



VOTING AT MEETINGS OF CREDITORS CONVENED UNDER THE CORPORATIONS ACT – ADJUDICATING PROOFS OF DEBT FOR VOTING PURPOSES AND THE PASSING OF RESOLUTIONS

1. INTRODUCTION

The holding of meetings of creditors in corporate insolvency administrations is a necessary and important part of the process. The necessity to hold such meetings arises from the operation of numerous sections of Parts 5.3 to 5.6 of the Corporations Act 2001 (“the Act”) which deal with all forms of insolvency administrations. Regulations 5.6.11 to 5.6.36A of the Corporations Regulations 2001 (“the Regulations”) govern the convening, conduct of and voting at all creditors meetings convened under the Act.

This paper will provide a brief overview of the requirements that relate to voting and specifically addresses the manner in which an administrator or liquidator adjudicates upon proofs of debt for voting purposes as well as the manner in which resolutions are carried.

2. WHO IS A CREDITOR FOR VOTING PURPOSES

The “creditors” who may attend a meeting and vote are not defined in the Act. In the matter of *Selim v McGrath* [2003] NSWSC 927 (“the Pan case”), Barrett J set out to determine who were the “company’s creditors” within the meaning of Section 439A of the Act. His Honour found that “creditors” means all persons who have, as against the company concerned, debts or claims provable in a winding up. The boundaries are therefore those set by Section 553(1) of the Act which defines debts provable in a winding up as follows:

“Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company”.

It is important to note that provable debts are those that where the circumstances giving rise to them occurred before the date of the commencement of the administration (per Cohen J in *Re Crawford House Press Pty Limited* [1995]) 17 ACSR 295 at 298).

Section 553 (1) of the Act refers to contingent and future debts or claims. An often used definition of “contingent creditor” was suggested by Pennycuik J in *re William Hockey Ltd* as a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date. The importance of these words according to Kitto J in *Community Development Pty Limited v Engwirda Construction Company* [1966] (120 CLR 455 at 459) lies in their insistence that there must be an existing obligation and that out of that obligation, a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen.

In *Expile Pty Limited v Jabb’s Excavations Pty Limited* [2004] 22 ACLC 667, Palmer J addressed what was meant by “future claims” and “contingent claims”. At 675 [37], His Honour said:

“A future claim is distinguishable from a contingent claim in that, while both are founded on an obligation existing as at the commencement date of the winding up... a future claim will arise at some time thereafter while a contingent claim may arise. A typical example of a future claim is a claim for rent which will become due under a lease which is in existence at the commencement of the winding up”.

Notwithstanding the broad definition of “creditor”, there are certain debts that are not provable in a winding up. These include debts that are not legally enforceable such as debts arising from illegal transactions, statute barred debts and Court imposed penalties.

3. CREDITORS WHO MAY VOTE

Pursuant to Regulation 5.6.23 (1), a person is not entitled to vote as a creditor at a meeting of creditors unless his or her debt or claim has been admitted wholly or in part by the administrator or liquidator, or he or she has lodged with the chairperson of the meeting particulars of his or her debt or claim, or if required, a formal proof of debt.

Regulation 5.6.23 (2) states that a creditor must not vote in respect of;

- an unliquidated debt or claim; or
- a contingent debt or claim; or
- a debt the value of which is not established;

unless a just estimate of its value has been made. This is consistent with Section 554A of the Act which states that where the liquidator admits a debt or claim as at the relevant date that does not bear a certain value, he or she must either make an estimate of the value of the debt or claim, or refer the question of the value of the debt to the Court.

In addition, Regulation 5.6.24 deals with the debts or claims of creditors holding security. These claims will be discussed later herein. There are further Regulations (5.6.23(3) and 5.6.46) dealing with bills of exchange, promissory notes and other negotiable instruments or securities that are outside the scope of this paper.

