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BY EMAIL

The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Room SG.64
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Dear Dr Dermody

Joint and joint and several appointments of external insolvency administrators

We appreciate that the extended date for submissions to the Committee has passed and thank you for agreeing to accept this submission.

1. Overview

This submission is concerned with the practice of joint and several appointments in external insolvency administrations (by which term we include receiverships, administrations, administrations of deeds of company arrangements and liquidations or windings-up), a topic dealt with by Chapter 5 of the *Corporations Act 2001* (Cth).

Strictly speaking, the term 'joint and several' applies only to the powers conferred on appointees. Accordingly, a reference to a 'joint and several appointment' should be understood to mean a joint appointment in which the appointees can exercise their powers either jointly or severally (*Kendle v Melsom (1998) 193 CLR 46*).

It has long been the practice for accounting firms and insolvency practitioners to take joint and several appointments on insolvency engagements. However, in the light of several recent court decisions regarding joint and several appointments, most notably, the decision of the Supreme Court of South Australia in *Harvey v Burfield (2002) 84 SASR 11*, uncertainty has been cast on the practice. Given the considerable advantages which a joint and several appointment will confer in the conduct of an external insolvency administration, this submission rehearses the arguments for amendments to relevant provisions of the *Corporations Act* to remove the uncertainty.

2. Summary of submission

In summary, our submission is that the *Corporations Act* should be amended by:

(a) the repeal of subsection 506(4); and

(b) the insertion of new provisions into Parts 5.2 and 5.6 of the *Corporations Act* (which deal, respectively with receiverships and windings-up generally) to clarify that, where more than one receiver or liquidator is appointed, their functions or powers can be exercised by any one of them (subject to the resolution or instrument appointing them providing otherwise).

In our view, the effect of the these amendments would be to:

- ensure consistency as between receiverships and liquidations and administrations and administrations of deeds of company arrangement (in respect of which sections 451A and 451B already provide in terms we have suggested); and
- provide clarity to the practice of joint and several appointments, thereby ensuring that they continue to be utilised to the advantage of the conduct of external insolvency administrations.

3. Appointment of external insolvency administrators

At the outset, it is worthwhile to set out the mechanisms by which external administrators are appointed in the most common forms of external insolvency administrations: winding up, receivership and administration.

3.1 Winding up

There are two principal forms of winding up: winding up by the Court (commonly known as compulsory winding up) and voluntary winding up.

A **compulsory winding up** is ordered by the Court. The winding up can be made on the basis of the company's insolvency (*Corporations Act*, Part 5.4) or on other grounds (Part 5.4A). Parties who may apply for a winding up order are numerous, but include *inter alia* the company itself, creditors and ASIC (subsections 459P(1) and 462(2)). In a compulsory winding up, it is the Court which appoints the liquidator (subsection 472(1)). If the Court appoints more than one liquidator, it must (subsection 473(8)):

> *'declare whether anything that is required or authorised by this [Corporations] Act to be done by the liquidator is to be done by all or any one or more of the persons appointed'.*

Doubts have been raised as to whether the Court could declare that every power given to the liquidators could be exercised by any single liquidator (*Re Eastern Properties Pty Ltd [1981] 1 NSWLR 499*). It is to be observed that the common practice is for the Court to appoint multiple liquidators on a joint and several basis, thereby obviating the need for the declaration.

Voluntary winding up can take two forms.

(a) **Members' voluntary winding up** If the company is solvent, its members in general meeting may resolve that it be wound up (*Corporations Act*, sections 490 and 491). The appointment of the liquidator or liquidators is made by the company (subsection 495(1)) at the meeting, although, if it turns out that the company is insolvent, the creditors may appoint a new liquidator (subsection 496(5)).

In practice, the liquidators are usually selected prior to the meeting by those 'driving' the winding up (usually the directors) and the formal appointment made by the meeting, usually by resolution (although a resolution may not be strictly necessary provided that the consent of the meeting appears clearly from the discussion or debate as to the appointment: *Re Gold Co of Southern India, The Times*, 3 March 1883).

