Proxies – More than Meets the Eye

Portman Iron Ore v Golden West Resources: Federal Court rules that Proxy Forms must be delivered directly to the Company

The provisions in the Corporations Act 2001 (Cth) (**Act**) relating to proxies appear, on their face, to be relatively straight forward. Legal requirements for proxy forms are often seen as merely procedural matters and hence are given inadequate attention. However, a failure to comply strictly with those legal requirements can lead to significant adverse consequences. A recent Federal Court decision imposes further requirements above and beyond what is expressly stated by the provisions of the Act. Accordingly, whilst the completion and delivery of proxy forms are essentially procedural matters designed to achieve a desired objective in an orderly and probative manner, it is critical to ensure such actions do not negate the very essential matter of ensuring that a shareholder is permitted to exercise its voting power.

Statutory Provisions

Section 249X of the Act provides that a member of a company who is entitled to attend and cast a vote at a meeting of the company's members may appoint a person as the member's proxy to attend and vote for the member at the meeting.[1] The person appointed as the member's proxy may be an individual or a body corporate.

A company must ensure that a notice of meeting informs all members:

(a) of their rights to appoint a proxy;

(b) whether or not the proxy needs to be a member of the company; and

(c) that a member who is entitled to cast 2 or more votes may appoint 2 proxies and may specify the proportion or number of votes each proxy is appointed to exercise.[2]

A proxy appointed to attend and vote for a member has the same rights as that member to speak at the meeting, to vote (to the extent allowed by the appointment) and join in a demand for a poll.[3]

[1] Section 249X is a replaceable rule for proprietary companies and a mandatory rule for public companies
[2] Section 249L(1)(d) of the Act

An appointment of a proxy is valid if it is signed (or otherwise authenticated in a manner prescribed by the regulations[4]) by the member of the company making the appointment and contains the following information:

(a) the member's name and address;

(b) the company's name;

(c) the proxy's name or the name of the office held by the proxy; and

(d) the meeting(s) at which the appointment may be used.[5]

If a company has a constitution, the constitution may provide that an appointment is valid even if it contains only some of the above information. The signature of a member on the proxy form does not have to be witnessed.

With regards to listed companies, a notice of meeting:

(a) ***must*** specify a place and a facsimile number for the purposes of receipt of proxy appointment and proxy appointment authorities; and

(b) ***may*** specify:

    (i) an electronic address for the purposes of receipt of proxy appointments and proxy appointment authorities; and

    (ii) other electronic means by which a member may give the company a proxy appointment or proxy appointment authority.[6]

Receipt of Proxy by the Company

To be effective, a proxy form must be received by the company at least 48 hours before the meeting[7]. However, this period may be reduced by the company's constitution[8].

A company is deemed to have received a proxy form when it is received at any of the following:

- the company's registered office;
- a fax number at the company's registered office; or
- a place, fax number or electronic address specified for the purpose in the notice of meeting (typically, the company's share registry).[9]

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[3] Section 249Y of the Act. However, if a company has a constitution, the constitution may provide that a proxy is not entitled to vote on a show of hands
[4] Regulation 2G.2.01 provides rules for an electronic authentication of an appointment of a proxy and rules where a member appoints a proxy by e-mail or Internet-based voting
[5] Section 250A(1) of the Act
[6] Section 250BA of the Act
[7] Section 250B(1) of the Act
[8] Section 250B(5) of the Act

In addition to the statutory provisions, a company's constitution may set out further rules for proxies that are not inconsistent with the requirements under the Act.

Bisan v Cellante[10]

Despite the fact that the Act does not state that a proxy form must be returned *directly* to the company, the courts have nevertheless taken the view that this is one of the requirements for a proxy to be validly and effectively received by a company. In *Bisan*, the court held that proxy forms must be returned directly to the company or to an intermediate party who is under an "onerous" fiduciary duty or other analogous obligation to safeguard the proxy forms. His Honour, Justice Dodds-Streeton stated[11]:

"*The legislation does not expressly state that the nomination of an intermediate recipient will render a notice of meeting or a proxy appointment ineffective or invalid. However, in my opinion, the legislation's insistence on receipt by the company appears to contemplate a receipt by an entity managed and controlled by persons subject to onerous fiduciary duties in relation to the proxies, which will safeguard the actual and apparent integrity of the corporate voting process.*

The interception of proxy appointment forms by an intermediate party who is under no fiduciary duty or other apparent obligations in relation to their safeguarding, entails an inherent exposure to the possibility of filtering or other inappropriate handling."

