutually exclusive. Just as it is true in the public realm that the separation of powers between the arms of state is not absolute and that some intrusion is necessary, it is true in the realm of company law that the separation of powers between a company’s board and shareholders is partial only: “*The areas are partly interacting, not wholly*

⁷⁶ *Medical Committee for Human Rights v. Securities and Exchange Commission* 432 F.2d 659 (D.C. Cir. 1970).

⁷⁷ SEC Rule 14a-8, of the Securities and Exchange Act of 1934, 17 C.F.R. § 240.14a-8 (2011). Discussed further in Appendix II to these heads of argument.

disjointed".⁷⁸ This is not a usurpation of the powers of the board, or an invasion into its exclusive domain.

This interpretation best promotes constitutional rights

78 Section 39(2) of the Constitution not only requires an interpretation that avoids limiting rights, but also requires an interpretation that better promotes rights. Where two or more interpretations of section 65(3) are reasonably possible, the interpretation that best promotes constitutional rights and values must be preferred.⁷⁹

79 Three sets of constitutional rights are directly implicated here: the section 16 right to freedom of expression, the section 18 right to freedom of association, and the section 24 environmental rights.

80 The right to freedom of expression is an expansive one, including the freedom to "*receive or impart information or ideas*".⁸⁰ Unless expression is excluded by

⁷⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) at 810E.

⁷⁹ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 89; *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at para 38.

⁸⁰ Constitution, section 16:

"16 Freedom of expression

(1) Everyone has the right to freedom of expression, which includes—

...

freedom to receive or impart information or ideas"

section 16(2) of the Constitution, it is protected and may be limited only in accordance with section 36(1) of the Constitution.⁸¹

81 Freedom of expression is closely connected with the right to freedom of association,⁸² which the Constitutional Court has described as a right that “enables individuals to organise around particular issues of concern” and “to collectively contest and ameliorate the structure of social power within its midst”.⁸³ Together, these rights not only protect individual expression, but extend to the collective formulation and expression of opinions and decisions on matters of shared concern.⁸⁴

82 These freedoms are essential to protecting the section 24 right to an environment that is not harmful to their health or well-being.⁸⁵ Our courts have recognised that

⁸¹ *Laugh It off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

⁸² Constitution, section 18: “Everyone has the right to freedom of association.

⁸³ *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* [2020] ZACC 7; 2020 (6) BCLR 725 (CC); (2020) 41 (ILJ) 1846 (CC).

⁸⁴ *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 8.

⁸⁵ Constitution, section 24:

“Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

i prevent pollution and ecological degradation;

ii promote conservation; and

section 24 is directly threatened by climate change and pollution, requiring greater accountability and transparency.⁸⁶ In *Arcelormittal*, Navsa ADP further recognised that the world is becoming increasingly ecologically sensitive, and that democracies around the world are waking up to the dangers of corporate secrecy and unresponsiveness on environmental harms.⁸⁷

- 83 Section 65(3) of the Companies Act provides an important mechanism through which shareholders can both exercise and protect these constitutional rights. The ability to table shareholder-proposed resolutions, with explanatory statements, allows shareholders to exchange information and ideas before and during shareholder meetings, and to organise around shared goals through public debate and voting. This is particularly important in the context of climate change and environmental risks, as demonstrated by the facts in this case. Given Thungela's public commitment to addressing climate risks and promoting environmental stewardship, public debate and voting on its record can only serve to strengthen these aims, ensuring transparency and accountability if it falls short of its public commitments to shareholders and society.

iii secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

⁸⁶ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58; 2017 (2) All SA 519 (GP) at para 82; *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* [2022] ZAGPPHC 208 (18 March 2022) at paras 149 - 183 (upheld on appeal in *Minister of Environmental Affairs v Trustees for the time being of Groundwork Trust and Others* [2025] ZASCA 43; 2025 (4) SA 98 (SCA)); *African Climate Alliance and Others v Minister of Mineral Resources and Energy and Others* [2024] ZAGPPHC 1271 (4 December 2024) at para 27.

⁸⁷ *Company Secretary, Arcelormittal South Africa Ltd and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) at 516l.

84 All of these rights are best promoted and protected by the applicants' interpretation of section 65(3). By contrast, the restrictive interpretation advanced by Thungela fails to promote these rights. Indeed, on Thungela's interpretation, shareholders would have no right to propose any resolutions, advisory or otherwise, on climate and ESG matters. Section 39(2) of the Constitution therefore mandates that the applicants' interpretation be preferred.

85 It is no answer for Thungela to contend that shareholders have other ways to exercise their constitutional rights. The rights to freedom of expression and association protect not only the content of the expression, but also the chosen form of expression.⁸⁸ Moreover, shareholder-proposed resolutions offer clear advantages over other forms of informal engagement, that better promote the implicated constitutional rights.⁸⁹

85.1 Private engagements between shareholders and companies are inherently selective, opaque, and easily deflected; they reach only a fraction of shareholders and leave no public record.

85.2 It is also practically impossible for individual shareholders of listed companies to contact and canvass the views of other shareholders, outside of the structure of a shareholders meeting. For instance, Thungela has more than 39,900 individual shareholders, which would require years

⁸⁸ *Laugh It off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC). See in particular the concurring judgment of Sachs J at para 74. See *Enoch Mgijima Municipality v Komani Protest Action and others* 2023 JDR 1819 (ECMA) at para 44.

⁸⁹ RA paras 21 – 30, CL 004-11 to 004-14.

of informal canvassing to solicit their views without the benefit of a formal resolution and a vote at the AGM.⁹⁰

85.3 Questions at AGMs are also time-limited, often met with cursory responses, and do not permit shareholders to consider written material or express their views through a vote. Given the inherent limitations of a question-and-answer segment at an AGM, this form of engagement is incapable of taking the place of proposing, tabling, and voting on a resolution.⁹¹ That is why the Act provides for both.

86 Therefore, a shareholder-proposed resolution is the only legal mechanism that guarantees that an issue will be placed before the full shareholder body, transparently and on the record, leading to a vote and an official record of the outcome.

87 For similar reasons, the US Court of Appeals (District of Columbia) in *Medical Committee for Human Rights* endorsed the view that shareholder-proposed resolutions represent “*the only effective vehicle through which shareholders can have an opportunity to express themselves, and even to hear any arguments on the questions involved*”.⁹²

⁹⁰ RA para 26, CL 004-13.

⁹¹ Applicants’ supplementary affidavit (SA) para 10, CL 005-63.

⁹² *Medical Committee for Human Rights v. Securities and Exchange Commission* 432 F.2d 659 (D.C. Cir. 1970) at fn 12.

Section 65(3) in comparative perspective

- 88 The progressive aims of section 65(3) are brought into sharper focus when compared with the shareholder-proposal regimes in other jurisdictions, including Canada, the European Union, New Zealand, India, the United States, the United Kingdom, and Australia. This relevant comparative law is summarised in greater detail in Appendix II to these heads of argument and the accompanying summary table.
- 89 These foreign regimes all impose stricter threshold requirements, procedures, and content-restrictions than our section 65(3). Viewed in comparison, it is clear that our section 65(3) is a more open, accessible, and democratic shareholder-proposal regime than any foreign comparator. Indeed, it is one of the least restrictive provisions of its kind in the world.
- 90 None of the jurisdictions surveyed in Appendix II (with the limited exception of Australia) have imposed subject-matter restrictions barring shareholder-proposed resolutions on climate change and related ESG issues. Indeed, it would be a startling conclusion to hold that section 65(3) of our Companies Act affords shareholders in South African fewer rights than its more restrictive foreign counterparts.
- 91 This comparative law also reinforces the value of shareholder-proposals as a tool for promoting corporate accountability on human rights issues. The history of these resolutions in the United States is particularly instructive.⁹³ For almost 80-

⁹³ See appendix II, paragraphs 57 - 58 below.

years, US-based shareholders have proposed resolutions addressing corporations' involvement in major human rights issues, including segregation, war crimes, apartheid, and climate change.

