FEDERAL COURT OF AUSTRALIA

Fewin Pty Ltd v Prentice [2016] FCA 1239

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| File number: |  |
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| Judge: | **MARKOVIC J** |
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| Date of judgment: | 20 October 2016 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – whether proxies were validly exercised in the appointment of the president and minutes secretary of a creditors’ meeting and in passing a resolution approving the remuneration of the trustee in bankruptcy – whether the basis of the remuneration of the trustee in bankruptcy can be fixed retrospectively – meaning of “chairman”  |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 30, 63A, 64E, 64K, 64L, 64M, 64N, 64P, 64Q, 64R, 64S, 64T, 64U, 64Z, 64ZA, 64ZB, 64ZC, 82, 83, 102, 162, 178, 179, 257, 306*Bankruptcy Regulations 1966* (Cth) rr 8.08 and 8.09*Corporations Act 2001* (Cth) ss 128, 129, 250D  |
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| Cases cited: | *Adams v Lambert* (2006) 228 CLR 409*Coshott v Coshott* (2010) 184 FCR 495*Cummings v Clairmont Petroleum NL and Another* (1996) 185 CLR 124*Doolan v Dare* (2005) 142 FCR 287*Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265*Frost v Sheahan (Trustee)* [2009] FCAFC 20*Nilant v Macchia* (2000) 104 FCR 238*Sopikiotis, in the matter of the Sopikiotis (Bankrupt) v Vince (Trustee)* [2013] FCA 592*Talacko v Talacko* (2010) 183 FCR 311*Worrell v Cash* (1995) 60 FCR 413Brown L (ed), *The New Shorter* *Oxford English Dictionary* (4th ed, Clarendon Press, 1993)Butler S (ed), *Macquarie Dictionary* (6th ed, Macquarie Dictionary Publishing Pty Ltd, 2013)Lang DA, *Horsley’s Meetings: Procedure, Law and Practice* (5th ed, LexisNexis, 2006) [16.16]  |
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ORDERS

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|  | NSD 25 of 2016 |
|   |
| BETWEEN: | FEWIN PTY LIMITED ACN 051 132 453Applicant |
| AND: | MAXWELL WILLIAM PRENTICERespondent |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 20 OCTOBER 2016 |

THE COURT DECLARES THAT:

1. The respondent was not entitled to vote on the election of the person to preside at the creditors’ meeting convened on 16 December 2015 in the bankrupt estate of Robert Gilbert Coshott as proxy for Stephen Michael Barry and Martin Pearce Board.
2. The proxy given by the Australian Taxation Office was limited to voting on the motions specified therein in the manner specified therein for each such motion and could not be used for any other purpose.
3. The proxy given by Woollahra Municipal Council was limited to the motions specified therein in the manner specified therein for each such motion and could not be used for any other purpose.
4. The motion approving the respondent’s remuneration is not valid.

**THE COURT ORDERS THAT:**

1. The parties are to file and serve any submissions, not exceeding 5 pages in length, going to the issue of costs by 3 November 2016 and in doing so are to indicate whether an oral hearing on the issue of costs is required or whether the question of costs can be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MARKOVIC J:

# introduction

1. Mr Robert Gilbert Coshott (**Robert Coshott**) was made a bankrupt on 7 November 2008 and has since been discharged. The current trustee of Robert Coshott’s bankrupt estate (**the Coshott Estate**), Maxwell William Prentice (**the Trustee**), who is the respondent to this proceeding, was appointed at a meeting of creditors held on 21 March 2013. Fewin Pty Ltd (**Fewin**) and Ronald Michael Coshott (**Ronald Coshott**), the applicants to this proceeding, are creditors of the Coshott Estate.
2. This proceeding concerns a meeting of the creditors of the Coshott Estate which took place on 16 December 2015 (**the Creditors’ Meeting**). The Creditors’ Meeting was convened to consider and pass a resolution to approve the Trustee’s remuneration. It is common ground that, since the date of his appointment, the Trustee had not sought any approval for nor drawn any remuneration. The applicants allege that the Creditors’ Meeting was irregular in relation to the appointment of the minutes secretary and President and what flowed as a result of those appointments principally the proposing and passing of the motion approving the Trustee’s remuneration.

# the applicants’ claims

1. The applicants’ specific claims for relief are set out in their application filed on 8 January 2016. In reliance on ss 30, 178 and 179 of the *Bankruptcy Act 1966* (Cth) (**the Act**) they seek declarations that:
2. the Trustee was not entitled to vote on the election of the person to preside at the Creditors’ Meeting as proxy for the Australian Taxation Office (**ATO**), the Commonwealth Bank of Australia (**CBA**); Woollahra Municipal Council (**Woollahra Council**), the Official Trustee in Bankruptcy (**Official Trustee**) and Messrs Stephen Michael Barry and Martin Pearce Board formerly trading as CKB Partners (**Barry and Board**);
3. the Trustee was not elected as the person to preside at the Creditors’ Meeting;
4. the Trustee was not entitled to vote at the Creditors’ Meeting as proxy for the ATO, the CBA and Woollahra Council;
5. the proxy purported to be given by the ATO was not valid;
6. in the alternative to (4), the proxy given by the ATO was limited to voting on the motions specified therein in the manner specified therein for each such motion and could not be used for any other purpose;
7. the proxy purported to be given by the CBA was not valid;
8. in the alternative to (6), the proxy given by the CBA was limited to voting on the motions specified therein in the manner specified therein for each such motion and could not be used for any other purpose;
9. the proxy purported to be given by Woollahra Council was not valid;
10. in the alternative to (8), the proxy given by Woollahra Council was limited to voting on the motions specified therein in the manner specified therein for each such motion and could not be used for any other purpose;
11. Ronald Coshott was elected as the person to preside at the meeting;
12. Ronald Coshott, as the person elected to preside at the meeting, was entitled to vote at the meeting as proxy, if the proxy was valid, for the CBA, Woollahra Council, the Official Trustee and Barry and Board in the manner specified in each such proxy; and
13. the motion approving the Trustee’s remuneration is not valid.
14. At the hearing the applicants abandoned that part of their application in which they sought relief in relation to a motion proposed at the creditors’ meeting concerning the removal of the Trustee.
15. Sections 30, 178 and 179 of the Act relevantly provide:

**30 General powers of Courts in bankruptcy**

(1) The Court:

(a) has full power to decide all questions, whether of law or of fact, in any case of bankruptcy or any matter under Part IX, X or XI coming within the cognizance of the Court; and

(b) may make such orders (including declaratory orders and orders granting injunctions or other equitable remedies) as the Court considers necessary for the purposes of carrying out or giving effect to this Act in any such case or matter.

**178 Appeal to Court against trustee’s decision etc.**

(1) If the bankrupt, a creditor or any other person is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable.

(2) The application must be made not later than 60 days after the day on which the person became aware of the trustee’s act, omission or decision.

**179 Control of trustees by the Court**

(1) The Court may, on the application of the Inspector-General, a creditor or the bankrupt, inquire into the conduct of a trustee in relation to a bankruptcy and may do one or both of the following:

(a) remove the trustee from office; and

(b) make such order as it thinks proper.

1. In my opinion, s 179 would not be an appropriate basis for the relief sought by the applicants having regard to the declarations sought and the way the matter proceeded before me. Section 179 permits an inquiry into the conduct of a trustee in relation to a bankruptcy and reflects the Court’s more general supervisory role. It is typically employed where an allegation of misconduct or error is made against a trustee. The onus is on the applicant to establish a case for an inquiry. Where relief is sought pursuant to s 179, the Court will usually engage in a two stage process: it will first consider whether there is a basis to order an inquiry and, if there is and an inquiry is ordered, what if any order should be made as a result of the inquiry. The Court has a broad discretion to order an inquiry but should be reluctant to do so unless there are “substantial grounds for believing that the trustee erred in his administration”, “sufficient grounds” and “reasonable cause to believe that a trustee may have failed to act in relation to a bankruptcy in the manner required by the Act or the general law”: *Sopikiotis, in the matter of the Sopikiotis (Bankrupt) v Vince (Trustee)* [2013] FCA 592 at [15].
2. No submissions going to issues relevant to whether an inquiry should be ordered were made. Indeed senior counsel for the applicants seemed to suggest, without conceding the point, that this was probably not a matter appropriate for an order pursuant to s 179. Further, as the events complained of are specific and all the evidence is before the Court in relation to those events, there would be no utility in ordering an inquiry pursuant to s 179.
3. If relief is to be granted, the more appropriate basis for exercise of the Court’s jurisdiction to make the declarations sought is pursuant to ss 30 or 178. Section 30 of the Act is not to be construed narrowly. The power conferred on the Court by the section is intended to assist in the exercise of the jurisdiction in bankruptcy. However, it is an ingredient of the exercise of discretion under s 30 that it be “necessary for the purposes of carrying out or giving effect” to the Act: *Talacko v Talacko* (2010) 183 FCR 311 at [19].
4. Section 178 confers a supervisory jurisdiction on the Court over the conduct of a trustee: *Cummings v Clairmont Petroleum NL and Another* (1996) 185 CLR 124 at 132. The terms of s 178 require that there be an act, omission or decision of a trustee. An applicant for relief under s 178 need not show that a trustee’s decision was absurd, unreasonable or taken in bad faith, but at the same time the Court will be slow to make orders which will have the effect of interfering in the day to day administration of a bankrupt’s estate and, in cases involving an exercise of commercial judgment, will place considerable weight on the trustee’s decision. An order can be made under s 178 even if the trustee’s decision was correct on the material before him or her if, for example, additional material is put before the Court: *Frost v Sheahan (Trustee)* [2009] FCAFC 20 at [8].

# statutory framework and relevant principles

## Procedures at meetings

1. Relevant to the matters in issue in this proceeding are the procedures to be observed at a meeting of creditors which are principally set out in Subdiv D of Pt 4 Div 5 of the Act.
2. Section 64K(1) provides that the trustee is to preside at the meeting until a person is appointed to preside under s 64P. Among other things, the trustee is required to open the meeting and introduce him or herself.
3. Section 64L deals with the appointment of a minutes secretary. It relevantly provides:

**64L Appointment of minutes secretary**

(1) The trustee must then:

(a) invite the creditors and their representatives to propose a motion appointing a person to record the minutes of the meeting; or

(b) if no such motion is passed—appoint a person to record those minutes.

(2) Anyone participating in person in the meeting, whether or not a creditor or a proxy or attorney of a creditor, and including the trustee but not including the bankrupt, is eligible for appointment as the minutes secretary.

…

1. Once appointed the minutes secretary is required to take the minutes of the business transacted at the meeting in accordance with s 64Z. Section 257 provides that the minutes of proceedings at a meeting of creditors signed by a person describing him or herself as, or appearing to have been, chair of the meeting is prima facie evidence of those proceedings.
2. Section 64M requires a trustee to announce the names of the creditors who are not participating in person or by telephone but whose proxies or attorneys are participating in person or by telephone and the names of the proxies and attorneys. It also requires the trustee to circulate the instruments appointing proxies and the powers of attorney or copies of those powers of attorney for inspection by persons present at the meeting. Section 64N then requires the trustee to determine whether a quorum is present.
3. Section 63A defines “President”, in relation to a meeting, as the person elected under s 64P to preside at the meeting. Section 64P sets out the procedure to follow for election of a person to preside at the meeting. Relevantly, that section provides:

**64P Election of person to preside at meeting**

(1) The trustee must:

(a) invite the creditors and their representatives to nominate a person for election to preside at the meeting; or

(b) if no person is so nominated—nominate a person for election to preside at the meeting.

(2) Anyone participating in person in the meeting, whether or not a creditor or a proxy or attorney of a creditor, and including the trustee but not including the bankrupt, is eligible to be nominated for appointment, and may be elected, to preside at the meeting.

(3) If only one person is nominated, that person is taken to be elected to preside at the meeting.

(4) If 2 or more persons are nominated, an election is to be held to determine which of the persons nominated is to preside at the meeting and the person who receives the greatest number of votes (whether or not a majority of the votes cast) is taken to be elected to preside at the meeting.

(5) Subject to subsection (6), voting at the election is to be on the voices.