In my opinion, it could constitute a grave defect in the electoral process in respect of any contemplated meeting. In the present case, the specified recipient in both the Notices and the Proxy Forms is not a disinterested party, but in my view, the defect does not depend on that circumstance. The apparent, as well as the actual integrity of the corporate electoral process, is important."

Portman Iron Ore Ltd v Golden West Resources Ltd[12]

The decision in *Bisan* was followed in the recent case of *Portman.* This case concerned the requisitioning of a general meeting of Golden West Resources Ltd (**Golden West**) by one of its substantial shareholders, Portman Iron Ore Ltd (**Portman**). Portman proposed resolutions to replace two directors of Golden West. Golden West subsequently dispatched a notice of general meeting together with a proxy form to shareholders in order to convene the requisitioned meeting. Approximately two weeks later, Portman wrote to all shareholders of Golden West recommending that shareholders vote in favour of its proposed resolutions. Portman's letter included a pre-completed proxy form with instructions for shareholders to sign the proxy form and return it to Portman. Portman received proxy forms from approximately 181 shareholders which it forwarded to Golden West.

Following receipt of the proxy forms from Portman, Golden West advised that the chair of the meeting considered that the proxy forms were invalid and intended to disregard the votes reflected in those proxy forms. Golden West argued this on the basis that those proxy forms were not sent *directly* to the company.

Portman contented that there was no requirement under section 250B of the Act for shareholders to forward proxies directly to the company. To read the provision otherwise

[9] Section 250B(3) of the Act
[10] *Bisan v Cellante; Eromanga Hydrocarbons NL v Cellante* [2002] VSC 430
[11] *Bisan* per Dodds-Streeton J at paragraph 44
[12] *Portman Iron Ore Ltd, Re Golden West Resources Ltd* [2008] FCA 1362

would require the "*imposing of a gloss over the plain language of the Statute*", Portman submitted.[13] McKerracher J also noted that the Explanatory Memorandum did not specify any intent that proxies should be returned directly to the company.

Whilst the court noted that the Act does not expressly state that proxy forms are to be returned *only* or *directly* to the company, it was nevertheless held to be one of the requirements of section 250B:

"*In conclusion, my view on this topic is that while the Act does not expressly spell out that proxy forms are to be returned only to the company or directly to the company, the reasoning articulated in Bisan Ltd [2002] VSC 430 at [44], reflects, with respect, a good deal of common sense. Also for the additional practical reasons discussed, while I may have been less emphatic about the construction placed on s 250B of the Act, there is no good reason to depart from the construction adopted in Bisan Ltd and I would not do so.*"[14]

The reasons given by the Court and submitted by Golden West in support of that conclusion included that, if proxies are returned directly to the company:

- the risk of tampering with proxies by third parties is eliminated;
- no consideration has to be given as to the treatment of the proxies whilst in the possession of a third party, including the procedures taken on receipt of the proxies and whether all of the completed proxy forms are forwarded to the company;
- the proxy forms are more likely to be received by the company in the natural course of affairs in a more even flow, rather than in a large portion at the last minute which would give the company insufficient time to review the proxies; and
- there is no risk of shareholders submitting multiple and inconsistent proxy forms (e.g. to the company and to a third party).

Implications

The *Portman* decision has significant implications, particularly for shareholders. The decisions of *Bisan* and *Portman* mean that proxy forms must be returned directly to the company or to another entity owing material fiduciary obligations to the company, such as its share registry. If any other intermediary party is involved in the receipt or delivery of a proxy form, such proxy form is at risk of being treated as invalid. An application of the strict view taken by the court means that a proxy form sent by a shareholder to a company via that shareholder's lawyer, accountant or other professional adviser could be held to be invalid. This could cause problems for shareholders who commonly forward signed proxies to their adviser to check that they have been properly completed and signed, or to obtain advice about the proposed resolutions set out in the proxy form, prior to directing that adviser to send the proxy on to the company.