91.1 In 1951, shareholders presented a resolution calling on the Greyhound bus company to end the racial segregation of its buses in the American South, several years before the US Supreme Court's landmark judgment in *Brown v Board of Education*.⁹⁴ While that resolution was blocked by the company, it marked an early corporate reckoning.⁹⁵

91.2 In 1970, the US Court of Appeals (District of Columbia) endorsed such shareholder activism in considering a resolution calling on Dow Chemicals to cease the production of napalm, an incendiary chemical weapon used against civilians in the Vietnam war.⁹⁶ The Court noted that there was “*no reason*” to block shareholders from presenting such resolutions, which pose the simple question to fellow shareholders “*whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy*”.

⁹⁴ *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).

⁹⁵ Lisa M Fairfax ‘Social Activism through Shareholder Activism’ (2019) 76 *Washington & Lee Law Review* 1129 – 1135.

⁹⁶ *Medical Committee for Human Rights v SEC* 432 F.2d 659 (D.C. Cir. 1970). The US Supreme Court later vacated this judgment on grounds of mootness, without addressing the merits, see *SEC v Medical Committee for Human Rights* 404 U.S. 403 (1972).

91.3 That was followed by a flood of shareholder resolutions in the 1980s calling on US-listed companies to divest from the apartheid regime.⁹⁷ While most resolutions failed to secure a majority, the tabling of these resolutions helped to force the corporate debate into the open, encouraged further negotiation with company boards, and ultimately led to many companies agreeing to shareholders' demands for divestment and reforms, supporting the broader anti-apartheid movement.⁹⁸

92 US-based shareholders achieved these gains, despite a considerably more restrictive and unstable regulatory regime. By contrast, it is inconceivable that our Companies Act, with its express commitments to constitutional rights and values, would bar South African shareholders from engaging in similar efforts. Yet that is precisely what Thungela contends for in this case.

THUNGELA'S MISTAKEN INTERPRETATION

93 Thungela advances a narrow interpretation of section 65(3) of the Companies Act that seeks to deprive shareholders of any meaningful right to propose resolutions. It advances four key contentions:

93.1 First, shareholders have no right to propose or vote on any matters except those "*expressly identified in the [Companies] Act or a company's MOI*".⁹⁹

⁹⁷ FA para 122, CL 001-43; and annexure TD44, CL 001-359 (Philip Broyles 'The Impact of Shareholder Activism on Corporate Involvement in South Africa during the Reagan Era' (1998) 28 *International Review of Modern Sociology* 1).

⁹⁸ Broyles id p 323 – 327.

⁹⁹ AA para 104, CL 003-54.

93.2 Second, shareholders have no right to propose non-binding resolutions because “*the concept of a ‘non-binding resolution’ of shareholders has never existed, and still does not exist, in our law*”.¹⁰⁰

93.3 Third, the company’s board has a unilateral power to screen the content of the resolutions and to block resolutions with which it disagrees.¹⁰¹

93.4 Fourth, non-binding shareholder resolutions would somehow usurp management powers and lead to abuses.¹⁰²

94 In what follows, we address each of these contentions in turn, but at the outset it is necessary to appreciate their startling implications.

95 First, on Thungela’s interpretation, shareholders could not propose any non-binding resolutions on climate change or ESG matters, let alone any other matters of pressing concern, including resolutions:¹⁰³

95.1 calling for investigations into corporate human rights abuses, including racial and sexual discrimination and harassment in the workplace;

95.2 seeking disclosure of discriminatory workplace practices;

¹⁰⁰ AA para 92, CL 003-49.

¹⁰¹ AA para 112, CL 003-56.

¹⁰² AA para 64, CL 003-33.

¹⁰³ RA para 15, CL 004-9.

95.3 encouraging accountability and action on the business' involvement in corruption and state capture; or

95.4 calling on a company to stop doing business with oppressive regimes committing ongoing human rights abuses.

96 Second, Thungela suggests that the only matters on which its shareholders could propose resolutions under section 65(3) are matters that are expressly provided for in the Companies Act and its MOI. As Thungela acknowledges, that would largely confine shareholder-proposed resolutions to the election and removal of directors and the approval of "*certain transactions*" that are specified in the Companies Act.¹⁰⁴

97 Third, this would entail that, despite our progressive company law regime, shareholders in South African companies have fewer rights to propose resolutions than shareholders in comparative jurisdictions, where non-binding shareholder-proposed resolutions on climate and ESG matters are common. Indeed, it would entail that South Africa would have one of the most restrictive shareholder resolution regimes in the world.

¹⁰⁴ AA para 115, CL 003-57. In terms of section 16(1)(c) shareholders may only propose an amendment of a company's MOI if those shareholders hold at least 10% of the voting rights that may be exercised on such a resolution.

First argument: Subject matter restrictions

98 Thungela’s attempt to restrict the subject matter of shareholder resolutions is unsustainable for four reasons.¹⁰⁵

99 First, it does violence to the express language of section 65(3) of the Act, which unambiguously provides that any two shareholders may propose a resolution concerning “any matter”, subject only to the requirement that “*each*” of these proposing shareholders must be entitled to vote on that matter. Section 65(3) does not say that “*any two or more shareholders may propose resolutions on matters that are expressly provided for in this Act or the MOI.*”

100 Second, Thungela’s interpretation ignores the clear terms of its own MOI which provides that each share entitles its holder to vote “*on any matter to be decided by shareholders of the Company*”.¹⁰⁶ The MOI places no restrictions on the subject matter.

101 Third, Thungela’s interpretation would lead to a manifest absurdity. On the one hand, Thungela appears to accept that a company board may propose resolutions on any matter, including climate change and other ESG issues, and its shareholders would be entitled to vote on these board-proposed resolutions at AGMs. Yet, on the other hand, Thungela suggests that its shareholders are somehow barred from proposing their own resolutions on precisely the same matters. The contradiction is never explained. If shareholders are entitled to vote

¹⁰⁵ AA para 104, CL 003-54.

¹⁰⁶ Thungela MOI clause 11.2.

on a matter, it stands to reason that they are entitled to propose their own resolutions on that matter.

102 Fourth, the restrictive interpretation proposed by Thungela would undermine the objectives of the Companies Act, including its goals of encouraging transparency and high standards of corporate governance¹⁰⁷ and balancing the rights and obligations of shareholders and directors within companies.¹⁰⁸ This would also ignore the progressive aims of the Companies Act, which seeks to expand not contract the rights of shareholders.

Second argument: The legal status of non-binding resolutions

103 Thungela argues that non-binding resolutions are not recognised in our law and are a legal nullity, without effect.¹⁰⁹ This argument is equally mistaken.

104 First, as noted above, the definitions of an “ordinary resolution” and a “special resolution” are deliberately framed in expansive and flexible terms. They neither prohibit non-binding resolutions nor do they dictate the substance or effect of resolutions.

105 Second, Thungela’s argument departs from its own practices and those of other publicly listed companies. The company has itself proposed non-binding “say-on-pay” resolutions at multiple of its AGMs, in accordance with the King Codes

¹⁰⁷ Section 7(b)(iii).

¹⁰⁸ Section 7(i).

¹⁰⁹ AA paras 8 and 9, CL 003-7.

and the JSE Listings Requirements.¹¹⁰ On Thungela's argument, these resolutions would now be *ultra vires* and null and void. In its answering affidavit, Thungela attempts to argue that these say-on-pay votes were not true resolutions.¹¹¹ But that is contradicted by its own records, where these votes are repeatedly categorised as "ordinary resolutions".¹¹²

106 Third, it is incorrect for Thungela to suggest that because these resolutions are advisory in nature, they could have no legal effect. That ignores the well-established principle that a decision may exist in law, and inform subsequent decisions and exercises of power, without itself imposing binding obligations.¹¹³

107 As a formal recordal of the views of shareholders on matters of mutual concern, these advisory resolutions would undoubtedly have legal effect, even if that effect is not to bind the board to a specific action. We have addressed the value of these non-binding resolutions in detail above.