More than one liquidator may be appointed (subsection 495(1) refers to 'a liquidator or liquidators') although, if a multiple appointment is made, subsection 506(4) assumes relevance. It provides:

> *'When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as is determined at the time of their appointment, or in default of such determination, by any number not less than 2.'*

In the absence of a determination under subsection 506(4), a 'default position' will operate requiring the liquidators' powers to be exercised jointly (*Re London and Mediterranean Bank; ex parte Birmingham Banking Co (1868) LR 3 Ch App 654*). Any failure in this regard, that is, any several exercise of the liquidators' powers, could expose the relevant conduct to challenge, as is well illustrated by the case of *Harvey v Burfield (2002) 84 SASR 11* which is considered later in this submission.

(b) **Creditors' voluntary winding up**. If the company is insolvent, a voluntary winding up involves the participation of the company's creditors as well as its members. In addition to the meeting of the members, the company must convene a meeting of creditors (subsection 497(1)). At their respective meetings, the members *must* and the creditors *may* nominate a person to be the liquidator (subsection 499(1)). If the members and creditors nominate different persons, the nominee of the creditors is to be the liquidator, but if the creditors make no nomination, the nominee of the members is to be the liquidator (subsection 499(1)). Subsection 499(2) specifically provides that, where different persons are nominated (and the nominee of the creditors becomes the liquidator), a member or director of the company may apply to the Court for an order that the nominee of the company should be the liquidator 'instead of or jointly with' the creditors' nominee.

Again, in practice, the liquidators are selected prior to the creditors' meeting, with the selection confirmed, and the formal nomination made, by a resolution of the meeting. The creditors' meeting can also resolve, whether in the same or a separate resolution, how the liquidators' powers are to be exercised. Again,

the effect of subsection 506(4) on the appointment process is discussed when *Harvey v Burfield* is considered later in this submission.

Winding up following administration or termination of deed of company management.

The winding up of a company following an administration or the termination of a deed of company arrangement takes the form of a creditors' voluntary winding up. Given that the winding up of companies following an administration under Part 5.3A is a very common form of external insolvency administration, the mechanism for appointing the liquidators merits detailed consideration.

A *company in administration* may be wound up if:

(a) its creditors so resolve under subsection 439C(c) (that is, at a creditors' meeting convened under section 439A); or

(b) it contravenes subsection 444B(2) (that is, if it fails to execute a deed of company arrangement within the prescribed time) (subsection 446A(1)(a) and (b)).

A *company subject to a deed of company arrangement* may be wound up if its creditors resolve, at a meeting convened under section 445F, that the deed be terminated and resolve, under section 445E, that the company be wound up (subsection 446A(1)(c)).

The company is taken to have passed a special resolution under section 499 that it be wound up (subsection 446A(2)) and, for the purposes of subsection 499(1), is taken to have nominated the administrator of the company or the administrator of the deed (as the case may be) as the liquidator and the creditors are taken not to have nominated anyone (subsection 446A(4)).

Effectively, section 446A and, in particular, subsection 446A(4) operates so that the administrator or deed administrator 'automatically' becomes the liquidator (*Hill v David Hill Electrical Discounts Pty Ltd (in liq) (2001) 37 ACSR 617 at 618*). Where there is more than one administrator or deed administrator, both (or all) will become the liquidator of the company (*McDonald v Hanselmann (1998) 28 ACSR 49*).

3.2 Receivership

The power to appoint a receiver (or a receiver and manager) under a mortgage debenture is inevitably vested in the registered holder of the debenture. The terms of the debenture govern the appointment mechanism. Usually, such terms provide not only for one or more persons to be appointed but also, where more than one is appointed, for them to act jointly or jointly or severally.

However, it is not uncommon, particularly in older debentures, that the terms of the debenture are not absolutely clear as to the issue of joint and several appointments. The

issue has been the subject of a leading High Court case, *Kendle v Melsom (1998) 193 CLR 46*, which is considered in more detail later in this submission.

