The Administrator's Casting Vote
1. **Introduction**

Regulations 5.6.11 - 5.6.36A of the Corporations Regulations 2001 (the *Regulations*) apply to the convening, conduct of and voting at all creditors’ meetings (as well as meetings of members, committees of inspection and committees of creditors) convened under Parts 5.3A, 5.4, 5.4B, 5.5 and 5.6 of the Corporations Act 2001 (Cth) (the *Act*) which deal with voluntary administration, deeds of company arrangement and liquidation. These regulations apply unless they are inconsistent with a specific requirement of the Act or the Regulations or the rules (Regulation 5.6.11).

This paper concentrates on the requirements relating specifically to the liquidator’s or administrator’s power to exercise a casting vote at creditors’ meetings and issues that arise in respect of the use of the casting vote. Unless otherwise stated, references in this paper to sections and regulations are to the applicable parts of the Act and Regulations.

2. **Resolutions of creditors and the power to exercise a casting vote**

Resolutions of creditors at a meeting are decided on the voices unless a poll is demanded. Regulation 5.6.19(1) sets out the circumstances where this may occur. If a poll is demanded and held then a resolution will be passed if a majority of the creditors voting (in person, by proxy or by attorney) are in favour of the resolution *and* the value of the debts owed to those voting in favour is more than half the total debts owed to all the creditors voting (in person, by proxy or by attorney) (Regulation 5.6.21(2)).

If no result is reached, then in accordance with Regulation 5.6.21(4) the chairperson of the meeting may exercise a casting vote to resolve the deadlock.

3. **Justification for granting the chairperson a casting vote**

Arguably, the chairperson of a creditors’ meeting is given a casting vote to resolve deadlocks in order for decisions in an external administration to be quickly arrived at, particularly in the context of a voluntary administration.

According to the explanatory statement in the Corporations Regulations (Amendment Regulation) 1993, SR No 135 of 1993, paragraph 95 (as quoted in Crutchfield’s Corporate Voluntary Administration, 3rd ed. page 290):

The term ‘casting vote’ thus has a broader meaning in this context than is usual and will allow the chairperson to effectively decide between the interests of the creditors with the preponderance in numbers and interests of the creditors with the preponderance in value. It is envisaged that the exercise of such a casting vote would be most appropriate in circumstances where:

a) the creditors with a majority in value have such an overwhelming interest that it is inappropriate to allow a majority in number, who do not have the same monetary interest, to carry the day, or vice versa; or

b) the inability to arrive at any decision because of continuing deadlocks, affects the welfare of the company concerned.
4. **Is a chairperson compelled to exercise the casting vote?**

The exercise of the casting vote is not compulsory. Regulation 5.6.21(4) indicates that in the event of a split resolution, the person presiding at the meeting *may* exercise a casting vote. Prior to the 31 December 2007 amendments to the Regulations, Regulation 5.6.21(4) stated that:

If no result is reached [by the obtaining of both a majority in value and number], then:

(a) the person presiding at the meeting may exercise a casting vote in favour of the resolution, in which case the resolution is carried; or

(b) the person presiding at the meeting may exercise a casting vote against the resolution, in which case the resolution is not carried.

Use of a discretionary term where a mandatory term could easily have been used, suggested that the chairperson has discretion whether or not to exercise a casting vote and Courts had held that where an administrator decided not to exercise his or her casting vote, the administrator did not act improperly: *Network Exchange Pty Ltd v MIG International Communications Pty Ltd* (1994) 13 ACSR 544 and followed in *Central Spring Works Australia Pty Ltd (adm appd) [2000]* VSC 145.

However, in *Re Martco Engineering Pty Ltd* (1999) 32 ACSR 487 at 489 it was suggested that the wording in regulation 5.6.21 assumed that the casting vote will be exercised. Similarly in *Cresvale Far East v Cresvale Securities* (2001) 19 ACLC 659 Austin J agreed (at p 677-678) that the drafting of regulation 5.6.21 seems to assume that the casting vote will be exercised, because the regulation makes no other provision for the outcome in the event that creditors by value and creditors by number disagree with one another. His Honour states:

> It is arguable that in these circumstances, the person presiding at the meeting has a duty to deliver an outcome by exercising the casting vote.