¹¹⁰ RA para 113, CL 004-36.

¹¹¹ AA para 93, CL 003-49.

¹¹² RA para 94, CL 004-30; para 113, CL 004-36. Annexures TD55, CL 004-169 ("Ordinary non-binding resolution number 4"); TD56, CL 004-175 ("Non-binding ordinary resolution number 4"); and TD59, CL 004-188 ("ordinary non-binding resolution number 4").

¹¹³ *South African Human Rights Commission v Agro Data CC and Another* [2026] ZACC 16; 2026 (7) BCLR 737 (CC) at para 81.

Third argument: The alleged unilateral board veto

108 Thungela asserts that its board has a unilateral power and discretion to screen and reject shareholder-proposed resolutions, without requiring a court application.¹¹⁴

109 Thungela admits that “*section 65(3) of the Act does not in express terms permit the Board to consider this and make this determination*”, but nevertheless claims that it has a “*fiduciary duty*” to block proposed resolutions that it deems to be undesirable.¹¹⁵ It further seeks to locate this power in 30.4 of the MOI which, it suggests, makes the circulation of the resolutions subject to the board’s discretion.¹¹⁶

110 These arguments are unsustainable, for the following reasons:

111 First, this claimed unilateral power is inconsistent with the text and purpose of section 65(3). As Thungela rightly acknowledges, section 65(3) is an “*essential section to avoid an abuse of power by the Board*”.¹¹⁷ But the unilateral veto that Thungela contends for would allow for precisely such abuses.

112 Second, this unilateral power is directly at odds with the dispute-resolution procedure prescribed in section 65(5) of the Act. The Act makes clear that the

¹¹⁴ AA para 112, CL 003-56.

¹¹⁵ *Id.*

¹¹⁶ AA para 122, CL 003-59.

¹¹⁷ AA para 174, CL 003-73.

only circumstances under which Thungela may refuse to circulate a shareholder-proposed resolution is if the resolution does not comply with the formal requirements in section 65(4). Even then, its directors are obliged to go to court. It is not permissible for Thungela to take the law into its own hands by refusing to circulate and table the resolutions.

113 Third, the board's fiduciary duties provide no basis for unlawful self-help, that overrides shareholders' rights under section 65(3).

113.1 These fiduciary duties, which are primarily sourced in the common law, must be exercised in a manner that is consistent with the Companies Act, including section 65(3), and the Constitution. After all, statutory rights take precedence over common law duties in cases of conflict.¹¹⁸

113.2 In any event, there is no conflict between shareholders' rights to propose resolutions and the board's duties to act in the best interests of the company. On the contrary, a plurality of views is conducive to better decision-making.¹¹⁹

113.3 The board would best discharge those duties by advising shareholders of the board's views on the proposed resolution, to allow shareholders to engage in an informed debate at the meeting. In similar circumstances, involving shareholders' powers to requisition a meeting, it has been held

¹¹⁸ *King N.O. and Others v De Jager and Others* 2021 (4) SA 1 (CC) at para 141.

¹¹⁹ That is one of the rationales for the *audi alteram partem* rule. Cf *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) at para 42.

that “[a]ny issues with regard to the resolutions must be raised at the meeting”, as “[i]t is not open to the [directors] to unilaterally decide beforehand that the resolutions are deficient...”.¹²⁰

113.4 If a board establishes that a resolution breaches section 63(4) of the Act, it would further discharge its duties by going to court to block that resolution under section 65(5).

113.5 And if a resolution is passed that the board believes to be invalid, it would exercise its fiduciary duties by going to court to declare that resolution invalid and to have it set it aside.

114 Fourth, clause 30.4 of Thungela’s MOI provides no support to its argument.¹²¹

That provision merely provides that the Thungela board will consider requests “in good faith” and “determine whether the resolution should be included in the notice of the Shareholders Meeting”. This contemplates that the board will apply its mind to proposed resolutions. It does not provide that the board may

¹²⁰ *Besso Investments (Pty) Ltd and Others v Capeco Development (Pty) Ltd and Others* 2024 JDR 5316 (ECGq) at para 58. In this case, directors alleged that certain shareholder-proposed resolutions calling for their removal were deficient, and that they were therefore entitled to not issue the notice of the meeting that had been requisitioned by the shareholders.

¹²¹ AA para 122, CL 003-59. Clause 30.4 provides, in full:

“Should the Board receive requests from Shareholders for the inclusion of certain resolutions in the notice prior to the dispatch of such notices, or after dispatch of such notices, but at least 15 Business Days before the Shareholders Meeting is to begin, the Board shall in good faith consider such requests and determine whether the resolution should be included in the notice of the Shareholders Meeting. Any such requests should provide the specific purpose for which the resolution is proposed, must be delivered to the Company in writing and be otherwise in compliance with the Companies Act. Requests for the inclusion of resolutions at a Shareholders Meeting receive by the Company within a period of 15 Business Days of the Shareholders Meeting shall not be considered at the Shareholders’ Meeting.”

unilaterally block resolutions that it deems to be unsuitable, without recourse to a court. In any event, sections 65(3) and 62(3)(c) of the Companies Act are unalterable provisions, which cannot be amended, qualified or overridden by Thungela's MOI.

115 Finally, not only does Thungela's argument violate the Companies Act, but it is akin to an administrative prior restraint on expression, which our courts have always viewed with the greatest suspicion.¹²² Thungela has offered no justification for such a prior restraint here.

Fourth argument: Usurpation of board powers and other potential abuses

116 Lastly, Thungela argues that non-binding resolutions constitute an impermissible usurpation of board powers and would lead to other potential abuses.¹²³ It relies on the board's management powers under 66(1) of the Companies Act, contending that this reflects a strict separation of powers that is rooted in the common law.¹²⁴ Again, these arguments are misconceived.

117 First, there is a clear contradiction in Thungela's argument: if advisory resolutions have no binding legal force, as Thungela accepts, it cannot also make the assertion that such advisory resolutions would somehow override and usurp the board's management powers.

¹²² *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at paras 44 – 46, 58 – 61.

¹²³ AA paras 64 - 65, CL 003-33 to 003-34; and para 56.3, CL 003-28.

¹²⁴ Id para 64, CL 003-33.

118 Second, section 66(1) of the Companies Act gives no support to this argument.

It provides that “[t]he business and affairs of a company must be managed by or under the direction of its board”, which has the “authority to exercise all of the powers and perform any of the functions of the company”. Those board powers are subject to an important exclusion: they are vested in the board “except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise”. To the extent that non-binding advisory resolution under section 65(3) of the Act intrude in any way on the management powers of the board, that is an intrusion that is mandated by the Act itself.

119 Third, the common law principle of non-usurpation of management powers provides no support to Thungela’s argument. In a line of cases dating back to the English Court of Appeal’s 1906 judgment in *Cunninghame*,¹²⁵ courts have invalidated or refused to give effect to binding shareholder resolutions, after they have been passed, in two circumstances:¹²⁶

119.1 True usurpation: where shareholders at a general meeting have purported to exercise powers that are exclusively reserved for the board (for

¹²⁵ *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* (1906) 2 Ch 34 (CA) (Cozens-Hardy LJ); *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA); *Scott v Scott* [1943] 1 All ER 582 (Ch). These cases have been cited with approval by our courts in *Cape United Sick Fund Society v Forrest* 1956 4 SA 519 (A); *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 1 SA 635 (O) 637 (citing *Scott v Scott*); *Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1084 (also citing *Scott v Scott*); *Letseng Diamonds Ltd v JCI Ltd and Others*; *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2007 (5) SA 564 (W) at para 16 (citing *John Shaw & Sons*).

¹²⁶ Bottomley “Rethinking the Law on Shareholder-Initiated Resolutions at Company General Meetings” (2019) 43 *Melbourne University Law Review* 93 at 103 – 105.

example, passing a binding resolution to sell company property¹²⁷ or to pay interim dividends¹²⁸).

