Electronic voting — Legal issues

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Introduction

The benefits to companies of using electronic means to communicate with their shareholders are now well understood. New technologies have provided faster, cheaper, more regular and more effective means of bringing information to the attention of shareholders.

No less understood, but less common, is the application of electronic forms of communication in the area of shareholder voting. Traditional methods of voting in a company meeting have involved shareholders either:

• appointing a proxy to attend the meeting and vote on their behalf or
• attending the meeting and casting their vote in person.

Technological developments have raised the possibility of adapting those methods to an electronic environment, and have also given rise to suggestions of alternative methods of shareholder voting.

Most significantly, electronic communication has given companies opportunities to enhance the level of shareholder participation in their decision-making processes. This has become increasingly relevant in view of the growing number of foreign shareholders, and the growing number of shareholders generally, on the share registers of Australian companies. The OECD Council has recognised the opportunities presented by electronic communication in this area. The OECD Principles of Corporate Governance recommend that companies consider favourably the enlarged use of technology in voting, including electronic voting, as a way of broadening shareholder participation.1 So far, there is limited evidence that Australian companies have taken up that call.

This article examines the legal issues relating to the use of electronic proxy appointments and electronic voting in company meetings, and outlines reform proposals that have been put forward to facilitate the use of alternative electronic voting methods by Australian companies.

Of course, apart from considering the legal issues involved, companies wishing to implement electronic voting methods will need to address a range of issues at a practical level. Such issues are not the focus of this article, but they include:

• what technology will the company employ to make electronic voting available, and is it sufficiently reliable?
• what information will shareholders be required to provide for identification purposes when submitting their vote? This could involve shareholders providing personal details or a PIN number issued by the company, or more sophisticated methods such as issuing digital signatures using public key/private key technology.
• what precautions will the company take to ensure that a shareholder’s vote may not be tampered with once it has been sent?

Electronic proxies

To determine whether a company may allow its members to appoint proxies electronically, it is necessary to consider the provisions of the Corporations Law regulating the appointment of proxies and any relevant provisions of the company’s constitution.

Sections 250A(1) and 250B(3)

The Company Law Review Act 1998 made amendments to the Corporations Law which were designed to facilitate the electronic lodgment of proxies. However, there is some
uncertainty over whether the amendments have achieved that result.

Section 250B(3) recognises that an appointment of proxy may be received at an electronic address specified for that purpose in a notice of meeting. The Explanatory Memorandum to the Company Law Review Bill 1997 states: ‘Given the nature of electronic transmission, it will not be necessary for the appointment to be signed’.

That position does not appear to have been reflected in the Corporations Law itself. Section 250A(1) states that an appointment of a proxy is valid if it is signed by the member of the company making the appointment and contains certain information.

The fact that s 250B(3) expressly authorises receipt of a proxy appointment at an electronic address suggests that Parliament’s intention was that certain forms of electronic ‘signature’ will satisfy the signing requirement under s 250A(1). The difficulty lies in identifying the precise requirements for a valid electronic signature.

The Corporations Law does not define the term ‘signed’. In Electronic Rentals Pty Ltd v Anderson, Windeyer J stated that:

…when a document is required by statute to be under a man’s hand or signed by him what is ordinarily meant is that he must personally sign it, with his name or his mark, by a pen or by a stamp.

No Australian court appears to have addressed the question of whether (and if so, how) an electronic message can be ‘signed’ for the purposes of satisfying a legal requirement. There is old case law which supports the proposition that a person does not need to physically ‘put pen to paper’ to sign something, but can do so via an agent or through the use of some mechanical means, such as an impress stamp bearing a facsimile of the person’s signature. In a recent English decision, it was held that a faxed proxy form was treated as signed for the purposes of statutory provisions dealing with proxies for a creditors’ meeting.

Those cases allow some scope for arguing that an electronic signature might satisfy the signing requirement under s 250A(1). However, judicial recognition of electronic signatures would require an extension beyond the methods of signature recognised in previous cases. Even if it is assumed that electronic signatures are permissible, the cases give little guidance on what the requirements are for a valid electronic signature. Complex issues concerning the form and requirements that must be met to constitute a valid electronic signature would need to be considered.