This directly contradicts the wording of section 600C which expressly contemplates the chairperson not exercising his or her casting vote, allowing a creditor to apply to the court for relief if:

> … because the person presiding at the meeting exercises a casting vote, or refuses or fails to exercise such a vote, a proposed resolution is not passed at a meeting of creditors of the company... [emphasis added]

As stated above, with operation from 31 December 2007, the *Corporations Amendment Regulations 2007 (No 13)* have now removed any doubt on the question by introducing paragraph (c) to Regulation 5.6.21(4):

(c) if the person presiding at the meeting does not exercise a casting vote, the resolution is not carried.

This now makes the chairperson's option to exercise the casting vote or not explicit and determines that if the chairperson elects not to exercise their casting vote the resolution is defeated.

In the recent case of *Ausino International Pty Ltd v Apex Sports Pty Ltd* [2007] NSWSC 289, the deed administrator did not exercise his casting vote to resolve a deadlock between the majority of creditors in value who wished to have a DOCA set aside and the majority of creditors in number who did not. The court decided that the administrator
should have exercised the casting vote and espoused the proposition [at 16] that although a chairperson has a discretion whether to exercise a casting vote, perhaps especially at a first meeting of creditors in a voluntary administration, 'the discretion can not be regarded as unfettered'. In fact, in the court's view, an administrator in a voluntary administration should exercise the casting vote 'unless there is some good reason to refrain from doing so'. The court's rationale was that the main purpose of the casting vote was to resolve deadlocks. It can therefore be assumed that in the event of a deadlock, a casting vote should be exercised unless the chairperson has a good reason not to exercise the vote.

*Ausino International* is also authority for the proposition that in deciding whether to exercise a casting vote, the chairperson must only have regard to relevant factors. In that case, the chairperson had declined to exercise his casting vote for several reasons including that there remained some dispute about the amounts that certain creditors should have been admitted to vote for at the meeting. Barrett J found that the administrator took into account irrelevant considerations in deciding not to exercise the casting vote. At [16] he stated that in deciding whether to exercise a casting vote a person is acting in an administrative decision making role and has a duty:

…to take into account relevant matters and to leave out of account irrelevant matters – with questions of relevance determined according to the purpose for which the power exists and the context in which it becomes exercisable.

The court said at [19] that it was not part of the chairperson's function when considering whether to exercise the casting vote to act on the footing that previous decisions made by the chairperson on admission or rejection of proofs for the purposes of voting were possibly questionable or wrong. Instead, this was an issue which should have been resolved prior to the meeting in accordance with the relevant regulations.

5. **Considerations that a chairperson should take into account when exercising a casting vote**

Once a chairperson has made the decision to exercise a casting vote, they must determine how that vote is to be exercised.

The Insolvency Practitioners Association of Australia (**IPAA**) at one time issued guidelines for voluntary administrations (Guidelines for Voluntary Administrations, 1/12/95) in which it stated that where a person has elected to exercise their casting vote, the person should:

… have regard to the wishes of the creditors with the greatest pecuniary interest in the likely outcome of the administration, that is that the vote should be exercised in accordance with the wishes of the majority in value of the creditors.

As stated below, perhaps in response to judicial commentary, this is no longer the view of the IPAA.

The notion that there is a general rule that the administrator should exercise the casting vote to prefer the view of the majority in value over the view of the majority in number has been rejected in several cases. Indeed in the context of a voluntary administration the courts have shown a willingness to uphold the exercise of a casting vote in favour of a deed of company arrangement supported by the majority of creditors by number and
opposed by the creditor holding the majority of the debt by value as long as the proposed arrangement was seen to be furthering the purposes of Part 5.3A: *Re Bartlett Researched Securities Pty Ltd (admin apptd)* (1994) 12 ACSR 707; *Hamilton v National Australia Bank Ltd* (1996) 14 ACLC 1202.

In considering this issue in the case of *Re Martco Engineering Pty Ltd* (1999) 32 ACSR 487, Santow J held that rather than arbitrarily favouring the majority in value, in exercising the casting vote, the administrator must act in the interests of creditors as a whole so as to avoid an unfair outcome for some creditors. This proposition was affirmed by Austin J in *Cresvale Far East v Cresvale Securities* (2001) 37 ACSR 394 (reversed on other grounds in *Kirwan v Cresvale Far East Ltd (in liq)* (2003) 21 ACLC 371).

In *Young v Sherman* (2001) 166 FLR 96 at 111 (reversed on appeal but on a different point) the court also confirmed that administrators are not required to exercise their casting vote simply by preferring the majority in value, but that instead they should weigh up all relevant factors and proceed according to what is in the best interests of creditors affected by the vote. This view was most recently endorsed by the New South Wales Supreme Court in *Ausino International* at [13] where it was acknowledged that any exercise of the casting vote must be consistent with the interests of creditors as a whole and likewise any decision not to exercise the casting vote must be consistent with the interests of creditors as a whole.