As the facts in *Portman* reveal, the rule that proxy forms must be delivered directly to the company may cause significant problems for shareholders wishing to requisition a meeting of shareholders. A shareholder or group of shareholders who requisition a meeting often appoint a particular entity (e.g. a major shareholder or a professional adviser) to assist in co-ordinating the requisition process including informing other shareholders of the reasons for the requisition and collating proxy forms. The collation of proxy forms by an entity other than the company or its share registry is no longer a safe option.

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[13] at paragraph 33
[14] at paragraph 39

In *Portman*, the court took the view that if proxies are returned directly to the company, the need to investigate or prove tampering with proxies by third parties is eliminated. However, if proxies can only be returned directly to the company, it will be very difficult for a shareholder or other third party to prove whether or not the company itself has tampered with the proxies. Whilst such conduct may be rare, it is nonetheless a possibility, especially in cases where a meeting is requisitioned by shareholders because of dissatisfaction and distrust with the company's incumbent directors and where the shareholders have proposed resolutions to replace them. Indeed, the decisions could be seen to have the effect of repressing shareholders' rights in cases where:

- a significant number of shareholders have requisitioned a shareholders' meeting; and
- those shareholders propose resolutions which may be adverse to the interests of the incumbent directors of the company.

Practical Suggestions

In light of *Portman*, some practical steps that shareholders who requisition a general meeting (**Requisitioning Shareholders**) could take in order to retain some control over the proxy process, whilst also satisfying the requirements of the current law, might be to:

- immediately after notice of the meeting has been dispatched to shareholders, write to shareholders:
    - advising them of the reasons for requisitioning the meeting;
    - recommending how they should vote on the proposed resolutions;
    - reminding them to forward their completed proxy form *directly* to the company or other place nominated by the company in the above stated notice; and
    - asking them to send a complete and accurate *copy* of their completed proxy form to the Requisitioning Shareholders or their adviser;
- advise the company in writing that copies of each of the proxies of nominated shareholders have been retained by the Requisitioning Shareholders or their adviser;
- avoid, wherever possible, circumstances where shareholders are provided with "competing" proxy forms – as happened in *Portman* (whether pre-completed by the Requisitioning Shareholders or not);
- in the event that a shareholder mistakenly sends an original proxy form to the Requisitioning Shareholders, immediately return that proxy form to that shareholder with instructions to send it directly to the company;
- draft and adopt an internal policy for dealing with proxy forms incorrectly sent to the Requisitioning Shareholders;
- check copies of the proxy forms received by the Requisitioning Shareholders in order to ensure that they are properly completed and signed. If any proxy form is not properly completed and signed, the Requisitioning Shareholders should ask the relevant shareholder to correct and resend their proxy form to the company;
- if there are a large number of Requisitioning Shareholders, try to avoid sending all or a large number of the proxy forms of those Requisitioning Shareholders to the company at the same time or just before the deadline for receiving proxies;

- ask the company to appoint an independent third party to review the completed proxy forms received by the company as soon as they are received by the company; and
- retain an accurate record of all correspondence with shareholders relating to the requisitioned meeting and their proxy forms, including copies of all proxy forms received from shareholders and copies of the proxy forms of the Requisitioning Shareholders themselves.

In addition to delivering a proxy form directly to the company, any power of attorney under which a proxy form is signed and any document appointing a corporate representative, should accompany that proxy form when sent directly to the company.

Unless *Bisan* and *Portman* are successfully challenged, in order to ensure its validity, proxy forms should be delivered directly to the company or such other place nominated by the company. *Portman* also serves as a timely reminder of the importance of the proxy rules and procedures set out in the Act and in a company's constitution, all of which need to be carefully considered by each of the company, its directors and shareholders, particularly when evaluating proxies received.

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