STATUTORY DEMANDS AND OTHER PAYMENT PROBLEMS - A VIEW FROM THE BENCH

The Hon Justice James Douglas
Supreme Court of Queensland

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My first real exposure to the payment problems that drive so much litigation was rarefied, sometimes exciting but eventually, from my point of view, provided a real incentive to fulfil my ambition of going to the bar earlier rather than later. It occurred in the latter half of 1976 in London. I had recently finished a post-graduate law degree at Cambridge and had begun to work for a leading firm of London solicitors then called Lovell White & King. I was working in their litigation section on two related actions involving the liquidation of a company called Investors Overseas Services (IOS). It was a company which encouraged investment in a large number of mutual funds which had, allegedly, been defrauded of millions of dollars by its founder, Bernard Cornfeld, and then of hundreds of millions of dollars by the man who took control of it from Bernard Cornfeld, Robert Vesco. The partners told me it was the largest international company liquidation ever.

Robert Vesco had been accused by the United States Securities and Exchange Commission of looting the company of $224 million. He had also been indicted for making illegal campaign contributions totalling $250,000 to the re-election campaign of President Richard Nixon and, in 1976, had been indicted by a United States Federal grand jury on charges relating to his fraudulent schemes in IOS.

In 1972 he fled the United States and had been living wealthily in Costa Rica, the Bahamas, Nicaragua and Antigua where he is said to have bribed the governments of those countries to avoid extradition requests from the United States and from Switzerland where IOS had been headquartered. Those expedients only lasted so long until in 1984 he went to live in Cuba which has no extradition treaty with the USA. He survived comfortably there for quite some time until 1996 when he was jailed for 13 years for economic crimes committed there.

His was fraud on a grand scale and fascinating litigation for a recently admitted young lawyer. We were acting for the Canadian based liquidator of the main IOS companies and our principal object at that time was to locate assets of the company which could be seized by the liquidator and used to assist him to locate the major funds that had been misappropriated. We, I recall, succeeded in identifying and chasing one fund of approximately £1 million while I worked on the case. We identified the fund initially in Jersey and then, after the villains moved it rapidly from there, tracked it to Guernsey, the Isle of Man, Munich, Zurich and eventually caught up with it in Hong Kong. Once secured there it was able to be put to good use in funding further inquiries but the process was expensive, time consuming and of only limited benefit in the grander scheme of things.

In the event it seems likely that Robert Vesco did not escape with anything like the amount of money he was accused of looting from IOS but he did manage to avoid paying for his crimes for a long time. Mind you, there is some justice in his ending up with a 13 year prison term in Cuba, not enough to recompense the victims of his fraud, but probably enough to help deter others from following his example.

My role in the fall of Robert Vesco was, however, very humble. My job was to organise the thousands of documents for disclosure and after five months of that, by Christmas 1976, the prospect of a career at the bar in Brisbane rather than more disclosure in London and Toronto seemed much more exciting and interesting than it had in the middle of that year.

During my career at the Bar I also had the good fortune to be engaged in a couple of corporate inquiries, including that into Qintex Ltd. As a result of that I was the last person to cross-examine Christopher Skase on Australian soil. By then most of the money had left Qintex, significant amounts going as management fees to Mr Skase's management company. The creditors were lined up but this time I was acting for the regulator which wanted him to remain in Australia to continue to assist it with its inquiries. The trouble was that he had already co-operated with its inquiries and there was little left to inquire into involving him. He had also returned to Australia when required previously. I was not, I hasten to say, in any way responsible for the

decision of the Australian Federal Police not to require his passport as one of his bail conditions in an associated criminal matter.

My juniors at the time, who are now Justices Atkinson and Daubney, and I, all thought, however, that it was unlikely that Christopher Skase would return willingly to Australia when Pincus J allowed him to leave shortly after that cross-examination. We were justifiably sceptical that he would perform his promise to return.