(6) If the trustee is unable to determine which of the persons nominated received the greatest number of the votes on the voices, the trustee must ask each creditor, and each proxy or attorney, participating in person or by telephone to state for which nominee the creditor, proxy or attorney is casting a vote or whether the creditor, proxy or attorney is abstaining from casting a vote.

(7) If 2 or more persons each receive the greatest number of votes, the trustee must decide by lot which of those persons is to be chosen to preside at the meeting, and the person so chosen is taken to be elected to preside at the meeting.

(8) A person elected under this section to preside at the meeting is to preside at all times after he or she is elected.

…

1. After the President has been elected he or she must undertake the duties imposed by the Act. He or she must:
2. invite creditors and their representatives to propose a motion that the meeting is being held at a time, date and place that are convenient to a majority of creditors. In the event that no such motion is proposed or such a motion is proposed, but not passed, the meeting is adjourned to such time, date and place as the meeting resolves: s 64Q;
3. if the meeting is the first meeting, request the trustee to lay the bankrupt’s statement of affairs before the meeting and the trustee must comply with that request: s 64R;
4. invite the trustee and the creditors and their representatives to make statements to the meeting and after the statements have been made invite the creditors and their representatives to ask questions of the trustee and, if the bankrupt is present, of the bankrupt. Once the statements, if any, have been made and the questions, if any, have been asked, the President may, if he or she wishes to do so, summarise the matters raised in any such statements and questions and the answers given by the trustee and the bankrupt: s 64S; and
5. invite the creditors and their representatives to propose any relevant motions: s 64T.
6. Sections 64ZA and 64ZB concern voting under s 64P or on any motion. Section 64ZA sets out the requirements for voting at an election under s 64P of a person to preside at a meeting, on any motion proposed at a meeting or an amendment proposed to such a motion. It relevantly provides:

…

(2) In this section:

***creditor*** means a creditor who, or whose proxy or attorney, participates in the meeting in person or by telephone.

(3) A person other than a creditor is not entitled to vote.

(4) Subject to subsections (5) and (6), each creditor is entitled to vote and has one vote.

(5) If a creditor is a secured creditor, the creditor is not entitled to vote unless the debt, or the total amount of the debts, owed to the creditor exceeds the amount estimated by the creditor in the statement given to the trustee under section 64D to be the value of the security.

(6) A creditor who has failed to give to the trustee a statement in accordance with section 64D is not entitled to vote.

(7) A creditor is not disqualified from voting merely because the creditor is the President or the minutes secretary.

(8) The trustee may determine any question that arises as to the entitlement of a person to vote.

1. Section 64ZB sets out the manner of voting and relevantly provides:

(1) A creditor who participates in a meeting in person or by telephone may cast the creditor’s vote personally and not otherwise.

(2) Subject to subsections (3) and (5), the vote of a creditor who is not participating in a meeting in person or by telephone may be cast by a proxy duly appointed by the creditor, or by an attorney duly authorised by the creditor under a power of attorney, being a proxy or attorney participating in the meeting in person or by telephone, and the casting of a creditor’s vote by such a proxy or attorney is taken to constitute the casting of a vote by the creditor.

(3) A person claiming to be the proxy of a creditor is not entitled to vote as proxy unless the instrument of appointment has been lodged with the President (or with the trustee, before the President was elected), either before or after the announcement is made under section 64M about the appointment of proxies and attorneys.

…

(4) A creditor’s proxy or attorney is not disqualified from casting the creditor’s vote merely because the proxy or attorney is the trustee, the President or the minutes secretary.

(5) If the trustee or an associate of the trustee is a creditor’s proxy or attorney, the trustee or associate may not cast the creditor’s vote on a motion relating to the trustee’s remuneration unless the instrument appointing the proxy or the power of attorney, as the case may be, expressly authorises the trustee or associate to cast the creditor’s vote on such a motion.

(6) For the purposes of subsection (5), a person is an associate of the trustee if the person is:

(a) a partner of the trustee; or

(b) an employee of the trustee; or

(c) a solicitor for the trustee, for a partnership in which the trustee is a partner, or for a person or partnership that employs the trustee.

(7) A motion proposed at a meeting is to be resolved:

(a) subject to paragraph (b)—on the voices; or

(b) if:

(i) the President is unable to determine the result of the voting on the voices; or

(ii) any of the creditors and their representatives requests a poll, whether the request is made before the motion is put to the vote on the voices or after the President announces the result of the vote on the voices; or

(iii) the motion relates to a matter in respect of which this Act requires the passing of a resolution or special resolution;

by a poll taken:

(iv) by a show of hands or written votes of creditors, or proxies or attorneys, participating in person; and

(v) by statements made by telephone to the President by creditors, or proxies or attorneys, participating by telephone.

(8) For the purposes of determining whether a motion proposed at the meeting is resolved, the value of a creditor who:

(a) has been assigned a debt; and

(b) is present at the meeting personally, by telephone, by attorney or by proxy; and

(c) is voting on the motion;

is to be worked out by taking the value of the assigned debt to be equal to the value of the consideration that the creditor gave for the assignment of the debt.

1. Section 64ZC deals with appointment of proxies. It prescribes what must be included in an instrument appointing a proxy: the full name and residential or business address of the creditor and of the person appointed as proxy and the bankrupt’s name and whether the appointment relates to a particular meeting or all meetings: subss (1) and (3). It also provides that an instrument appointing a proxy may appoint more than one person as a proxy and then sets out what is to occur if that is the case. In particular if the first named person is participating in the meeting, in person or by telephone, only that person can cast the creditor’s vote and any other nominated person can only participate and vote if no person named before that person is participating in the meeting: subs (2). An instrument appointing a proxy may authorise the proxy to cast the creditor’s vote on all matters arising at the meeting or only on specified matters and may direct the proxy how to vote on a particular matter or matters that may arise at the meeting or on a particular motion or motions that may be proposed: subss (4) and (5).

## Section 306 of the Act – formal defects

1. Also relevant to the matters in issue is s 306 which is in the following terms:

(1) Proceedings under this Act are not invalidated by a formal defect or an irregularity, unless the court before which the objection on that ground is made is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.

(2) A defect or irregularity in the appointment of any person exercising, or purporting to exercise, a power or function under this Act or under a personal insolvency agreement entered into under this Act does not invalidate an act done by him or her in good faith.

1. Section 5 of the Act defines “proceeding” to mean a proceeding under the Act. The word “proceeding” in s 306(1) is not confined to curial proceedings and should be given a wide meaning. In *Nilant v Macchia* (2000) 104 FCR 238 (***Nilant***) at [26] Hill J held that the word “proceeding” as used in s 306(1) should be read having regard to the context in which it appears. His Honour said at [27] that the language of s 306 provides the best guide to the meaning of “proceeding” and that the proceeding must be one which, but for s 306, is invalidated by reason of the formal defect or irregularity referred to and, albeit itself not curial, it must be one which is capable of coming before the court on an objection concerning an invalidity. Weinberg J at [51]-[53] agreed with Hill J in relation to the way in which the word “proceeding” should be considered when used in s 306(1). His Honour listed examples of steps to be taken in relation to the affairs of a person whose estate has been sequestrated all of which required written notice or the filing of documents and which, in his opinion, constituted a proceeding under the Act within the meaning of s 306(1). This included the convening of a meeting of creditors of a bankrupt, the giving of notice of such a meeting and the form of the notice.
2. In *Adams v Lambert* (2006) 228 CLR 409 (***Adams***) the High Court considered s 306 in the context of a bankruptcy notice that had been issued and which misstated the section of the *District Court Act 1973* (NSW) pursuant to which interest was claimed. There being no suggestion of any substantial injustice, the question for the High Court was whether the error was a formal defect or irregularity. The Court (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ) said at [24] to [25]:

24. The composite expression "a formal defect or an irregularity", in its application to a bankruptcy notice, conveys a meaning with elements of both inclusion and exclusion. A failure to comply with a requirement, to be found in the Act, imposed by reference to the regulations as to information to be furnished by the notice, is a defect or irregularity. So, in *Kleinwort Benson Australia Ltd v Crowl,* an erroneous statement of the amount of interest owing on a judgment debt was a defect or irregularity. What is excluded from the section is a defect or irregularity of such a nature that, reading s 306 in the context of the whole Act, it is not "a formal defect or an irregularity". What kind, or degree, of defect is to be regarded as having such a nature?

25. In some cases the answer to that question may be easy. In others, a difficult question of judgment may be involved. The matter for judgment was identified by this Court in *Kleinwort Benson Australia Ltd v Crowl*. In that case, the majority contrasted the concept of a formal defect or irregularity with a defect or irregularity that renders a bankruptcy notice a nullity that cannot be saved by s 306. To describe a defect as merely formal, or to describe a notice as a nullity, is, of course, to state a conclusion, rather than the reason for reaching that conclusion. Even so, it is necessary to identify the question that arises for judgment. The majority, referring to *James v Federal Commissioner of Taxation*, and *Pillai v Comptroller of Income Tax*, summarised the exclusionary aspect of the meaning of "a formal defect or an irregularity" by saying:

The authorities show that a bankruptcy notice is a nullity if it fails to meet a requirement made essential by the Act, or if it could reasonably mislead a debtor as to what is necessary to comply with the notice.

(citations omitted)

1. At [26] to [31] their Honours considered the construction of the phrase “a formal defect or irregularity” noting at [26] that it is to be decided by reading s 306 in the context of the whole Act, informed by the general purpose of the legislation and the particular purpose of, in that case, the provisions relating to bankruptcy notices.
2. At [28], the Court observed that the other exclusionary aspect of the words “a formal defect or irregularity” in s 306 was said to consist of a failure to meet a requirement made essential by the Act. Their Honours said that the word “essential” in its application in a particular case involved a conclusion and held that if a requirement is made essential by the Act then a failure to meet that requirement is not a formal defect or an irregularity within s 306. However whether a requirement is essential is to be decided by the process of statutory construction earlier described by their Honours. The Court noted at [29] that a requirement being expressed by the use of the word “must” is not conclusive of the issue.
3. In *Coshott v Coshott* (2010) 184 FCR 495 Rares J, having already found for other reasons that Mr Burke, the trustee at the time, was validly appointed to the Coshott Estate, considered s 306 of the Act in the context of the appointment of a trustee pursuant to s 181A of the Act. At [37] his Honour said:

However, as the Court made clear in *Adams* 228 CLR at 419-421 [26]-[31] the use of the word “must” is not conclusive. Whether the Act, in providing for something that “must” be done is seeking to create a requirement which, if not met, would automatically invalidate that which was done, must be assessed having regard to what the requirement is and the consequences of non-compliance. Here, the nomination of a new trustee and consequent appointment under s 181A is not of the same character as the consequence to a person failing to meet the requirements of a bankruptcy notice, or the requirements necessary to be observed and fulfilled in order that the court may make a sequestration order against a person’s estate. The identification of a new person to administer the bankrupt’s estate, while having important and serious consequences under the Act, including for the bankrupt, is not of the same order as the consequences that attend upon the steps the Act prescribes as necessary to enable a person’s status to be changed to that of being a bankrupt, or otherwise under administration so as to cause his or her affairs to be administered under the Act, either involuntarily, or as a result of his own act by filing either a debtor’s petition or proposing a personal insolvency arrangement.

## Trustees’ remuneration

1. Another issue that arises in the proceeding concerns the approval of a trustee’s remuneration. The relevant provisions of the Act for the purpose of considering this aspect of the matter are those in force immediately before 1 December 2010 by reason of the date of Robert Coshott’s bankruptcy on 7 November 2008: *Bankruptcy Legislation Amendment Act 2010* (Cth), Sch 1, item 17 and *Bankruptcy Amendment Regulation 2010 (No. 2)* (Cth), reg 4.
2. At the time, s 64U of the Act provided:

**64U Remuneration of registered trustee** [*see* Table B]

(1) If the meeting is the first meeting of the bankrupt's creditors and the trustee is a registered trustee, the President must then ask the trustee to state the basis on which the trustee wishes to be remunerated.

(2) If the trustee states that he or she wishes to be remunerated as prescribed by the regulations, the minutes secretary is to record that statement in the minutes of the meeting.