Electronic transactions legislation is intended to overcome problems of the type raised by s 250A(1) of the Corporations Law, by purporting to give electronic methods of communication the same legal force as paper based methods of communication. The Electronic Transactions Act 1999 (Cth) (‘ETA’) came into force on 15 March 2000, and it is proposed that uniform electronic transactions legislation will be introduced in each of the States and Territories. As at the date of writing, such legislation has commenced operation in Victoria, the Australian Capital Territory and Tasmania. Section 10(1) of the ETA provides that a requirement under a Commonwealth law for the signature of a person is taken to have been met in relation to an electronic communication if:

• a method is used to identify the person and to indicate their approval of the information communicated

• having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated and

• the person to whom the signature is required to be given consents to the requirement being met by the use of the method.

Because the Corporations Law is legislation that has been introduced on a uniform basis in each Australian State and Territory, it is not a Commonwealth law, and so the ETA does not apply to it. However, the Corporations Bill 2001 was introduced into the House of Representatives on 4 April 2001. The Bill is a legislative response to the recent High Court decisions which have held aspects of the national scheme legislation presently underpinning the Corporations Law to be constitutionally invalid. If enacted, the Bill will re-enact the
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existing Corporations Law as a Commonwealth Act applying throughout Australia. It is intended that this new regime will come into effect from 1 July 2001. The Corporations Law will initially be excluded from the operation of the ETA under the regulation making powers contained in the ETA12, and consideration will then be given to which parts of the Corporations Law should be subject to the operation of the ETA.

Clarification of the legal status of electronic proxy appointments, perhaps by the application of s 10(1) of the ETA to s 250A(1) of the Corporations Law, would be welcome. Such clarification has recently been given in the United Kingdom14 and in a number of jurisdictions in the United States.

Requirements under a company’s constitution

Provisions of a company’s constitution requiring things such as that a proxy appointment be:

- ‘signed by’ or ‘under the hand of’ a member
- an ‘instrument’ or
- sent to the company by particular means.

arguably imposes requirements that would not be met by an electronic form of appointment.

Another quite common provision in the same category is one which requires that an appointment of proxy is ‘in writing’, and which incorporates the definition of ‘writing’ in s 9 of the Corporations Law. That definition states:

‘writing’ includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form.

On one view, the method by which a proxy is appointed using an online facility (namely, by sending an electronic message over the Internet) would not be regarded as ‘writing’. That view is supported by the definition of ‘document’ in s 9, which states:

’document’ includes:

a) any paper or other material on which there is writing or printing or on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them

b) a disc, tape or other article from which sounds, images or messages are capable of being reproduced and

c) a disc, tape or other article, or any material, from which sounds, images, writings or messages are capable of being reproduced with or without the aid of any other article or device

…

The two definitions appear to make a distinction between an actual representation or reproduction of words (for example) in a visible form, and something from which words are capable of being reproduced. On that basis, an electronic message would be a ‘document’, but not ‘writing’.

For a company to ensure that the use of electronically appointed proxies is binding on its members, it would be advisable for its constitution to be amended to expressly authorise the use of electronic proxy appointments. However, it will be desirable to ensure that the provisions included are not overly prescriptive, so that they give the company flexibility to change the method of appointment used, particularly to respond to technological changes. One possibility would be for the constitution to provide that a proxy appointment may be authorised by a member in any manner approved by the company’s directors and specified in the notice of meeting.

Electronic meetings

The problem that shareholders are not able to be physically present at a company meeting due to its location or timing could be countered by companies giving their shareholders the ability to ‘attend’ meetings (and cast their votes) electronically.