I have told these stories partly to illustrate the ramifications of the collapse of large corporations, particularly where there has been fraud in their management, and almost always where the collapse has been preceded by demands for payment that have not been met. So the humble statutory demand can begin the process of unravelling much more significant corporate misbehaviour than the simple non-payment of a debt.

My main task here today, however, is to speak about the role of statutory demands, current difficulties with their enforcement and other problems in enforcing payment by corporate debtors. Commonly it is such payment problems that lead to the unwinding of much more complex stories stemming from the mismanagement of corporations.

I propose to deal with several current issues highlighted in recent decisions:

(a) the time limit of 21 days to set aside a statutory demand;

(b) can a creditor issue more than one statutory demand for debts currently owed?

(c) applications to set aside the demand based on genuine tax disputes and conditions for payment into court that may be attached to an order setting aside a demand.

I shall then conclude on a cautionary note about the consequences of using a statutory demand on the likelihood of a payment being treated as a preference.

The 21 day time limit

The High Court held in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 that the period of 21 days within which an application to set aside a statutory demand may be commenced cannot be extended. When s. 459S of the Act is taken into account that time limit is significant. As I am sure you know it provides:

> "(1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:
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> (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
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> (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).
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> (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."

Failure to challenge the statutory demand or an unsuccessful challenge to it, therefore, prevents the debtor company from seeking to oppose the winding up application because of the statutory demand unless the Court permits it to do so. It also emphasises that the focus at the winding up hearing should be on whether the company is solvent. The normal approach is that the Courts should be slow to grant permission to oppose the application to wind up on a ground available to the company to set the demand aside; see *Kekatos v Holmark Construction Co Pty Ltd* (1995) 121 FLR 39 and *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661, 674, 676 but s. 459S does apply, for example, "where the circumstances giving rise to the asserted dispute as to the existence or amount of the debt or as to the existence of the offsetting claim did not exist during the period of 21 days referred to s. 459G…"; see Barrett J in *Biron Ltd v Velowing Pty Ltd* [2003] NSWSC 1181 at [11]. See also the decision of Austin J in *Perpetual Nominees Ltd v Mazri Apartments Ltd* (2004} 49 ACSR 719 where his Honour said at [12]:

> "Where, however, it is established on the evidence that the directors of the company did not become aware of the existence of the statutory demand until after the expiration of the 21 day period, and they have acted reasonably with respect to superintendence of the collection of mail from the company's registered office, the case is one where the company could not, in a factual sense, have relied on any of the grounds available to challenge the demand within the time period. In such a case, fairness requires that the company be permitted to raise those issues at the only hearing available to it, namely the final hearing of the application for winding up, even though to that extent one reverts to the old practice which the Harmer reforms were intended to reverse."

Another recent issue that has caused some controversy, surprising in the light of the *David Grant* decision, is whether an order may be made extending the period for compliance with a statutory demand after the period for compliance has expired. Last Wednesday the High Court concluded that that question should be answered "no" in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2008] HCA 9.

That was an appeal from the Victorian Court of Appeal which, sitting as five members had reached the same conclusion factually but in circumstances where only Chernov JA was satisfied that the Court was not able to extend the period for compliance after it had expired. Two members of that Court, Maxwell P and Neave JA held that the time for compliance with a statutory demand could be extended after it had expired while Nettle and Ashley JJA preferred a construction of the act that the time for compliance could be extended after it had expired but felt that they should follow earlier decisions to the opposite effect which could not be said to be wrong and productive of inconvenience.

The majority of the High Court consisting of Gleeson CJ, Hayne, Crennan and Kiefel JJ, against the dissent of Kirby J, made some comments of general importance about the overall structure of the Act. Let me read some of them to you[1]:

> "The evident purposes of Pt 5.4 of the Act include speedy resolution of applications to wind up companies in insolvency. One particular feature of the way in which that purpose is carried into effect is to focus principal attention at the hearing of the winding up application upon

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[1] See paras [14]-[19] and [26] reproduced without footnotes.

whether a company is insolvent rather than upon defects in the procedures that precede the institution of the application for winding up.