4. DETERMINING ENTITLEMENT TO VOTE

One of the first tasks of a chairperson is to determine the voting entitlements of each person present at the meeting. In doing so, a chairperson will be mindful of the observations of Barrett J in the Pan case where his Honour said that there are significant differences between proofs of debt and claims for voting purposes and proofs of debts and claims for the purposes of entitlement upon the distribution of a dividend. This means that in the case of the former, a person need only establish a prima facie entitlement to vote as compared to the latter where there is a much greater onus of proof.

Bearing this in mind, the chairperson will need to satisfy his or herself that:

- the person attending the meeting, either in person or by proxy, is a creditor of the company concerned, and
- the quantum of that person's debt or claim is reasonable.

The chairperson will carry out this task by reference to proofs of debt already admitted in the administration by the administrator or liquidator. Those creditors are permitted to vote for the quantum shown on the proof of debt. If a person's proof of debt has not been admitted, then the chairperson will review the documentation provided by the person in support of his or her debt or claim. That documentation would normally comprise of a proof of debt with evidence in support but it may also be no more than particulars of the debt or claim, such as copy statements and invoices.

The chairperson must then adjudicate on each persons right to vote as a creditor and the quantum of debt in respect to which the right to vote is available. Pursuant to Regulation 5.6.26(1), the chairperson has the power to either admit or reject a proof of debt or claim for voting purposes. Notwithstanding this unqualified reference to proofs being admitted or rejected, Justice Barrett observed in the Pan case at 81 that a concept of partial admission of a debt exists.

If the chairperson is in doubt as to whether a proof of debt or claim should be admitted or rejected, then in accordance with Regulation 5.6.26(2), he or she must mark the proof of debt or claim as objected to and allow the creditor to vote, subject to the vote being declared invalid if the objection is sustained. However this Regulation will only apply where there is actual doubt in respect of whether the proof should be admitted or rejected as compared to doubt as to the value which should be assigned to the claim.

Generally speaking, the admitting of creditor claims for voting purposes can be a relatively simple process as most debts or claims, such as those of trade suppliers, can be easily established to the chairperson's satisfaction. However, that process can become quite complicated, especially when dealing with contingent and unliquidated claims. Meetings involving large numbers of creditors are also difficult as proofs of debt and particulars of debts and claims are often handed up for adjudication immediately before the commencement of the meeting. In such circumstances, there is no time for extensive debate and deliberation on the merits of a claim nor is it possible to undertake extensive enquiry in relation to those claims.

The onus is on the chairperson to adjudicate so that the meeting can proceed. The guidelines for the chairperson to follow are set out in the Regulations and been determined by case law. Some of these guidelines are summarised below.

(a) Claims Requiring a Just Estimate.

As stated above, before voting is permitted, Regulation 5.6.23(2) requires a just estimate to be made of contingent and unliquidated debts and claims and debts the value of which has not been established. Based upon the judgements of Austin J in *Bovis Lend Lease Pty Ltd v Wily* [2003] 21 ACLC 1,737 and Barrett J in the *Pan* case, such claims should be dealt with as follows:

- if an estimate has been made of the debt or claim by the person attending, then the chairperson will need to assess whether or not the estimate is just. If so, the claim should be admitted for voting purposes.
- if no estimate has been made or if the chairperson considers the estimate made by the person is not just, then the chairperson, acting reasonably, will need to make the just estimate of value and permit the person to vote for that amount.
- if a just estimate cannot be made, then the person should not be allowed to vote (Regulations 5.6.23(2) and 5.6.26(1)).
- if the claim cannot be quantified by a just estimate, but it appears that the person is a creditor for at least some amount, then it is appropriate to admit the person for voting purposes at a nominal value of one dollar.
- if a just estimate has been made as required by the Regulation, but the chairperson remains in doubt as to whether the person should be allowed to vote at all, then the chairperson must mark the proof or claim as objected to in accordance with Regulation 5.6.26(2).