119.2 Instructing resolutions: involving shareholders attempting to give binding directions to the board on how it must exercise its powers (for example, passing resolutions instructing directors to cease litigation¹²⁹ or ordering directors to launch a forensic investigation).¹³⁰

120 This line of cases does not apply to non-binding, advisory resolutions, or resolutions calling for the mere disclosure of information on the board's policies, plans, and activities. This case law also does not support Thungela's assertion of a unilateral power to reject resolutions before they are put to a vote, without a court order.

121 Fourth, there is no evidence of the potential abuses that Thungela postulates. In the 15 years since section 65(3) came into effect, there has been no spiral of competing resolutions, no disappointed proponent compelling immediate re-circulation, and no flood of frivolous filings.

122 The Companies Act also contains clear safeguards against any potential abuses. The board can go to court to block a resolution, if it is truly an abuse. It can urge

¹²⁷ *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* (1906) 2 Ch 34 (CA).

¹²⁸ *Scott v Scott* [1943] 1 All ER 582 (Ch) at 584.

¹²⁹ *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA) at 113 – 119, 134.

¹³⁰ See *Scott v Scott* [1943] 1 All ER 582 (Ch) at 585.

its shareholders to vote against the resolution. And, if passed, it can go to court to have the resolution declared invalid and set aside.

123 In these circumstances, we can do no better than to quote from the SCA's judgment in *Nova Property Group*, where it held as follows, in the context of rights of public access to shareholder registers under section 26(2) of the Act:¹³¹

"In the absence of an express limitation of that right by the legislature, it is not for the court to limit it because of some nebulous spectre of abuse, particularly where, as in this context, there are built-in safeguards... and the constitutionality of the provision is not challenged."

¹³¹ *Nova Property Group* at para 42.

REMEDY

124 The applicants seek declaratory relief to vindicate their rights under the Companies Act, declaring that:

124.1 Thungela breached its obligations and the Applicants' rights under sections 65(3) and 62(3)(c) of the Companies Act in refusing to circulate and table the Applicants' 2023, 2024 and 2025 proposed resolutions; and

124.2 The applicants have a right to propose and exercise voting rights on non-binding resolutions on climate change and other ESG matters, and Thungela has a corresponding obligation to circulate and table those resolutions for discussion at its AGMs.

125 This Court is empowered to grant this declaratory relief under section 161 of the Companies Act, read with section 158. This is relief “*determining*” the rights of shareholders under the Act and Thungela’s MOI (section 161(1)(a)), and it is further an “*appropriate order necessary*” to protect those rights and to “*rectify any harm*” caused by a contravention of the Act (section 161(1)(b)). In terms of section 158, when a court determines any matter or issues any order contemplated in the Act, it must “*promote the spirit, purpose and objects*” of the Act.

126 This is also a proper case for this Court to exercise its general discretion to grant declaratory relief.¹³² The applicants, as Thungela shareholders, plainly have an

¹³² Section 21(1)(c) of the Superior Courts Act 10 of 2013. *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) at

interest in an existing, future or contingent right under sections 65(3) and 62(3)(c) of the Companies Act. The interests of justice also support such relief.¹³³

126.1 There is a live dispute between the parties over the applicants' rights and Thungela's obligations.

126.2 The applicants have taken reasonable steps to exhaust alternative legal remedies, having initiated a complaint with CIPC and having attempted alternative dispute resolution in the Tribunal.

126.3 If not resolved, this dispute will continue to arise each time that the applicants propose shareholder resolutions, including non-binding resolutions on ESG issues and climate change. The applicants intend to propose similar resolutions in future and Thungela has clearly demonstrated that it will continue to refuse them.

126.4 Declaratory relief will also provide guidance for similar disputes arising between shareholders and companies. This guidance will also be of assistance to the second respondent, CIPC, in its investigations of future contraventions of this nature.

126.5 This declaratory relief is also appropriate to protect and advance the implicated constitutional rights, including the rights to freedom of expression, association, and the environment.

paras 15 – 17; *Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre* [2017] ZAGPPHC 576; [2017] 4 All SA 150 (GP); 2018 (3) SA 515 (GP) at paras 52 - 59.

¹³³ FA para 133, CL 001-47.

127 In *Rail Commuters*, O'Regan J espoused the value and importance of declaratory orders, particularly as a means of setting respondents straight on their legal obligations when they erroneously deny them.¹³⁴ The declaratory relief sought in this application is narrowly tailored to this remedial function. Prayer 1 declares the breach of the applicants' rights and Thungela's obligations in refusing the three resolutions in 2023, 2024 and 2025. Prayer 2 then corrects the primary errors in Thungela's reasons for rejecting the applicants' resolutions:

127.1 Prayer 2.1 addresses the permissible subject matter of resolutions, confirming that Thungela shareholders are entitled to propose and vote on resolutions concerning environmental, social, and governance matters, including issues related to climate change;

127.2 Prayer 2.2 addresses the status of non-binding resolutions, confirming that Thungela shareholders are entitled to propose and vote on such resolutions;

127.3 Prayer 2.3 confirms Thungela's obligation to circulate and table such resolutions that comply with the formal and procedural requirements of the Act and its MOI, with an important proviso: "*unless it is subject to a court order obtained under section 65(5) of the Act or other applicable law restraining it from doing so.*"

¹³⁴ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at paras 107 to 109.

- 128 This guidance is particularly important here because the applicants intend to submit further resolutions on climate change and related ESG matters¹³⁵ which, but for this declaratory relief, would inevitably be met with the same recalcitrance faced by the applicants in 2023, 2024, and 2025.
- 129 In this light, Thungela’s complaints that the order in prayer 2.1 “*goes well beyond*” the subject-matter of the proposed resolutions is misconceived.¹³⁶ The orders are framed in response to Thungela’s erroneous grounds for refusal, no more and no less. Thungela has expressed the categorical view that shareholders have no right to vote on any matter not expressly addressed in the Act or its MOI, which extend to climate and ESG-related matters. That categorical rejection requires categorical correction.
- 130 Equally, there is no basis to Thungela’s complaint that prayer 2.3 is simply an order to “comply with the law”.¹³⁷ Thungela has claimed that its board has the unilateral power to block resolutions, even if they are formally and procedurally compliant, without going to court. This declaratory relief seeks to disabuse Thungela of that error and provides appropriate guidance on its obligations going forward.

¹³⁵ FA para 131, CL 001-47.

¹³⁶ AA paras 124 – 129, CL 003-60 to 003-61.

¹³⁷ AA para 134, CL 003-61.

CONCLUSION AND COSTS

131 In the circumstances, we submit that the applicants are entitled to the relief sought in the notice of motion. Their interpretation of sections 65(3) and 62(3)(c) is consistent with the clear wording and objectives of the Companies Act; it best promotes shareholders rights under the Act; and it best protects and promotes constitutional rights to freedom of expression, freedom of association, and an environment that is not harmful to health or well-being.

132 By contrast, the restrictive interpretation advanced by Thungela finds no support in this legislative scheme, it is inconsistent with the progressive objectives of the Act, it fails to protect and advance constitutional rights, and would result in a shareholder proposal regime that is among the most restrictive in the world.

133 In the circumstances, we submit that the applicants' relief ought to be granted in terms of the notice of motion, with costs, including the costs of one senior and two junior counsel, on Scale C.

**GILBERT MARCUS SC
CHRIS MCCONNACHIE
KHANYA DAMBUZA**

**Applicants' counsel
Chambers, Sandton
17 September 2026**

APPENDIX I – SECTION 185 OF THE OLD COMPANIES ACT

Companies Act 61 of 1973 (“old Companies Act”), section 185 (prior to repeal)

185 Duty of company to circulate notice of resolutions and statements by members

(1) Subject to the provisions of this section, a company shall, on the requisition in writing of such number of members as is referred to in subsection (2), and (unless the company otherwise determines) at the expense of the requisitionists-

(a) give to members of the company entitled to receive notice of the next annual general meeting, notice of any resolution which may properly be moved and is intended to be moved at that meeting; and

(b) circulate to members entitled to have notice of any general meeting sent to them, any statement of not more than one thousand words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting.