The provisions that now appear in Pt 5.4 of the Act were first enacted as amendments to the Corporations Act 1989 (Cth) by s 57 of the Corporate Law Reform Act 1992 (Cth). The provisions found their origins in the Report of the General Insolvency Inquiry conducted by the Law Reform Commission generally referred to as the "Harmer report". As that report recorded, the Law Reform Commission recommended repeal of what was then s 364(2) of the relevant companies legislation. That section had "deemed" a company to be insolvent if a creditor to whom the company was indebted for more than $1,000 made demand for payment of the sum due and the company had, for three weeks after the service of the demand, failed to comply with the demand.

The Law Reform Commission recommended repeal of this provision and replacement by "a provision which specifies the circumstances from which it may be presumed that a company is unable to pay its debts". It was intended that this approach, coupled with provisions designed to overcome defects in notices of demand, would "more clearly permit the court to exercise a discretion in relation to defective notices of demand and may avoid winding up proceedings against a company being dismissed for technical or minor defects when the company is clearly insolvent".

That speed in the resolution of applications to wind up in insolvency is an important underlying policy of Pt 5.4 of the Act is evident from a number of provisions. First, there is the requirement of s 459R that an application for a company to be wound up in insolvency is to be determined within six months after it is made. Although that period may be extended by a Court, an extension may be granted only if the Court is satisfied that special circumstances justify the extension and if the order is made within the six months or within the period as last extended. Secondly, there is the absolute limitation in s 459G of the time within which a company may apply for an order setting aside a statutory demand to 21 days after the demand is served. This Court held in David Grant & Co Pty Ltd v Westpac Banking Corporation that the period of 21 days within which an application to set aside a statutory demand may be commenced cannot be extended. Thirdly, there is the fixing by s 459E(2)(c) of the time for compliance with a statutory demand (21 days) coupled with the fixing of times under s 459F(2) for compliance with a demand according to whether or not an application is made to set it aside.

The emphasis which these provisions give to the speedy resolution of an application to wind up in insolvency is coupled with provisions which seek to focus attention at the hearing of an application to wind up in insolvency upon whether the company is insolvent rather than upon the formal adequacy of steps which have preceded the institution of the application to wind up. Chief among the provisions intended to focus

attention upon solvency is s 459S. That section limits the grounds on which a company may oppose a winding up application which is founded on failure to comply with a statutory demand. Section 459S provides:

> '(1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:
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> (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
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> (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).
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> (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent.'

The reference in s 459S to grounds that a company relied on or could have relied on in an application to set aside a statutory demand takes its content from s 459J. That section identifies when a Court may set aside a statutory demand. In particular, the Court "must not set aside a statutory demand merely because of a defect"; the defect must be such that "substantial injustice will be caused unless the demand is set aside".

It would be sharply at odds with the purposes revealed by the provisions of Pt 5.4 to read the power to extend time for compliance with a statutory demand as capable of exercise after the time has expired. That may well be reason enough to consider that the Act intends that the general provisions of s 70 and the definition of "extend" in s 9 should not apply to the power to extend time for compliance with a statutory demand. But the point is put beyond doubt when regard is had to the consequence that the Act attaches to a failure to comply with a statutory demand. As noted at the outset of these reasons, if a company fails to comply with a statutory demand, and that failure occurs during or after the three months ending on the day when that winding up application is made, the Court must presume that the company is insolvent. It is s 459C that requires the Court to make that presumption.

