Power Allocation and the Role of Shareholders - A Comparative Examination

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Power Allocation and the Role of Shareholders - A Comparative Examination

Pearlie M.C. Koh*

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In Meridian Global Funds Management Asia Ltd. v Securities Commission,¹ Lord Hoffmann referred to the company as a "persona ficta... deemed... to have certain of the powers, rights and duties of a natural person."² This, undoubtedly, is a universal truth. However, the question, “with whom should the power to exercise these powers lie?” does not have a universally accepted response. The legislative scheme for companies in practically all jurisdictions is premised on a dichotomy between the shareholders as a collective group,³ and the board of directors. There are, it appears, two extant models for the allocation of decision-making powers in the common law world: (1) a “statutory” allocation of powers, and, (2) a “contractual” allocation of powers.

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* Singapore Management University. I would like to thank Professor Kon Sik Kim and the participants at the Comparative Corporate Governance Conference 2018 Singapore for their constructive and helpful comments. All errors remain mine.

2. Id. at 506.
3. In this paper, the reference to “shareholders” is necessarily a reference to the shareholders as a collective whole, operating and acting by means of the processes stipulated by the companies legislation.
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The paradigm example of the statutory model may be found in American corporation law statutes. These uniformly provide that the board of directors is the ultimate decision-maker. In contrast, the U.K. features a contractual model, with companies legislation being silent as to the functions of the board. Subject to certain matters expressly reserved to the shareholders in general meeting, the matter of power allocation is left to the company’s constitution. Under U.K. law, a company’s constitution is accorded contract-like status, as shareholders are bound by the document’s terms “to the same extent as if there were covenants on the part of the company and of each [shareholder] to observe” the constitution. And since the constitution may be amended by, and only by, the shareholders collectively, the originating power of the company is presumed to lie with the shareholders. Therefore, it should follow that any authority of the directors to manage the company must be ultimately derived from the shareholders. The necessary corollary of this conclusion is that with the contractual model, it should be permissible for the shareholders to confer general management powers on themselves by means of a suitably drafted provision in the constitution. Notwithstanding this seemingly logical position, arguments have been made to deny the shareholders their primary position in the company. There is judicial authority for this position, as the English courts

4. And also in Canada. All Canadian jurisdictions, with the exceptions of British Columbia and Nova Scotia, adopt the Canadian Business Corporations Act, R.S.C. 1985 c. C-44, § 102(1) of which provides:
Subject to any unanimous shareholder agreement, the directors shall manage the business and affairs of a corporation.
In the Alberta Court of Appeal decision of Canadian Jorex Ltd v. 477749 Alberta Ltd, 85 Alta. L.R. (2d) 313 (1991), the effect of § 102 was explained by Fraser J.A. as follows (at ¶¶ 8–9):
Under the corporate model adopted by the [Canadian Business Corporations Act 1985], the residual power to manage the corporation’s affairs rests with the directors. This power is given by statute and is not derived from the delegation of powers by the shareholders. To suggest that the directors enjoy no specific power unless it has been expressly granted to them by the CBCA would effectively render the § 102 “basket clause” redundant. This result would run counter to the philosophy underlying the basket clause. The effect of this clause is that the directors’ powers to manage a corporation’s affairs are unlimited except to the extent these powers may have been circumscribed by the corporation’s by-laws or a [unanimous shareholders’ agreement].


6. Companies Act (U.K.) 2006, c. 44, § 33 which provides that “the provisions of the company’s constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe it.” See also Corporations Act 2001 (Ch.), § 140(1) and Companies Act Cap. 50 (Singapore), § 39, which also provide for the constitution to have contractual effect.

7. Companies Act (U.K.), § 21: “A company may amend its articles by special resolution,” and “special resolution” is defined in § 283(1) as a resolution of the members passed by a majority of not less than 75%.


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have on occasion read down[10] the power of the shareholders to intervene in management matters, notwithstanding a constitutional provision that expressly preserves their right to intervene. The dissonance between what the contractual model promises and the judicial limits placed on shareholder power may be discerned in Australia and in Singapore as well.

The allocation of power in a company is fundamental to the proper operation of the corporate form. In common law jurisdictions, vesting general management power in the board of directors is usually the default position in theory and in practice. But it is not a mandated legal position. The fact that there appears to be some dissonance between the legislation and the courts, as well as a general lack of consensus amongst commentators as to the role for the shareholders as a whole, indicate that the matter is far from settled. We examine the issue from Singapore’s perspective. We begin with a consideration of the extant governance scheme dictated by legislation in England, Australia, and Singapore. We then proceed to assess whether the courts’ treatment of power allocation provisions and their effect sits coherently against that legislative background. Finally, we traverse the various arguments for and against shareholder empowerment, and suggest the way forward.

PART I: POWER ALLOCATION REGIMES COMPARED

The question of whether corporate governance[11] should be premised on the idea of shareholder primacy is the subject of much debate.[12] The debate exposes the fundamental existential question for companies in general: do companies exist solely for the maximization of shareholder wealth, or do they exist for the betterment of a larger group of stakeholders, including employees, creditors, and the wider consumer community (i.e., the opposing “stakeholder” model of corporate governance)? This particular debate, which has been referred to as the “ends” question in the governance of companies,[13] has little

11. This refers, in a broad sense, how companies are managed and controlled. The Cadbury Committee 1992 defined corporate governance as ‘the system by which companies are directed and controlled.’ COMMITTEES ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, Report of the committee on the financial aspects of corporate governance, at ¶ 2.5 (1992).

Essentially, all of these models [of corporate governance] are ways of thinking about the means and ends of corporate governance. They strive to answer two basic sets of questions: (1) as to the means of corporate governance, who holds ultimate decisionmaking power? and (2) as to the ends of corporate governance, whose interests should prevail?
impact on the question whether shareholders collectively should have a role in corporate decision-making. Instead, the latter question\textsuperscript{14} raises the issue of decision-making power allocation. In the U.S., this question is resolved mostly against the shareholders such that the shareholders are allocated only a limited role in decision-making. The Delaware General Corporation Law, for example, provides that “the business and affairs of every corporation organized\textsuperscript{15} under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”\textsuperscript{16} The effect of such provisions was explained by Judge Collins of the New York Courts of Appeal in Manson v. Curtis\textsuperscript{17}:

In corporate bodies, the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. All powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts.\textsuperscript{18}

This shows that the U.S. model of power allocation is director-centric, with the board of directors controlling much of the decision-making in U.S. corporations.\textsuperscript{19} Shareholders do not have the power to dictate that the directors take a particular course of action. Instead, shareholder voting rights are limited to a number of specific actions,\textsuperscript{20} which usually require board approval before they can be brought to a shareholder vote. In contrast, the English approach to power allocation, as well as the extant legislative positions in Australia and in Singapore, is significantly more shareholder-centric in according the shareholders a larger role under the operative legislative regimes. Indeed, the U.K. position is often discussed as a comparative counterpoint to the U.S.

\textsuperscript{14} Id.
\textsuperscript{15} DEL. CODE ANN. Tit. 8, § 101, which provides that “[a]ny person, partnership, association or corporation, singly or jointly with others, and without regard to such person’s or entity’s residence, domicile or state of incorporation, may incorporate or organize a corporation under this chapter…”
\textsuperscript{16} DEL. CODE ANN. tit. 8, § 141.
\textsuperscript{17} 223 N.Y. 313 (1918).
\textsuperscript{18} Id. at 322–23 (references omitted).
\textsuperscript{19} As Professor Bainbridge explained, “The statutory decisionmaking model thus is one in which the board acts and the shareholders, at most, react.” Stephen M. Bainbridge, The Case for Limited Shareholder Voting Rights, 53 UCLA L. REV. 601, 603 (2006).
\textsuperscript{20} These are the election of directors, and approval of charter or bylaw amendments, mergers, sales of substantially all of the corporation’s assets, and voluntary dissolution: see Stephen M. Bainbridge, Corporate Law at ¶ 5.1 (3rd ed. 2015).
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regime. Typically, the shareholders in these jurisdictions are empowered to decide on the content of the constitution, a document that underpins the internal regulation of the company. The shareholders also have the power to decide on the composition of the board. In ensuing paragraphs, we consider the respective approaches towards power allocation in these three jurisdictions.