(3) If the trustee states a different basis for the fixing of his or her remuneration, the following provisions of this section have effect.

(4) The President must invite the creditors and their representatives to propose a motion that the trustee be remunerated in accordance with the statement and, if no such motion is proposed, the trustee may propose such a motion.

(5) A statement to be made by the trustee as mentioned in subsection (3) must:

(a) if the trustee proposes to charge on a time-cost basis:

(i) if there is only one rate at which the remuneration is to be calculated-state that rate: or

(ii) otherwise-state the respective rates at which the remuneration of the trustee and the other persons who will be assisting, or will be likely to assist, the trustee in the performance of his or her duties are to be calculated; or

(b) if the trustee proposes to charge on the basis of a commission upon money received by the trustee-state the rate of that commission;

and must also state the periods at which the trustee proposes to withdraw funds from the bankrupt's estate in respect of the trustee's remuneration.

(5A) The statement under subsection (3) must also include:

(a) an estimate of the total amount of the trustee's remuneration; and

(b) an explanation of the likely impact of that remuneration on the dividends (if any) to creditors.

(6) Any of the creditors and their representatives may ask the trustee questions about the proposed remuneration of the trustee and, if such a question is asked, the trustee must answer it.

(7) Any of the creditors and their representatives may move an amendment to a motion proposed in accordance with subsection (4) so as to change in any way the basis on which the trustee is to charge or the periods at which the trustee may withdraw funds in respect of his or her remuneration or to refer the fixing of the trustee's remuneration to a committee of inspection.

(8) If the meeting is not the first meeting of the bankrupt's creditors and the trustee is a registered trustee, the President must request the trustee to lay before the meeting a statement of the amount of remuneration drawn by the trustee from the funds of the bankrupt's estate before the meeting was held and the trustee must comply with the request.

1. Section 162 of the Act provided, among other things, that a trustee’s remuneration could be fixed, from time to time, by the creditors of the estate or, if the creditors so resolve, by a committee of inspection and where remuneration was not so fixed the trustee was to be remunerated as prescribed by the regulations: subs (1) and subs (4).
2. Regulation 8.08 of the *Bankruptcy Regulations 1966* (Cth) (**the Regulations**) provided that for the purposes of s 162(4) of the Act a trustee's remuneration was to be at 85% of the scale of charges as set out in the IPAA Guide to Hourly Rates published by the Insolvency Practitioners Association of Australia and applicable to the work to be remunerated.
3. Regulation 8.09, titled "Taxation of trustee's remuneration and costs - preliminary", provided in subreg (1) that where the trustee of the estate of a bankrupt claims remuneration under s 162 of the Act, the bankrupt or a creditor who is dissatisfied with the amount of the claim may, by written notice lodged within 28 days of being notified in writing or becoming aware of the claim, request a taxing officer to tax the claim.
4. Section 162(6A), which was introduced on 5 May 2003, provided that the trustee was required to give such notices to the bankrupt and creditors in relation to his or her remuneration as required by the regulations.
5. Regulation 8.12, which was introduced at the same time as s 162(6A), provided that, for the purposes of s 162(6A), the notices that a trustee must give the bankrupt and creditors are:

(a) a notice that includes the basis and the method on which the trustee seeks to be remunerated, and, if appropriate, an estimate of the expected level of the trustee's remuneration;

(b) if the trustee claims remuneration calculated by reference to an hourly rate - a notice that includes:

(i) the type of work undertaken by the trustee and the trustee’s staff; and

(ii) the number of hours charged by each person; and

(iii) the hourly rate charged for each person; and

(iv) the total remuneration claimed;

(c) a notice advising the bankrupt and creditors of their right, within 28 days of receiving notice of a trustee' s claim for remuneration, to request the claim be taxed.

1. In *Doolan v Dare* (2005) 142 FCR 287 (***Doolan v Dare***) a Full Court of this Court (Lee, Merkel and Hely JJ) considered the effect of ss 64U and 162 of the Act, in the form that apply to the Coshott Estate, and the associated regulations. The Full Court held at [8] that s 64U, although headed “Remuneration of registered trustee”, is not itself the source of the trustee’s entitlement to remuneration but prescribes what is to happen at the first, and then subsequent, creditors’ meetings in relation to a trustee’s remuneration. A motion fixing a trustee’s remuneration passed in accordance with s 64U is “a resolution for the purposes of s 162(1)” of the Act.
2. The Full Court noted at [19] that where a trustee in bankruptcy is appointed in the expectation that he or she will be remunerated and there is no prior agreement to act gratuitously the Act, in s 109(1), assumes a right to be remunerated. Their Honours went on to observe that s 162 sets out a mechanism for the fixing of remuneration. The Court said at [20]:

There is nothing in the Act which indicates or requires that the provisions of subsection 162(1) are subject to any contrary wish stated by the trustee at the first meeting of creditors. If the trustee states at that meeting that he or she wishes to be remunerated at the prescribed rate, it would be open to the creditors to fix the trustee’s remuneration under s 162(1), at least in relation to future work, at a lower rate. Section 162(4) does not prevent the creditors from fixing the trustee’s remuneration in relation to work to be undertaken thereafter in a sum or at a rate less than that which would otherwise flow from the application of the prescribed rate. The trustee’s entitlement to a minimum level of remuneration is expressly fixed by s 161B; it does not flow by implication from s 162(4), which is concerned with a different subject matter.

1. The Full Court held at [25] that ordinarily a right to remuneration arises as work is performed and a trustee’s entitlement to remuneration is not dependent on the exercise of the creditors’ power pursuant to s 162(1). Their Honours observed that s 162(4) is self-executing and applies to work done by a trustee if, when it was done, the trustee’s remuneration was not fixed by the creditors or a committee of inspection.
2. Arguments were not put to the Full Court in *Doolan v Dare* in relation to the then recently introduced s 162(6A) and reg 8.12 and the parties agreed that it did not impact on the construction of ss 64U and 162(1) in the context of the facts before the Full Court. However, the Full Court provided the following obiter comments on the amendments at [32] and [33]:

32. The obligation to provide a notice under reg. 8.12(a) of “the basis and the method on which the trustee seeks to be remunerated” is not restricted to the first meeting of creditors to which the provisions of s 64U of the Act apply. It is a continuing obligation. Furthermore, the trustee is to give a notice even if s 162(4) and reg. 8.08 are to be relied upon by the trustee to fix the scale of charges by which the trustee will calculate the remuneration claimed.

33. It is apparent that the purpose of s 162(6A), reg. 8.12, and s 64U(1) to (7) is to better inform the creditors, and the bankrupt, of the cost, or likely cost, to the estate of the trustee’s administration.

1. At [34] the Court noted that from the time of introduction of s 162(6A), 5 May 2003, the Act and Regulations imposed a duty on a trustee to provide a notice to creditors and the bankrupt that would inform them of the likely impact on the estate of the cost of the trustee’s administration and that, at least for bankruptcies occurring after 5 May 2003, it was an obligation to be performed within a reasonable time from the date of the trustee’s appointment and before the first creditors’ meeting referred to in s 64U to enable the creditors to have sufficient information to exercise the rights provided by that section. The Court also observed that, at least from 5 May 2003:

… it may well be that the creditors have the power to fix remuneration in respect of services provided after that date not only prospectively but also retrospectively in the event that the trustee has not performed the duty imposed by the Act to provide notice of the intended basis of remuneration.

# facts

1. By letter dated 20 November 2015 the Trustee informed Fewin of a proposed meeting of creditors of the Coshott Estate to be convened at his office at 11 am on Thursday, 16 December 2015 and that he was in the process of issuing a further report to creditors to convene the proposed meeting.
2. By letter dated 25 November 2015 addressed to Ronald Coshott the Trustee raised the following matters by way of “prelude” to the proposed meeting of creditors of the Coshott Estate:
3. the proposal that creditors consider appointing another trustee to administer the Coshott Estate. Ronald Coshott was invited to provide a completed Form 12 Trustee Consent to Act Declaration so that the Trustee could properly inform creditors of the issue, the identity of the proposed trustee and evidence of that person’s willingness to act;
4. consequent on the judgments of the Federal Circuit Court (Judge Driver) and this Court (Jagot J) the need for Fewin to formally withdraw its proof of debt and for Ronald Coshott to lodge a fresh proof of debt;
5. notification that the Trustee did not accept the validity of the purported assignment by Gary Doyle of the debt of $10,831.70 to Fewin because, prior to effecting the assignment, Mr Doyle was made a bankrupt and therefore had no legal capacity to assign the debt. Thus Fewin was unable to assign the debt to Ronald Coshott and, in turn, Ronald Coshott was unable to include that debt in his proof of debt; and
6. an invitation to Fewin to lodge a proof of debt in the Coshott Estate for 50% of the debts paid by Ljiljana Coshott to Stephen Barry and Rui Oliviera with the funds provided to her by Fewin.
7. On 27 November 2015 Mr Stephen Bonnor, a delegate of the Inspector-General in Bankruptcy (**Inspector-General**), wrote to Fewin in relation to “application for taxation of remuneration” for the Coshott Estate. It is not clear, on the evidence before the Court, to what remuneration the letter was referring. But, in that letter, among other things, Mr Bonnor said:

In regard to your payment of the agreed costs, I again attach the short orders, and am awaiting confirmation of payment. However, this is not a precondition of proceeding with this taxation.

I note that Mr Findlay has spoken with Mr Allan Ma since receiving your letter, and he is in the process of arranging a meeting of creditors. I believe that given your comments about the possibility of the matter settling, it would be prudent to await the outcome of that meeting before proceeding with a taxation.

Subsequent to this meeting should you wish to proceed with your request for taxation please acknowledge, by signing and returning a copy of this letter to me, that you are aware of the fee and that you may be liable for the costs of the taxation. I will then appoint a taxing officer.

1. A notice of the Creditors’ Meeting was issued by the Trustee setting out the agenda for the meeting and informing creditors that if they wished to participate in the meeting they should complete the enclosed statement of claim and proxy form and proof of debt with all supporting documentation or provide the Trustee with a written statement setting out the amount and full particulars of the debt due to the creditor including the circumstances that gave rise to the debt. The agenda included as item 12 “Approval of trustee’s remuneration”.
2. The Trustee issued a report to creditors dated 4 December 2015 (**the** **December Creditors’ Report**). In that report the Trustee noted, under the heading “Executive Summary”, that in his previous report he had sought creditor approval of his remuneration for administering the Coshott Estate pursuant to s 64ZBA of the Act. The Trustee reported that:

Whilst a number of creditors returned their completed Voting Forms indicating that they were voting in favour of the resolution to approve my remuneration, three parties associated with Mr Coshott asserting to be creditors, lodged an objection pursuant to section 64ZBA(2)(d)(ii) of the Act to the proposal being resolved without a meeting of creditors. As mentioned in my previous Report, I did not accept the full amount of the debts which each of these three parties, being Mr Ronald Coshott (the bankrupt’s brother), Fewin Pty Limited (Ronald Coshott’s company) and Mrs Ljiljana Coshott (the bankrupt’s wife), are claiming to be a creditor. However, it appears that each of them have a provable debt in Mr Coshott’s bankrupt estate but for a much lesser amount than they have claimed.

The Trustee also reported on litigation in which Ronald Coshott and Fewin had made applications seeking declarations and orders that they were creditors of the Coshott Estate and noted that, as those proceedings were at an end, a meeting of creditors could be held and was to be held at 11 am on Wednesday, 16 December 2015 at his offices.