(2) The number of members necessary for a requisition under subsection (1) shall be-

(a) any number of members representing not less than one-twentieth of the total voting rights of all the members having at the date of the requisition a right to vote at the meeting to which the requisition relates; or

(b) not less than one hundred members.

(3) (a) Notice of any such resolution shall be given and any such statement shall be circulated to members of the company entitled to have notice of the meeting sent to them, by serving a copy of the resolution or statement on each such member in any manner permitted for the service of notice of the meeting, and notice of any such resolution shall be given to any other member of the company by giving notice of the general effect of the resolution in any manner permitted for giving him notice of meetings of the company.

(b) A copy of any such resolution or statement shall be served and notice of any such resolution shall be given in the same manner and, so far as practicable, at the same time as the notice of the meeting in question, or if it is not practicable to do so, as soon as practicable thereafter.

(4) A company shall not be bound under this section to give notice of any resolution or to circulate any statement unless-

(a) there is lodged at the registered office of the company a copy of the requisition signed by the requisitionists or two or more copies thereof which between them contain the signatures of all the requisitionists-

(i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting; and

(ii) in the case of any other requisition, not less than two weeks before the meeting; and

(b) there is lodged or tendered with the requisition a sum reasonably sufficient to meet the company's expenses in giving effect thereto:

Provided that if, after a copy of a requisition requiring notice of a resolution has been lodged at the registered office of the company, an annual general meeting is called for a date six weeks or less after the copy has been lodged, the copy, though not lodged within the time required by this subsection, shall be deemed to have been properly lodged.

(5)

(a) The Court may absolve any company from the obligation to circulate any resolution or statement in terms of this section if, on the application either of the company or of any other interested person, the Court is satisfied that the rights thereby conferred are being abused to secure needless publicity for defamatory matter.

(b) An order under this subsection may include an order for the payment by the requisitionists of the costs or any portion of the costs incurred in connection with the relevant application, whether or not they are parties to the application.

(c) The decision of the Court on any such application shall be final.

(6) Notwithstanding anything contained in the articles of a company, the business which may be dealt with at an annual general meeting thereof, shall include any resolution of which notice has been given in accordance with this section, and for the purpose of this subsection notice shall be deemed to have been so given notwithstanding the accidental omission to give such notice to one or more members.

(7) In the event of any failure to comply with any provision of subsection (1), every director or officer of the company who authorizes or knowingly permits or is party to the failure, shall be guilty of an offence.

APPENDIX II – COMPARATIVE LAW

CANADA

Applicable legal provisions

- 1 The Canada Business Corporations Act (CBCA)¹³⁸ governs corporations incorporated at federal level. Section 137 of the CBCA affords shareholders the right to submit proposals to be raised at shareholder meetings, subject to eligibility requirements prescribed in regulations.

Threshold requirements

- 2 Section 137 was overhauled through amendments introduced in 2001, which significantly lowered the barriers to shareholder proposals.
- 3 The eligibility threshold for submitting a proposal is currently set at 1% of voting rights or a share value of at least CAN\$ 2000.¹³⁹ There is no cost to submit a proposal. Proposals must be submitted during a prescribed “permitted window”.

Legal effect of resolutions

- 4 Section 137 expressly provides that shareholder proposals are non-binding in nature and have advisory effect.

Subject matter

- 5 Proposals may be submitted on “*any matter that the person proposes to raise at the meeting*”, subject only to the narrow category of exemptions in section 135(5) of the CBCA (addressed below). Canadian shareholders have used this provision to file extensive proposals on climate change and related ESG issues, framed in non-binding terms.

Board powers to exclude

- 6 A company board is obliged to circulate a proposal and supporting statement, unless it can establish that one of the exemptions applies under section 135(5).
- 7 These exemptions include: a) failure to submit the proposal within the prescribed period; b) where it “*clearly appears*” that the primary purpose of the proposal is to “*enforce a personal claim or redress a personal grievance*”; b1) where it “*clearly appears*” that the

¹³⁸ RSC 1985, c C-44. Similar rights are found in the federal Bank Act (S.C. 1991, c. 46) and provincial statutes.

¹³⁹ Canada Business Corporations Regulations, 2001 (SOR/2001-512) Reg 46.

proposal “does *not relate, in a significant way to the business or affairs of the corporation*”; c) the proposer failed to present their proposal at a shareholders meeting, either in person or by proxy; d) substantially the same resolution previously failed and did not achieve the prescribed minimum number of votes (starting at 3%); or e) the proposal constitutes an abuse of rights “*to secure publicity*”.

- 8 If a company invokes any of these grounds of exemption, it is obliged to notify the proposer in writing, within a prescribed period of 21 days after receiving the proposal.¹⁴⁰ The proposer is entitled to challenge that decision by applying to court seeking relief, including an order restraining the meeting from taking place.¹⁴¹

Notable judgments

- 9 In *Verdun*, decided in 1996, the Supreme Court of Canada acknowledged that section 137 of the CBCA and its counterparts in federal and provincial law reflect an “*evident [...] commitment to the promotion of shareholder participation in corporate governance*”.¹⁴²
- 10 The Superior Court of Quebec has held that a “*broad interpretation*” must therefore be given to shareholders rights to submit proposals “*with a view to promoting shareholder participation*”.¹⁴³
- 11 More recently, in *Fraser*, the Superior Court of Quebec held that “[t]he ability for each shareholder to raise a matter for the consideration of his/her fellow shareholders is a cornerstone of shareholder democracy.”¹⁴⁴ While noting that a board has a responsibility to prevent abuses, the court confirmed that the board’s powers to refuse resolutions were narrowly confined to the grounds of exemption under section 135(5).

¹⁴⁰ Section 135(7) read with regulation 53.

¹⁴¹ Section 135(8).

¹⁴² *Verdun v Toronto-Dominion Bank* [1996] 3 SCR 550 at para 32.

¹⁴³ *National Bank of Canada v Weir* 2006 QCCS 278 (CanLII) at para 25.

¹⁴⁴ *Fraser v Canadian National Railway Company* 2022 QCCS 1138 (CanLII) at para 1.

EUROPEAN UNION

Applicable legal provisions

- 12 The Shareholder Rights Directive (Directive 2007/36/EC,¹⁴⁵ as amended by Directive 2017/828/EC),¹⁴⁶ provides the framework for the exercise of shareholder rights in listed companies in the EU.
- 13 The Preamble to the Directive recognises that “*effective shareholder control is a prerequisite to sound governance*”.¹⁴⁷ It was adopted following a proposal from the European Commission that new initiatives should be taken with a view to enhancing shareholders’ rights in listed companies, and in the context of the European Parliament’s support for the Commission’s intention to strengthen shareholder rights.¹⁴⁸
- 14 Art. 6 of the Directive, which governs shareholders’ right to table draft resolutions, must be read with this context and purpose in mind. Art 6.1(a) gives a shareholder the right to table draft resolutions which may be adopted at a general meeting. It states:

“Member States shall ensure that shareholders, acting individually or collectively:

(a) have the right to put items on the agenda of the general meeting, provided that such item is accompanied by a justification or a draft resolution to be adopted in the general meeting; and

(b) have the right to table draft resolutions for items included or to be included on the agenda of a general meeting.

Member States may provide that the right referred to in point (a) may be exercised only in relation to the annual general meeting, provided that shareholders, acting individually or collectively, have the right to call, or to require the company to call, a general meeting which is not an annual general meeting with an agenda including at least all the items requested by those shareholders.”

¹⁴⁵ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (SRD I).

¹⁴⁶ Significant amendments were introduced in 2017 in Directive 2017/828/EC of the European Parliament and of the Council of 11 July 2007 (SRD II).

¹⁴⁷ Cl. 3 of the Preamble to the Directive.

¹⁴⁸ Cl. 2 and 3 of the Preamble to the Directive.

- 15 In the EU, shareholders therefore have the right to table draft resolutions which accompany items they wish to put on the agenda, and to table a draft resolution on its own if it concerns an item already on the agenda.