Reversing its earlier position on the exercise of the casting vote, in 2005 the IPAA released the Statement of Best Practice "Calling and Conducting Creditors’ Meetings" which states that that when exercising a casting vote, a Chair:

> … shall weigh up all relevant factors allowing the Chair to exercise his or her casting vote and to then exercise it in good faith, for proper purpose and in the best interests of creditors as a whole.

The Statement of Best Practice also indicates that a chairperson should declare at the meeting of creditors the rationale for exercising the casting vote, whether for or against a particular resolution, or choosing not to exercise the casting vote. The rationale if declared, will be recorded in the minutes. This recommendation has now been enshrined in law by the *Corporations Amendment Regulations 2007*(No. 13) which introduced Regulation 5.6.21(4A) which states:

> If no result is reached under subregulation (2) or (3), and the meeting is not a meeting of eligible employee creditors, the person presiding at the meeting must include in the minutes of the meeting the reasons for exercising, or not exercising as the case may be, a casting vote under subregulation (4).

The IPAA, adopting the position expressed in the case law, then provides a non-exhaustive list of matters for the chairperson to consider when exercising a casting vote. Those factors include:

- Do creditors with a majority in value however not in number have an overwhelming interest over those in number?
- What opinion, if any, was proffered by the member in support or opposition of the resolution in any report to creditors or otherwise?
- Has any information come to the member’s attention since the member formed his or her opinion that might require a change in support of that opinion?
- What level of influence is direct or indirect opportunity of financial reward having upon the member’s intention to exercise of the casting vote?
• Of those creditor(s) opposing the member’s opinion, do any have a motive that may not be considered to be in the best interests of the population of creditors and/or contrary to the purpose and objectives of the appointment?
• Are those creditors opposing the member’s opinion making an informed and unbiased decision?
• Can the purpose for exercising the casting vote be substantiated by independent, objective and impartial reasoning?
• Will any unfair advantages accrue to the directors by exercising a casting vote in favour of the member’s opinion?
• Should the member seek to adjourn the meeting for the purpose of further consideration or taking advice?
• What proxies have been given on the basis that the member would vote in accordance with his recommendation?

6. Can a chairperson exercise a casting vote in relation to a resolution dealing with his or her replacement or remuneration?

There has been some criticism and question of a chairperson’s ability to effectively confirm their own appointment as voluntary administrator through the use of casting vote on a deadlocked resolution put at the first meeting of creditors in a voluntary administration to replace the administrator.

In Young v Sherman (2001) 166 FLR 96 at 111, at a second meeting of creditors, a creditor proposed a motion that the administrator be replaced. The administrator used his casting vote against his proposed replacement. The exercise of that casting vote was appealed before the Court. Justice Austin found that it was reasonable for the administrator to have exercised the casting vote to defeat the replacement motion because the vote was cast after a resolution to enter into a Deed of Arrangement was carried (also as a result of a casting vote). Engaging another administrator would have risked undermining the Deed. Justice Austin recognised that ability of the chairperson to use the casting vote to keep himself or herself in office was by no means clear. Quoting his previous thoughts on the matter in the case of Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd (2001) 37 ACSR 394, he noted:

In the Cresvale case (at 423) I said, ‘It is not easy to think of circumstances in which it would ever be appropriate for an administrator to [vote to keep himself in office notwithstanding that the largest creditor by far wished to remove him]”. The facts of the present case are the circumstances that I could not think of on that occasion. Experience has once again trumped imagination.

His Honour concluded [at 111] that although a court may be suspicious where an administrator exercises a casting vote in order to keep themselves in office, if it can be shown to be in the interests of the administration it will be acceptable.

In Kirwan v Cresvale Far East Ltd (in liq) [2002] NSWCA 395; (2003) 21 ACLC 371 Giles and Meagher JJA thought it was appropriate for an administrator to exercise a casting vote to defeat a proposed resolution to remove him, given his critical attitude towards the conduct of the liquidators to whom the administration might pass. The liquidators had been responsible for the winding up of a related company.