The U.K.

Under English law, shareholders, as contributors of capital, were traditionally treated as “owners” of the company. The board of directors, on the other hand, were seen as skilled managers, who received the authority to manage the business from the “owners.” With this perspective, it was not controversial if the shareholders were able to exercise supervisory powers over the directors’ management of the company, or step in to run the company should the board become incapacitated for any reason. As Professor Hill noted, “traditional corporate theory assumed that the role of directors was to carry out the will and implement the interests of shareholders, and that within standard principles of agency law, shareholders had a formal right to control their agents.” However, incorporation created a discrete legal entity. Because the company became its own individual entity, this insight made it difficult, as a matter of logic, to see the shareholder as the “owner” of the company. Indeed, Professor Bainbridge would consider this to be “deeply erroneous.” Nevertheless, English law adopted a shareholder-centric view of the company, reinforced by the provisions of successive companies Acts. This

22. Accordingly, as Sir James Wigram V.C. noted, the board was “always subject to the superior control of the proprietors assembled in general meetings.” Foss v. Harbottle 67 E.R. 189, 203 (Ch. 1843).
27. Hill, supra n. 25, at 42–43.
provided the basis for the shareholders’ central role in the control of corporate matters.

A shareholder-centric view that subjects the board of directors to the superior control of the shareholders collectively does not, however, necessarily mean that the board is an agent for the shareholders. On the contrary, it is trite that both the general meeting and the board of directors are organs of the company, each deriving directly from the company’s constitution, an original authority to commit the company to juristic acts that fall within designated spheres. As Greer LJ noted in John Shaw & Sons (Salford) Ltd v Shaw:

A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting.

The English approach to power allocation is referred to as a contractual allocation of power, essentially because the constitution is accorded contract-like status by the Companies Act 2006. While the constitution cannot be inconsistent with the Companies Act, its content, including the matter of power allocation, is largely a matter for the shareholders. What the legislation does provide, in subsidiary legislation, is a standard form constitution. The Model Articles, promulgated by the Secretary of State under authority conferred by the Companies Act of 2006, set forth the default position for both private and public companies, and may be adopted by

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30. Or perhaps more accurately, a majority of them. see MacDougall v Gardiner, 1 Ch. D. 13, 22–25 (1875) (C.A.), where the court equated the company with the majority of the shareholders.
32. Id. at 134.
33. These articles of association are closer in content to the “bylaws” of a US corporation, while the “articles of incorporation” of a US corporation are more akin the memorandum of association of a U.K. company.
34. Automatic Self-Cleansing Filter Syndicate Co Ltd v. Cuninghame [1906] 2 Ch. 34, 38 (H.C.), per Warrington J., aff’d on appeal.
35. Section 33 of the Companies Act 2006, ch. 46 (U.K.) provides as follows:
36. Any provision that is inconsistent with the Companies Act is void: Welton v. Saffery [1897] A.C. 299, 329. See also Re Peveril Gold Mines Ltd. [1898] 1 Ch. 122; Re Greene [1949] Ch. 333.
37. See generally DAVID KERSHAW, COMPANY LAW IN CONTEXT – TEXT AND MATERIALS 191 (2nd ed. 2012).
38. Companies (Model Articles) Regulations 2008/3229
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companies in whole or in part. Article 3 of the Model Articles provides for the “general authority” of the directors in the following terms:

Subject to the articles, the directors are responsible for the management of the company’s business, for which purpose they may exercise all the powers of the company.

This general management authority of the board is, however, subject to Article 4 of the Model Articles, which expressly provides for the “reserve power” of the shareholders to “direct the directors to take, or refrain from taking, specified action” by special resolution. An earlier default version qualified the general grant of management powers to the board by making it “subject nevertheless . . . to such regulations . . . as may be prescribed by the company in general meeting.” Although the textual differences affect the scope and boundaries of the instruction power, it remains clear that both versions preserved the power of the shareholders to intervene in matters of management. On the other hand, once power is allocated, the allocation remains sacrosanct until such time as the constitution is validly altered. This is a necessary corollary of the “contractual” nature of the constitution. Nevertheless, except for limited constraints, the constitution may generally be amended as and how the shareholders deem fit. Ultimately, the shareholders remain statutorily in control of power allocation in the company. Such a regime clearly reinforces the “superior” position of the shareholders. It is therefore incontrovertible that the U.K. has resolved the “means” question in favor of the shareholders. Indeed, this is also the case in the “ends” question. In this regard, Section 172 of the Companies Act 2006 expressly stipulates that a director “must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole” when performing managerial functions.

Australia

The legislative position regarding power allocation in Australia is different in form, but similar in substance to the U.K. position. In form, Section 198A of the Corporations Act of 2001 states that “the business of a company is to be managed by or under the direction of the directors” and that “the directors may exercise all the powers of the company except any powers that [the

40. Companies Act (U.K.), § 20(1).
41. See Regulation 55 of Table A of the Companies Act 1862 (U.K.), and successor versions culminating in Article 80 of Table A of the Companies Act 1948 (U.K.), before the newer version was adopted.
42. Quin & Astens Ltd. v. Salmon [1909] A.C. 442, 443 (H.L.) per Collins M.R.
43. The common law imposes a requirement that the power to alter the constitution shall be exercised bona fide for the benefit of the company as a whole. Greenhalgh v. Arderne Cinemas Ltd. [1951] Ch. 286, 290 (C.A.).
Corporations] Act or the company’s constitution (if any) requires the company to exercise in general meeting.” While this appears to provide for a statutory allocation of power, Section 198A in fact does not dictate a mandatory position. It is instead designated as a replaceable rule. Under the regulatory scheme of the Corporations Act, a replaceable rule is a section or subsection of the Corporations Act that the corporation can displace or modify in its constitution. These replaceable rules govern the internal management of a company, matters that were previously dealt with under the model articles of association. Similar to the U.K.’s position, the Corporations Act vests the power to modify the constitution exclusively in the shareholders, and the shareholders cannot be deprived of this statutory right.

Like their counterparts in the U.K., shareholders in Australia are entitled to initiate any change to the constitution. Shareholders can either give notice to the company of their intention to propose necessary resolutions at the company’s annual general meetings, or requisition an extraordinary general meeting at which such resolutions may be passed. Therefore, the Australian position vis-à-vis power allocation is substantially the same as that which obtains in the U.K. as it is also essentially shareholder-centric.

Singapore

Singapore’s regime differs from that in the U.K. and Australia. Prior to 2003, it was clear that Singapore’s Companies Act followed the English model very closely, with the internal regulation of the company generally left to the company’s constitution. A default constitution was prescribed in the Fourth Schedule (referred to as “Table A”) of the version of the Companies Act then in force. The allocation of power provision found in Table A mirrored the earlier English version. Although it was usual for registered articles to expressly exclude Table A, the power allocation provision is often

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44. Corporations Act, § 135(2).
45. Including matters such as the governance of meetings and the appointment, removal and resignation of directors. Section 141 of the Corporations Act sets out a table of all the replaceable rules. By s. 135(3), a contravention of a replaceable rule is not of itself a contravention of the Corporations Act. Instead these rules have the effect of a contract between the company, its directors and company secretary and its members (s. 140). See generally ROMAN TOMASIC, STEPHEN BOTTOMLEY & ROB MCGEEN, CORPORATIONS LAW IN AUSTRALIA, Ch 9 (2nd ed. 2002).
46. Corporations Act, § 136(2).
48. Who held at least 5% of the votes or who number at least 100.
49. Corporations Act 2001, § 249N.
50. Id. at § 249F.
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reproduced verbatim. However, when Singapore undertook its first comprehensive review of its Companies Act in the early 2000s, it introduced a provision that resembles the statutory decision-making power allocation model adopted in U.S. state corporation law statutes. Section 157A of the Companies Act was introduced pursuant to a recommendation by the Company Legislation and Regulatory Framework Committee, which took inspiration from Section 198A of the Australian Corporations Act. The section provides:

The business of a company shall be managed by, or under the direction or supervision of, the directors. . . The directors may exercise all the powers of a company except any power that this Act or the constitution of the company requires the company to exercise in general meeting.

