

CHAPTER 13

RECEIPT OF PROXY APPOINTMENTS

Whether listed companies must specify a place, fax number and electronic address for the purpose of receiving proxy appointments

13.1 Section 250BA of the Corporations Law provides that, in a notice for a meeting of members, a listed company must specify a place and a fax number and may specify an electronic address for the purpose of receiving proxy appointments.

13.2 Submissions to the PJSC commented on the manner of transmission of proxy appointments and the validity of proxy appointments sent by facsimile and electronic mail.

Arguments in favour of provision of facsimile address for receiving proxy appointments

Matters requiring clarification

13.3 Generally submissions were supportive of the requirement for companies to specify a facsimile address for proxy appointments. For example, GIO Australia Holdings Ltd (GIO) submitted that the provision of facsimile addresses was either in the interests of shareholders or efficient corporate governance.¹

13.4 The new provision also reflects current developments and will assist the global marketplace by encouraging foreign investors “to participate in a faster fashion than that available by mail.”² Corporate Governance International Pty Ltd noted that:

...even the smallest listed company should not have any practical difficulty or material cost in providing its public shareholders with a mutually convenient fax number for receipt of proxies....such a fax facility extends for public shareholders both the practical time for, and the convenience of, lodging their proxy votes and therefore,

1 GIO, Submission 29, p 3.

2 West Australia Joint Legislative Review Committee of the Australian Society of CPA, the Institute of Chartered Accountants and the Chartered Institute of Company Secretaries, Submission 18, p 5. See also Investment & Financial Services Association Ltd, Submission 34, p 9 and Australian Institute of Company Directors, Submission 47, p 6.

should encourage public shareholders to register their proxy votes, and especially institutional investors.³

13.5 However, several companies and professional bodies drew the attention of the PJSC to a number of issues that should be resolved.⁴ For the requirement to be effective, it was submitted that:

- The proxy should be sent to the facsimile number specified in the notice of meeting;
- A company should be entitled to rely on the fact that a proxy transmitted by facsimile is signed correctly without the need for authentication; and
- The consequences should be clarified as to the situation where a proxy, which is transmitted by facsimile, has been improperly prepared and the proxy is counted in good faith and alters the result of the meeting.⁵

13.6 The Australian Law Reform Commission (ALRC) also cautioned that the manner of transmission may promote the fraudulent abuse of proxies:

The extent to which such methods can lend themselves to fraud needs, however, to be considered and, if necessary, taken into account in the legislation.⁶

13.7 In relation to the issue of the authentication of signatures on proxies, Mr John Wilkin advised the PJSC that the authentication of a signature on a facsimile is much the same as for a letter.⁷

Companies should specify only one place and facsimile address

13.8 Support for a facsimile address in the notice of meeting was qualified by the assertion that companies should submit only one place and one facsimile address to avoid confusion. Arnold Bloch Leibler stated that the rationale for this is that proxy appointments do not have to be dated. If a member executes more than one proxy difficulties may arise in determining which proxy was received last as they can be “delivered in too many different ways to a company.”⁸ Mr Nick Renton told the PJSC:

3 Corporate Governance International Pty Ltd, Submission 62, p 12.

4 See Henry Walker Group Ltd, Submission 12, p 3 and Australian Institute of Company Directors, Submission 47, p 6.

5 Chartered Institute of Company Secretaries in Australia Ltd, Submission 1, p 3.

6 Australian Law Reform Commission, Submission 10, p 6. See also Mr Ted Rofe, Committee Hansard, 18 August 1999, p 303

7 Mr John Wilkin, Submission 21, p 9.

8 Arnold Bloch Leibler, Submission 23, p 10.

Clearly, there must be certainty as to what constitutes a valid proxy. Stipulation as to the acceptable places of lodgment is therefore essential.⁹

Arguments in favour of the provision of an electronic address for receiving proxy appointments

13.9 At present the Law does not require listed companies to specify an e-mail address for the transmission of proxies. This is only an option. A number of submissions expressed support for the proposal that companies should provide an electronic address for receiving proxy appointments.¹⁰

Modern day technology

13.10 The ALRC expressed the view that the requirement addresses the realities of modern day communications:

The requirement to have a fax machine and an electronic address facility cannot be regarded as an imposition on a listed company.¹¹

13.11 The PJSC was told that casting votes electronically should be encouraged on the grounds of efficiency.¹² To illustrate these efficiencies Mr Renton described the method of electronic voting by US companies where each shareholder is provided with a unique “control number” or PIN which accompanies the notice of meeting. On accessing a specified web site, the shareholder is given a choice of voting for the directors’ recommendations or voting on each question separately:

The former is the equivalent of sending in a blank proxy in favour of the chairman of the meeting, while the latter allows “for”, “against” or “abstain” decisions as the voter sees fit...If desired, an e-mail response from the returning officer can be obtained immediately, acknowledging that the vote has been duly received and processed. This highly efficient use of the new technology is very quick, convenient and cheap for all concerned.¹³

13.12 The Investment & Financial Services Association Ltd (IFSA) supported the use of electronic mail because it will enable shareholders to lodge votes faster. IFSA noted that:

9 Mr Nick Renton, Submission 58, p 2.

10 See Mr R Furlonger, Submission 4, p 6; Mr J Tilburn, Submission 11, p 1; Mr JA Sutton, Submission 57, p 4 and Corporate Governance International Pty Ltd, Submission 62, p 12.

11 Australian Law Reform Commission, Submission 10, p 6.

12 Mr Nick Renton, Submission 58, p 2.

13 Mr Nick Renton, Submission 58, p 3.

... the use of electronic communication can only increase as time goes on. To rely on outmoded methods of voting can only lead to Australia lagging behind the rest of the world.¹⁴

13.13 Computershare Registry Services told the PJSC that many companies are keen to embrace the new technology and in particular electronic proxy voting but are unable to do so because of the impediment of the Law. Mr David Cantrick-Brooks, Manager, Computershare Registry Services summarised the provisions relating to electronic proxy appointments:

The Corporations Law currently envisages electronic proxy voting in section 249J(3) where notice may be given by sending it to an electronic address, by section 250B(3) where proxy documents may be received at an electronic address specified for the purpose in the notice of meeting, and section 250BA where listed companies may specify an electronic address...

Many of our larger clients are keen to embrace electronic proxy voting but feel constrained...there appears at the moment to be a door open for you to use proxy voting. For example there is a reference to sending out a notice of meeting, using an electronic address and receiving back a proxy form on an electronic address. But the missing link is the requirement in section 250A for the document to be signed. That is a bit of a sticking point because you cannot actually sign it unless it is a digital signature or you have somehow or other taken it off the print-out, scanned it - and back again.¹⁵

Arguments against the provision of electronic address for proxy appointments

Ascertaining whether proxy form duly executed

13.14 The Henry Walker Group Ltd advised the PJSC that there might be difficulty in ascertaining whether a proxy appointment has been properly executed. It suggested that consideration should be given to the circumstances in which a company can assume a proxy form has been properly executed when received electronically.¹⁶

13.15 The PJSC was also advised that whereas authentication of a signature on a facsimile transmission is similar to that for letters, this is not the case in regard to electronically transmitted documents. Mr John Wilkin submitted that

14 Investment & Financial Services Association Ltd, Submission 34, pp 9-10.

15 Mr David Cantrick-Brooks, Committee Hansard, 16 June 1999, pp 74-77.

16 Henry Walker Group Ltd, Submission 12, p 3.

electronic mail has other authentication problems and should not be allowed.¹⁷ The Law Institute of Victoria cautioned the PJSC that the issues relating to electronic signatures should be resolved before provisions relating to electronic mail are introduced.¹⁸

13.16 Similarly the Accounting Bodies recommended to the PJSC that guidelines be developed to ensure that companies have adequate arrangements in place to deal with any breakdown in transmission of proxy appointments and the security of those communications.¹⁹

13.17 Coles Myer Ltd pointed out that before electronic transmission can be implemented the Law must incorporate a new definition of what is 'signed' for electronic purposes.²⁰ It was noted that the problem arises from section 250A of the Law which requires the proxy appointment to be signed. Coles Myer suggested that a definition could be included in Section 9-Dictionary, which defines signing for electronic purposes "to be the input of a PIN, digital signature or such other method as the parties agree".²¹

Some companies not prepared for electronic proxy appointments

13.18 It was argued that a large number of listed companies are not yet equipped to comply with a requirement to provide an electronic address for proxy appointments. For example, the Henry Walker Group Ltd does not have an Internet proxy form and currently has no plans to develop one. The Australian Stock Exchange along with other submissions argued that an electronic address should remain optional.²²

13.19 The Association of Mining and Exploration Inc (AMEC) told the PJSC that many smaller companies do not have an e-mail facility. AMEC recommended maintaining the current situation where companies provide a place and facsimile address, and if desired an electronic address for proxy appointments.²³

17 Mr John Wilkin, Submission 21, p 9. See also Australian Listed Companies Association Inc, Submission 66, p 3.

18 Law Institute of Victoria, Submission 55, p 3.

19 Joint Submission by the Australian Society of CPA and the Institute of Chartered Accountants in Australia, Submission 73, p 6.