Threshold requirements

- 16 Article 6.2 prescribes that where domestic law imposes a minimum threshold of shareholding to exercise the right to propose resolutions, that threshold may not exceed 5% of the company's share capital. Member states are also permitted to set a deadline for exercising these rights before an AGM.¹⁴⁹
- 17 The Directive allows Member States to impose further obligations on companies or take further measures to facilitate shareholders' exercise of their rights under the Directive,¹⁵⁰ but does not contemplate that Member States may restrict these rights.

Legal effect

- 18 Shareholders explicitly have the right to *"table draft resolutions for items included ... on the agenda of a general meeting"*. The Directive does not prescribe whether those resolutions are binding or non-binding.
- 19 Amending Directive (EU) 2017/828, introduced in 2017, prescribes that shareholders shall have the right to vote on director remuneration policies at least every four years. The vote may be binding or advisory, at the choice of the Member State.

Subject matter

- 20 The Directive does not impose any restrictions on the subject matter of shareholder proposals.

Board powers to exclude

- 21 The Directive does not contemplate that the board exercises any unilateral discretion to exclude shareholder-proposed resolutions that are formally compliant.

NEW ZEALAND

Applicable legal provisions

- 22 New Zealand's 1993 Companies Act expressly provides that shareholder-proposed resolutions on management issues are non-binding, unless a company's constitution provides otherwise.

¹⁴⁹ Art. 6.2 and 6.3 of the Directive.

¹⁵⁰ Art. 3 of the Directive.

- 23 Section 109(2) of the Act provides that “[n]otwithstanding anything in this Act or the constitution of the company, but subject to subsections (2A) and (3), a meeting of shareholders may pass a resolution under this section relating to the management of a company”, and section 109(3) qualifies this power by providing that “unless the [company’s] constitution provides the resolution is binding, a resolution passed pursuant to subsection (2) is not binding on the board”.

Threshold requirements

- 24 Section 9(1) stipulates that “a shareholder” may give written notice to the board of a matter which they propose to raise for discussion or resolution at the next shareholders’ meeting at which that shareholder is entitled to vote. It therefore appears that even one shareholder acting alone, no matter how small their shareholding, may propose a non-binding resolution.

Legal effect

- 25 The Act expressly provides that, unless a company’s constitution provides otherwise, a shareholders’ resolution relating to the management of a company is not binding.

Board powers to exclude

- 26 In terms of section 9(6), a board is empowered to exclude:
- 26.1 any part of a statement prepared by a shareholder that the directors consider to be defamatory, frivolous, or vexatious; or
 - 26.2 any part of a proposal or resolution prepared by a shareholder that the directors consider defamatory.

INDIA

Applicable legal provisions

- 27 Section 111 of India’s Companies Act of 2013 requires a company to give notice of “any resolution which may properly be moved and is intended to be moved” at a meeting on requisition by the number of shareholders prescribed in section 100.

Threshold requirements

- 28 In the case of a company with share capital, the threshold is the number of shareholders who, on the day the requisition is received, hold not less than one-tenth of the paid-up share capital of the company which on that date has voting rights.

Legal effect

- 29 The Act does not expressly state whether shareholder-moved resolutions are or must be binding on companies.

Subject matter

- 30 A board may not refuse to circulate a shareholder resolution based on its subject matter. See the discussion below on the case of *Invesco*.

Board powers to exclude

- 31 In terms of section 111(2), the company is obliged to give notice, unless the shareholders fail to either:

- 31.1 deposit a signed copy of the requisition at the registered office of the company within the prescribed period; or
- 31.2 deposit or tender a sum reasonably sufficient to meet the company's expenses in giving effect to the requisition.

Notable judgments

- 32 In *Invesco*¹⁵¹ shareholders in a company had issued a requisition in terms of section 100(2)(a) of the Indian Act calling for an extraordinary general meeting (EGM). The board concluded that the resolutions contained in the requisition were unlawful and that it was therefore unable to convene the EGM. The board accordingly initiated proceedings seeking a declarator to that effect, as well as an interdict restraining the appellants from taking any step in furtherance of the requisition¹⁵².
- 33 The appellate court confirmed that, on a proper reading of section 100:
- 33.1 a “*valid requisition*” means a numerically and procedurally compliant requisition, and nothing further¹⁵³; and
 - 33.2 the board of a company is obliged to requisition a meeting if the requirements in section 100(2) and (3) are met, and whether or not the proposed requisition

¹⁵¹ *Invesco Developing Markets Fund and Anr v Zee Entertainment Enterprises Limited and Anr* Appeal (L) No. 25420 of 2021 in IA (L) No. 22525 of 2021 in Suit (L) No. 22522 of 2021 with IA (L) No. 25423 of 2021.

¹⁵² *Invesco* at paras 2.1 to 2.10.

¹⁵³ *Invesco* at paras 12 and 14.

should be given effect to is to be decided by the shareholders at the general meeting¹⁵⁴.

- 34 The court held that a shareholder “*cannot be restrained from calling a meeting and he is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting. Nor are the reasons for the resolutions subject to judicial review*”¹⁵⁵.
- 35 The court discussed its prior decision in *Cricket Club of India v Madhav L Apte*.¹⁵⁶ There, the executive committee of a cricket club had challenged the validity and legality of the resolution proposed under a shareholders’ requisition. The court held that even if the requisition is illegal or invalid, the board is obliged to call for the meeting¹⁵⁷.
- 36 In refusing the relief sought by the directors, the court held that it cannot lay down a precedent which would “*[derail] the democratic functioning of Companies across India owing to the non-cooperative and obstructive conduct of the Board of Directors*”¹⁵⁸.

UNITED STATES

Applicable legal provisions

- 37 The Securities and Exchange Commission (SEC) Rule 14a-8, which was first introduced in 1942, governs shareholder proposals filed with public companies.¹⁵⁹ It determines which proposals may be included in annual proxy statements – the lengthy documents that public companies send to shareholders and file with the SEC before their annual shareholder meetings. The rule is framed as a series of questions and answers, setting strict timeframes, eligibility criteria, and content requirements. These requirements and the SEC’s guidance have been frequently amended over the years, reflecting shifting political winds.

Threshold requirements

- 38 Rule 14a-8 sets a high bar to participation. There is currently a three-tier ownership requirement, requiring proposers to demonstrate that they have owned at least a

¹⁵⁴ *Invesco* at para 15.

¹⁵⁵ *Invesco* at para 21, citing the decision of the Indian Supreme Court of Civil Appeal in *LIC v Escorts & Ors* (1986) 1 SCC 264.

¹⁵⁶ [1975] 45 Comp Cas 574 (Bom).

¹⁵⁷ *Invesco* at paras 28 to 31.

¹⁵⁸ *Invesco* at para 63.

¹⁵⁹ Securities and Exchange Act of 1934, 17 C.F.R. § 240.14a-8 (2011).

\$25,000 stake in the target company's shares for one year, a \$15,000 stake for two years, or a \$2,000 stake for three or more years.¹⁶⁰ Individual shareholders may only make a single proposal each year¹⁶¹ and are barred from resubmitting proposals that fail to meet minimum thresholds of support.¹⁶²

Legal effect of resolutions

- 39 Shareholder proposals in the US are almost always framed in non-binding, "precatory" terms due to the requirements of state law.¹⁶³

Subject matter

- 40 US shareholders have filed hundreds of resolutions each year on climate change and related ESG issues which have been included in proxy statements. Unless a proposed resolution falls within the listed grounds for exclusion in rule 14a-8, discussed below, companies are obliged to include them in their proxy statements.

Board powers to exclude

- 41 Rule 14a-8(i) lists 13 grounds on which a shareholder proposal may be excluded. These include where a proposal would breach relevant laws; contains personal grievances; is not "significantly related to the company's business"; it relates to the company's "ordinary business"; it duplicates a resolution which has already been proposed for that meeting; or it addresses matter that has already been "substantially implemented". The meaning of these exclusions, particularly the "ordinary business" rule, has shifted significantly over the years.¹⁶⁴ SEC guidance issued under the Biden administration indicated a more lenient approach to resolutions addressing social and environmental issues.¹⁶⁵

¹⁶⁰ Rule 14a-8(b)(i). This three-tier framework was introduced through amendments effected in 2020.

