

Secret Ballots, or Risky Ballots?

By Gary Bugden*

A number of recent disputes relating to secret ballots have highlighted the risks that bodies corporate, their managers and returning officers are exposed to when running secret ballots.

The *Body Corporate and Community Management Act 1997* and its related regulation modules are very detailed and precise as to the process that must be followed by both the body corporate and a voter in order for there to be a valid secret ballot. Furthermore, neither the Act nor the regulation modules provide any “relief” if there is a failure to follow that process (e.g. a provision to the effect that an innocent failure to follow the process does not invalidate the process).

Arguably, this leads to a clear intention on the part of the law that the process must be followed precisely and any departure, no matter how minor, will invalidate the process. An adjudicator in the Commissioner’s office has discretion whether or not to make an order, but that discretion must be exercised within the confines of the law. Given the approach adopted by superior Courts in this regard it would not be wise to rely upon the exercise of discretion. And therein lays the risk factor with secret ballots.

Returning officer

Bodies corporate and their managers should actively manage the risks associated with secret ballots. The starting point is the choice of returning officer. Because the returning officer has to ensure that the technical requirements of the law are observed and people casting votes are entitled to do so, they need to be well versed in the relevant law and procedures.

Lawyers are an obvious choice, but such a choice does carry with it a cost burden that many bodies corporate are unable or unwilling to bear. Other knowledgeable professionals or specially trained persons will need to be considered and carefully chosen. The desirability for a returning officer to have professional indemnity insurance should also be considered.

Internal risk management

Having chosen the right returning officer, the body corporate or its manager must then turn their attention to the procedures and documentation. In particular, the following should be considered:

1. The returning officer must be appointed by resolution of the body corporate or its committee, which must be followed by an instrument of appointment. Failure to make an effective appointment may invalidate the entire process.
2. Meeting documentation must reflect the exact requirements of the regulation module, although additional clarifying material may be helpful provided it is accurate.

3. Secret Ballot Papers must always be a separate document designed specifically for a secret ballot. They should not contain motions for other resolutions.
4. Where possible Secret Voting Paper Envelopes with particulars tabs should be used rather than two envelopes, because this makes the process easier for the voter.
5. Once issued, secret Ballot Papers cannot be withdrawn and new papers substituted before the meeting because it becomes impossible for the returning officer to determine which paper is the substitute without prematurely opening the particulars envelope or voting paper envelope.
6. Supplement the instructions to voters so that they –
 - a. stress the importance of completing the particulars tab or particulars envelope properly and in detail, because this is the most common reason for rejection of votes; and
 - b. warn voters (particularly those relying on e-mail documentation) against using substitute envelopes for those supplied with the meeting documentation, because substitute envelopes are not permitted.
7. Never issue **additional** Secret Ballot Voting Papers or envelopes to voters before the meeting, because this facilitates the canvassing of votes by pressure groups and this is contrary to the spirit of a secret ballot. However, if a body corporate or manager is satisfied that a voter has spoiled their Secret Ballot Voting Paper and simply wishes to make another attempt at voting, then, upon recovering the spoiled paper from the voter, the manager could issue a new paper and/or envelopes for that voter. Recovery of the spoiled paper ensures that it is not used to canvas other votes.
8. Have a supply of secret ballot papers and relevant envelopes at the meeting because voters are entitled to ask for them at the meeting if they have not cast a vote and still wish to do so.
9. Ensure the returning officer keeps and hands over to the body corporate accurate records of votes submitted, allowed and rejected, as well as the reasons for any rejections.

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