1. The Trustee also prepared a remuneration report dated 4 December 2015 in relation to the Coshott Estate for the periods 21 March 2013 to 18 November 2014 and 19 November 2014 to 14 October 2015. That report included details of a trustee’s entitlement to remuneration and methods by which a trustee can be remunerated. Under the heading “Remuneration Method Chosen” the Trustee stated that:

Given the nature of this matter, I propose that my remuneration be calculated on time based hourly rates. This is because:

* It ensures that creditors are only charged for work that is performed as time is recorded and charged in six (6) minute units;
* A number of tasks are required to be performed which do not relate to the realisation of assets, for example:

- responding to creditor enquiries;

- reporting offences if identified; and

- distributing funds in accordance with the provisions of the *Bankruptcy Act 1966.*

* It is not possible to estimate with certainty the total amount of fees necessary to complete all tasks required in this matter.
1. Relevantly, the remuneration report also:
2. provided an explanation of the schedule of hourly rates;
3. gave notice that if creditors were dissatisfied with the amount being claimed for remuneration they were entitled, within 28 days of receiving notice of a trustee’s claim for remuneration, to request that the claim be taxed by a taxing officer appointed by the Inspector-General;
4. gave notice that if creditors do not approve of the remuneration by way of a resolution, the Trustee can rely on the provisions of s 162(4) of the Act and reg 8.08 of the Regulations which enable a trustee to take his remuneration as prescribed by the Regulations;
5. included a description of work completed for which approval was being sought in the two relevant periods: 21 March 2013 to 18 November 2014 and 19 November 2014 to 14 October 2015; and
6. under the heading “Statement of Remuneration Claim” set out the form of resolution to be put to creditors at the proposed meeting for approval of the Trustee’s remuneration as follows:

That the remuneration of Maxwell William Prentice as trustee of the bankrupt estate of Robert Gilbert Coshott, his partners and staff, be fixed on a time basis for the period from 21 March 2013 to 14 October 2015, to a limit $372,198.50 plus GST, comprised of $207,693.50 plus GST for the period 21 March 2013 to 18 November 2014 and $164,503.00 plus GST for the period 19 November 2014 to 14 October 2015, as calculated in accordance with the Trustees Remuneration Report dated 4 December 2015, which the Trustee is authorised to draw subject to the provisions of the Bankruptcy Act and Regulations.

1. On 8 December 2015 Ronald Coshott, on behalf of Fewin, signed the acknowledgment referred to in the letter from Mr Bonner dated 27 November 2015 noting that he wished to proceed with the taxation of the Trustee’s remuneration.
2. The minutes of the Creditors’ Meeting signed by the Trustee as president and Mr Ma as minutes secretary (**the Minutes**) record that the Trustee received proxies for the purpose of the Creditors’ Meeting from the ATO, CBA, the Official Trustee, Woollahra Council, Barry and Board, Fewin, B&W Windows Pty Ltd (in liquidation), Shipton Lodge Cobbity Pty Ltd, Principal Strategic Options Pty Ltd and Voits Holdings Pty Ltd (debts assigned to Ronald Coshott in accordance with the orders of Jagot J), the Estate of the Late Michael Petrovic Lenin and Ljiljana Coshott. A summary of those proxies is set out below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Creditor** | **Amount of claim** | **Proxy in favour of**  | **Proxy entitled to vote on all matters** | **Proxy given specific directions** |
| ATO  | $201,207.60 | Mr Prentice | No | Yes |
| CBA | $316,558.00 | Chairman of the meeting | Yes | Yes |
| Official Trustee  | $10,832.00 | Minutes secretary | Yes | Yes |
| Woollahra Council  | $268,639.00 | Chairperson/minutes secretary | No | Yes |
| Barry and Board | $2,144.52 | The chairperson | Yes | Yes |
| Ljiljana Coshott | $151,149.62 | Robert Coshott | Yes | No |
| The estate of the late Michael Petrovic Lenin | $32,870.30 | Ronald Coshott |  |  |
| Fewin | $157,299.63 | - | - | - |
| Ronald Coshott | $348,655.38 | - | - | - |

1. The Creditors’ Meeting took place on 16 December 2015 at the offices of the Trustee. Present at the Creditors’ Meeting were:
2. the Trustee;
3. Robert Cruickshanks, an employee of BPS Recovery, the Trustee’s firm;
4. Alan Ma, an employee of BPS Recovery;
5. Sally Nash, solicitor for the Trustee;
6. Mark Findlay, delegate of the Inspector-General (via telephone);
7. Robert Coshott;
8. Ronald Coshott;
9. Fewin represented by Ronald Coshott; and
10. Richard Horsley, barrister for Ronald Coshott and Fewin.
11. According to the Minutes, among other things:
12. the Trustee opened the meeting at 11.12 am;
13. the Trustee as proxy holder for the ATO nominated Alan Ma as minutes secretary and no creditors objected to the nomination;
14. Mr Ma announced the proxies received and the amounts in which they were admitted and/or rejected. The Trustee rejected the proxies received from Ljiljana Coshott in favour of Robert Coshott and from the estate of the late Michael Petrovic Lenin in favour of Ronald Coshott and admitted the balance of the creditors to vote at the meeting for the amounts of their claims. Ronald Coshott and Robert Coshott objected to the Trustee’s decision to admit in full the statements of claim and proxy forms lodged by the ATO, the CBA, the Official Trustee, Barry and Board and Woollahra Council. The Trustee dismissed each of the objections;
15. the Trustee determined that there was a quorum present;
16. in relation to the appointment of a President of the meeting:
	1. the Trustee proposed that he be appointed as President of the meeting;
	2. Mr Ma as proxy holder for the Official Trustee seconded the appointment of the Trustee as President;
	3. Ronald Coshott objected to the Trustee’s nomination as President and nominated himself as President;
	4. Mr Findlay, the delegate of the Inspector-General, informed the meeting that:
		1. the Trustee was to preside at the meeting until a person was appointed to preside for the remainder of the meeting pursuant to s 64K(1) of the Act;
		2. all proxies were entitled to vote for the purpose of election of a President but could not be used for voting of approval of the Trustee’s remuneration; and
		3. there is a ruling on who can vote and it is simply a poll on the voices;
	5. Mr Ma announced voting via “polling votes” and the result of the poll was that 61.24% of the value of creditors entitled to vote voted in favour of the Trustee as President of the meeting with the balance voting in favour of Ronald Coshott;
	6. based on the results of the polling votes the Trustee was elected as President of the Creditors’ Meeting;
	7. Ronald Coshott objected to the use of proxies to appoint the Trustee as President;

(6) in relation to the motion to approve the Trustee’s remuneration:

(a) Ronald Coshott informed the meeting that he and Fewin opposed the motion;

(b) Mr Ma as proxy holder for the Official Trustee proposed the following motion:

That the remuneration of Maxwell William Prentice as Trustee of the Bankrupt Estate of Robert Gilbert Coshott, his partners and staff, be fixed on a time basis for the period from 21 March 2013 to 14 October 2015, to a limit of $372,196.50 plus GST, as calculated in accordance with the Trustee’s Remuneration Report dated 4 December 2015, which the Trustee is authorised to draw subject to provision of the Bankruptcy Act and Regulations;

(c) Mr Ma advised that the motion was to be considered via polling votes as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Creditor** | **For** | **Abstain**  | **Percentage value** |
| ATO  | $201,207 |  | 15.42% |
| CBA | $316,558 |  | 24.25% |
| Official Trustee in Bankruptcy | $10,832 |  | 00.83% |
| Woollahra Council  | $268,639 |  | 20.58% |
| Barry and Board | $2,144 |  | 00.16% |
| Fewin |  | $157,299 | 12.05% |
| Ronald Coshott |  | $348,655 | 26.71% |
| **Total** | **$799,380(61.24%)** | **$505,954(38.76%)** | **100%** |

(d) the motion was carried as there were no dissenting creditors;

(7) Ronald Coshott informed the meeting that he considered that the meeting had been invalidly held because the Trustee had not been properly appointed as President and had refused to submit his motion for his replacement as trustee to the meeting.

1. The applicants rely on a transcript taken of the Creditors’ Meeting. In relation to the appointment of the minutes secretary the transcript records:

MR PRENTICE: Ladies and gentlemen, the time is 12 minutes past 11. The meeting was convened for 11 o'clock. We have sufficient quorum this morning to conduct the business of the bankrupt. My name's Max Prentice, for those who don't know me, the trustee of the estate of Robert Gilbert Coshott. The first matter on the agenda is to appoint a minutes secretary. To my right is Alan Ma, and I would suggest that he be appointed as the minutes secretary, or I can use a proxy .....

RONALD COSHOTT: Sorry?

MR PRENTICE: Would you like to appoint him? I can do it .....

RONALD COSHOTT: No, I don't want to appoint him. He's one of yours.

MR PRENTICE: I'll do it.

MR MA: Yeah .....

MR PRENTICE: Yes. I'll use - I've got a specific proxy here from the Australian Tax Office which I'll use ..... So I appoint Alan Ma as the minute secretary.

RONALD COSHOTT: All right.

ROBERT COSHOTT: Well, can we see the proxies before you use them?

In relation to the appointment of the President the transcript records:

MR PRENTICE: I'd like to declare the necessary quorum exists. We'll now have the election of president of the meeting. The meeting is being held at - sorry. If someone could nominate - - -

RONALD COSHOTT: Yes. I nominate myself, Ronald M. Coshott.

MR PRENTICE: And I also nominate myself.

ROBERT COSHOTT: Using the proxies; is that right?

MR PRENTICE: That's right.

ROBERT COSHOTT: Which proxies are you using, Mr Prentice?

RONALD COSHOTT: You can only use the ones specific - - -

ROBERT COSHOTT: The ones which are general.

MR HORSLEY: General.

RONALD COSHOTT: Yeah.

MR PRENTICE: Now, this one. With the Commonwealth Bank claim, it's in favour of the chairman of the meeting, but it says to vote on all matters.

MR MA: .....

MR HORSLEY: That's once we have a chairman, presumably.

MR PRENTICE: That's what I said.

MR MA: I've also got ..... minutes secretary as the appointed proxy of the Official Trustee in Bankruptcy in relation to the bankrupt estate of Gary Doyle. I have a general proxy. So I'll second the appointment of Max Prentice as chairperson.

…

MR PRENTICE: Well, that's - you've nominated and I've nominated so we should take a poll.

…

MR PRENTICE: Well, you've - you're entitled to volunteer to be chairman and I am, too, so we should put this to a poll.

RONALD COSHOTT: Based on our voting entitlements.

MR PRENTICE: Based on proxies that .....

RONALD COSHOTT: Admissible. The proxies which are valid to vote on that matter.

…

MR MA: - - - I've got Fewin for $157,299. I've got Ronald Coshott of $348,655. That's with assigned debts. And that will total $505,954. Now, so the ATO with a proxy for Max Prentice for $201,207. Commonwealth Bank for $316,558 as chairman. S. Barry and M. Board for $2,144 as chairperson. Woollahra Council chairperson and minutes for $268,189. And the Official Trustee in Bankruptcy in relation to the bankrupt estate of Gary Doyle for $10,832. Total is $798,930.

ROBERT COSHOTT: And that includes the proxies which are specific, not general?

MR MA: As Mark was saying - - -

MR PRENTICE: As Mark just said.

MR MA: - - - all the proxies are entitled to vote with the exception of remuneration.

ROBERT COSHOTT: Even though they're marked not to vote on any other matter except the tick boxes? Is that what you're ruling?

RONALD COSHOTT: Some of them have tick boxes - - -

MR PRENTICE: Well, what I'm saying - - -

RONALD COSHOTT: - - - there of specifics.

MR PRENTICE: - - - is those proxies can be utilised by all matters except my remuneration.

ROBERT COSHOTT: Even though - - -

MR PRENTICE: Otherwise, it has to be specific, which it is. There's a tick box proving.

ROBERT COSHOTT: What about the ones that say there - - -

MR PRENTICE: You might have - - -

ROBERT COSHOTT: - - - not other matters. You may not vote.

MR PRENTICE: You might have heard me.

ROBERT COSHOTT: Right.

MR PRENTICE: I said I'm admitting them for the purpose of voting on the president. So I will so chair the meeting as president.