¹⁶¹ Rule 14a-8(c).

¹⁶² Rule 14a-8(i)(12).

¹⁶³ Rule 14a-8(i)(1) and (7). State laws typically preclude binding shareholder proposals. In turn, the SEC Regulations provide that permissible grounds for excluding a proposal include "[i]f the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization"

¹⁶⁴ See Renee Jones 'The Shareholder Proposal Rule: A Cornerstone of Corporate Democracy' (2022) Speech at the Council of Institutional Investors Spring 2022 Conference available at <https://www.sec.gov/news/speech/jones-cii-2022-03-08> accessed 1 September 2023.

¹⁶⁵ SEC Division of Corporation Finance issued Staff Legal Bulletin 14L, rescinding Staff Legal Bulletins 14I, 14J and 14K, regarding the exclusion of shareholder proposals on the grounds that they fall within the ordinary business and economic relevance exceptions of Rule 14a-8.

- 42 For more than 80-years, the SEC exercised administrative oversight and control over companies' decisions to refuse to table shareholder proposed resolutions, through a system of 'no action' letters. Companies did not have a unilateral discretion to exclude shareholder proposals. If a company sought to exclude a shareholder proposal, it had to file its reasons in advance with the SEC as part of a 'no action' request – effectively seeking confirmation that the SEC would not take enforcement action against the company. The SEC's Division of Corporation Finance considered these reasons and, if it agreed, it issued the 'no action' letter, signalling that it will not recommend enforcement action if the proposal is omitted. If the company's request was declined by the SEC, the proposal had to be included in the proxy statement and put forward for a vote.
- 43 In November 2025, the Trump-appointed SEC announced it would no longer substantively review companies' no-action requests under Rule 14a-8, abandoning its decades-long role as a neutral arbiter. As a result, companies have been left to make unilateral exclusion decisions, forcing shareholders into costly federal litigation to get their proposals included in the proxy statements.¹⁶⁶

Notable judgments and legal developments

- 44 In 1951, shareholders and civil rights campaigners filed a proposal with the bus company, Greyhound, calling for the end to racially segregated bus seating in the American South.¹⁶⁷ The company refused to circulate this proposal in its annual proxy statement, claiming that this was "not a proper subject" for shareholders to vote on. The SEC endorsed Greyhound's refusal at the time,¹⁶⁸ and later amended its rules in 1952 to exclude proposals made "*primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.*"¹⁶⁹
- 45 That exclusion was tested in the late 1960s, when shareholders filed proposals with Dow Chemicals to stop the production of napalm – the highly flammable jelly used by the US military to horrific effect in the Vietnam War.¹⁷⁰ Dow Chemicals sought to block these proposals from going to a vote, relying on the SEC's 1952 amendments. The SEC sided with the board by issuing a 'no action' letter. The shareholders successfully challenged that decision in the US Court of Appeals for the District of Columbia Circuit, which would

¹⁶⁶ See RA para 193, CL 004-52.

¹⁶⁷ *Peck v Greyhound Corporation* 97 F. Supp. 679, 680 (S.D.N.Y. 1951) (an unsuccessful suit seeking a temporary injunction to delay Greyhound's annual meeting to allow time for the proposal to be included in its proxy statement).

¹⁶⁸ For a detailed account of this history, see Lisa M Fairfax 'Social Activism through Shareholder Activism' (2019) 76 *Washington & Lee Law Review* 1129 – 1135. Fairfax notes that the SEC did not reference the Greyhound resolution in its reasons for the amendment.

¹⁶⁹ Solicitation of Proxies, 17 Fed. Reg. 11,431, 11,433 (Dec. 18, 1952).

¹⁷⁰ See Sarah C Haan 'Civil Rights and Shareholder Activism: SEC v. Medical Committee for Human Rights' (2019) 76 *Washington & Lee Law Review* 1167.

have sent the matter back for fresh consideration.¹⁷¹ Judge Tamm, who authored the unanimous judgment, framed the case as raising “*novel and significant questions concerning the implementation of the concepts of corporate democracy*”. The Court held that –

*“No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy.”*¹⁷²

- 46 On appeal, the US Supreme Court did not enter the merits.¹⁷³ It held that the matter had been rendered moot, as Dow Chemicals had eventually tabled the disputed proposal and announced, shortly before the appeal hearing, that it would stop production of napalm.
- 47 Through the 1970s, the SEC issued further amendments to Rule 14a-8, softening and later removing the exclusion of proposals on social and political issues.¹⁷⁴ That cleared the way for the surge of anti-apartheid resolutions, which increasingly used shareholder proposals calling on US-listed companies to divest from South Africa and to end their complicity in apartheid crimes.¹⁷⁵
- 48 In 1970, the Episcopal Church filed the first shareholder resolution on apartheid, calling on General Motors to stop producing vehicles in South Africa.¹⁷⁶ The number of anti-apartheid shareholder resolutions steadily grew in the 1980s. By 1980, at least 44 anti-apartheid proposals.¹⁷⁷ By 1987, this number peaked at 144 proposals, with the majority calling for complete divestment from South Africa.¹⁷⁸

¹⁷¹ *Medical Committee for Human Rights v SEC* 432 F.2d 659 (D.C. Cir. 1970).

¹⁷² *Id.*

¹⁷³ *SEC v Medical Committee for Human Rights* 404 U.S. 403 (1972).

¹⁷⁴ Notable reforms were introduced in 1972 and 1976. See SEC Securities Exchange Act Release No. 9,784 (Sept. 22, 1972), 37 Fed. Reg. 23, 178-80 (1972); SEC Securities Exchange Act Release No. 12,999 (Nov. 22, 1976), 41 Fed. Reg. 52, 994-96 (1976).

¹⁷⁵ See Philip Broyles ‘The Impact of Shareholder Activism on Corporate Involvement in South Africa during the Reagan Era’ (1998) 28 *International Review of Modern Sociology* 1.

¹⁷⁶ Broyles *id* 3.

¹⁷⁷ Broyles *id* 15.

¹⁷⁸ *Id.*

UNITED KINGDOM

Applicable legal provisions

- 49 Shareholder-proposed resolutions are regulated by sections 338, 338A and 339 of the Companies Act 2006, read together with the model articles of association for public companies under the Companies (Model Articles) Regulations 2008, s 4 of Schedule 3.

Threshold requirements

- 50 Section 338(3) of the Companies Act 2006 sets out the eligibility requirements for shareholder-proposed resolutions, requiring that the proposed resolution must be supported by at least 5% of the voting rights in respect of that resolution or 100 members with the right to vote on that resolution (and having average shareholdings of at least GBP100 per shareholder).

Legal effect

- 51 Section 4(1) of the model articles provides that “*shareholders may, by special resolution, direct the directors to take, or refrain from taking, specified action.*” If a public company does not register articles of association, or if they do not exclude or modify this provision, section 4(1) of the model articles would apply.
- 52 As a result, most shareholder-proposed resolutions in the UK have been presented in the form of binding special resolutions, seeking to direct boards to take specific action.¹⁷⁹

Subject matter

- 53 The Companies Act 2006 does not impose restrictions on the subject matter of resolutions. In terms of section 338(2), a company may only refuse a shareholder-proposed resolution if it would be: (a) ineffective if passed (“*whether by reason of inconsistency with any enactment or the company’s constitution or otherwise*”); (b) defamatory of any person; or (c) frivolous or vexatious.¹⁸⁰

Board powers to exclude

- 54 In terms of section 338(3), a company “*is required to give notice of a resolution*” proposed by shareholders who meet the threshold requirements, unless one of the disqualification factors in section 338(2) applies.