The appointment is usually made in writing by the debenture holder and notice given to the company. The debenture holder decides the identity of the receiver and, in doing so, is under no obligation to consult with the company.

3.3 Administration

The appointment of an administrator under Part 5.3A of the *Corporations Act* can occur in one of three ways, namely:

(a) by the company where the company's board resolves that the company is, or is likely to become, insolvent and that an administrator should be appointed (section 436A); or

(b) by a liquidator or provisional liquidator of a company if he or she thinks that the company is, or is likely to become, insolvent (section 436B); or

(c) by a person who is entitled to enforce a charge over the whole, or substantially the whole, of the company's property (section 436C).

Subsection 451A(1) of the Act contemplates multiple appointments in specifically providing that where a provision of the Act *'provides for an administrator of a company to be appointed, 2 or more persons may be appointed as administrators of the company.'* As to the exercise of powers, subsection 451A(2)(a) provides that, where there are two or more administrators, a function or power *'may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the instrument or resolution appointing them otherwise provides.'*

Section 451B makes similar provision in respect of the appointment of an administrator of a deed of company arrangement.

In practice, the administrators are selected prior to their appointment and their identity specified in the resolution, notice or other instrument by which they are appointed. It is rare, in our experience, for the appointor to 'otherwise provide' for the manner in which the administrators may exercise the powers or to identify which powers may be exercised by which of the administrators.

4. Advantages and disadvantages of joint and several appointments

4.1 Advantages of joint and several appointments

The obvious advantage of a joint and several appointment over a joint appointment is convenience and expedition in the conduct of the relevant external insolvency administration. The advantages were explained by the New South Wales Court of Appeal in *NEC Information Systems Australia Pty Ltd v Lockhart (1991) 4 ACSR 411*.

In that case, Meagher JA observed that to make multiple appointments is common in the case of the insolvency of large corporations or in cases where it is perceived that

difficult questions may arise (at 422), and pointed to the shortcomings of joint (but not several) appointments:

> *'The commercial purpose behind this practice must be that it is more convenient to conduct an expeditious receivership or liquidation if decisions can be made by one only of the appointees. That end would not be served if every decision, and every act, however trivial, required the concurrence, after due consideration, of all appointees. Indeed, joint receivers would be more cumbersome than a single appointee.'*

As to a joint and several, rather than joint, appointment, Kirby P (as he then was) pointed out that to require multiple external administrators to exercise their powers jointly would be unwieldy and would hinder the achievement of the benefits which would otherwise flow from multiple appointments (at 419):

> *'Signing cheques, executing documents and otherwise managing the affairs of the company may be performed more expeditiously if those functions may, where appropriate, be performed severally. A requirement that they should all be done jointly, no matter how trivial, mechanical or routine, would impose upon multiple receivers an unwieldy necessity of undivided common action which would wholly (or substantially) frustrate the very purpose apparently contemplated by the provision of the power to appoint a multiplicity of receivers and managers. In practical terms, the receivers and managers will generally be members of a single firm of accountants. They will decide among themselves an efficient and economical way of dividing responsibility, acting severally where that is suitable and jointly where that is thought to be appropriate.'*

4.2 Disadvantages of joint and several appointments

The Court of Appeal in *NEC Information Systems* also considered arguments against joint and several appointments, which included that:

- A joint and several appointment might affect the amount of remuneration paid in the external insolvency administration. Although it is not clear from the judgment, it appears that the remuneration provisions of the security in the *NEC* case were unusual. However, as Meagher JA pointed out, although some difficulties could arise, they would be no more so than might arise in respect of a joint appointment (at 422).

  An issue of more general relevance is the scope for a joint and several appointment to result in increased remuneration of the appointees, to the financial detriment of the company or other parties (for instance, the creditors). Again, however, this issue is more concerned with the number of appointees and not whether they should be able to exercise powers jointly and severally, rather than just jointly.

  To the extent that joint appointments differ from joint and several appointments as far as remuneration (and costs in general) is concerned, there

would be a sound counter-argument that the efficiencies achieved by a joint and several appointment actually serve to reduce costs.

