

## update

14 November 2008

## Friday Facts: Court finds proxy forms collected by a third party invalid

*In the recent case of Portman Iron Ore Ltd; Re Golden West Resources Ltd [2008] FCA 1362, the Federal Court considered whether proxy forms collected by a third party intermediary were valid and capable of being used to vote at a general meeting.*

Portman Iron Ore Ltd (**Portman**) held 19.2% of the voting shares in Golden West Resources Ltd (**Golden West**). Portman requested that Golden West call and hold a general meeting to replace two of its directors. The meeting was arranged and Golden West sent out proxy forms to all its shareholders, returnable to the company. Portman then sent all the shareholders proxy forms which had been pre-completed in support of their campaign and requested that these be returned to Portman for delivery to Golden West. Portman received completed forms for 12% of the voting shares and these were forwarded to Golden West within the required timeframe (48 hours prior to the meeting).

At the meeting, the chair ruled that all the proxies collected and lodged by Portman were invalid because they had not been sent directly to Golden West and, therefore, did not comply with section 250B of the *Corporations Act 2001* (the "**Act**"). Portman applied to the Federal Court for orders declaring that those proxies were not invalid and that chair was wrong to exclude them.

The Court found that it was inappropriate to grant declaratory relief because the inclusion

of Portman's proxies would have had no practical effect on the resolution. Despite this finding, the Court went on to discuss the validity of the proxies collected by Portman.

The key issue was whether sending the proxies to Portman rather than Golden West was inconsistent with section 250B(1) of the Act. The Court stated that, whilst section 250B does not expressly state that proxy forms must be returned directly to the company holding a general meeting, the preferred construction is that forwarding the proxies to a company via a third party is contrary to the requirements of section 250B(1).

If all proxies are returned directly to the company then there is no need to investigate whether the proxies have been tampered with or excluded by the third party. In addition, the risk that some shareholders may complete two proxies and therefore purport to vote twice is eliminated and the proxies would most likely be received by the company in a more even flow, rather than in a large quantity at the last minute.

In reaching this conclusion, the Federal Court relied on comments made by Victorian

Supreme Court in *Bisan Ltd v Cellante and others* [2002] VSC 430, an earlier case in which it was suggested that forwarding proxies to the company via a third party is contrary to section 250B of the Act.

The decision in Portman should serve as a warning to shareholders wishing to promote and monitor their campaign by sending out pre-completed proxy forms and requesting that they be returned to that shareholder. In light of the Federal Court's interpretation of section 250B, all proxy forms should now be sent directly to the company.

Shareholders who wish to monitor the progress of their campaign should adopt the Court's suggestion and request that a duplicate proxy form be forwarded to them when the original proxy is returned to the company.

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