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Further, it is of fundamental importance to recognise that the provisions which are now in question do no more than create a presumption about the ultimate issue that arises in an application to wind up in insolvency: is the company insolvent? Denying the power of a Court to extend time

> for compliance with a statutory demand after the time has already expired determines no right or liability of the company or of the party that has made the demand. And contrary to much of the argument advanced in this case on the appellant's behalf, denying the power to extend time after its expiry does not cut down the utility, or impede the exercise, of rights of appeal. The principles governing orders preserving the utility of the exercise of rights of appeal are well established. If there is a right of appeal and those principles are engaged, orders will be made to preserve the subject matter of the appeal. Thus if, as in the present case, the appellant had an appeal as of right from the orders of the Master who heard the matter at first instance it was open to the appellant to seek orders preserving the utility of that right."

This is another example of the High Court, as it did in *David Grant*, basing its decision clearly on the policy expounded in the Harmer Report which emphasised the need for speed in the resolution of applications to wind up in insolvency.

Can a Creditor Issue More than One Statutory Demand?

Whether a creditor can issue more than one statutory demand against a debtor company is an area of controversy in Queensland because of the conflicting decisions of Chesterman J in *Cooloola Dairys Pty Ltd v National Foods Milk Ltd* [2005] 1 Qd R 12 and of Mullins J in *Leda Developments Pty Ltd v Orion Consolidated Pty Ltd* [2001] QSC 400. In the earlier decision, Mullins J had decided that the proper construction of s. 459E(1) of the *Corporations Act* 2001 required a creditor to make one demand for all debts claimed to be owing by the company to the creditor. The section provides:

> "**Creditor may serve statutory demand on company**
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> (1) A person may serve on a company a demand relating to:
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> (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
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> (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum."

Earlier decisions in other States supported her Honour's conclusion that multiple demands could not be served which would have required separate applications to set aside each demand. Her Honour regarded that potential as oppressive in reliance upon decisions such as *Sentinel Financial Management Pty Ltd v Entercorp Finance Pty Ltd* (1997) 15 ACLC 201 and *Hooker Cockram Ltd v Minesco Pty Ltd* (2001) 3 VR 466. In deciding not to follow those decisions, Chesterman J in *Cooloola Dairys* took the view that s. 23 of the *Acts Interpretation Act* 1901 (Cth), which provides in familiar language that words in the singular number include the plural and words in the plural number include the singular, had the effect that s. 459E of the Act did not oblige a creditor who was owed more than one debt by a company to include all of the debts in a single demand. He qualified that by saying that in an appropriate case the number of demands issued and other circumstances may lead the Court to conclude that there has been oppression or an abuse of process.

In reaching that conclusion his Honour expressed the view that the company could in one application seek to have more than one demand set aside, a view contrary to the decision of Young J in the New South Wales Supreme Court in *Helpdesk Institute Pty Ltd v Adams* (Supreme Court of NSW, 18 November 1998, Young J, unreported, BC9806553) to which he was not referred but which was followed by me in *Ambassador at Redcliffe Pty Ltd v Barreau Peninsular Property Pty Ltd* [2006] QSC 247.

In concluding that there was no compelling reason why s. 459E(1) should oblige a creditor to include all of the debts owed to it in the one demand Chesterman J said at [17]-[18], [21]-[22]:

> "[17] Warren J. [in *Hooker Cockram Ltd v Minesco Pty Ltd*] expressly accepted the reasoning of Master Mahony in Sentinel. In addition her Honour wrote (469):
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> > 'Consideration of subs (1) [of s 459E] reveals that a creditor may serve 'a demand' in relation to 'a single debt' or 'a demand' in relation to '2 or more debts that the company owes to the person'. Subsection (2) of s 459E requires that 'the demand' specify 'the debt' and 'its amount' if it relates to 'a single debt' and, if it relates to '2 or more debts' to specify 'the total of the amounts of the debt'. Subsection (3) of s 459E