- A joint and several appointment might expose the company under external administration to the possibility of conflicting or overlapping acts on the part of the persons severally appointed. For instance, inconvenient results might occur where one receiver authorised the sale of an asset on certain conditions while another authorised the sale of the same asset on different conditions. However, as Meagher JA pointed out (at 423), while theoretically such a situation might arise, commonsense suggested that it would be a remote theoretical possibility and one which in any event would not be insoluble (for instance, by application to the Court for directions).

4.3 Summary as to advantages and disadvantages of joint and several appointments

In summary, the Court was dismissive of the arguments against joint and several appointments, which Kirby P described as 'insubstantial, particularly when weighed against the practical circumstances' (at 419).

If the logic of Meagher JA and Kirby P as expressed in *NEC Information Systems* is accepted, there is a clear benefit to be derived from multiple appointments where the appointees are able to exercise their powers jointly and severally.

5. Recent cases concerning joint and several appointments

In cases where the issue of whether an appointment is joint or joint and several is in dispute, that issue inevitably forms part of a broader argument seeking to impugn some conduct or action of the external insolvency administrators. Two recent cases, *Kendle v Melsom* concerning the appointment of joint and several receivers, and *Harvey v Burfield* concerning the appointment of joint and several liquidators, are such instances.

5.1 Kendle v Melsom (1998) 193 CLR 46

This High Court case concerned the validity of a joint and several appointment of receivers. The facts were relatively simple. A company granted an equitable mortgage over its assets and undertaking to secure advances made by a bank. Following default by the company, the bank appointed receivers and managers under the mortgage. That appointment purported to be joint and several. The mortgage provided that 'the Bank may appoint in writing any person to be receiver of the mortgaged premises or any part thereof'.

The appointment was challenged on two bases, the second of which is presently relevant - concerning whether the receivers could exercise their powers jointly and severally. The High Court was divided on the issue. A majority (Gummow and Kirby JJ and Hayne J) determined that the powers could be exercised jointly and severally, while a minority (Brennan CJ and McHugh J) held that each receiver could not act jointly and severally but only jointly.

- Gummow and Kirby JJ drew a distinction between a joint and several *appointment* to an office and the joint and several *exercise of powers* of that office. According to their Honours, an office such as that of receiver under a

mortgage cannot be held severally but only jointly. As to the exercise of powers, Gummow and Kirby JJ construed the appointment clause, which provided that 'every such receiver' could be empowered to exercise the powers and authorities granted under the mortgage, and concluded that those powers and authorities 'were conferred and could be exercised by each of the receivers collectively or individually'. Accordingly, the joint and several exercise of the powers was valid.

- The other member of the majority, Hayne J, reached the same conclusion as Gummow and Kirby JJ but for different reasons. He considered that the mortgage was silent as to the issue of joint and several appointment and preferred to determine the issue by reference to the commercial bargain struck between the parties. On this basis, Hayne J concluded that the joint and several exercise of the powers was valid.

- On the other hand, Brennan CJ and McHugh J decided that the receivers were empowered to act only jointly. They held that, in the absence of an express provision in the mortgage, whether the powers could be exercised severally depended on the nature of the duties which the mortgage authorised to exercise. Their Honours concluded that the receivers' powers had to be exercised 'in an orderly or consistent manner' (at 53), from which it followed that the powers had to be conferred jointly unless the terms of the charge otherwise provided.

5.2 Implications of Kendle v Melsom

Subsequent cases to have considered *Kendle v Melsom* provide little or no guidance as to how the decision of the High Court will be applied in practice. Overall, the decision itself provides some comfort in light of the majority's view that the joint and several exercise of powers by the receivers was valid.

By and large, the difference between the majority and minority arose from the interpretation of the mortgage. In that regard, the case illustrates how opinions, even of members of the country's highest court, can differ as to the effect of provisions contained in an instrument. More relevantly, the case illustrates how a technical argument over the basis of an appointment can be used to interdict the effective conduct of an external insolvency administration.