Subsidiary legislation then replaced Table A with a “Model Constitution,” which may be adopted in whole or in part. A new default power allocation article in the same terms as Section 157A is also found in Article 77 of the Model Constitution.

While Singapore’s statutory provision is modelled after the Australian version, a significant difference lies in the fact that Section 157A is not designated as a default rule. The Companies Act appears to prescribe a specific model for decision-making in companies. This suggests a regime that approximates the American statutory model of power allocation. However, the approximation is incomplete because the governance premise of the Companies Act remains shareholder-centric. The participative and interventionist rights accorded to the shareholders remain unchanged. The power to alter the constitution continues to be exclusively vested in the shareholders, as well as the right to propose and pass resolutions. Therefore, the question is whether, by the insertion of Section 157A, Parliament intended to provide for a mandatory statutory distribution of powers. In *TYC Investment Pte Ltd v. Tay Yun Chwan Henry*, Lee Kim Shin J.C. phrased the question thus:

[S]hould an express term in a company’s articles conferring management powers upon the shareholders be deemed invalid as a matter of law? Or does s. 157A establish a default rule which may be varied by the company’s articles?

In Lee J.C.’s view, Section 157A, notwithstanding its clear terms, did not introduce a statutory allocation of power. The provision was a default rule, which may be readily excluded or altered by the shareholders. Lee J.C. also opined that the fact that “the language of s. 157A is replicated in Art 73 of the Table A Articles suggests that a company may choose to depart from the
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statutorily prescribed division of powers.”59 The issue of power allocation remained, therefore, a matter of contract. His Honour explained:60

[A]s a matter of practicality and commercial reality, corporate structures are so varied that it would be impossible to prescribe a set form of corporate governance...[and] there may be good commercial justifications for certain management powers to be reserved to the members.

While this is undoubtedly true, it should be noted that section 157A(2) already permits a company’s constitution to provide expressly for certain powers to be allotted to the general meeting. Indeed, this explicit legislative stipulation, read together with the use of the mandatory “shall,” suggests that reservation of a general supervisory power would be contrary to the intent of Section 157A. Two other factors lend support to this view. First, quite unlike Section 198A of the Australian Corporations Act, Section 157A is not specifically expressed as being “replaceable.” Second, Parliament did not simply alter the relevant article in Table A, opting instead to include the restatement as a provision in the Act itself. It may be that with these textual nuances, Parliament intended to underscore the mandatory nature of Section 157A’s division of powers. Nevertheless, this interpretation sits uncomfortably with the overall scheme of Singapore’s Companies Act, thus explaining Lee J.C.’s preferred view. It would seem that the precise purpose and effect of Section 157A remains unclear.

PART II: JUDICIAL DISSONANCE

From the preceding discussion, it is clear that, on the whole, the legislative regimes in the three jurisdictions recognize and give effect to shareholder primacy. Through a collection of rules and principles, shareholders are accorded general governance supremacy.61 A number of consequences should logically follow from this premise. First, and most fundamentally, it should be permissible for a company’s constitution to confer general management powers on the shareholders. Second, it should remain permissible for shareholders to pass advisory resolutions, even with respect to matters falling within the purview of the board. And third, should the board be incapacitated for whatever reason, the powers to act should vest in the general meeting. Judicial treatment of these matters are considered in the ensuing paragraphs.

59.  Id. ¶ 87.
60.  Id.
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Power of Shareholders to Give Binding Directions to Directors

A governance regime that vests in the shareholder the exclusive power to decide on power allocation must accommodate an allocation that confers instruction rights on the shareholders, even as management powers are vested in the board. However, there appears to be some judicial reluctance to accord to the shareholders the full complement of their theoretical control rights. The doctrine of division of powers developed because the board of directors and the general meeting are treated as separate organs of the company, each with respective spheres of power, the boundaries of which are defined by the company’s constitution. Hence, should the constitution provide that managerial powers are to be vested in the board of directors, then the board “and they alone can exercise these powers.” Nevertheless, this view of the distribution of powers between the organs of a company is consistent with the proposition that power allocation remained a matter for the incorporators, and subsequently, the shareholders, to decide with the inclusion of an appropriate provision in the constitution. The doctrine should not therefore preclude, as a matter of law, the reservation of full management powers in the shareholders. Under the contractual model, the shareholders’ ability to give binding directions to the board to act in a management matter must depend on a proper construction of the relevant power allocation provision in the company’s constitution. This basic proposition was, however, deviated from in the U.K.. As we saw above, the English Companies Act does not dictate how power ought to be allocated. Instead, the default power allocation provision historically vested general management power in the board of directors, but reserves to the general meeting a power to intervene through a shareholder resolution. While there does not appear to have been any judicial pronouncement on the current model, decisions on the earlier version demonstrated a willingness to read down the power of the shareholders to intervene in management matters by ordinary resolution. In the earlier version, the grant of management powers to


63. An ordinary resolution sufficed in the earlier iterations of the default provision. This was changed to a special resolution in the 1985 Act.

64. Companies (Model Articles) Regulations 2008/3229, article 4.


66. Although it would appear, as was pointed out by both Goldberg, supra n.65, and Sullivan, id., that, besides Scott v. Scott [1943] 1 All E.R. 582, none of the other cases were either decided on an interpretation of Article 80 or could be explained on other grounds.
the board was made “subject... to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting.” The obvious meaning of these qualifying words is to vest in the shareholders the overriding power to intervene in management matters. And yet, this straightforward proposition was impugned when a number of influential commentators interpreted the case law as laying down a “strict theory of a division of powers” which curtailed the power of the general meeting to intervene in matters of management. The source of this may be traced to the decision of the English Court of Appeal in Shaw & Sons (Salford) Ltd. v. Shaw, where the Court of Appeal declined to permit the general meeting to direct the discontinuance of legal proceedings. Greer L.J. famously stated, “the only way in which the general body of shareholders can control the exercise of powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove.” His Lordship opined that “the law on this subject is... accurately stated in Buckley on Companies as the effect of the decisions there mentioned.” The relevant passage in Buckley on the Companies Acts had stated as follows: 

67. See Companies Act 1948 (U.K.), Table A, art. 80 which provided as follows: 

The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Companies Acts 1948 to 1980 or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to the Companies Acts 1948 to 1980 or by these regulations, required to be exercised by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made. 

An identical version was found in the earlier 1929 Act.


70. See G.D. Goldberg, supra. at 177, citing The Principles of Modern Company Law 127 (2nd ed. 1957).

71. This position was described as “remarkable” in Paul L. Davies, Gower and Davies’ Principles of Modern Company Law 302 (7th ed. 2003).


73. Id. at 134.

74. This was a reference to H.B. Buckley et al., The Law and Practice Under the Companies Acts Containing the Statutes and the Rules, Orders and Forms to Regulate Proceedings (11th ed. 1930).

75. See counsel’s argument at [1935] 2 K.B. 113, 121.
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prescribed by the company in general meeting’, these words do not enable the shareholders, by resolution passed at a general meeting without altering the articles, to give directions to the directors as to how the company’s affairs are to be managed, nor to overrule any decision come to by the directors in the conduct of its business, even as regards matters not expressly delegated to the directors by the articles.\(^\text{76}\)

It appeared that the learned authors of the eleventh edition\(^\text{77}\) had considered this to be the effect of the decision of the House of Lords in \textit{Quin \& Axtens Ltd. v. Salmon}.* There, Lord Loreburn had, in \textit{obiter dicta}, stated that he would require “a great deal of argument” to accept that “the word ‘regulations’ in this article\(^\text{79}\) does not mean that same thing as articles.”\(^\text{80}\) This reading of \textit{Quin \& Axtens} was also accepted by Slesser L.J.\(^\text{81}\) However, as a number of commentators\(^\text{82}\) have already pointed out, a context-sensitive reading of \textit{Quin \& Axtens} does not support any reading down of the shareholders’ general power of intervention. On the facts of the case, in addition to a general article conferring management powers on the board “subject to such regulations (being not inconsistent with the provisions of the articles) as may be prescribed by the company in general meeting,” there was a specific article requiring the consent of both the company’s managing directors before certain premises could be acquired or leased. The general meeting passed, by a simple majority, resolutions to acquire and let premises, to which one of the managing directors objected. Lord Loreburn himself considered that the “regulations or resolutions which have been passed are of themselves inconsistent with the provisions of these articles” and the company could not therefore act on them. The \textit{ratio decidendi} of the decision, therefore, is that, on a proper construction of the company’s articles, the specific decision to acquire premises had been exclusively vested in the board of directors. Accordingly, with respect to this

\(^{76}\) BUCKLEY, supra note 73 at 723.