(b) Adequate Particulars to Support a Claim not Already Admitted

Ignoring proofs of debt already admitted, the remainder of Regulation 5.6.23(1) states that a person is not allowed to vote as a creditor unless particulars of the debt or claim have been lodged with the chairperson. In the *Pan* case, the Court was asked to review a decision of the chairperson denying 417 creditors the right to vote on the basis that inadequate particulars of their claim had been provided. In considering what constituted “adequate particulars”, Barrett J stated at 104:

“In light of the relevant provisions of the regulations taken as a whole, I think that reference to “particulars” is a reference to particulars sufficient to show, at least at a prima facie level, the existence of the asserted debt or claim. Merely to say that one has a debt or claim leads nowhere in this context. The person asserting creditor status must at least go to the extent of setting out facts or alleged facts which, viewed within the context of pre-existing knowledge of the person making a decision about the proof, are sufficient to warrant a finding that at least a claim exists in more than mere assertion.”

In the *Pan* case, Barrett J held that the chairperson’s decision to reject 417 proofs at an adjourned meeting of creditors was proper having regard to the time at which they were received (immediately before the commencement of the meeting), and their lack of particularity relying for their admission on the assertion of the claimants, combined with the absence of any opportunity to seek supplementary information from the claimants.

Obviously the adequacy of the particulars provided in support of a debt or claim will vary enormously and depend on the circumstances. In addition, the chairperson may have pre-existing knowledge of a debt or claim, gained from access to a company’s books and records or from discussions with directors where such matters as disputed debts or claims are raised. In light of the comments of Barrett J in the *Pan* case, a chairperson when adjudicating for voting purposes upon proofs of debt (not admitted) and particulars of debts or claims, will be looking to see:

- that the debt or claim was incurred with the company concerned.
- that the date the debt or claim was incurred predates the date of administration or liquidation.
- that the documentation provided in support of the debt or claim is adequate evidence of the quantum of the debt. That evidence may take many forms. For example, it may comprise copies of statements and invoices or loan agreements or any other evidence that would prima facie establish a liability for a debt or claim.
- whether there are any claims for set off.

- whether the debtor claim is subject to any security.
- whether the debt or claim is disputed by the directors.

(c) Claims by Secured Creditors

Pursuant to Regulation 5.6.24(1), for voting purposes, a secured creditor must estimate in the creditor's proof of debt or claim, the value of the security unless he or she surrenders the security. The creditor is entitled to vote only in respect of the balance, if any, due to the creditor after deducting the estimated value of that security (Regulation 5.6.24(2)). If the secured creditor votes in respect of the whole debt or claim, then the creditor is taken to have surrendered his or her security, unless the Court on application is satisfied that the omission to value the security arose from inadvertence (Regulation 5.6.24(3)).

Importantly, Regulation 5.6.24(4) states that Regulation 5.6.24 does not apply to meetings of creditors convened under Part 5.3A of the Act dealing with voluntary administration, or meetings held under a deed of company arrangement.

The importance of properly completing a proof of debt was illustrated in the case of *Young v ACN 081 162 512 and Anor* [2005] NSWSC 130. Prior to voting at a meeting of creditors, a Mrs Cockerill lodged a proof of debt for the amount of \$146,009.24. In estimating the value of her security, she entered the words "not known" on the proof. At the meeting, there was a motion to adjourn which went to a poll. The liquidator recorded Mrs Cockerill as voting in favour of the motion to the full extent of her debt.

Mrs Cockerill later argued that she failed to value the security through inadvertence. She claimed the motion that she voted for was of little importance and that she was not advised either before or during the meeting of the consequence of voting. The Court examined the way the meeting was conducted and found no evidence of an estimate of the value of the security either in the proof of debt or in discussion during the meeting. The conclusion was that the use of the words "not known" on the proof was evidence of an inability to determine a value of the security as opposed to not valuing through inadvertence. Accordingly Gzell J held that Mrs Cockerill was taken to have surrendered her security.