Modern technology allows for various forms of remote participation by shareholders in company meetings. For example, it would now be possible for shareholders to access a transcript of the proceedings of a meeting that appears in real time on an electronic bulletin board, or even a real time audio-visual feed of the meeting, via a company’s website. Facilities could be established for shareholders to email questions to be read out to the meeting by the chairman and answered, and to electronically submit their votes on resolutions put to the meeting. In time, one can envisage further developments in technology that will enable a level of interactive communication involving large numbers of remote participants approaching that available in physical meetings. It has even been suggested that companies may be able to do away with physical meetings and instead hold ‘virtual meetings’.15

The Corporations Law presently allows for the possibility of shareholder meetings being held electronically. The Company Law Review Act 1998 introduced s 249S, which states:

A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.
Australian listed companies have made use of s 249S to enable meetings to be held in two or more locations linked by video conference facilities (normally, to enable directors who are not physically present to participate). However, as far as we are aware, no Australian listed companies have yet enabled their shareholders to cast their votes in company meetings online, although s 249S appears to allow for this, provided that the members as a whole are given a reasonable opportunity to participate.

The manner of voting in company meetings is for the most part regulated by a company’s constitution. Traditionally, company constitutions have provided for voting on a show of hands and, if demanded, on a poll. Clearly, the concept of a show of hands is unsuited to electronic methods of voting, and parallel concepts would need to be devised for inclusion in company constitutions to cover electronic voting methods. As in the case of amendments to company constitutions to provide for electronic proxy appointments, there will be a need to ensure that any provisions included maintain flexibility in the types of voting methods that can be used.

**Direct voting by absentee shareholders?**

In June 2000, the Companies & Securities Advisory Committee released its final report on Shareholder Participation in the Modern Listed Public Company. The report recommends that the Corporations Law should be amended to enable directors of a listed public company, subject to any restriction in the company’s constitution, to provide that shareholders may, as an alternative to voting in person or by proxy, cast electronic or postal votes directly on any matters arising for consideration at a general meeting.16

As the report notes, besides encouraging shareholder participation in corporate decision-making because of its directness and simplicity, direct absentee voting would also avoid some of the practical difficulties associated with proxy votes (for example, the fact that a proxy vote cannot be exercised unless the proxy is present).17 One commentator has suggested that the need for proxy appointments may disappear if electronic votes can be directly lodged.18

**Conclusion**

Electronic communication has given rise to a range of new possibilities for shareholder voting, and provides companies with an opportunity to increase the level of shareholder participation in their decision-making processes. It is to be hoped that lawmakers will soon revisit the issues in this area, particularly to clear up the uncertainty surrounding electronic proxy appointments, but also to consider facilitating the use of other methods of electronic voting.

The need to give further consideration to these issues does not just rest with lawmakers. Companies also should review their constitutions to identify the amendments required to adopt new electronic voting methods.

2 Paragraph 10.68
3 (1971) 124 CLR 27
4 (1971) 124 CLR 27 at 42
5 Jenkins v Gaisford, Re Jenkins (decd)’s goods (1863) 3 Sw & Tr 93; Goodman v J Eban Ltd [1954] 1 All ER 763
6 Re a debtor (No 2021 of 1995); ex parte Inland Revenue Commissioners v the Debtor [1996] 2 All ER 345
7 Paragraph 13.26(ii)
8 The Electronic Transactions (Victoria) Act 2000 (Vic) commenced operation on 1 September 2000.
9 The Electronic Transactions Act 2001
10 The Electronic Transactions Act 2000 (Tas) commenced operation on 1 June 2001.
11 Although interestingly, the Corporations Law as it applies in Victoria has not been excluded from the operation of the Electronic Transactions (Victoria) Act 2000 (Vic). As a result, a company registered in Victoria that enables proxies to be appointed electronically in a way that meets the requirements of s 9(1) of the Electronic Transactions (Victoria) Act 2000 (Vic) (which is in the same terms as s 10(1) of the ETA) will satisfy the signing requirement under s 250A(1). In view of the likely passage of the Corporations Bill 2001 into law, this anomaly is likely to be short-lived.
13 See s 8(4) of the ETA.
14 The Companies Act 1985 (Electronic Communications) Order 2000 amends the Companies Act 1985 (UK) to permit a proxy to be appointed in an electronic communication sent to such address as may be notified by or on behalf of the company for that purpose. The amended provisions override any inconsistent provisions in a company’s constitution.
17 Ibid, paragraph 4.127.