\(^{77}\) One of the authors was Lord Wrenbury’s younger son, D.B. Buckley J.


\(^{79}\) Which, in providing that the business of the company was to be managed by the directors, who might exercise all the powers of the company ‘subject to such regulations (being not inconsistent with the provisions of the articles) as may be prescribed by the company in general meeting’, was in \textit{pari materia} with the article under consideration in \textit{Quin \& Axtens}.

\(^{80}\) [1909] A.C. 442, 444. Lord Clauson (sitting as a judge in Chancery Division) expressed “greatest difficulty in seeing how any resolution of the company in general meeting, controlling the directors in the management of the business, can possibly be justified under the terms of this article”. \textit{See also Scott v. Scott} [1943] 1 All E.R. 582, 585. Even if one reads “such regulations…” as may be prescribed by the company in general meeting’ to refer to ordinary resolutions, his Lordship thought that any such resolution would be ineffective as it would necessarily be ‘inconsistent with the aforesaid regulations.” \textit{Id.} at 585. This reading of the article effectively divests the italicized words completely of any significance. \textit{See Credit Development v IMO} [1993] 2 S.L.R. 370 (H.C.).


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decision, the general meeting could not intervene short of amending the relevant article.

The Singapore High Court took a somewhat more robust position vis-à-vis the interpretation of a similar provision. In Credit Development Pte Ltd v. IMO Pte Ltd, the High Court of Singapore was confronted with the task of interpreting an article that was substantially identical\(^8\) to the then extant version in the Fourth Schedule to the Companies Act (otherwise known as “Table A”). That article provided that the board of directors shall exercise all management powers of the company, “subject nevertheless to the provisions of the statutes, these articles and to such regulations, being not inconsistent with the said provisions and articles, as may be prescribed by the company in general meeting.”\(^5\) This article mirrors the older English version. Lim Teong Qwee JC meticulously reviewed relevant case law from both England and Australia, and concluded that the qualifying words mean:

... that although the directors are to manage the company’s business and may exercise all the company’s powers yet the company in general meeting may at any time prescribe regulations which the directors must comply with. . . The regulations which may be prescribed by the company in general meeting are not to be inconsistent with “the said provisions and articles”. . . “Articles” in the expression “said provisions and articles” refers to all the articles other than the first part of article 88(1). The first part of this article is qualified by the second part and must be read together.\(^6\)

In other words, under the terms of this article, the general meeting may instruct the directors on any matter that relates to the management of the business of the company provided there is no other article that requires that specific matter to be dealt with by the directors. In that case, the matter falls within the exclusive purview of the board.\(^7\)

Against the legislative backdrop provided by the respective companies legislation in both the U.K. and Singapore, Lim JC’s interpretation must be correct. The default positions in both the U.K. and Singapore were changed subsequently. In the U.K.,\(^8\) the default provisions were altered to make it clear that the general meeting could give directions to the board, provided that these directions were given using special resolutions. Beyond the requirement of a

\(^{83}\) [1993] 2 S.L.R. 370.
\(^{84}\) Except that the word “regulations” have been replaced with the word “articles.”
\(^{87}\) This interpretation has also been suggested by some academic observers. See G. Hornsey, Some Aspects of the Law Relating to Company Control, 13 MOD. L. REV. 470, 477 (1950); M. S. Blackman, Article 59 and the Distribution of Powers in a Company, 92 S. AFRICAN L.J. 286, 289 (1975).
\(^{88}\) Article 70 in the Table A prescribed by the Companies Act 1985 (U.K.) provided for general management powers to be exercised by the board but explicitly recognized the power of the general meeting to, by special resolution, curtail the board’s powers.
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special resolution, the power of the general meeting to intervene in management matters appears to be unqualified. While this amendment would appear to solve the interpretative difficulties associated with the predecessor article, the current position may be less clear. As pointed out above, the Model Articles provide explicitly for the “reserve power” of the shareholders to “direct the directors to take, or refrain from taking, specified action” by special resolution. Classifying this power of the general meeting as a “reserve” power suggests that the shareholders in general meeting may exercise the power only when the board is itself unable or unwilling to act. Unlike the previous position, therefore, under this new provision, shareholders may not have the general ability to give directions or instructions to the board.

Power of Shareholders to Pass Advisory Resolutions

Consistent with the idea of shareholder primacy, all three jurisdictions legislatively provide for shareholders to initiate meetings and bring resolutions to a vote. The English Companies Act 2006\(^\text{89}\) provides that the directors must convene a general meeting upon the requisition of shareholders who control at least five percent of the paid-up capital carrying voting rights.\(^\text{90}\) The request must state the general nature of the business to be dealt with at the meeting,\(^\text{91}\) and may include the text of a resolution intended to be moved at the meeting. Whether the resolution does eventually get passed at the meeting is a separate matter. However, any resolution proposed must qualify as a resolution that may “properly be moved” by the shareholders.\(^\text{92}\) An exclusionary definition of resolutions that may “properly be moved” is provided in the Act. A resolution that is “ineffective,” if passed, is not a resolution that “may properly be moved” by the members of the company.\(^\text{93}\) Resolutions that are defamatory, frivolous, or vexatious are also not resolutions that “may properly be moved.” An ineffective resolution is a resolution that is contrary to any law, or more relevant for our purposes, one that is inconsistent with the company’s constitution. The latter exclusion is a clear reference to the constitutional allocation of decision-making powers between the general meeting and the board of directors.

There are similar provisions in Australia’s Corporations Act and in Singapore’s Companies Act permitting shareholders to initiate actions. These statutes generally empower shareholders to put resolutions they propose before a general meeting in a number of ways. Shareholders may: (1) requisition the

\(^{89}\) Id. at c. 46.
\(^{90}\) Companies Act 2006, § 303.
\(^{91}\) Id. at § 303(4).
\(^{92}\) See id. at §§ 292(2); 303(5); 338(2).
\(^{93}\) Companies Act 2006, §§ 292(2); 303(5); 338(2).
board to call a general meeting; (2) convene a meeting themselves, or (3) give notice to the company of resolutions which they propose to move at a general meeting. Typically, the exercise of such powers is subject to certain minimum threshold, often procedural, requirements. The Corporations Act 2001, for example, empowers shareholders with at least five percent of the votes that may be cast at the general meeting to either requisition the directors to call and arrange to hold a general meeting, or to call, and arrange to hold, a general meeting themselves. Shareholders “with at least 5% of the votes that may be cast on the resolution; or at least 100 members who are entitled to vote at a general meeting” are also entitled to give notice to the company of their intention to move proposed resolutions at a general meeting. Shareholders in Singapore are also accorded similar rights. The Companies Act obliges the directors of a company, notwithstanding anything in its constitution, to immediately convene a general meeting of the company, as long as the requisitionists comprise not less than 10% of the total number of paid-up shares. Additionally, two or more members holding not less than 10% of the total number of issued shares of the company may call a meeting of the company. Shareholders may also propose resolutions by requesting that the directors circulate notice of the same with the notice calling an Annual General Meeting.