The issue of a chairperson purporting to use the casting vote to approve their own remuneration as administrator or liquidator was recently considered by Barrett J in the case
of Krejci as liquidator of Eaton Electrical Services [2006] NSWSC 782. In that case the applicant was the administrator and subsequently the liquidator of the company. At a meeting of creditors chaired by the applicant it was resolved that the company be wound up. Two further resolutions were proposed, one for the applicant’s remuneration as administrator and the other for his remuneration as liquidator. The resolutions were passed only because the applicant used his casting vote. The applicant later sought confirmation from the court that the resolutions approving his remuneration were validly passed, or alternatively approval from the court for his remuneration.

Barrett J recognised that there was no rule in relation to the exercise of the casting vote equivalent to that contained in Regulation 5.6.33 which prohibits persons from voting in favour of any resolution which would place them ‘in a position to receive any remuneration out of assets of the company except as a creditor rateably with the other creditors of the company’. However, his Honour found that there was an unwritten rule that a chairman exercising the casting vote under Regulation 5.6.21(4) must act ‘honestly and in accordance with what he believed to be the best interests of those affected by the vote’:

Kirwan v Cresvale Far East Ltd (in liq) per Young CJ in Eq. Barrett J emphasised that an administrator was a fiduciary of the company and has the task of administering and applying the company’s property for the benefit of others. As a fiduciary, the administrator:

… must subordinate personal interests to those of the person or group whose interests are to be served. Any profit derived from the fiduciary office without the informed consent of the person or group concerned may not be retained. A related aspect of the expectations to which fiduciaries are subject requires that they not put themselves in a position where their duties conflict with their interests.

In Krejci, Barrett J found that when faced with a deadlock over the question of his remuneration the chairman had three paths available to him:

(a) he could exercise the casting vote in favour of the remuneration resolution;
(b) he could exercise the casting vote against the remuneration resolution; or
(c) he could not exercise the casting vote at all.

In Barrett’s view, either the second or third paths would have been acceptable as they would have resulted in the remuneration resolution not being passed, in which event the fixing of the application’s remuneration would have been a matter for the decision by the court. Exercising the casting vote in favour of the resolution, however, was a breach of fiduciary duty and equity would not allow the applicant to retain any remuneration received in reliance on the resolution.

7. Challenging the chairperson’s exercise of a casting vote

Where a resolution is passed by the casting vote of the chairperson, a creditor who voted against the resolution may apply to the court for an order setting aside or varying the resolution under section 600B of the Act. Similarly, where a resolution is not passed because of the casting vote of the chairperson or the chairperson refusing or failing to exercise a casting vote, a creditor who voted for the resolution can apply to the court under section 600C for an order that the resolution is taken to have been passed at the meeting. The Act does not indicate what issues or factors a Court will consider in determining
whether to make an order under sections 600B-C. It is therefore helpful to examine some case law which has considered these provisions.

7.1 ‘Good Faith' not sufficient to avoid judicial review.

In Yeomans v Walker (1986) 5 NSWLR 378 it was said that:

A court should not interfere with a decision made by a liquidator unless there is fraud, or it can be demonstrated that the discretion has not been exercised bona fide, or it can be said that the liquidator has acted in a way in which no reasonable liquidator would have acted (para 6).

This decision was cited in Hawkwood Holdings Pty Ltd & Anor v Williamson (liquidator of Merlino Construction Services Pty Ltd) [2000] WASC 73 in which Master Bredmeyer considered an application under section 600B to set aside a resolution, passed by virtue of a liquidator's casting vote, to enter into a funding agreement to pursue an unfair preference claim of $620,000 against the applicant.

The applicant argued, amongst other things, that the resolution should be set aside because of the liquidator's financial interest in the resolution. The liquidator was owed fees and would gain priority repayment if the resolution was carried. The Court decided not to interfere with the exercise of the casting vote because the liquidator had not misled or defrauded the creditors about his entitlement for payment. Despite his personal financial interest in the outcome of the resolution, given such disclosure, there was no need for him to decline to exercise a casting vote. Master Bredmeyer stated that the liquidator acted properly:

in casting a vote for a resolution which offered reasonable prospects of recovering money for the benefit of all creditors, even though it incidentally offered the prospect of recovering money to pay his fees.