> provides that unless 'the debt' or 'each of the debts' is a judgment debt the demand must be accompanied by an affidavit that complies with the rules and verifies that 'the debt' or 'the total amounts of the debts' is due and payable. The words of the section and their meaning are plain.
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> Section 459E contemplates that a creditor may serve one statutory demand in relation to a single debt or one statutory demand in relation to multiple debts. Section 459E(1) provides that a person 'may' serve a statutory demand and then proceeds to set out that the demand can be by way of a demand relating to a single debt or … two or more debts. In so far as the subsection uses the expression 'may' it allows a creditor to exercise a discretion to serve a statutory demand. The expression is confined to whether or not to serve a demand. The discretion … does not extend to a discretion to serve a demand relating to a single debt or separate demands for two or more debts. In my view, it could not be said that there is an election by a creditor to serve a demand relating to a single debt or two or more debts provided for by the expression 'or' between paras (a) and (b) of s 459E(1). The conjunctive 'or' exists between the two alternative scenarios: one demand where there is a single debt or one demand where there are two or more debts.'

[18] The first passage quoted appears to overlook the effect of s. 23 of the Acts Interpretation Act. The second passage appears to import a restriction into s. 459E which the words of the section themselves do not have. The only restriction which appears from the terms of the section itself is that if a demand is served in respect of a single debt the debt must exceed the statutory minimum, and if debts are aggregated in a demand the aggregate amount must exceed the minimum.

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[21] … A creditor, according to the subsection, may serve a demand relating to a single debt or a demand relating to more than one debt as long as together they exceed the statutory minimum. The wording is permissive. It gives a creditor the choice whether or not to serve a demand and, if it does, whether or not to serve a demand for a single debt or for multiple debts. A creditor who was owed more than one debt by the one debtor may exercise either of the choices given by paras (a) and (b), so long, of course, as the statutory conditions as to amount are met. A creditor who is owed more than one debt may serve separate notices in respect of each of them, if each exceeds the

> minimum. Section 23 of the Acts Interpretation Act obliges one to read s. 459E(1):
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> > 'A person may serve on a company [demands] relating to:
> >
> > * (a)
> > … single debt[s] that the company owes to the person …'

[22] The construction favoured by Warren J. obliges a creditor owed more than one debt (exceeding in the aggregate the minimum) to deliver one demand only for all of the debts. A creditor may have a good reason for not wishing to include a debt in a statutory demand directed to the debtor. One debt may be disputed while others are not. If the disputed debt is excluded the debtor would have no basis for making an application under s. 459G. If the undisputed debts were not paid the debtor would be wound up. To include a disputed debt would be to invite an application with attendant expense and delay. It is a serious thing to read into a statute words which are not there, or to impose on a right conferred by a statute restrictions that do not naturally appear in the wording of the section. In my opinion the imported restriction is unjustified."

Clearly this is an issue that is likely to arise again and not one about which I should express an opinion beyond saying that it is a dispute that needs to be resolved, preferably by an appellate decision.

Applications to set aside the demand

Demands based on disputed tax debts

An important decision on its way to the High Court from the Queensland Court of Appeal is that in *Neutral Bay Pty Ltd v DCT*; *MA Howard Racing Pty Ltd v DCT*; *Broadbeach Properties Pty Ltd v DCT* [2007] QCA 312 where Keane JA, giving the judgment of the Court, considered the interaction of the Act with the *Income Tax Assessment Act* 1936 (Cth) and other taxation legislation including the *GST Act* (*A New Tax System Goods and Services Tax Act* 1999 (Cth)).

The Court of Appeal did not follow an earlier decision of the Full Court of the Federal Court in *Hoare Bros Pty Ltd v The Commissioner of Taxation* (1996) 62 FCR 302 which had held that there could not be a genuine dispute "about the existence of a

debt to which the demand relates" for the purposes of the statutory predecessor of s. 459H(1) of the Act by reason of the pendency of genuinely arguable issues in proceedings brought by the company under the relevant taxation legislation.