In our view, a goal of any external insolvency administration should be its efficient and expeditious completion once the decision to commence it has been made. Such a goal is consistent with not only commercial interests, but also the broader interests of the community and of fairness which insolvency regimes attempt to advance. This was the view of both the Harmer Committee in its 1988 report and the Cork Committee in the United Kingdom in 1982. A corporate insolvency is often a complex and complicated situation. The scope for it to be complicated further by the availability of arguments as those adopted in *Kendle v Melsom* should be constrained.

We are not suggesting that the actions of external insolvency administrators should be beyond supervision or challenge by interested parties (including Courts, creditors and, in the case of receiverships, the debtor). However, there exists a comprehensive accountability regime in the form of both the *Corporations Act* and in the oversight

provided by the Companies Auditors and Liquidators Disciplinary Board. Persons aggrieved by the conduct of external insolvency administrators have avenues by which to challenge that conduct.

In our view, however, challenges should relate to matters of substance. Challenges based on the issue of whether one or more external insolvency administrators should be appointed and what powers they may lawfully exercise serve to impede the process and to create unnecessary delay and expense, inevitably to the detriment of creditors. In order to curtail the scope for such challenges, the *Corporations Act* should be amended by the insertion of a provision clarifying that the power of multiple receivers may be exercised by any of them. In that regard, we draw comparison with sections 451A and 451B which make like provision in respect of the powers of administrators and deed administrators.

Such an amendment would remove dependence on the provisions of often poorly drafted charges. There is a precedent in that section 420 of the Act provides for a series of powers that may be exercised by a receiver, whether appointed by the court or pursuant to the powers contained in an instrument. Similarly, therefore, and subject to the express provisions of the charge, the *Corporations Act* should authorise multiple appointments and the exercise of all powers by any of the appointees.

5.3 Harvey v Burfield (2002) 84 SASR 11

This case concerned the validity of an application for public examination issued by one of two voluntary liquidators under sections 596A, 596B and 596D of the *Corporations Act*. A challenge was brought to the application for the examination on the basis of subsection 506(4), which, it will be recalled, requires that a determination be made as to how liquidators exercise their powers.

It was common ground that there was no determination by the creditors, at the time of the appointment of the liquidators, that either one of them might exercise any power given by the Act. Accordingly, it was necessary to determine whether only one of the liquidators could exercise the power to seek examination orders.

In considering that issue, Perry J of the Supreme Court of South Australia had the advantage of a line of authority concerned with equivalent provisions of United Kingdom legislation, subsection 506(4) of the *Corporations Act* being, in relevant respects, on all fours with section 113 of the *Companies Act 1862* (UK). Relying on the line of authority, Perry J concluded:

> *'The cases to which I have so far referred lend strong support for the view that where two or more liquidators are appointed, the appointment should be regarded as joint and not several, so that absent any statutory provision to the contrary, liquidators must act together and are unable to authorise any one or more of them to act on behalf of all of them.*
>
> *In cases to which s506(4) applies, that principle may be qualified, in the sense that where there are several liquidators, any two or more may exercise any power given by the Act, or, if a determination is made at the time of their*

> *appointment, such one or more of them may do so, as may be so determined at that time.'*

His Honour reached this conclusion notwithstanding that the definition of 'an eligible applicant' in section 9 included '*a* liquidator or provisional liquidator' (emphasis added). However, Perry J, applying the principle of statutory interpretation that a specific provision overrides a general provision, held that the definition could not override the substantive provision in subsection 506(4). Perry J's approach in this regard is to be contrasted with that of the High Court in *Kendle v Melsom* which upheld a multiple appointment on the basis of a general interpretative provision contained in the mortgage debenture. The distinction may be explicable on the basis that *Kendle v Melsom* concerned the interpretation of a mortgage debenture, while *Harvey v Burfield* concerned interpretation of a statute.