¹⁷⁹ ShareAction “*UK Guide to Shareholder Resolutions*” (2019) available at <https://shareaction.org/resources/uk-guide-to-shareholder-resolutions/>

¹⁸⁰ Section 338(2) of the Companies Act 2006.

- 55 It is unclear whether the board may refuse to table a shareholder-proposed resolution at a special meeting if it believes that it would be ineffective if passed, or whether the board would be required to approach a court first.
- 56 Section 339 of the Companies Act makes it an offence for an officer of a public company to fail to circulate a shareholder-proposed resolution for consideration at an AGM.

AUSTRALIA

Applicable legal provisions

- 57 Section 249N of the Australian Corporations Act 2001 permits shareholders who have the necessary numbers or voting power to give a company *“notice of a resolution that they propose to move at a general meeting”*. This right is subject to section 198A of the Corporations Act, which provides that:

“(1) The business of a company is to be managed by or under the direction of the directors.

(2) 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.”

Threshold requirements

- 58 Section 249N(1) sets a threshold requirement of 5% of voting rights or at least 100 shareholders before shareholders may propose a resolution.

Legal effect

- 59 Section 249N does not prescribe the legal effect of resolutions.
- 60 Non-binding advisory shareholder resolutions are expressly recognised in section 250R of the Corporations Act, which provides for an advisory resolution at the AGM on a company’s remuneration report.

Subject matter

- 61 Section 249N imposes no express restrictions on the subject matter of resolutions, although the courts have imposed limits, as discussed below.

Board powers to exclude

- 62 Case law has endorsed the board’s power to refuse to circulate and table resolutions, discussed below.

Notable judgments and legal developments

- 63 Australian courts have adopted a restrictive interpretation of shareholders' rights under section 249N of the Corporations Act. This is reflected in the Federal Court of Australia's 2016 judgment in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia (ACCR)*,¹⁸¹ which endorsed a 1986 judgment of the New South Wales Supreme Court in *National Roads & Motorists' Association v Parker*.¹⁸²
- 64 In *ACCR*, a shareholder advocacy organisation sought to table three resolutions related to climate risk at the Commonwealth Bank of Australia's annual general meeting.
- 64.1 The first two resolutions were framed as non-binding advisory resolutions, calling for, among other things, the disclosure of GHG emissions resulting from projects financed by the bank and the risks that climate change posed to the to the bank. The third proposal was a special resolution to amend the bank's constitution to include an explicit requirement that the bank publish an annual report on the GHG emissions that it was responsible for financing.
- 64.2 The Bank included the third resolution in its notice of the AGM, but refused to include the first and second resolutions. The Bank argued that these resolutions concerned the management of business and were not matters on which shareholders could have a say.
- 64.3 The ACCR then launched an application in which it sought a declaration that the disputed resolutions "*could validly be moved*" at the AGM.
- 65 Both the lower court and the full court of the Federal Court dismissed this application. Relying on *Parker*, both courts held that the proposed non-binding resolutions would usurp the directors' functions to manage the business of the company. The full court held further that the non-binding resolutions would be ineffective if passed¹⁸³ and that shareholders lacked the authority to propose non-binding resolutions, in the absence of any express provision in the company's constitution or in legislation conferring this

¹⁸¹ *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2015) 325 ALR 736; [2015] FCA 785 (Jul. 31, 2015); upheld on appeal in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280; [2016] FCAFC 80 (Jun. 10, 2016) (ACCR full court).

¹⁸² *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517.

¹⁸³ ACCR (full court) at paras 26 – 33.

power.¹⁸⁴ These judgments have been the subject of significant academic criticism in Australia.¹⁸⁵

- 66 After *ACCR*, shareholders have resorted to presenting double-barrelled resolutions, seeking an amendment of companies' constitutions to allow for non-binding resolutions coupled with the resolution they propose to advance.¹⁸⁶

¹⁸⁴ Id at paras 34 – 38.

¹⁸⁵ See, for example, Bottomley "Rethinking the Law on Shareholder-Initiated Resolutions at Company General Meetings" (2019) 43 *Melbourne University Law Review* 93.

¹⁸⁶ Peel et al *Corporate Energy Transition: Legal Tools for Shifting Companies Towards Clean Energy Practices* (2020) available at: <https://minerva-access.unimelb.edu.au/handle/11343/244384>.

SUMMARY TABLE – COMPARATIVE LAW

Jurisdiction	Key provisions	Threshold requirements for proposing resolution	Legal effect of resolutions	Climate and ESG resolutions permitted?	Unilateral board discretion to block resolutions?
Canada	Section 137 of the Canada Business Corporations Act, read with regulations, governs businesses incorporated under federal law.	1% of voting rights or share value of at least CAN\$ 2000; no cost implications; proposals to be filed in the “permitted window” (the 60-day period that begins on the 150 th day before the anniversary of the previous annual meeting of shareholders)	Non-binding. Shareholder proposals are non-binding in nature.	Yes. Any subject matter is permitted, unless it falls under the narrow exclusions in section 135(5).	No. Board is obliged to circulate proposals unless it can establish that one of the exemptions in 135(5) applies. If it refuses a proposal on this basis, it must give written notice to the proposer, who may challenge the refusal in court.
EU	The Shareholder Rights Directive: EU Directive 2007/36/EC, as amended by EU Directive 2017/828/EC	Maximum threshold of 5% of shareholding prescribed. Deadlines to be determined by Member States.	Binding or non-binding. The Directive does not prescribe or outlaw non-binding resolutions.	Yes. No subject matter restrictions imposed in Directive.	No. Directive is silent on board's powers to exclude proposed resolutions.
India	Section 111 of India's Companies Act of 2013.	The number of shareholders who, on the day the requisition is received, hold not less than one-tenth of the paid-up share capital of the company which on that date has voting rights.	Binding. Binding resolutions are permitted, but the status of non-binding resolutions has not been determined.	Yes. No subject-matter restrictions are imposed.	No. The board is obliged to approach a court.
New Zealand	1993 Companies Act, sections 9 and 109.	Any shareholder may propose a resolution.	Non-binding. Unless a company's constitution provides otherwise, a shareholders' resolution relating to the management of a company is not binding	Yes. No subject-matter restrictions are imposed, except that the content of the resolution may not be frivolous, defamatory, or vexatious.	No. The board may only exclude a resolution if defamatory, frivolous or vexatious.

SUMMARY TABLE – COMPARATIVE LAW

Jurisdiction	Key provisions	Threshold requirements for proposing resolution	Legal effect of resolutions	Climate and ESG resolutions permitted?	Unilateral board discretion to block resolutions?
United States	Securities and Exchange Commission (SEC) Rule 14a-8	Three-tier ownership requirement: proposers must demonstrate that they have either owned at least a \$25,000 stake in the target company's shares for one year, a \$15,000 stake for two years, or a \$2,000 stake for three or more years.	Non-binding. State law typically requires that resolutions be framed in non-binding, "precatory" terms	Yes. Subject to the 13 listed exclusions in Rule 14a-8.	No, prior to November 2025 boards had to seek "no action" letters from the SEC before blocking any proposed resolution. Recent SEC directives indicate a retreat from that role.
United Kingdom	Sections 338, 338A and 339 of the 2006 Companies Act, read with the Model Articles.	A minimum threshold of 5% of total voting rights of shareholders entitled to vote on the resolution; or at least 100 members who are entitled to vote on the resolution.	Binding. Resolutions directing the board to take specific action are presented as binding special resolutions.	Yes.	No. The board is obliged to circulate a procedurally compliant resolution unless one of the exceptions in section 338(2) applies.
Australia	Section 249N of the Australian Corporations Act 2001.	5% of voting rights or at least 100 shareholders.	Non-binding, in respect of advisory resolutions on remuneration reports (250R of the Corporations Act). Other non-binding resolutions are not permitted unless a company's constitution provides otherwise.	Yes, if permitted under the company's constitution or coupled with a resolution to amend the constitution. No, if framed as an advisory resolution, and in the absence of an amendment to the company's constitution to allow for non-binding resolutions.	Yes.