However despite the judicial position espoused above, other cases have indicated that it is not sufficient that a casting vote be exercised honestly (Martco Engineering, Cresvale). In August of 2007, the Federal Court in its decision of Deputy Commissioner of Taxation v Wellnora Pty Limited [2007] FCA 1234 considered the cases that have examined the issues relevant to the exercise of the casting vote under Regulation 5.6.21 and of applications under section 600B to set aside a resolution passed on the casting vote and concluded that the authorities showed that:

1. Good faith alone will not necessarily shield the resolution from a setting aside (or variation under s 600B);
2. A factor that may justify setting aside the resolution is a statement or omission from the administrator's report under s439A that is apt to have misled creditors when they cast their deliberative vote;
3. Inadequacy and superficiality of an administrator's investigation of the company's business, property, affairs and financial circumstances, at least as disclosed by the evidence before the Court, may warrant a setting aside of the resolution;
4. There is no presumption in favour of the majority in value, although any large disproportion between the values of the debts of the numerical minority and the numerical majority will be a factor to be taken into account; and
5. Payment of a premium to the creditors who supported the DOCA but not to a dissident creditor will justify a setting aside by the court.

Similarly, in Blue Ring Pty Ltd v Landshore Pty Ltd [2006] WASC 245 at [47] Newnes J said 'the court does not automatically accept the honest exercise of the casting vote as an
appropriate one’ and in deciding whether to review the chairperson’s exercise of the casting vote may consider whether the casting vote was exercised in the interests of the creditors as a whole.

7.2 Review of the reasons for the exercise of the casting vote

The court's power to set aside or vary resolutions affected by the use of the casting vote extends to a review of the reasons for the chairperson exercising the casting vote in the first place. To that end, Newnes J in Blue Ring [at 47] expressed the view that, in reviewing a chairperson's use of the casting vote, the court should have available to it the material that was available to chairperson in making his or her decision to exercise the vote.

The importance of the reasons behind the exercise of the casting vote is reflected in the fact that the recent amendments to the Regulations introduced the requirement that when there is a deadlock at a creditors’ meeting, the reasons for the chairperson deciding either to exercise or not to exercise the casting vote will now have to be published in the minutes of the meeting: Regulation 5.6.21(4A).

Soia & Ors v Internet Tuition College Pty Ltd (Administrator Appointed) [2002] WASC 125 is another example of a case where the court expressly reviewed the administrator’s reasons for exercising the vote.

In that case, a proposed DOCA was put to a second meeting of creditors in a voluntary administration. A majority in value voted in favour of the resolution. A majority in number voted against. The presiding chairperson (a nominee of the administrator) exercised a casting vote in favour of the DOCA and the resolution was passed. The aggrieved creditors argued that the chairperson was not entitled to exercise a casting vote because she had merely voted with the majority in value without considering the merits. The chairperson's report referred to the 1995 Guidelines issued by IPAA which stated that where a deadlock exists the chairperson should prefer those credits with the greatest pecuniary value. The creditors correctly submitted that this approach was doubtful in light of the decision in Cresvale. White J examined the chairperson's reasons for exercising a casting vote and concluded that the chairperson had acted properly because, even though the chairperson's report referred to the IPAA guidelines, the chairperson had used the casting vote in favour of the resolution based primarily on the recommendation made the administrator's report, rather than an outright preference for the majority in value over the majority in number of creditors voting and that was a proper basis for the use of the casting vote.

7.3 Other factors a court may consider when assessing whether a casting vote was exercised appropriately

In Cresvale Austin J listed at [416] the kind of factors that a court may consider when deciding whether an administrator exercised a casting vote to support a proposed deed of company arrangement appropriately. He cited Re Coaleen Pty Ltd (1999) 30 ACSR 2000 and stated that this case showed that it was relevant to take into account as factors matters such as:
opposition to the proposal by the major creditor, especially where there is a large
disproportion between the major debt and other debts;

• support of the proposal by the directors where the proposal could deliver an
advantage to the directors;

• misleading information in the administrator’s report; and

• whether creditors who voted in favour of the deed would be prejudiced if the court
set aside the resolution.

The court may also be influenced by whether the administrator had made adequate
investigations before deciding to use the casting vote.

Similarly, as set out above, Lindgren J in the recent decision of Deputy Commissioner of
Taxation v Wellnora Pty Limited went into some detail outlining the factors that may be
relevant to a court’s consideration of whether the casting vote has been properly exercised
(or not exercised as the case may be). Ultimately in that case Lindgren J accepted at [220]
that the chairman had exercised his casting vote in good faith and the interests of the
company. The chairman gave evidence in considerable detail of his course of reasoning
and materials that led him to exercise his casting vote, that he treated all creditors equally,
carried out a thorough investigation, indicated lines of inquiry which could be pursued by a
liquidator, formed view that recovery proceedings might be fruitless and exercised vote in
favour of DOCA which he thought would give better return. This was found to be sufficient
to have justified the use of the casting vote in favour of the DOCA.

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