1. On 12 January 2016 Robert Coshott commenced proceedings NSD 34 of 2016 against the Commissioner of Taxation as first respondent and the Trustee as second respondent in which he sought that “the income tax assessment for the income tax year 2007/2008 be set aside and a NIL income tax assessment be issued in its place” (**the Tax Assessment Proceeding**).
2. By notice dated 1 February 2016 Stephen Bonnor, an authorised employee for the purposes of the Act and acting pursuant to a delegation by the Inspector-General given under s 11(4) of the Act, appointed Michael E. Barr to be a taxing officer and to tax all bills of the Trustee in relation to his remuneration (including professional fees, non-professional disbursements and non-professional expenses) relating to the administration of the Coshott Estate.
3. On 8 February 2016 Mr Barr wrote to Fewin informing it of his appointment as taxing officer and that he had requested the Trustee to provide his detailed bill of costs in relation to his claim for remuneration within 28 days with a copy of that bill to go to Fewin. Mr Barr indicated that once the Trustee’s bill was received he would hold a meeting to discuss the taxation procedure and the date on which the taxation could commence and queried whether Fewin was agreeable to such a meeting.
4. On 24 February 2016 counsel for the Trustee was provided with a draft notice of discontinuance and draft consent orders in the Tax Assessment Proceeding by counsel for the Commissioner for Taxation. The Trustee gave instructions to sign the notice of discontinuance on his behalf. On 25 February 2016 this Court made an order in the Tax Assessment Proceeding that the applicant, Robert Coshott, have leave to file the notice of discontinuance dated 24 February 2016. The terms of the notice of discontinuance are that:

Robert Gilbert Coshott, the Applicant discontinues the whole of the proceeding.

The discontinuance is by consent on the following terms:

1. The First Respondent will withdraw the Proof of Debt within 14 days of the date of filing of the notice of discontinuance.

2. There be no order as to costs between the Applicant and the First Respondent.

1. At the hearing of this matter counsel for the Trustee informed the Court that the Trustee had received a letter from the ATO that morning informing him that the ATO had withdrawn its proof of debt lodged in the Coshott Estate.

# the status of the statements of claim and proxy forms

1. Central to the issues to be determined in this proceeding is the status of the various statements of claim and proxy forms submitted for the purposes of the Creditors’ Meeting.

## Statement of claim and proxy form from the ATO

1. The statement of claim and proxy form from the ATO is for an amount of $201,207.60 based on a proof of debt dated 9 May 2013. It nominated the Trustee as the proxy and specified that the Trustee was not entitled to vote on all matters. That is, it was not a general proxy. It directed the Trustee to vote in favour of two of the resolutions which had been notified: one relating to the time at which the Creditors’ Meeting was being held and the second relating to the approval of the Trustee’s remuneration; and to abstain if a motion was put fixing a time, date and place for another meeting.
2. The applicants submitted that, while the Trustee and the ATO had acted on the assumption that there was a debt owing to the ATO, the fact was and is that the ATO was not a creditor and should not have been treated as such. In circumstances where the Trustee and the ATO could not have known that was the case at the time of the Creditors’ Meeting, the applicants submitted that the proper analysis is that the ATO was not a creditor. They further submitted that the lack of knowledge on the part of the Trustee and the ATO of the true state of the ATO’s debt would go to discretion and relief.
3. As at the date of the Creditors’ Meeting the ATO had submitted a proof of debt for $201,207.60 dated 9 May 2013 which, according to the Trustee, had been admitted in full in the Coshott Estate. The ATO provided a completed statement of claim and proxy form to the Trustee for the purpose of the Creditors’ Meeting. The ATO was admitted as a creditor to vote at the Creditors’ Meeting. There is no issue raised as to the validity of the proxy form, beyond the question of whether there was a debt due to the ATO.
4. Section 82(1) of the Act provides that all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject prior to discharge by reason of an obligation incurred before the date of bankruptcy are provable in bankruptcy. Robert Coshott’s debt to the ATO, on which the ATO’s proof of debt was based, was for a re-assessment of income tax liability for the year ended 30 June 2008.
5. Section 83 of the Act provides that a creditor shall be taken not to have proved a debt until a proof of debt lodged by it for the debt has been admitted. Section 102 of the Act requires a trustee to examine each proof of debt and, not later than 14 days after the expiration of the period specified in the notice of intention to declare a dividend as the period within which creditors may lodge their proofs of debt, either admit the proof of debt in whole, admit it in part and reject it in part, reject it in whole or require further evidence to support it. According to the Trustee’s letter dated 22 January 2016 to the ATO referred to above, the ATO’s proof of debt was admitted in full after Robert Coshott did not provide any compelling reasons as to why it should not be admitted.
6. At the Creditors’ Meeting an objection was raised to the ATO’s proxy by Robert Coshott which is recorded in the Minutes as follows:

As it is a specific proxy and not properly signed and the debt is no longer owing following the decision of the Federal Court which extinguished his wife’s debt to the ATO, which directly related to his debt.

According to the Minutes the Trustee dismissed the objection because the “ATO has not withdrawn its POD & has advised that it has no intention of doing so”.

1. The evidence before me is that the Trustee first became aware of the Tax Assessment Proceeding in January 2016. On 22 January 2016 he wrote to the ATO noting that he had become aware of that proceeding but that it had not been served on him, despite him being named as second respondent. In that letter the Trustee asked for confirmation that the Deputy Commissioner of Taxation did not wish to withdraw his proof of debt. No response to that letter is in evidence before me. However, it is clear from the material before me that, as a result of a notice of discontinuance filed in the Tax Assessment Proceeding, the ATO has withdrawn its proof of debt.
2. In my opinion, as at the date of the Creditors’ Meeting, the ATO was a creditor of the Coshott Estate. It had submitted a proof of debt which had been admitted in full. It was thus entitled to participate in the meeting and vote by its proxy as it did. There is no evidence before me that the ATO or the Trustee had notice, as at the date of the Creditors’ Meeting, of the Tax Assessment Proceeding, which was not commenced until 4 January 2016 or, despite the objection raised by Robert Coshott at the Creditors’ Meeting, of his intention to commence that proceeding.

## Statement of claim and proxy form from CBA

1. The CBA is admitted as an unsecured creditor in the amount of $316,558. The CBA appointed the chairman of the meeting as its proxy, indicated that the proxy was entitled to vote on all matters and directed the proxy to vote for the three resolutions identified in the statement of claim and proxy form.

## Statement of claim and proxy form from the Official Trustee in Bankruptcy

1. The Official Trustee is a creditor in the amount of $10,832 for funds owed to her as trustee of the bankrupt estate of Garry Doyle, formerly trading as Little Bay Plumbing. She appointed the minutes secretary as proxy and indicated that the proxy was entitled to vote at all meetings in the administration and was entitled to vote on all matters. The Official Trustee directed the proxy to vote for the three resolutions identified in the statement of claim and proxy form.

## Statement of claim and proxy form from Woollahra Council

1. Woollahra Council is an unsecured creditor for $268,639 for what is described as “costs orders”. It appointed the “Chairperson/Minutes Secretary” as its proxy and indicated that the proxy was not entitled to vote at all meetings in the administration and was not entitled to vote on all matters. Woollahra Council directed the proxy to vote for the three resolutions identified in the statement of claim and proxy form.

## Statement of claim and proxy form from Barry and Board

1. Barry and Board are creditors for $2,144.52, an amount described as being allowed by the former trustee, Mr Burke, following proof of debt for charges for appearing as witness. In their statement of claim and proxy form Barry and Board answered “yes” to the question “do you hold security over any of the debtor’s property?”. They referred to an annexure in the part of the form asking for a description of the security. A copy of the annexure has not been provided to the Court. Barry and Board appointed the chairperson as their proxy, indicated that the proxy was entitled to vote at all meetings and on all matters and directed the proxy to vote in favour of the three resolutions set out in the statement of claim and proxy form.
2. The Trustee submitted that, as Barry and Board indicated that their debt was secured, pursuant to s 64ZA(5) they were not entitled to vote at the meeting. I accept that submission. It follows that the Trustee was not entitled to vote as proxy for Barry and Board in relation to any motion put to the Creditors’ Meeting.

## Statement of claim and proxy form from Ljiljana Coshott

1. Ljiljana Coshott claims to be a creditor in the total amount of $157,149.62 for debts described as “the other 50% of debt formerly owed to Stephen Michael Barry” and “the other 50% of debt formerly owed to Rui Oliviera”. Ljiljana Coshott appointed Robert Coshott as her proxy entitled to vote at all meetings in the administration and on all matters. She did not give any direction to the proxy about how to vote.
2. The Trustee submitted that Ljiljana Coshott was not entitled to participate as an ordinary unsecured creditor at the Creditors’ Meeting, that she had assigned her rights to Fewin and that she is not a creditor. In any event, her proxy was rejected at the Creditors’ Meeting and no issue is taken by the applicants in relation to the decision to reject that proxy.

## Statement of claim and proxy form from Fewin

1. Fewin is an unsecured creditor in the amount of $157,299.63 arising out of the orders of a Full Court of this Court. In its statement of claim and proxy form Fewin does not nominate anyone to be its proxy but nominates Ronald Coshott as an authorised officer of the creditor. Ronald Coshott is the sole director and shareholder of Fewin. The Trustee submitted that the statement of claim and proxy form does not confer the status of “authorised representative” on Fewin and that, as no proxy is appointed by Fewin, it could not vote at the Creditors’ Meeting.
2. The Act requires a trustee to notify the creditors that if they wish to appoint a proxy at a meeting they must complete the appointment of proxy form: s 64E. The content of an instrument appointing a proxy is prescribed by s 64ZC. There is no requirement that creditors or creditors of a certain nature, e.g. corporate creditors, must appoint a proxy. The decision to appoint a proxy is entirely in the discretion of the creditor. Sections 64H and 64M(1) relied upon by the Trustee do not take the matter any further.
3. That then raises the issue of how a body corporate, such as Fewin, is entitled to vote at a creditors’ meeting and whether it is only by a duly appointed proxy or by an attorney.
4. Chapter 2G of the *Corporations Act 2001* (Cth) (**the Corporations Act**) deals with meetings. Division 6 of Pt 2G.2 sets out procedures relating to proxies and body corporate representatives. In particular, s 250D provides that a body corporate may appoint an individual as a representative to exercise all or any of the powers the body corporate may exercise at meetings of the company’s members or at meetings of creditors or debenture holders or relating to resolutions to be passed without meetings or in the capacity of a member’s proxy appointed under subs 249X(1). The applicants rely on that section and refer to the commentary in Lang AD, *Horsley’s Meetings: Procedure*, *Law and Practice* (5th ed, LexisNexis, 2006) (**Horsley’s**) at [16.16] where the author notes that, as an incorporated body is an artificial legal entity which has no physical presence, it can only “exercise its rights as a member of a body at meetings of that body through individuals appointed to represent it” and that, in the case of a company, s 250D of the Corporations Act specifically authorises a body corporate to appoint an individual as its representative to exercise all the powers of membership at general meetings. The author says that a representative appointed pursuant to s 250D(1) is not to be regarded as a proxy.
5. Section 250D(4) of the Corporations Act provides that, unless otherwise specified in the appointment, a representative may exercise, on the body corporate’s behalf, all of the powers that the body could exercise at a meeting or in voting on a resolution. That is, the Corporations Act provides a mechanism by which a company is able to vote at a meeting and, to adopt the words of the author of Horsley’s at [16.16], may “speak and act at a meeting in any way that a personal member can”.
6. However, as, in effect, submitted by the Trustee, there is no evidence before me that Ronald Coshott is Fewin’s authorised representative pursuant to s 250D of the Corporations Act. In the statement of claim and proxy form the creditor is identified as Fewin, the question about whether Fewin or its related entities are related to the debtor is answered positively and in response to the request in the form to provide details of the relationship the following is said:

Ronald Michael Coshott is sole director and sole shareholder of Fewin Pty Limited and is brother of debtor.

Ronald Coshott is then named as the “creditor/authorised officer of creditor”.

1. In response, the applicants relied on s 122 of the Corporations Act and the presumption of regularity. I take the applicants to in fact be referring to s 128 of the Corporations Act which provides that a person is entitled to make the assumptions referred to in s 129 in relation to dealings with a company. Section 129(3) provides that:

**129 Assumptions that can be made under section 128**

…

(3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:

(a) has been duly appointed; and

(b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.

1. Based on the available evidence and relevant sections of the Corporations Act and, in particular, s 128, I accept that there was a presumption that Ronald Coshott was an authorised officer of Fewin and in that capacity could vote on its behalf at the Creditors’ Meeting. The minutes record that Fewin did participate and vote, no issue was taken at the meeting and the Trustee has the benefit of the presumption that arises as a result of s 128 of the Corporations Act. No evidence was led before me that would displace that presumption.