Two interesting questions arise. The first is whether a secured creditor can vote without surrendering its security. We have already noted that by virtue of the operation of Regulation 5.6.24(4), a secured creditor can vote for the entirety of its debt at meetings convened by an administrator or deed administrator. It also appears that a secured creditor will not surrender its security where voting is "on the voices" rather than a poll. In the case of *Health and Life Care Ltd (in Liquidation) v South Australian Management Corporation* [1995] 18 ACSR 153, it was held that "voting on the voices or by show of hands does not involve voting on the whole of the debt". This is because when a vote is taken on the voices or by a show of hands, each creditor who votes has one vote only and thus the outcome is determined by numbers, not the value of debt.

The second is whether the chairperson has a duty to inform a secured creditor of its actions or omissions. The issue was not raised by Mrs Cockerill nor was it addressed by Gzell J in his judgement. At least one commentator has suggested that a chairperson has no such duty on the basis that his or her primary concern is to maximise the return to unsecured creditors. Whilst it is difficult to agree with this reasoning, it is likely that a chairperson does not have a duty to inform. However, a chairperson determining the voting entitlements of a secured creditor, would in the ordinary course look at the value, if any, that had been attributed to the security. If "not known" had been shown on the proof, then it is likely that a discussion would ensue and in our opinion that discussion would eventually lead to a prudent chairperson, acting reasonably, informing the creditor of the consequences of its actions. For whatever reason, there was no discussion at the meeting attended by Mrs Cockerill as to the value of her security nor could the chairman provide any evidence as to why he recorded Mrs Cockerill as voting for the entirety of her debt.

5. VOTING ON RESOLUTIONS

Pursuant to Regulation 5.6.19(1), a resolution put to the vote of a meeting of creditors must be decided on the voices unless, a poll is demanded, before or on the declaration of the result of the voices by:

- the chairperson; or
- at least 2 persons present in person, by proxy or by attorney and entitled to vote at the meeting; or
- by a person present in person, by proxy or by attorney and representing not less than 10% of the total voting rights of all the persons entitled to vote at the meeting.

Unless a poll is demanded, the chairperson must declare that a resolution has been carried, or carried unanimously, or carried by a particular majority, or lost (Regulation 5.6.19(2)). A declaration is conclusive evidence of the result to which it refers, without proof of the number or proportion of the votes recorded in favour of or against the resolution, unless a poll is demanded (Regulation 5.6.19(3)).

Notwithstanding these Regulations, many chairpersons will ask creditors to vote by raising their hand as this gives a more accurate counting of the vote.

If a poll is demanded, then Regulation 5.6.20 states that the chairperson is to determine the manner in which it is to be taken and the time at which it is to be taken.

6. CARRYING OF A RESOLUTION AFTER A POLL HAS BEEN DEMANDED

If a poll has been demanded, then pursuant to Regulation 5.6.21(2), a resolution is carried if:

- a majority of the creditors voting (whether in person, by attorney or by proxy) vote in favour of the resolution; and
- the value of the debts owed by the corporation to those voting in favour of the resolution is more than half the total debts owed to all the creditors voting (whether in person, by proxy or by attorney).

Conversely, Regulation 5.6.21(3) states that a resolution is not carried if:

- a majority of creditors voting (whether in person, by proxy or by attorney) vote against the resolution; and
- the value of the debts owed by the corporation to those voting against the resolution is more than half the total debts owed to all creditors voting (whether in person, by proxy or by attorney).

To put it more simply, for a motion to be carried, there will need to be a majority in number and value of creditors voting for the motion. For a motion to be lost, there will need to be a majority in number and value voting against the motion. It will therefore be obvious that it is possible for a motion to be neither carried nor lost. This outcome is provided for in Regulation 5.6.21(4) which states that, if no result is reached under sub-regulations (2) or (3), then the chairperson may either:

- exercise a casting vote in favour of the resolution, in which case the resolution is carried; or
- exercise a casting vote against the resolution, in which case the resolution is not carried; or
- not exercise a casting vote, in which case the resolution is not carried.

A commentary on the power of the administrator or liquidator to use a casting vote is outside the scope of this paper.

References :	Authors :	Date :
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