Notwithstanding the generally permissive nature of these provisions, the courts tend to require adherence to the division of powers doctrine established in John Shaw & Sons (Salford) Ltd. v. Shaw and limit the kind of resolutions that shareholders may propose. This is especially well-demonstrated in cases that involve shareholders seeking to circulate resolutions. As Lim Teong Qwee J.C. noted in Credit Development Pte. Ltd. v. IMO Pte. Ltd.: If the object of the meeting is to... pass a resolution which is ultra vires the meeting, then the directors ought not to be required to convene the meeting. If such a meeting is in fact held and a resolution is passed, the directors are not bound to comply with it. The resolution is void and of no effect. There is nothing in the Act

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94. Corporations Act 2001, § 249D
95. Such as a minimum shareholding requirement. Additionally, the Corporations Act 2001, § 249O(5)(a) provides that the company is not required to circulate proposed resolutions that are “more than 1,000 words long or defamatory.”
96. Corporations Act 2001, § 249D.
97. Corporations Act 2001, § 249F.
98. These requirements may be altered in respect of certain companies by prescribed regulations.
100. Companies Act Cap. 50, § 176(1).
101. Companies Act Cap. 50, § 177(1).
102. Companies Act Cap. 50, § 183.
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to suggest that the directors must act on a requisition for a meeting having as an object that which is not within the powers of the meeting. I think the directors are well entitled on receipt of such a requisition to decline to call a meeting.

Thus, unless the particular constitution of the company provided otherwise, proposed resolutions which concern the exercise of management powers that have been exclusively vested in the board, fall outside of the purview of the general meeting, and are not resolutions that may be effectively be passed by the shareholders in general meeting. To permit thus would be to condone the general meeting’s usurping of the board’s powers. It followed from this that the directors of the company would be entitled to disregard a members’ requisition if the proposed resolutions set out therein were of that nature. Thus, in Queensland Press Ltd. v. Academy Investments No. 3 Pty. Ltd., the court considered a members’ requisition for a general meeting to be invalid as its object was to secure shareholder approval for a disposal of the company’s asset, a matter that, under the company’s constitution, expressly fell solely within the authority of the directors to determine.

This, thus far, is not particularly controversial, as these decisions may be justified on the basis of a due construction of the company’s constitution. However, a recent decision of the Full Federal Court of Australia appears to have gone further in curtailing the powers of the general meeting. In Australasian Centre for Corporate Responsibility v. Commonwealth Bank of Australia, shareholders were denied the power to pass purely advisory resolutions concerning the management of the company. Advisory, or sometimes called “non-binding,” resolutions are shareholder resolutions that do not compel the board to act in any particular way. Instead, such resolutions serve to convey the shareholders’ collective opinion or views on certain matters. Such resolutions, although of no legal effect, are nevertheless very influential given that board members, as a general proposition, tend not to act contrary to the wishes of a large portion of shareholders. In the present case, the shareholder concerned was a “not-for-profit association whose mission was to promote informed shareholder engagement and advocacy for more just and sustainable corporate activity.” In an attempt to influence the environmental reporting policy of the respondent bank, it gave notice to the bank that it proposed to move one of three alternative resolutions at the upcoming annual general meeting. The first was framed as an expression of opinion that it would be “in the best interests of the company” that the directors provide, together

105. This should be subject to the earlier discussion.
with the annual directors’ report to the shareholders, a report outlining the quantum of greenhouse gas emissions financed by the bank, the risks posed by associated environmental issues to the bank, and the strategies adopted by bank to mitigate these risks. The second proposed resolution was couched as an expression of “concern” at the absence of such a report in the annual directors’ report. The third proposed resolution, in contrast, took the form of an affirmative special resolution to amend the bank’s constitution so as to include a requirement that the directors include in their annual report the amount of greenhouse gas emissions that the bank was responsible for financing. As the notice was given to the bank in due time, the bank would have been obliged to notify its members of the proposed resolutions. The bank, however, declined to include the first two proposed resolutions on the ground that they were “matters within the purview of the Board and management of the Bank.” The bank’s constitution vested responsibility for the management of the bank on the board on the terms of the replaceable rule in Section 198A of the Corporations Act. The third proposed resolution, on the other hand, was included in the notice, which was accompanied by a statement from the board that it did not consider the resolution to be in the best interests of the company and recommended that the members vote against it.

The applicant sought declarations, inter alia, that all three proposed resolutions were resolutions that could validly have been moved at an annual general meeting of the bank. Further, the applicant declared that the board had acted outside of its powers in “publicly offering an opinion with respect to the third proposed resolution.” Citing the New York Court of Appeals decision in Auer v. Dressel, the applicant contended that shareholders were vested with the power to pass such advisory resolutions, unless that power was expressly taken from them, which was not the case here. The primary judge rejected the application and held that unless the proposed resolutions were referable to a power vested in the shareholder in general meeting, and not to the power of management vested exclusively in the bank’s board of directors, the board was not required to put those resolutions to the annual general meeting. The Full Court affirmed her Honour’s decision, stating the following “fundamental proposition”:  

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[S]hareholders in general meeting have no authority to speak or act on behalf of the company except to the extent and in the manner authorized by the company’s constitution or any relevant statute, and to an extent and in a manner consistent with the constitution or statute.

The Full Court found that such interests as shareholders may have, in the management of a company, provided no justification for the existence of any power to express corporate views or opinions, nor was there any constitutional or statutory basis upon which to premise such a power. The Full Court stated that “the shareholders in general meeting did not have a role to play in the exercise of powers vested exclusively in the board by passing a resolution which would express an opinion on the exercise of those powers.”118 The directors of the company were therefore entitled to decline to include the proposed resolutions in the notice for the company’s Annual General Meeting. In reaching its conclusion that the general meeting had no power at all to pass advisory resolutions, the Full Court relied on authorities which, in its view, suggest that the general meeting could not, as a general proposition, pass “ineffective” resolutions. The Full Court cited the English Court of Appeal decision in Isle of Wight Railway Company v. Tahourdin 119 as “[tending] against the existence of a ‘power’ vested in shareholders in general meeting to pass an ineffective resolution.”120 Specifically, the court referred to the following statement of Fry L.J. in Isle of Wight:121

If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it. But if the object . . . be such that by any form of resolution or by any machinery sanctioned by the Act, it can be carried into effect, then it is the bounden duty of the directors to call the meeting.

In the Full Court’s view, Fry L.J. was “drawing a distinction between effective and ineffective resolutions, rather than between resolutions that did or did not seek to usurp the powers of the directors.”122 On this basis then, since the resolutions proposed by the applicant were, on its own case, not binding and without legal effect,123 the general meeting was without power to pass those resolutions, which therefore need not be circulated.

Fry L.J.’s statements have to be read in context. The case concerned a requisition to convene a general meeting for the purposes of appointing a committee to which it was intended that certain powers be delegated. The directors sent out a notice calling a general meeting but declined to include therein all the proposals of the requisition on the ground that those which were

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118. Id. ¶ 60.
119. 25 Ch. D. 320 (1883).
120. [2016] FCAFC 80, ¶ 27.
121. 25 Ch. D. 320, 334 (1883)
122. [2016] FCAFC 80, ¶ 33.
excluded could not “legally be submitted to an extraordinary meeting of shareholders.” The requisitionists treated the directors as having failed to convene the meeting, and proceeded themselves to convene a meeting for all the purposes expressed in the original requisition. The directors applied to restrain the requisitionists from holding the meeting. The English Court of Appeal held that there was no ground for granting the injunction. Cotton L.J. noted:

It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is intra vires of the directors, is not the benefit of the company.

There is no doubting, therefore, that the decision of Isle of Wight Railway Company stands as authority for the “supreme” position of the shareholders and their concomitant right to hold a general meeting than for any curtailment of the same. In the contemporaneous decision of the English Court of Appeal in Harben v. Phillips, Cotton L.J. had explicitly recognized that “the wish of a corporation” may be “effectually be expressed by any meeting of the shareholders duly called for such purpose” even if that wish is, per se, ineffective. Technically, advisory resolutions are generally accepted as ineffective, but in the sense that the directors are not bound to act on the advice or opinion. As Samuels J.A. observed in Winthrop Investments Ltd. v. Winns Ltd., “shareholders’ advice. . . do not involve the exercise of power. . . [t]hey are not acts in the law, and could have no effect.” It should follow then that the general meeting’s expressions of opinion or advice by way of resolutions should not be seen as contradicting the principle expressed by Greer L.J. in John Shaw & Sons, as the general meeting cannot, by such resolutions, “usurp” the board’s powers. Against the prevailing view of shareholder primacy and in the context of case itself, it seems more likely that Fry L.J. was concerned with proposed positive resolutions intended to effectuate some illegal or unlawful object. This was certainly the sense in which Fry L.J.’s statement was applied in a number of the cases that were cited by the Full Court in support of its interpretation of the same.