In seeking to distinguish that decision under the current relevant taxation legislation Keane JA said[2]:

> "It is apparent that, although in a general sense, a liability to income tax arises by reason of the operation of the ITAA upon events which have occurred, the making of an assessment by the Commissioner was regarded as essential to the creation of a fixed and enforceable liability to income tax. To this extent, there was, in my respectful opinion, real force in the learned primary judge's view that, to the extent that the respondents' debts for GST did not arise from an assessment or declaration by the Commissioner, that situation was materially different from the situation which obtained under the ITAA. There were good reasons for his Honour to make this distinction: an action can be brought for the recovery of a liability to GST without an assessment having issued and been served whereas the issue and service of an assessment under the ITAA was necessary before the amendments to s 204 of the ITAA.
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> The attention of the learned primary judge had not, however, been drawn to the circumstance that s 204 of the ITAA had been amended since the decision in Hoare Bros Pty Ltd v FCT to include subsection (1A) and to amend subsection (1) to recognise the process of self-assessment to income tax. It was common ground that each of the respondents, and, in particular, Broadbeach Properties, is a "full self-assessment taxpayer". The basis for the distinction which the learned primary judge, deferring to and applying the reasoning in Hoare Bros, drew between assessment to income tax and liability to GST has disappeared.
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> The appellant submitted that, once an assessment has issued, either in respect of income tax or GST or a declaration made under s 165-40 of the GST Act, there is brought into existence a debt, separate and distinct from the taxpayer's true liability to income tax or GST and having an existence by virtue of the fact of the making and service of the assessment. Further, s 177 of the ITAA and s 105-100 of Sch 1 of the TAA serve to render that debt indisputable save by means of the processes contemplated by Pt IVC of the TAA.
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> The respondents submitted that, to speak of a tax debt, either for income tax or GST, created by the making and service of the

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[2] At [59-[65] without the footnotes.

assessment or declaration, which stands free of and distinct from the underlying liability to tax, is to allow form to triumph over substance. In the respondents' submission, the processes of objection and appeal under Pt IVC of the TAA are designed to establish the taxpayer's true liability to tax which is given formal effect by amendment to the assessment which has been shown to be erroneous. On this view, it is not correct to say, as the learned primary judge did, that, because the debt arising from an assessment under the ITAA or a declaration under s 165-40 of the GST Act exists indisputably until amended consequent upon the outcome of proceedings under Pt IVC of the TAA, the debt is not disputed while those processes are in train. Even a declaration under s 165-40 of the GST Act is not given effect by s 165-50 of that Act to create a liability if there is not a supply of goods or services upon which the GST Act operates.

The reasoning in Hoare Bros in relation to s 459H of the Act was clearly not based on the conclusive effect of s 177 of the ITAA. Rather, it seems that the Full Court of the Federal Court reasoned that the subject matter of the dispute pursuant to Pt IVC of the TAA was the Commissioner's assessment rather than the debt constituted by the taxpayer's liability to tax. In other words, the Full Court of the Federal Court held that, because the subject matter of the dispute was the assessment, the debt was not the subject of the dispute. To say this is to erect a dichotomy between a challenge to a liability to tax and a challenge to an assessment to tax. That dichotomy is not established by the ITAA or the GST Act. There is no support in authority for the view that a dispute under Pt IVC in which it is contended that an assessment is excessive cannot accurately also be described as a dispute about the amount or (depending on the extent to which the assessment was excessive) the existence of the debt. A dichotomy of the kind in question is also inconsistent with s 14ZZK which contemplates an objection to an assessment on the ground that it is excessive in its statement of the amount (or existence) of the tax liability.

The Full Court's approach fails to appreciate that the end of the process of assessment and disputation under Pt IVC is to establish the taxpayer's true liability to tax, that is the existence and amount of the taxpayer's debt to the Commissioner. It has long been recognised that the true purpose of the processes provided by Pt IVC is to enable the taxpayer's contention that the assessment is excessive to be determined and the taxpayer's true liability to tax to be established. As Kitto J said in McAndrew v Federal Commissioner of Taxation:

> ‘an objection … based upon a contention that the commissioner has fallen into some error in the course of making it … is an objection that it has resulted in an assessment fixing the taxpayer with a higher liability than that which attaches to him upon a correct application of the Act as a whole.’”