20 Correspondence to the Chairman of the PJSC, 3 September 1999. The definition of "sign" was repealed by the *Company Law Review Act 1998*, Schedule 2, Part 1.

21 Correspondence to the Chairman of the PJSC, 3 September 1999.

22 Australian Stock Exchange, Submission 44, p 11; KPMG, Submission 71, p 5 and Arnold Bloch Leibler, Submission 23, p 10.

23 Association of Mining and Exploration Companies Inc, Submission 45, p 3.

Potential fraudulent abuse

13.20 As noted earlier, the ALRC warned that the legislation should address the extent to which electronic mail and facsimile transmissions can be used to advance fraudulent purposes.²⁴ Similarly it was recommended that in light of the potential for abuse consideration should be given to absolving a company and its registry from liability where a proxy accepted in good faith is later shown to be fraudulent.²⁵

Other matters

Appointment of proxies

13.21 Section 249X(1) of the Law provides that a member of a company may appoint a “person” as the member’s proxy to attend and vote for the member at the meeting. The Australian Shareholders’ Association Ltd (ASA) told the PJSC that from time to time shareholders appoint the ASA as their proxy on the understanding that it will then appoint an individual as its representative to attend the meeting. While some listed companies accept proxies in this form, the ASA submitted that “others and their legal advisers and auditors take the view that the word ‘person’ in subsection in 249X(1) is restricted to a natural person, ie an individual.”²⁶

Conclusions

13.22 The PJSC believes that it is a matter of prudence and good corporate governance for companies to facilitate the receipt of proxy appointments. Most listed companies already retain the services of a professional share registry to receive proxies by facsimile and as the ALRC noted the requirement for a facsimile address is not a large imposition on a listed company. The benefit of this facility for shareholders was not in question. However, certain practical issues were drawn to the attention of the PJSC which included the authentication of proxies and security of electronic communications. The PJSC concludes that section 250BA should be retained and the following requirements should be included in the section to authenticate proxy appointments and avoid confusion:

- For a facsimile transmission of a proxy to be executed, the proxy should be a complete reproduction of the entire original writing or transmission;

24 Australian Law Reform Commission, Submission 10, p 6.

25 Chartered Institute of Company Secretaries in Australia Ltd, Victoria Branch, Submission 24, p 3.

26 Australian Shareholders’ Association Ltd, Submission tabled at hearing on 18 August 1999, p 2 and Mr Ted Rofe, Committee Hansard, 18 August 1999, pp 302-3.

- For proxy appointments executed by corporate or institutional investors, proxy appointments must be witnessed or executed by an officer of the court. In the case of foreign investors it must be executed by an attorney;
- The notice of meeting must specify only one place and facsimile address.

13.23 In its 1998 *Report on the Company Law Review Bill 1997* the PJSC supported changes to the Law facilitating the use of electronic communication between companies, their shareholders and the regulatory bodies. It concluded that:

The Bill does not impose, nor should it, an obligation to use electronic forms of communication but rather facilitates its greater use to improve the flow of information in the market.²⁷

13.24 The PJSC has not changed its view on this matter and recommends that the requirement should remain optional for listed companies. Several companies, shareholder groups and share registry services favoured the use of electronic communication and receipt of proxy appointments electronically. However, the two major concerns were security of communications and the impediment of the Law. The PJSC believes that companies should be able to transmit electronically any document which the Corporations Law requires they send to members provided that the individual shareholder or institution has agreed. To facilitate the receipt of proxy appointments, the PJSC concludes that a new definition of “sign” should be inserted in Section 9-Dictionary, that defines signing for electronic purposes to be the input of a ‘PIN’.

13.25 To formalise the practice of some listed companies in accepting proxies appointing the Australian Shareholders’ Association, the PJSC concludes that the words “including a body corporate” should be inserted after the word “person” in section 249X(1).

Recommendation

13.26 The PJSC recommends that the Corporations Law:

- (i) should retain section 250BA subject to the amendments described above to authenticate proxy appointments;
- (ii) should include a new definition of “sign” in Section 9 – Dictionary, to define sign for electronic purposes to be the input of a “PIN”;
- (iii) should include in section 249X(1) provision for a body corporate as well as a natural person to be appointed as a proxy.

27 Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Company Law Review Bill 1997*, March 1998, p 17.