## Statement of claim and proxy form from Ronald Coshott

1. Ronald Coshott is an unsecured creditor in the amount of $348,655.38 as a result of orders of a Full Court of this Court. He did not appoint a proxy but attended the Creditors’ Meeting in person. There is no issue about his entitlement to vote at that meeting.

# consideration

## The appointment of the minutes secretary

1. The first issue that arises for determination is whether the minutes secretary was validly appointed. While no relief is sought in relation to that appointment it is of relevance because of the role the minutes secretary played in subsequent events at the Creditors’ Meeting which the applicants allege undermined the appointment of the President and the passing of the motion approving the Trustee’s remuneration.
2. The applicants submitted that the appointment of Mr Ma as minutes secretary was invalid because, contrary to the requirements of s 64L of the Act, the Trustee did not invite the proposal of a motion appointing a minutes secretary, the ATO proxy on which the Trustee relied was not a proxy in respect of all matters and the matters specified did not include the appointment of a minutes secretary and, in the alternative, there was no debt owed to the ATO as recognised by the terms of the notice of discontinuance in the Tax Assessment Proceeding.
3. The Trustee submitted that the ATO was an admitted creditor and it was entitled to vote and that there was a requisite participation by the ATO at the Creditors’ Meeting permitting the resolution for the appointment of the minutes secretary under the control of the Trustee who was presiding at the meeting. The Trustee further submitted that if there was a defect or irregularity in the appointment of the minutes secretary it could be cured by s 306(1) of the Act and that, in particular, no injustice had been done because the minutes secretary was given specific instructions on how to vote by those creditors who appointed him as their proxy.
4. Pursuant to s 64K of the Act, the Trustee presided at the Creditors’ Meeting until the appointment of a President pursuant to s 64P of the Act. According to the Minutes the Trustee, as proxy holder for the ATO, nominated Mr Ma as minutes secretary and no creditor objected to that nomination. The transcript of the meeting records that Ronald Coshott said he did not want to appoint Mr Ma as he was “one of yours” but that once the Trustee made the appointment he said “alright”.
5. The applicants’ alternative submission, that the appointment of Mr Ma as minutes secretary was invalid because the ATO was not a creditor at the time of the Creditors’ Meeting given the terms of its notice of discontinuance in the Tax Assessment Proceeding and its subsequent withdrawal of its proof of debt, cannot succeed. I refer to my findings at [56] to [63] above. The ATO was a creditor at the time of the Creditors’ Meeting and its proxy was valid.
6. In relation to the other matters raised by the applicants which are said to invalidate Mr Ma's appointment as minutes secretary, neither the Minutes nor the transcript record that the Trustee invited the creditors to propose a motion appointing a person to record the minutes of the Creditors’ Meeting as was required by s 64L(1)(a). Further, the proxy from the ATO was not a proxy to vote on all matters. It appointed the Trustee as proxy to vote in the manner specified on the three resolutions specified in the form. Thus the procedure adopted for the appointment of the minutes secretary did not comply with the Act and the Trustee relied on a proxy which was limited and did not extend to the nomination of a minutes secretary.
7. The question that then arises for consideration is whether relief can be granted pursuant to s 306(1) of the Act. That relief would be available where the defects in the appointment of the minutes secretary are formal defects or irregularities which would not invalidate the proceedings at the meeting and where substantial injustice has not been caused by them and the injustice can be remedied by an order of the Court.
8. The first issue that arises is whether the appointment of the minutes secretary at the Creditors’ Meeting is a proceeding under the Act for the purpose of s 306(1). In my view, adopting the reasoning in *Nilant*, it is. The appointment of the minutes secretary would, but for s 306(1), be invalidated because of the defects or irregularities which have been identified by the applicants and the proceeding is capable of coming before the Court on an objection as to its invalidity as evidenced by this proceeding.
9. The next issue that arises is whether the defects or irregularities which have been identified are formal defects or irregularities. The first defect or irregularity is the failure to invite the creditors and their representatives to propose a person to record the minutes as required by s 64L(1). The Court must assess whether the Act, in providing that something “must” be done, is seeking to create a requirement that if not done would automatically invalidate what in fact was done. That assessment is to be made having regard to the nature of the requirement and consequences of non-compliance. As the High Court said in *Adams* use of the word “must” in the relevant section is not conclusive. The appointment of a minutes secretary at a creditors’ meeting is important in that there must be a proper record of the proceedings at such a meeting. The person so appointed must take the minutes in the manner prescribed. The requirement on a trustee to invite the creditors to appoint a person to act as minutes secretary is also important as it recognises that it is the creditors who have the right to identify and control who should undertake that role. However, adopting the words of Rares J in *Coshott v Coshott*, it is not of the same order as the consequences “that attend upon the steps the Act prescribes as necessary to enable a person’s status to be changed to that of being a bankrupt, or otherwise under administration so as to cause his or her affairs to be administered under the Act”: at [37]. That is, in my opinion the failure to invite the creditors to appoint a person to record the minutes would not automatically invalidate what was done namely, the unilateral nomination of Mr Ma as minutes secretary. Once appointed a minutes secretary must undertake his role in accordance with the requirements of the Act. The non compliance in this case did not prevent the minutes secretary from doing so. In my opinion the failure to comply with s 64L(1) of the Act was a formal defect or irregularity.
10. The same cannot be said for the use of the ATO proxy to nominate Mr Ma as minutes secretary. The proxy was valid. It complied with the terms of s 64ZC. The Trustee as the holder of the proxy used it for a purpose not permitted by its terms. In my opinion that is not a formal defect or irregularity. There was no failure to comply with a requirement under the Act. There was a failure to observe the terms of the instrument appointing the Trustee as proxy. Those instruments are in a prescribed form and enable the creditor who makes the appointment to direct the proxy as to what he or she can do and how he or she can vote. The creditor is only present at a meeting through its proxy. It must be assumed that the creditor’s expectation will be that the proxy will only act within the terms of the authority granted and direction given by it and that the proxy holder will observe the terms and ambit of the instrument appointing him or her as proxy.
11. That being the case, I do not propose to consider whether there is any substantial injustice that has been caused by the failure to comply with s 64L(1) of the Act which is in my view a formal defect or irregularity. Even if that formal defect could be cured, the nomination of Mr Ma relying on the ATO proxy cannot be validated in the same way.
12. It follows that, in my opinion, the minutes secretary was not validly appointed.

## The appointment of the President

1. The applicants submitted that the appointment of the Trustee as President was invalid for a number of reasons.
2. First they submitted that the Trustee’s nomination, relying as it did on the proxy given to the chairman of the meeting by the CBA, was invalid. They contended that the chairman of the meeting is the President and that the appointment of the President does not take effect until the election pursuant to s 64P of the Act. In support of that argument they referred to those sections of the Act dealing with the procedures at meetings which preceded the 1992 introduction of ss 64K to 64X of the Act. In particular, the applicants relied on the former s 65, as it existed prior to 1992, which concerned the election of the chairman and provided that the majority in number of creditors present at a meeting of creditors in person, by attorney or by proxy shall elect a chairman to preside at the meeting.
3. Secondly, the applicants submitted that the election of the Trustee as President was invalid because of the purported use of proxies for the vote. In particular the applicants submitted:

(1) in relation to the ATO proxy:

(a) although it nominated the Trustee as its proxy, it was not a proxy in respect of all matters and the matters specified did not include the nomination of a President;

(b) there was no debt owed to the ATO as recognised by the terms of the notice of discontinuance in the Tax Assessment Proceeding;

(2) in relation to the CBA proxy it was given to the “chairman of the meeting” and thus only applied to the President after his appointment and could not be used to nominate that position;

(3) in relation to the Woollahra Council proxy:

(a) it was not a proxy in respect of all matters and the matters specified did not include the nomination of a President;

(b) it was given to the “chairperson/minutes secretary” which:

* + 1. could not be used by the chairperson for nominating a President for the same reasons as the CBA proxy; and
		2. could not be used by the minutes secretary given that his appointment was invalid. In any event, it appears to have been purportedly used by the Trustee and not by Mr Ma in his capacity as minutes secretary;

(4) in relation to the Official Trustee proxy it was given to the minutes secretary whose appointment was invalid; and

(5) in relation to the Barry and Board proxy:

(a) it was given to the “chairperson” which only applied to the President after his appointment and thus could not be used to nominate that position; and

(b) it recorded that the debt was secured, in which event no vote was permitted.

1. The Trustee submitted that, pursuant to s 64K(1) of the Act, until a person is elected to preside at a meeting pursuant to s 64P(1), the trustee is to preside. The Trustee contended that the effect of this is that the trustee is the president until such time as the President is elected. He further submitted that, whether that person is called chairman or president, does not matter. The Trustee contended that it really did not matter who the President was because ultimately each of the proxies in favour of the President gave directions as to how to vote on the specific motions to be put to the Creditors’ Meeting. For that reason relief would be granted pursuant to s 306 of the Act if there was a defect or irregularity in the appointment of the President.
2. The first issue to resolve is that of nomination of the Trustee for appointment as President. While not clear on the face of the Minutes, based on the transcript that is in evidence before me, the Trustee nominated himself for appointment as President using the CBA proxy. The CBA appointed “the Chairman of the meeting” as its proxy entitled to vote on all matters. The submission put on behalf of the applicants raises the issue of who the “Chairman” of the meeting is at particular points in time.
3. The applicants contended that a proxy in favour of the “Chairman” could not be enlivened until the chairman, who they say is the President, had actually been appointed. They submitted that interpretation is consistent with the legislative history. Section 64P was introduced into the Act in 1992. Prior to its introduction s 65 of the Act, which was in Div 5 – Meetings of Creditors and Committee of Inspection, provided that:

The majority in number of the creditors present at a meeting of creditors in person, by attorney or by proxy shall elect a chairman to preside at the meeting.

There was no equivalent to s 64K in the Act prior to 1992.

1. In *Worrell v Cash* (1995) 60 FCR 413 (***Worrell v Cash***) a Full Court of this Court (Ryan, Foster and Sackville JJ) considered whether the appellant, a registered trustee, should have been elected chairman of a creditor’s meeting pursuant to s 196(1) of the Act which concerned the conduct of meetings for the purpose of personal insolvency agreements. Section 196 was in identical terms to the former s 65 of the Act. It provided that:

The majority in number of the creditors present at the meeting in person, by attorney or by proxy shall elect a chairman to preside at the meeting.

At the time, the provisions of s 64P were made applicable to meetings of creditors under Pt X of the Act by r 85A of the *Bankruptcy Rules 1968* (Cth).