In the same case, Taylor J said:

> "… there is no reason for thinking that an assessment, made in purported but not justifiable exercise of a statutory power, may not properly be described as excessive; it purports to impose a specified liability and, upon appeal, the claim of the appellant is that he is not liable to pay any part of it. Whether the particular ground upon which he seeks to escape or reduce the liability merely touches the accuracy of the assessment or assails its validity as an assessment, he is, in the words of s 185, 'dissatisfied with' the assessment because it purports to impose upon him a liability in excess of that to which he may lawfully be subjected and I can see no reason why, in either case, his complaint may not be accurately described as a complaint that his assessment is excessive."

In then considering the conclusive evidence provisions of the legislation attaching to production of a notice of assessment save in proceedings on a review or appeal his Honour went on to say at [68]:

> "It is clearly a strong thing to say that when a court is made aware that the lawful processes whereby a tax debt may be disputed have been engaged, and it is accepted that there is an arguable basis for that challenge, nevertheless, for the purposes of s 459H of the Act, the court cannot regard the debt as being subject to a genuine dispute, and is obliged to conclude, contrary to the evident truth of the matter, that there is not a genuine dispute as to the existence of the debt. If an intention to bring about such a fictional state of affairs is to be attributed to the legislature, that intention would need to be expressed clearly. There are good reasons to conclude that the legislature has not sought to make the court a slave to such a fiction."

His Honour then continued at [72]:

> "In summary, the appellant's submission requires the Court to ignore the reality that the existence of the debt is being disputed, on a genuine basis, in a forum which is competent to set the assessment, and hence the debt, aside. This requirement is not apparent in the language of the tax legislation or the Act. It seems to rest, at least in part, upon an assumption, not expressly articulated in the reasons of the Full Court of the Federal Court in *Hoare Bros*, that, unless the dispute as to the tax liability asserted by the appellant is justiciable in the proceedings under s 459P or s 459G, the court before which those matters are pending may not notice a genuine dispute pending elsewhere. But there is nothing in s 459H(1)(a) which requires that the dispute as to the debt be justiciable in the court which is asked to set aside the statutory demand; it should not be given a narrower operation than its language requires. Nor is there anything in the language or statutory history of s 105-100 of Sch 1 of the TAA which would warrant the expansive operation of its conclusive fictional effect for which the appellant contends.[39] The issue which arises on an application under s 459G of the Act is not whether the tax liability

> assessed against the company is recoverable, but whether the recovery of the tax is being genuinely disputed. If that matter is being disputed, with arguable prospects of success, in a tribunal able to set the assessment aside, then it accords with common sense to say that there is a genuine dispute about the existence of the debt insofar as it is sought to be made a basis for winding the company up in insolvency under s 459A of the Act."

Finally, in discussing the extent of the discretion under s. 459J(1)(b) of the Act to set aside the statutory demand his Honour compared the approach of the Queensland Court of Appeal in *KW & KM Quinn Investments Pty Ltd v DCT* [2004] QCA 91 at [6] with the approach of Olney J in *Kaelis Nominees Pty Ltd v DCT* (1995) 31 ATR 188, 193 before concluding at [83] as follows:

> "In my respectful opinion, the strictures expressed by Olney J in this passage tend to narrow the scope of the discretion conferred by s 459J(1)(b) in a way which is not warranted by the language, subject matter or purposes of the Act. In my respectful opinion, the approach of Holmes J and of Davies JA in this Court is to be preferred to an approach which tends to narrow the discretion conferred by s 459J(1)(b) by reading into it words which are not there. There are four reasons why I prefer the approach of Holmes J and Davies JA to the approach suggested by Olney J in the passage cited above. First, to the extent that the passage cited assumes that the policy of the tax law identified by Olney J would be defeated if a demand were set aside because a review is pending and there is an arguable case that the review will be successful, the accuracy of his Honour's assumption as to the policy of the tax law is not self-evident: it is certainly not expressly stated in the language of the tax law. Secondly, the scope of the discretion conferred by s 459J(1)(b) should be determined by reference to the subject matter and purposes of the Act not the tax law. Thirdly, to recognise that there is no indication in the taxation legislation that companies engaged in genuine disputes about their tax liabilities should be wound up before the dispute is resolved is hardly to treat the discretion conferred by s 459J(1)(b) as an occasion to express disapproval of the taxation legislation: in truth, it is simply to acknowledge the legislative purpose which explains the existence of s 459J. Fourthly, even if one were to accept the strict distinction drawn by the Full Court of the Federal Court in *Hoare Bros* between the "process of assessment" and the taxpayer's underlying liability to pay an amount of tax, observations of the Court in that case suggest that the existence of a genuine dispute as to the underlying tax liability could be taken into account as one factor in exercising the discretionary power to set aside the demand under s 459J(1)(b).[46] And if one were to add to that factor consideration of the disruption to the taxpayer and its creditors and contributors involved in a winding up and the absence of any suggestion that the creditor would suffer actual prejudice if left to remedies other than a winding up, it would, in my view, be open to a court to conclude that there was a reason to set aside the statutory demand without pausing

> to consider whether the circumstances involved unconscionable conduct or unfairness on the part of the Commissioner."

It is not surprising that the High Court has granted special leave to appeal in this matter because of its potential ramifications for the collection of claimed tax debts as well as the possible inconsistency between the decisions of the Court of Appeal and the Full Court of the Federal Court. Special leave was granted on 8 February 2008 and it is expected to be listed for an appeal in the High Court sittings in Brisbane in June.

Payment into Court as a condition of setting aside a statutory demand

The power of the Court to order that a statutory demand be set aside on a condition that the recipient pay into Court the amount of the alleged debt was recognised by the Court of Appeal in *Natcraft Pty Ltd v WIN Television Pty Ltd* [2003] 1 Qd R 196. That condition is normally imposed in circumstances where the genuineness of a dispute is in issue but, because of the interlocutory nature of the proceedings, and the unsatisfactory state of the affidavit evidence filed on behalf of the applicant, the Court may be reluctant to prevent winding up proceedings from ensuing; see ss 459J(1)(b) and s. 459M. See, e.g., *Re Stockman's Australasia Pty Ltd and Sunshine Enterprises Pty Ltd* (No 372 of 1999, Supreme Court of Queensland, White J, 5 February 1999, unreported). I am told reliably that the condition continues to be imposed regularly.

The risks of using statutory demands as a debt recovery tool

Let me conclude with a cautionary note about one possible consequence of using statutory demands. The Court of Appeal in *Muller v Academic Systems Pty Ltd* [2007] QCA 218 recently drew attention again to the fact that a payment made pursuant to a statutory demand is likely to be required to be repaid as a preference should the debtor company not survive beyond the relation back period. As Williams JA said at [33]:

> "Whilst one could not conclude that a creditor, who becomes so frustrated with an inability to recover a debt that he serves a statutory demand and within the period provided for by that demand accepts a lesser sum in full

> settlement, could never discharge the onus of establishing a defence under s 588FG, it has to be said that ordinarily the inference would be open in such circumstances that the creditor had grounds for suspecting that the company was insolvent at the time payment was made."

See also Atkinson J at [41].

Conclusion

These are only some of the many issues that affect this area of practice, one that is very important for the efficient conduct of the country's commercial life and which demands speed and certainty in its administration from practitioners such as yourselves. Thank you for the opportunity to speak to you.