For instance, in the Full Court decision of Windsor v. National Mutual Life Association of Australasia Limited, the object of the requisition in question

124. 25 Ch. D. 320, 322 (1883).
125. Id. at 329.
126. see Foss v. Harbottle, 2 Hare 461, 493 (1843).
127. 23 Ch. D. 14 (1883).
128. Id. ¶ 39.
129. [1975] 2 N.S.W.L.R. 666.
130. Id. at 683-684.
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was to pass a resolution to convert the status of the company from one limited both by shares and by guarantee to a company limited by guarantee only. This, however, could not be lawfully done under the relevant legislation (i.e. the Companies (Vic.) Code). The requisition was therefore held to be “wholly ineffective.”133 Similarly, in Turner v. Berner,134 the resolution proposed by the shareholders and which the directors declined to include in the notice convening the requisitioned extraordinary general meeting was a declaration that the defendant director had “committed breaches of the provisions. . . of the Companies Act”135 which imposed criminal sanctions. The court held that, while the company could, by its appropriate organ, decide to commence proceedings against the director for a breach of his duties, it possessed no right to make a determination that the director was guilty of the breach. This was a matter for the court. Accordingly, the proposed resolution had been justifiably excluded from the notice.136 It is worth noting that one of the other proposed resolutions, which had not been excluded and in respect of which the court made no comment, was in fact a resolution that declared that the shareholders had “no confidence” in the beleaguered director as managing director of the company. In contrast, Young J. in Stanham v. The National Trust of Australia (New South Wales)137 declined to permit a motion of no confidence against the council of the National Trust (effectively its board of directors) to be included for consideration before an extraordinary general meeting of the National Trust on the ground that this was not a motion that could be validly passed at the meeting.138 Superficially, it would seem that Stanham supported the Full Court’s position. It is however important to point out that the National Trust was a body corporate established under the National Trust of Australia (New South Wales) Act 1960, and a creature that was rather different from companies. Under that Act, almost half of the statutorily required number of council members were statutory appointments or persons nominated by various Government or independent bodies and the powers of the council are statutorily vested on it. Membership of the Trust was ultimately subject to the “by-laws,” which under the Act, were to be made by the council itself, and subject to ultimate parliamentary approval.139 It is therefore clear that membership of the Trust is quite unlike membership of a company. In the circumstances, the relevance and utility of the decision in Stanham to the question of the powers of the general meeting of a company is doubtful at best.

136. Supra n. 132, at 72.
137. 15 A.C.L.R. 87 (1989).
138. Id. at 92.
139. See National Trust of Australia (New South Wales) Act 1960, § 16.
The Full Court also referred to Jordan C.J.’s dissenting judgment in *Clifton v. Mount Morgan Ltd.*, 140 a decision of the New South Wales Court of Appeal, and opined that *Clifton* stood for “the fundamental proposition that the shareholders in general meeting have no authority to speak or act on behalf of the company except to the extent and in the manner authorized by the company’s constitution or any relevant statute.” 141 With respect, the actual holding in *Clifton* provides little support for this general proposition. The case concerned competing claims to board seats by the plaintiffs and defendants, the latter were retiring directors who were seeking re-election. There was a dispute as to whether certain votes, which had been cast by proxy, were valid as this affected the outcome of the matter. The lower court concluded in favor of the plaintiffs and granted injunctions to restrain the defendants from excluding the plaintiffs from acting as directors and to restrain the defendants from acting as directors. The court however refused the defendants’ application for the court to order a general meeting, although Roper J. explicitly recognized that the company could, of its own accord, hold a meeting “to test the feeling of the meeting on the question of whether the plaintiffs [were] acceptable to the company as directors.” 142 On appeal, the appellate court, by a majority, reversed the lower court’s conclusion as to the outcome of the election and discharged the injunctions. In the circumstances, it was unnecessary to consider whether a general meeting ought to be held. This notwithstanding, the majority judges expressed the view that, if they had concluded otherwise, they would have been inclined to allow the shareholders the opportunity to express their wishes. 143 Thus, far from providing the support for the proposition contended for, the majority judgment would stand clearly for the contrary view.

Indeed, it is important to contextualize Jordan C.J.’s expressed opinion. The question his Honour considered was whether the court ought to direct the holding of a general meeting to ascertain by ordinary resolution whether the shareholders approved of the plaintiffs as directors. Under the company’s constitution, directors could be removed only by special resolution. It bears reiterating that his Honour had concluded that the plaintiff directors had been properly appointed. It followed then that they should not be prevented from acting as directors by those who are opposed to them simply by means of a mere expression of opinion procured by ordinary resolution. Indeed, as Jordan C.J. categorically noted, such “an expression of opinion... would be irrelevant to anything which this Court has to determine.” 144 It was in this connection that

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140. 40 S.R. (N.S.W.) 31 (1940).
141.  Id. at 37.
142.  Id.
143. 40 S.R. (N.S.W.) 31, 56, 62 (1940).
144. 40 S.R. (N.S.W.) 31, 51(1940).
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His Honour considered that Cotton L.J.’s observation in *Harben v. Phillips*, 145 alluded to above, “opposed both to principle and to authority [as it] confuses the corporation with the persons who are its members...” With respect, Jordan C.J. appeared to arrive at this conclusion on the basis that Cotton L.J. had accorded the general meeting’s non-binding resolution substantial significance, much more, than Cotton L.J. himself intended.

*Harben* also involved disputed board seats. The question before the English Court of Appeal was whether the court ought to compel, by injunction, the company and the other members of the board to allow the plaintiffs to act as directors. At a general meeting requisitioned by the defendant directors, a strong majority of the general meeting, albeit falling short of the special majority required for the removal of directors, expressed the view that they were *not* in favour of the plaintiffs acting as directors. The court declined to grant the injunction. It is important to note, however, that the court did not come to its decision solely on the basis of that expression of adverse opinion, which Cotton L.J. had clearly accepted was ineffectual to remove them as directors. Instead, it was on account of the “accidental” 147 nature of the plaintiffs’ appointment that the court felt unable to intervene, as to do so would mean “compelling the company to put the management of its affairs into the hands of the plaintiffs.” 148 The factual matrices in the two cases were thus quite different – while the plaintiff directors in *Clifton* had been properly appointed in Jordan C.J.’s view, there was significant doubts in *Harben* as to the propriety of the plaintiffs’ appointments. Under the circumstances, it was not appropriate for the court in *Harben* to order the injunction.

The applicant had also argued that the general meeting had the power to consider and pass the proposed advisory resolutions because the shareholders “had a legitimate interest in their subject matter.” 149 The Full Court considered that argument “misunderstands the nature of the company as an entity distinct from its shareholders and directors.” 150 The court stated: 151

An act of the company (of which a resolution of its members is an example) must necessarily be an act which the company has the capacity or power to undertake. The legitimate interests of the various shareholders in the management of the company are distinct interests which cannot be aggregated to provide a justification for a resolution of the shareholders in general meeting, because the powers and

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145. 23 Ch. D. 14 (1883).
146. 40 S.R. (N.S.W.) 31, 49 (1940).
147. 23 Ch. D. 14, 40 (1883).
148. *Id.*
149. [2016] FCAFC 80, ¶ 41.
150. *Id.* ¶ 42.
151. *Id.*
capacities of the company arise from its constitution and statute and not from the legitimate interests of its shareholders.

The case generated a significant amount of interest in Australia, as it had implications for shareholder rights and hence the scope for shareholder activism. Indeed, in affirming that “the powers and capacities of the company arise from its constitution and statute,” the Full Court had confirmed that, as a matter of law, there has been no retreat from the traditional precept of shareholder primacy. The Full Court had recognized that the impugned resolutions did not require the board of the bank to exercise its management powers in any particular manner. Accordingly, the general meeting’s passing of the resolutions would not have involved any infraction of the constitutional allocation of powers. In the circumstances, to deny the general meeting the power to pass such non-binding resolutions signals a failure to accord sufficient significance to the legislatively conferred status of the general meeting of shareholders. Recall that the board of directors had included in the notice a statement of its view that the resolution to alter the company’s constitution was not in the company’s best interests and recommended that the shareholders vote against the same. It is of interest to note that the Full Court accepted that the board’s expression of its opinion was permissible, notwithstanding that it was in respect of a matter that clearly fell within the purview of the general meeting.