5.4 *Implications of Harvey v Burfield*

To date, no case has applied the decision in *Harvey v Burfield*. The provision on which the decision rests, subsection 506(4) of the *Corporations Act,* applies only in respect of a voluntary winding up and, by operation of section 446A, to the voluntary winding up of a company in administration or subject to a deed of company arrangement (in fact, the very situation which occurred in *Harvey v Burfield* where the company, which had been in administration, was put into liquidation by a resolution of its creditors under section 439C(c) of the *Corporations Act*). Given the frequency of this form of winding up (particularly following an administration), there is scope for the decision to have a considerable, and unfortunate, impact. It potentially imperils every solo exercise of power by one of two liquidators appointed as voluntary liquidators, whether by decision of the members or creditor(s) or automatically by virtue of subsection 446A(4) on the transition from administration or deed of company arrangement to a creditors' voluntary winding up.

That impact of the decision can be ameliorated by having the meeting of members or creditors make the determination for the purposes of subsection 506(4). In practice, however, this step is usually overlooked. Moreover, the ameliorating step may not be available in respect of a company that goes into winding up as a result of subsections 446A(1)(b) and 446(2) (this is, for failing to execute a deed of company arrangement in the prescribed time).The administrators of such a company will become its liquidators (subsection 446A(4); *McDonald v Hanselmann (1998) 28 ACSR 49*), but how they are entitled to exercise their powers as liquidators and, in particular, whether they are entitled to exercise their powers jointly and severally, has not been the subject of a decided case.

Given that subsection 446A(4) operates automatically, notions of continuity and consistency dictate that the liquidators should be able to exercise their powers on the same basis as they did as administrators (that is, if entitled as administrators to exercise their powers jointly and severally, so they should as liquidators). However, a difficulty might arise if, in their appointment, no provision was made for how the administrators are to exercise their powers. For instance, it is conceivable that the appointment instrument might not deal with the exercise of powers by the administrators, but rely instead on section 451A (or section 451B in the case of deed administrators).In such circumstances, there would be no expression of the consent of the members or creditors

as to how the liquidators should exercise their powers. The relative infrequency of this scenario (the number of companies which go into winding up as a result of section 446A(1)(b) is being relatively small) does not mean that the *lacuna* we have identified should not be addressed. *Lacunae* will, unless filled, be exploited sooner or later. Our solution is the repeal of subsection 506(4).

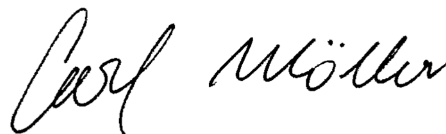
In arguing for the repeal of subsection 506(4), we should not be understood as arguing that, because a law (being the requirement that the determination be made) is not observed in practice, it should be repealed. Rather, our concern is with the purpose or utility of subsection 506(4). We can think of no need for the creditors or members to have to make the determination referred to in the subsection. We have considered Australian cases on the subsection, as well as the English authorities considered by Perry J in *Harvey v Burfield*. However, none of those cases explains the need for the provision, which appears to have been adopted into Australian companies legislation, including the *Corporations Act*, from its English antecedents and carried forward in subsequent versions without critical analysis of its purpose. The scope for the subsection to cause havoc is illustrated not only by *Harvey v Burfield*, where it impeded the liquidators' ability to conduct examinations, but also by at least two reported cases in which one of two liquidators died in office. Because there had been no determination, the other was not able to exercise any of the powers of the office at all (*Re Metropolitan Bank and Jones (1876) 2 Ch D 366; Re Aplin Brown & Co. (1902) QSR 67*). Old as they are, these decisions could yet come back to haunt a present day liquidator.

Once again, the position in respect of winding-up can be contrasted with that prevailing in an administration or a deed of company arrangement, where sections 451A(2)(a) and 451B(2)(a) have the effect that, unless the contrary is provided, any power of an appointee may be exercised by any one of them. Our concern is with the voluntary windings up where the members or creditors do not expressly confer several authority on liquidators or where there is no opportunity for them to do so.

In our view, the default position in a winding-up should be that the powers of liquidators should be capable of several exercise, subject to the right of those appointing the liquidators to provide to the contrary.

We would be happy to expand upon this submission. Should you have any queries or require any further information, please let us know.

Yours sincerely



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