1. The primary judge had held that the entitlement to be elected as chairman of the meeting was confined to creditors, their attorneys and proxies and referred to s 64P(2) in aid of her interpretation. The Full Court did not agree and held that anyone physically present at the meeting was eligible to be nominated for appointment as chairman, regardless of whether that person played, or intended to play, an active part in the meeting. The Full Court based that conclusion on the definition in s 63A(2) of “participating in person in a meeting” and its impact on the interpretation of s 64P(2) of the Act.
2. The applicants submitted that ss 64P and 196, as considered in *Worrell v Cash*, could only sit together if, in fact, what was said in s 64P about the election of a person to preside, who then became the President, was the same as under s 196 in relation to the election of a chairman. That is, the chairman is the President and the taking of that role is dependent on election.
3. I do not think the judgment in *Worrell v Cash* and the history of the legislation assists me in determining the issue which the applicants now raise. The current regime for the conduct of creditors’ meetings was introduced in 1992. The previous terminology, that a chairman be elected, was removed from the Act some 14 years ago and the regime was changed significantly by the introduction of the 1992 amendments. Prior to 1992 there was, as already noted, no equivalent to s 64K in the Act.
4. The CBA proxy simply appoints the “Chairman of the meeting”. The *New Shorter Oxford English Dictionary* (4th ed, Clarendon Press, 1993) defines the word chairman as “a person chosen to preside over a meeting…”. Similarly, the *Macquarie Dictionary* (6th ed, Macquarie Dictionary Publishing Pty Ltd, 2013) defines the word “chairperson” as “the presiding officer of a meeting, committee, board, etc”. The “chairman” must be the person who is presiding over or running the meeting from time to time. In my opinion, that person is, pursuant to s 64K, the trustee until such time as the President is elected pursuant to s 64P. On that basis, no issue arises with the use by the Trustee of the CBA proxy, a general proxy allowing the “Chairman” to vote on all matters, in relation to his nomination as President. The same conclusion would apply to the use by the Trustee of the CBA proxy in voting for the President where, as here, there was a contest for that role.
5. The applicants submitted that the appointment of the minutes secretary was invalid and therefore any proxy in favour of the minutes secretary that was used for the seconding of the nomination of the Trustee to be appointed as President or to vote in favour of the Trustee as President is invalid. Despite my findings about the appointment of the minutes secretary at [80] to [91] above I do not accept this submission. First, s 64P does not require that a nomination be seconded. The only requirement is that the creditors and their representatives be invited to nominate a person to preside at the meeting. Thus the seconding of the Trustee’s nomination by Mr Ma acting in the capacity of minutes secretary and relying on the proxy from the Official Trustee did not affect or invalidate that nomination.
6. Secondly, the invalid appointment of the minutes secretary does not, in my opinion, affect the use by him of the proxy given by the Official Trustee. Section 306(2) relevantly provides that a defect or irregularity in the appointment of any person exercising or purporting to exercise a power or function under the Act does not invalidate an act done by him or her in good faith. In contrast to s 306(1), the section is not limited to formal defects or irregularities. There was a defect or irregularity, which could not be classified as formal in nature, in the appointment of the minutes secretary by use of the ATO proxy to nominate Mr Ma. Notwithstanding that defect in his appointment, Mr Ma performed the role of minutes secretary at the Creditors’ Meeting, discharging his function as required by the Act. In doing so he exercised a valid proxy in favour of the minutes secretary in accordance with its terms. There is no evidence that he did so other than in good faith and believing his appointment to be valid. In my view, having regard to s 306(2), the vote cast by Mr Ma in that capacity was not invalidated despite the defect or irregularity in his appointment.
7. The ATO and the Woollahra Council proxies were not proxies given in respect of all matters. They were proxies confined to voting as directed in relation to the resolutions specified in the proxy forms. Notwithstanding that, those proxies were used by the Trustee, the relevant proxy holder, to vote in favour of his appointment as President. I do not think that those proxy forms, limited in the way that they were, could be used for that purpose. To do so was to use them in a way that was not permitted by their terms.
8. Nor do I think that the use of those proxies in that way could be validated by s 306 of the Act. The appointment of the President pursuant to s 64P of the Act is, in my opinion, a proceeding for the purposes of s 306 of the Act. However, the particular conduct the subject of this objection is not the actual procedure undertaken to appoint the President as required by s 64P, a matter which I address below, but the use of the ATO and Woollahra Council proxies in the election for the contested position of President in a way not permitted by their terms. For the same reasons as set out at [89] above, in my opinion, the use of the proxies to vote in favour of the Trustee was not a formal defect or irregularity. As with the appointment of the minutes secretary there was no failure to observe particular requirements of the Act by using the proxies in a way that was not permitted by their terms. Rather there was a casting of votes which was not permitted by the terms of the instruments relied upon.
9. To the extent the applicants submitted that use of the ATO proxy invalidated the Trustee’s election as President because the ATO was not a creditor I refer to my findings at [56] to [63] above.
10. The proxy from Barry and Board indicated that the debt owing was secured. As was conceded by the Trustee and, as I have already found, that proxy could not, in those circumstances, be used to vote in favour of any resolution put to the Creditors’ Meeting.
11. It follows that the proxies given by the ATO, Woollahra Council and Barry and Board could not be used to vote on the election of the President. That vote was taken on a poll. If those creditors were excluded from the vote then the Trustee would not have been appointed as the President. Ronald Coshott would have received a majority of the votes by number and value.
12. But the applicants also complain that another irregularity in the election of the President was the method of voting. The Trustee concedes that the method of voting for the President was not in accordance with s 64P(5), which required the vote to be on the voices, unless a result could not be determined by that method. In the latter case the Trustee was required to follow the method in s 64P(6) and to ask each creditor and each proxy or attorney appearing in person or by telephone to state for which nominee each creditor, proxy or attorney was casting a vote or whether they were abstaining. Neither of those methods was adopted to vote for the President.
13. If the vote had been taken on the voices, as required by s 64P(5) then, taking into account my findings about the use of the proxies, the Trustee would have been elected as the President. This is because the Trustee had one voice as proxy for the CBA and the minutes secretary had one voice as proxy for the Official Trustee while Ronald Coshott had one voice as the authorised representative of Fewin and as a creditor in his personal capacity. The result would have been clear on the voices. But if the Trustee had to have resort to the method prescribed by s 64P(6) with two votes for each candidate, the result would have been a tie, requiring the Trustee to decide by lot whether he or Ronald Coshott would be chosen to preside at the Creditors’ Meeting. It is not known what the outcome would have been. Ironically, it is only on a poll that the result is in fact that Ronald Coshott would be elected President when taking into account my findings.

## Approval of the trustee’s remuneration

1. The applicants challenged the validity of the motion for approval of the Trustee’s remuneration on two bases.
2. First they submitted that the motion was invalid because:
3. the appointment of the minutes secretary and the President were invalid;
4. the motion was proposed by Mr Ma whose appointment was invalid; and
5. the purported exercise of the proxies in favour of the motion was invalid because:

(a) in respect of the ATO proxy, there was no debt owing to the ATO;

(b) in respect of the CBA proxy, it was given to the “Chairman of the meeting” but the Trustee had not been validly appointed as President;

(c) in respect of the Woollahra Council proxy, it was given to the “Chairperson/Minutes Secretary” neither of whom had been validly appointed;

(d) in respect of the Official Trustee, it was given to the minutes secretary whose appointment was invalid; and

(e) in respect of Barry and Board it was given to the President whose appointment was invalid and it specified that its debt was secured.