The decision of the Full Court of the Federal Court of Australia demonstrates a judicial reluctance to recognize the full extent of the shareholders’ participatory rights, when doing so is perceived as intruding into management matters.

**Reserve Powers of Shareholders**

Where the constitution confides management powers exclusively on the board, are the shareholders necessarily stripped of all ability to take on management decisions? The Singapore Court of Appeal stated the issue in the following manner:

But what if it turns out for some reason that the board is unable or unwilling to act? In such circumstances, should it be implied into the company’s constitution that the management power is then reserved to the other organ, the shareholders in general meeting? Or is it the case that only the board may manage the company such that where the board does not function, the remedy, if there be one, is confined to reconstituting the board or commencing proceedings to compel the board to act?

The latter alternative, which effectively denies shareholders all intervention rights, is inconsistent with the contractual model. Thus, while it is accepted

152.  [2016] FCAFC 80, ¶ 69.
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shareholders are bound by the power allocation found in the constitution unless this allocation is properly altered, the courts have generally recognized the existence of residual or reserve powers in the shareholders when the board is dysfunctional. The often-cited authority for this is the decision of the English High Court in *Barron v. Potter*, where Warrington J. observed:

If directors having certain powers are unable or unwilling to exercise them – are in fact a non-existent body for the purpose – there must be some power in the company to do itself that which under other circumstances would be otherwise done.

However, the precise scope of such reserve powers is not clear. *Barron v. Potter* concerned a board comprising two directors who were not on speaking terms with each other. Under the circumstances, the court held that the general meeting had the power to appoint additional directors. Given that the power to appoint directors is, in any case, normally vested in the general meeting, the case does not support the conclusion that the general meeting has the power itself to make those decisions which, by the articles, are exclusively for the board to make. Nevertheless, subsequent English cases have affirmed the existence of reserved powers. In *Alexander Ward & Co. Ltd. v. Samyang Navigation Co. Ltd*, the subject company had the usual provision in its articles conferring managerial powers on the board. There were, however, no directors at the relevant time. The House of Lords nevertheless held that the company had the power to commence legal proceedings. Lord Hailsham said:

In my opinion at the relevant time, the company was fully competent . . . to raise proceedings in the . . . courts. The company could have done so either by appointing directors, or . . . by authorising proceedings in general meeting which, in the absence of an effective board, has a residual authority to use the company’s powers.

To Lord Hailsham, the shareholders’ reserve powers are not necessarily constrained. However, this view is not universally accepted, as the courts in Australia and Singapore have exhibited a clear preference for circumscribing the general meeting’s reserve power to assume the management mantel.

In the New South Wales decision of *Massey v. Wales*, Hodgson J.A. observed as follows:

Where the articles contain an express power to appoint additional directors. . . it does not seem. . . reasonable to regard a deadlock. . . as giving rise to any general power of management, when the deadlock can be resolved by the general meeting exercising its power to appoint additional directors. It may be that, even if the articles do not provide for the appointment by general meeting of additional directors, the power which the general meeting has to remove directors and replace them with other directors would

\[154. \quad [1914] 1 Ch. 895, 903.\]
\[155. \quad Id. at 678\]
\[156. \quad 57 N.S.W.L.R. 718 (2003).\]
itself be sufficient to prevent the implication of any general reserve powers in
the general meeting to undertake management decisions.\textsuperscript{157}

The company had three approximately equal shareholders, two of whom sat
on the board of directors. The directors, however, had fallen out with each
other, and the board was unable to act. One of the directors, together with the
remaining shareholder, instructed a firm of solicitors to commence proceedings
in the name of the company against the other director. These proceedings were
subsequently dismissed as incompetent. A general meeting of the company
then passed a resolution purporting to ratify the appointment of
the firm as solicitors to the proceedings. The New South Wales Court of Appeal held
that the purported ratification by the shareholders was invalid as it was beyond the
power of shareholders. Hodgson J.A. explained his rationale:\textsuperscript{158}

It is of significance that management of the company should be by a body of
persons who each have a fiduciary duty to act in the interests of the company as a
whole, rather than a body where the majority is free to favour its own interests over
those of the minority. The general meeting does have power to approve transactions
undertaken by directors which might otherwise be a breach of fiduciary duty; but
this requires that there be full disclosure by the board to the general meeting, and it
is also subject to the requirement that there not be “fraud on the minority” or
oppression. Despite this power in the general meeting, it is reasonable to see the
entrusting of management to a body of persons subject to fiduciary duties to act in
the interests of the company, as a whole, as giving greater protection to minority
shareholders than they would have if the general meeting could simply make
majority decisions on management matters.

The Singapore Court of Appeal also adopted a restrictive approach to
shareholders’ reserve powers, as demonstrated by its recent decision \textit{Chan Siew
Lee v. TYC Investment Pte. Ltd.}\textsuperscript{159} A private company, TYC, was essentially
controlled by HT and JC, who were husband and wife. Each of HT and JC held
almost half of the issued shares and were the only directors on the board. Their
marriage broke up and as a result, they entered into a number of agreements to
resolve some issues between them, including the management of the company.
Crucially for the present proceedings, they agreed on a voucher system for
payments out of the company’s bank accounts. Accordingly, neither director
could issue a check on the company’s bank accounts unless the other director
had signed a voucher approving of the payment. This particular provision was
included in the agreements to prevent either party from making payments in
their personal interest out of the company’s assets. Unfortunately, it also meant
that either could stymie legitimate payments that the company had to make.
This happened when JC refused to approve certain payments that HT wanted to
make. The board was therefore deadlocked. HT then called an extraordinary

\textsuperscript{157} Id. at 730.
\textsuperscript{158} Id.
\textsuperscript{159} [2015] 5 S.L.R. 409.
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general meeting where he and his son (who held 5% of the voting power) commanded a 51% majority. They passed resolutions to authorize HT to unilaterally sign the checks necessary to make those payments. The general meeting also resolved to appoint lawyers to commence litigation against JC for breach of directors’ duties. At issue was whether the resolutions had been validly passed by the general meeting even as the constitution vested management powers on its board of directors, and not its shareholders. It was accepted that the power to authorize payment of obligations owed by the company would, as a general principle, fall within the ambit of management powers.160

The Court of Appeal agreed with the High Court that the existence of any reserve power of the general meeting to make management decisions, and its scope, depended on whether the existence of such power could be implied into the statutory contract. The basis on which such implication might be made was “necessity.”161 There would simply be no need to invoke any reserve power if a functional board existed. Hence, the “predicate” of necessity162 would generally be the existence of a deadlock within the board. However, even where there was a deadlock, there would still be no need to imply reserve powers if that deadlock “could be broken by the appointment of additional directors and/or the removal of existing directors in a general meeting.”163 On the facts of the present case, there was undoubtedly a deadlock on the board in respect of payment matters given the breakdown in the relationship between HT and JC. This deadlock could not be broken by the majority shareholders by the simple expedient of changing the composition of the board because the company’s constitution provided that any appointment of new directors required the approval of both HT and JC. The preconditions for the implication of shareholder reserve powers were therefore amply met. The only question that remained was that of scope – what exactly did these implied reserve powers enable the shareholders to do? Diametrically opposing conclusions were reached by the High Court and by the Court of Appeal. The High Court held that while the implied reserve powers enabled the shareholders to appoint solicitors to commence legal proceedings against JC for breach of directors’ duties, there was nevertheless no implied power to authorize HT to unilaterally make payment on the company’s behalf.164 The Court of Appeal, on the other hand, concluded that the shareholders did have the reserve power to authorize

160. This was explicitly accepted by the High Court in TYC Investment Pte. Ltd. v. Tay Yun Chwan Henry [2014] 4 S.L.R. 1149, ¶ 85, and, while no overtly stated, it was necessarily the premise upon which the Court of Appeal discussed the issue of division of powers. Id. ¶ 35.
161. Id. ¶ 48.
162. Id. ¶ 49.
payment of the company’s obligations, but not to appoint solicitors in respect of the alleged breach of duty.