1. I have already found that the appointment of the minutes secretary was invalid. However, whether the appointment of the President was invalid depends on the voting method.
2. Assuming that Mr Ma in his capacity as minutes secretary proposed the motion approving the Trustee’s remuneration in his capacity as proxy for the Official Trustee, which is an available inference, then for the reasons given at [104] above, pursuant to s 306(2), the proposing of the motion by Mr Ma in that capacity was not invalidated despite the defect or irregularity in his appointment.
3. As to the exercise of the proxies in favour of the motion:
4. the ATO proxy was valid at the time it was provided and relied on;
5. the CBA proxy was given in favour of the chairman. The President, once appointed, would be required to exercise the vote in accordance with the terms of the proxy;
6. the Woollahra Council proxy was given to the “Chairperson/Minutes Secretary”. It was exercised by the President. The President, once appointed, would be required to cast the vote in accordance with the terms of the proxy;
7. the Official Trustee’s proxy was given to the minutes secretary. For the reasons given at [104] above, pursuant to s 306(2), the exercise of the proxy in conformity with its terms by Mr Ma in his capacity as minutes secretary was not invalidated despite the defect or irregularity in his appointment; and
8. Barry and Board’s proxy indicated that their debt was secured and accordingly they were not entitled to vote at the Creditors’ Meeting.
9. Even if the Trustee’s appointment as President was not valid I would in any event find, for the same reasons as set out in [104] above that, despite the defect or irregularity in his appointment, his voting for the remuneration motion by exercising in good faith the proxies in favour of the chairperson would not be invalidated. As I have found those votes were cast in conformity with the terms of each of the proxies and there is no evidence that the Trustee did not act in good faith in casting those votes.
10. The applicants submitted that the Trustee did not have sufficient proxies to defeat Ronald Coshott’s nomination as President and that Ronald Coshott would not, if he were President, have proposed the motion for approval of the Trustee’s remuneration. The transcript of the Creditors’ Meeting discloses that Ronald Coshott objected to the remuneration resolution when proposed but there is no evidence that, had he been President, he would not have proposed that motion. It is impossible to speculate on what would have occurred at the Creditors’ Meeting had Ronald Coshott been elected as President. The President must observe the requirements of the Act in conducting creditors' meetings and must, in relation to proxies in his or her favour, vote as directed. There is little discretion to be exercised by a President.
11. Those proxies that were entitled to be exercised, that is all those other than the proxy given by Barry and Board, gave specific directions as to how to vote and each directed that the proxy holder should vote in favour of the motion approving the Trustee’s remuneration. The vote was taken on a poll. No issue was taken with the method by which the vote was taken. Fewin and Ronald Coshott abstained. The motion was passed by a majority of creditors in number and value present in person or by proxy but including Barry and Board. Absent Barry and Board’s vote the outcome is the same. That is, it remains the case that a majority of creditors in number and by value voted in favour of the motion.
12. Secondly, the applicants submitted that there was doubt as to whether the creditors had power to approve the Trustee’s remuneration and, if they did, whether ultimately it is of any utility given that a taxation process of that remuneration has commenced. The applicants’ argument in that regard relies on the judgment in *Doolan v Dare*. They submitted that from May 2003:
13. creditors had power to fix remuneration under s 162(1) from time to time;
14. where remuneration was not fixed by the creditors the trustee was entitled to be remunerated pursuant to s 162(4) and reg 8.08 by reference to a scale;
15. regulation 8.09 provided that where a trustee claims remuneration under s 162, a bankrupt or a creditor may request a taxation within 28 days of being notified in writing or becoming aware of the amount of the claim;
16. section 64U of the Act prescribed certain disclosures to be made in relation to a trustee’s remuneration at the first meeting of creditors and then at subsequent meetings but is not of itself the source of entitlement to remuneration which derives from s 162 and also generally;
17. section 162(6A), which was introduced on 5 May 2003, requires the trustee to give, in relation to his or her remuneration, such notices as may be prescribed by the regulations. Regulation 8.12 prescribes those notices that must be given to the bankrupt and creditors;
18. the Full Court in *Doolan v Dare* said that in light of the introduction of s 162(6A) it may well be that the creditors have power to fix remuneration for services provided after that date not only prospectively but retrospectively in the event that “the trustee has not performed the duty imposed by the Act to provide notice of the intended basis of remuneration”. In other words, the applicants submitted that the Full Court appears to have taken the view that prior to May 2003 the creditors’ power under s 162 was only to fix remuneration prospectively which would be consistent with the obligations on the trustee to make disclosure under s 64U of the Act;
19. the reference in reg 8.09 to a power to seek a taxation where the trustee claims remuneration under s 162 should be understood as drawing a distinction between the fixing of remuneration in advance under s 162(1) and the claiming of remuneration (retrospectively) in accordance with that fixing, the latter of which triggers the right to seek a taxation. The applicants rely on *Doolan v Dare* at [27] where they say the Full Court seems to have contemplated such a regime at least in the context of remuneration pursuant to s 162(4);
20. viewed in this light the 2003 amendments introduced a requirement by reg 8.12 for prospective notices where the trustee seeks to be remunerated and thus enlivens the power under s 162(1) or s 162(4) (reg 8.12(a)) and retrospective notices where the trustee claims remuneration in accordance with that power as enlivened (or to be enlivened) (reg 8.12(b)). It is then only a notice of a retrospective claim that enlivens the right to seek taxation of which notice must be given under reg 8.12(c);
21. it follows that the creditors had no power to approve remuneration retrospectively whether under s 162(1) or at all.
22. Further or in the alternative the applicants submitted that whatever the position in relation to s 162(1) of the Act a fixing of remuneration by the creditors, whether prospectively or retrospectively, does not oust the obligation to give ongoing disclosure nor the entitlement of the bankrupt or a creditor to seek a taxation of remuneration claimed by the trustee. They contend that position appears to have been contemplated by the Trustee who, at the time of disclosing his remuneration and indicating that he would seek a resolution to approve his remuneration, gave notice of the right to seek taxation pursuant to reg 8.09.
23. The applicants’ contention is, in effect, that the creditors had no power to approve the Trustee’s remuneration. They contend that the creditors’ power pursuant to s 162(1) is to fix remuneration prospectively at a rate or rates notified by the trustee. Once fixed, a trustee can then notify a claim for his or her remuneration at the rate fixed by the creditors or, if it is not so fixed, at the prescribed rates. The applicants say that what should occur is that the trustee provides disclosure of his claim for remuneration together with notification of the right to seek a taxation in accordance with the Regulations, that if there is no application for a taxation of the remuneration claimed within the prescribed 28 day period the trustee is then able to pay himself. However, if taxation is sought by a creditor or the bankrupt then the trustee must await the outcome of the taxation process and, at its conclusion, can pay himself the taxed amount. The applicants submitted that their concern is that, because the Trustee’s remuneration has been approved, he can pay himself the approved amount so that any taxation would be of no effect and the right to seek taxation would be lost.
24. The Trustee submitted that the Creditors’ Meeting was not a first meeting of creditors. To that extent, s 64U(8) applied requiring the President to “request the trustee to lay before the meeting a statement of remuneration drawn by the trustee from the funds of the bankrupt’s estate before the meeting was held” and for the Trustee to “comply with that request”. He took the Court to the December Creditors’ Report and the remuneration report annexed to it which, he contended, complied with his obligations of disclosure under the Act and the Regulations as they apply to the Coshott Estate.
25. The Trustee further submitted that there was no resolution as contemplated by s 162(1) that sought to fix the Trustee’s remuneration at any time prior to the Creditors’ Meeting and that the Trustee has not drawn any remuneration. The Trustee submitted that, until remuneration has been fixed by the creditors or by an appropriately qualified taxation, a trustee cannot draw down his or her remuneration. That is, contrary to the applicants’ submission, until it is approved a trustee cannot take his remuneration.
26. The Trustee contended that the obligation to provide a notice under reg 8.12(a) was, as noted by the Full Court in *Doolan v Dare*, an ongoing obligation not limited to the first creditors’ meeting and that s 162(1) permits the creditors to fix a trustee’s remuneration “from time to time”. He submitted that there was nothing in s 162(1) that stated that remuneration can only be fixed prospectively.
27. In some respects the applicants’ challenge to the validity of and to the creditors’ power to approve the resolution concerning the Trustee’s remuneration is moot and, as they submitted, the question of whether the resolution approving the remuneration is valid is of little, if any, practical effect. This is because there is evidence before me that the first applicant, Fewin, has sought a taxation of the Trustee’s claim for remuneration. Counsel for the Trustee also informed the Court that, despite the approval given by the Creditors’ Meeting, no remuneration had been drawn consequent upon that resolution. Notwithstanding these events, where the parties differ is on the issue, which is not before me for determination, of whether the fact of taxation means that a trustee is precluded in the interim from relying on the creditors’ approval and drawing down the remuneration. Hence the challenge to the resolution approving the Trustee’s remuneration is pressed.
28. The Trustee is the fourth trustee of the Coshott Estate. The Creditors’ Meeting was not the first meeting of creditors. As noted, counsel for the Trustee informed the Court that no motion fixing the Trustee’s remuneration pursuant to s 162(1) had been put to the creditors of the Coshott Estate prior to the Creditors’ Meeting. As required by s 162(6A) of the Act and reg 8.12 the Trustee provided in his remuneration report, annexed to the December Creditors Report, a notice of the basis on which he sought to be remunerated, the type of work undertaken, the number of hours charged by each person, their applicable hourly rates and the total remuneration claimed. Notice was also given of the bankrupt’s and creditors’ rights to request the claim be taxed within 28 days of receipt of the notice.
29. However the terms of the motion put to the meeting do not seek to fix the basis for the Trustee’s remuneration prospectively but seek approval of the Trustee’s claim for remuneration on the basis of hourly rates not previously approved for work undertaken from 21 March 2013 to 14 October 2015. The issue for resolution is whether s 162(1) permits such retrospective approval. In my opinion it does not.
30. Section 162 is the source of the entitlement to remuneration. At the relevant time, it provided that the remuneration of the trustee of a bankrupt estate may be fixed by resolution of the creditors from time to time (subs (1)). I do not accept, as submitted by the Trustee, that there is no temporal limit on the ability to fix a trustee’s remuneration. The scheme for fixing of a trustee’s remuneration pursuant to s 162 operates prospectively. The creditors, or a committee of inspection, have the power pursuant to s 162(1) to fix a trustee’s remuneration. At the time, s 64U prescribed the details that a trustee had to provide in relation to the fixing of his or her remuneration at the first Creditors’ Meeting pursuant to s 162(1). Where a trustee’s remuneration is not fixed by the creditors a trustee is to be remunerated as prescribed by the Regulations.
31. That the fixing of a trustee’s remuneration is prospective is consistent with the objective, as observed by the Full Court in *Doolan v Dare* at [36], that the question of remuneration is to be settled early in the administration and further that the creditors should be aware of the basis for a trustee’s remuneration and, if possible, its likely impact on the bankrupt’s estate. Despite its comments in relation to the impact of s 162(6A) and reg 8.12, which I address below, it is also consistent with the Full Court’s construction of s 162(1) in *Doolan v Dare* based on the facts of that case. Once a trustee’s remuneration is fixed, he or she is then required to notify any claim for remuneration based on that approval. The right to a taxation arises consequent on that notification.
32. In my opinion, the terms of s 162(6A) and reg 8.12 do not displace this conclusion. Section 162(6A) imposes a continuing obligation on a trustee to provide the information prescribed by reg 8.12 in relation to his or her remuneration. That is, as noted by the Full Court in *Doolan v Dare*, the requirement for that information is not confined to the first creditors’ meeting. But that is not inconsistent with a requirement that remuneration be approved prospectively.
33. Regulation 8.12(a) requires notification of the basis and method on which a trustee **seeks to be** remunerated and, where appropriate, an estimate of **the expected** level of remuneration. It is prospective in its language. The question that arises is why, in circumstances where a trustee’s remuneration has been fixed pursuant to s 162(1), this ongoing obligation would exist. In my opinion, one could envisage a situation where a trustee seeks to change the basis for his or her remuneration going forward. Further, it may be necessary that in providing notice of a claim for remuneration pursuant to reg 8.12(b) the creditors need to be reminded of the basis for that claim as previously approved under s 162(1) or as applies under s 162(4) as the case may be.
34. Regulation 8.12(b) requires a trustee to provide certain information where a claim for remuneration is made by reference to an hourly rate. That requirement is consistent with a claim based on a prior approval under s 162(1) or where a trustee is to be remunerated pursuant to s 162(4).
35. In obiter dicta the Full Court in *Doolan v Dare* remarked at [34] that perhaps from the time of introduction of s 162(6A) and reg 8.12 the creditors may have power to fix remuneration for services provided after 5 May 2003 not only prospectively but retrospectively where a trustee has not observed the duty imposed by the Act to provide notice of the intended basis of remuneration. Neither party made any submission as to whether and, if so why, I would or would not be persuaded by the Full Court’s comments.
36. That observation by the Full Court was made in the context of commenting on the amendments to s 162 constituted by the introduction of subs (6A) and reg 8.12 in circumstances where the parties had agreed that they did not have any direct impact on the construction of ss 64U and 162 of the Act on the facts of the case before the Court and where no submissions were made about the impact of s 162(6A). The Full Court did not explain why the amendments may change the nature of the creditors’ power under s 162(1) so that it could also be exercised to approve remuneration retrospectively. At [35] to [38] the Full Court continued:

35. In reconciling the terms of s 64U and s 162 of the Act it is necessary to accept that in some degree the Act has left at large the operation of those provisions. However, it is possible to discern, by necessary implication, how s 64U and s 162 are intended to apply.

36. The object of the duty imposed on the trustee to provide a notice to the creditors, and the bankrupt, of the proposed basis for remuneration is to have that question settled early in the administration and, if possible, at the first meeting of creditors. Of course, upon appointment as trustee of a bankrupt estate the trustee is entitled forthwith to the minimum remuneration fixed by s 161(B).

37. If the trustee has complied with the Act by providing such a notice and within a reasonable period thereafter the creditors have not acted to fix another basis of remuneration in response to that notice it may be taken that the trustee will be entitled to claim remuneration on the basis prescribed by the regulations pursuant to s 162(4).

38. However, if the trustee fails to carry out the duty to provide the notice to creditors, and to the bankrupt, it may be the intention of the Act that the creditors be empowered by s 162(1) to fix the basis of remuneration both prospectively and retrospectively until such time as the required notice is given by the trustee, at which point the creditors will have a reasonable time to have the trustee convene a meeting of creditors pursuant to s 64(1) of the Act to consider a resolution to fix the basis for remuneration pursuant to s 162(1).

1. What their Honours seem to suggest was that the retrospective power which may be available was a power which could be exercised by the creditors where no notice of the proposed basis of remuneration had been given by a trustee and which was exercisable until such time as the requisite notice is given.
2. The basis upon which the Full Court suggests that the meaning of s 162(1) might have changed to permit retrospective approval is a result of the introduction of s 162(6A) and reg 8.12. But there is nothing in the terms of subs (6A) which could lead to a construction of s 162(1) that differed from that which otherwise applied.
3. Thus I would infer that their Honours comments arise from the terms of reg 8.12. If that is the case the result is that reg 8.12 would be construed in a way that is inconsistent with the Act or, alternatively, the regulation would be used to construe the Act such that a bottom up approach was adopted in a way not permitted: see *Federal Commission of Taxation v Macoun* (2014) 227 FCR 265 at [40]. That cannot be what their Honours intended.
4. While the views of a Full Court should be given the most careful consideration, with the utmost respect, I am not persuaded that I should adopt their Honours obiter comments in relation to the effect of the introduction of s 162(6A) and reg 8.12 on the construction of ss 64U and 162(1) of the Act.
5. In my view, the introduction of s 162(6A) and reg 8.12 do not change the position. A trustee should provide notice of the basis for his remuneration and may seek creditor approval to proceed to charge on that basis pursuant to s 162(1). The approval thereby provided is prospective and entitles a trustee to proceed to charge for his or her services going forward on that basis. In the absence of that approval and, until such approval is given, a trustee is to be remunerated pursuant to s 162(4) of the Act.
6. Finally, I accept the applicants’ submission that whatever the position is in relation to s 162(1), a resolution passed by creditors approving a trustee’s remuneration, whether prospectively or retrospectively, does not oust the trustee’s obligation to give ongoing disclosure nor the entitlement of the bankrupt or a creditor to seek a taxation of the remuneration claimed by the trustee.
7. It follows from the matters set out above that, while the motion for approval of the Trustee’s fees was not invalidated by reason of the way in which it was put and passed, the creditors in fact had no power to approve the Trustee’s claim for remuneration retrospectively. For that latter reason I must find that the motion to approve the Trustee’s remuneration was not valid.

# disposition

1. As a result of the matters and my findings set out above I would grant the following relief:
2. a declaration that the Trustee was not entitled to vote on the election of the person to preside at the Creditors’ Meeting as proxy for Barry and Board;
3. declarations that the proxies given by the ATO and Woollahra Council were limited to voting on the motions specified therein for each such motion and could not be used for any other purpose;
4. a declaration that the motion approving the Trustee’s remuneration is not valid.
5. I do not propose to make the declarations sought in relation to the election of the President. Those declarations are not necessary for the purpose of giving effect to the Act, nor are the applicants affected by the acts of the Trustee in his capacity as President, particularly in light of my finding in relation to the power of the meeting to approve the Trustee’s remuneration. Further, there is no evidence before me that, had Ronald Coshott been elected as President, there would have been a different result in relation to the proposing and passing of that motion.
6. The applicants seek an order that the Trustee pay the costs of this application on an indemnity basis without recourse to an indemnity by the Coshott Estate. In the course of argument counsel for the Trustee made submissions on the issue of costs but senior counsel for the applicants preferred to await the publication of these reasons before making submissions on the issue of costs including whether an order in the nature of that outlined above is pressed. Accordingly I will make orders requiring the parties to provide any submissions, or in the case of the Trustee further submissions, on the issue of costs within 14 days of the date of the publication of this judgment and, in doing so, for the parties to notify the Court whether they wish to address the Court orally or whether the issue of costs can be dealt with on the papers.

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| I certify that the preceding one hundred and forty-five (145) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 20 October 2016