While the Court of Appeal accepted that the need for implied reserve powers rested upon the “underlying principle... that a company should not needlessly be hamstrung by a deadlock on the board but should be allowed to get on with managing its affairs provided there is a functioning majority of shareholders”, it was nevertheless a “general rule” that any reserve power must be limited so as to ensure that “the power reserved to the general meeting is not to do whatever the board may do and hence, in effect, to step into the shoes of the board.” Accordingly, the court imposed two further restrictive requirements before the shareholders may be permitted to exercise a reserve power. First, the exercise of the power must relate to the performance of a bona fide obligation owed by the company to a third party. Second, there must not be any suggestion that it would not be in the company’s best interest to honor those obligations. The court held that as these requirements were satisfied on the facts of the present case, the shareholders’ reserve power included the power to authorize those payments. In connection with the power to bring proceedings against JC, however, the court held that such a power did not fall within the shareholders’ reserve powers. In the court’s view, allegations of breach of directors’ duties were better pursued by the shareholders via the statutory derivation action under section 216A of the Companies Act. Accordingly, it was unnecessary to imply the existence of such a reserve power in the shareholders.

The Court of Appeal stated its rationale for adhering strictly to the power allocation provided in the company’s constitution thus:

165. [2015] 5 S.L.R. 409, ¶ 44.
166. Id. ¶ 45.
167. Id.
168. Id.
169. Id. ¶ 83.
170. Id. ¶ 36.
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statutory contract contained in the company’s constitution, thus provides the framework, or context, within which its terms are construed. Accordingly, if the scope of the reserve powers of the shareholders is informed by this premise, there seems little justification to overly constrain these powers beyond a requirement that they are exercisable only when the board is unable or unwilling to act.

PART III: THE ROLE OF SHAREHOLDERS

The apparent reluctance of the courts to give full effect to shareholder supremacy in connection with management matters suggests that there may well be concerns over according shareholders intervention rights in management matters. These concerns are not without ground. As the Singapore Court of Appeal pointed out in Chan Siew Lee v. TYC Investment Pte. Ltd., while directors are constrained to act in accordance with their fiduciary duties, the shareholders are not. Accordingly:

[i]n the preference for vesting management power in the board of directors alone is thus grounded in the fact that the risk of managerial abuses is best curbed by allocating the responsibility to manage the company to the directors, who in turn are constrained by the fiduciary duties they owe to the company.

It should be noted that the imposition of duties on directors is borne out of an awareness of the “agency problem” that arises because of the separation of the function of decision-making (the purview of the board) from the risk of investment loss (which is borne by the shareholders). Accordingly, where there is a breach of directors’ duties, the company’s power to forgive or ratify that breach is generally vested in the shareholders collectively. This is the common law position, and remains substantially the position in Singapore. In the U.K., the statute provides that the ratification of any breach of duty “must be made by resolution of the members of the company.” In Australia, this position is also true, except with respect to any breach of the statutory

172. Id. ¶ 36.
174. This is subject to the rules on minority oppression.
duties contained in Pt. 2D.1 of the Corporations Act of 2001. It seems reasonably clear that the company’s power to forgive errant directors is vested in the shareholders collectively. This is simply because shareholders benefit from the due enforcement of these duties more directly than any other constituent body. In the circumstances, it is somewhat incongruent to deprive the shareholders of the right of intervention on the basis that, unlike directors, they are not subject to duties.

Despite this, the courts have expressed their concern. Perhaps the solution lies in the approach taken in New Zealand’s Companies Act of 1993. At first glance, New Zealand’s approach to power allocation is not that different from the approaches in the jurisdictions considered here. Although the Act provides an allocation of power which confers on the board of directors “an original statutory jurisdiction to manage,” this statutory allocation was conceptualized as “presumptive only,” and may be excluded by the company’s constitution. Even where there is no such exclusion, it appears that the shareholders are statutorily conferred with the right, “notwithstanding anything in [the] Act or the constitution of the company,” to pass a resolution relating to the management of a company. The Act expressly provides that such shareholder resolutions are not binding on the board unless the constitution otherwise provides. As the power to alter the constitution lies exclusively with the shareholders, New Zealand also embraces shareholder primacy and does so overtly. What is interesting is that the Act confronts the concern raised by the Singapore Court of Appeal and deals explicitly with it. Section 126(2) of the Act provides:

If the constitution of a company confers a power on shareholders which would otherwise fall to be exercised by the board, any shareholder who exercises that power or who takes part in deciding whether to exercise that power is deemed, in relation to the exercise of the power or any consideration concerning its exercise, to be a director for the purposes of sections 131 to 138.

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178. See Angas Law Services Pty Ltd (in liq) v Carabelas 215 A.L.R. 110 (2005); Forge v ASIC 213 A.L.R. 574 (2004). It may be that this is also the position in Singapore vis-à-vis the duties imposed under section 157 of the Companies Act, but courts have not weighed in on the issue.


182. Companies Act 1993 (NZ), § 109(2).


184. Companies Act 1993 (NZ), § 32.

185. PETER WATTS, DIRECTORS’ POWERS AND DUTIES 27 (2009).

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Imposing obligations on shareholders who take on the management of the company will, however, do little to allay the concerns of those who view shareholders as ill-suited for decision-making at all. As a generalisation, it may be said that shareholders tend not to be a homogeneous group. As Professor Bainbridge noted, “[s]hareholders have widely divergent interests and distinctly different access to information.”\(^ {187}\)

According to critics of shareholder primacy, the presence of these afflictions justifies a system of centralized decision-making, with the board of directors elected as the central decision-maker. Nevertheless, these views are usually confined to the large listed company as proponents of such board-centric decision-making regimes recognise that shareholders in closely-held companies are less likely to suffer from the sort of collective action problems that affect their brethren in large dispersed corporations. Indeed, the issue of power allocation within a company is a question that cannot be considered without reference to the type of company concerned and its paradigm structural makeup. Unlike the U.S., where the general incorporation acts are designed to deal with large public companies,\(^ {188}\) the Companies Acts of Australia, Singapore and the U.K. are intended to provide a basic scheme that applies not only to, at one end of the spectrum, the small private company, but also, at the other end, the large commercial enterprise with a widely dispersed public membership. Conferring management powers on the board of a publicly held company would not only be theoretically justifiable, but certainly also practically necessary, as its shareholders are many and dispersed, with little if any interest in the running of the company beyond its profitability. In a closely held company, on the other hand, there is likely little or no difference between ownership and control, and the shareholders will tend to expect the ability to control management decisions. Ultimately, perhaps there is a need to distinguish between private and public companies. While one form of allocation of powers may be suited to one, it is not necessarily suited to the other. For closely held companies, a default rule will probably work better, and a less restricted view of residual powers would be more appropriate.

**PART IV: CONCLUSION**

The judicial decisions considered in this paper disclose an apparent reluctance to recognize the full extent of shareholders’ intervention rights. It may well be that this illustrates the difficulty of defining an appropriate role for shareholders generally. Indeed, while there are discernible corporate

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governance benefits to providing shareholders with stronger participatory and control rights, there are also convincing arguments against doing so. In particular, there is the risk that permitting shareholder activism will result in unnecessary disruption to the running of businesses generally. It is, however, not the purpose of this paper to advocate the supremacy of any particular system or regime over another. Its objective is much more modest: to highlight the dissonance between judicial attitudes towards the shareholder franchise and the underlying legislative terrain. Companies are not homogeneous, and a governance system that works for the large listed company may not be appropriate for the small closely held company. A single-dimensional judicial approach towards the role and powers of shareholders is likely to risk a disjunction between the letter of the law, and the reality on the ground. It is suggested that clarification is in order, and judicial sensitivity to the contours and characteristics of the particular corporate entity in which the issue of power allocation arises will go towards this ultimate goal.