

STATUTORY DEMANDS

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Whether your client is looking to recover a debt, or has been served with a demand, the key issue is what amounts to a sufficient basis to set a demand aside. These grounds fall into three categories:

- a) Formal defects;
- b) Genuine disputes about the existence or amount of the debt; and
- c) Offsetting claims.

While this paper focuses on the grounds for setting a demand aside, it is appropriate to make a few brief comments about the formalities of making the application. The party served with the demand must apply to the Court within the 21 days and must serve the originating process and affidavits on the issuing party within the 21 days. The time limit cannot be extended¹ and public holidays count. Once the application is filed and served, the 21 day time limit stops running until the Court gives judgment. The evidence can later be supplemented provided that the affidavits served within the 21 days fairly put the defendant on notice of the case it has to meet, and the ambit of the dispute.²

Defects in the demand

A statutory demand can be set aside if it is defective in a formal sense. The form of demand is prescribed by the *Corporations Regulations*³ and must be followed strictly

¹ *David Grant & Co v Westpac Banking Corporation* (1995) 184 CLR 265.

² Discussed below at page 6.

³ Form 509H, *Corporations Regulations*.

which includes the Important Notes at the end of the form.⁴ However, the Court will not set aside a demand unless the defect results in a substantial injustice to the company.⁵ The classic territory for defects leading to substantial injustice is those going to the amount or the identification of parties. Where there is a problem with the particulars of various debts⁶ or the break-up of the principle debt and interest⁷ are not provided in the demand, it will generally result in the demand being set aside. Defects in the names of creditors will also generally result in the demand being set aside.⁸ Many contracts have dispute resolution procedures. If these are not followed before a party resorts to a statutory demand, it will generally not result in the demand being set aside.⁹

Complaint is often made about service of the demand. The demand may either be served personally at the company's registered office or can be served by post.¹⁰ However the cost of a process server is usually justifiable on the basis that these problems are eliminated. A creditor is generally entitled to rely on the effective service at the company's registered office recorded in the ASIC records, even where that party knows that the company has moved.¹¹ However, strict attention should be given to the address, including floor and suite.¹² It is good practice to always prepare an affidavit of service of the statutory demand so that it can be relied upon in winding up proceedings if the debt is not paid.

⁴ But see *Besser Industries (NT) v Steelcon Constructions* (1995) 16 ACSR 546 per Branson J.

⁵ Section 459J(1) of the *Corporations Act 2001*, *Kalamunda Meat Wholesalers Pty Limited v Reg Russell & Sons Pty Limited* (1994) 12 ACLC 391. However, in *Topfelt Pty Limited v State Bank of New South Wales Limited* (1993) 12 ACLC 15 Lockhart J expressed the view that even where there was no injustice, defects could be of such a magnitude as to constitute some 'other reason' why the demand should be set aside.

⁶ *Delta Beta Pty Ltd v Everhard Vissers* (1996) 20 ACSR 583, but see *Jarpab Pty Ltd v Winter* (1994) 14 ACSR 255, where the debtor knew the particulars of the debts.

⁷ *Topfelt Pty Ltd v State Bank of NSW* (1993) 47 FCR 226; 12 ACLC 15 at 28 (doubted on other grounds in *Tuta Healthcase v Nipro Asia* [2005] NSWSC 664); *Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia* (1994) 15 ACSR 544; 13 ACLC 73 at 78-79.

⁸ *Re Macro Constructions Pty Ltd* (1992) 10 ACLC 1722; *Scandon Pty Ltd* (1995) 14 ACLC 124; *Hornett Aviation Pty Ltd v Ansett Australia Ltd* (1995) 13 ACLC 613.

⁹ *Reinsurance Australia Corporation Ltd v Odyssey Re (Bermuda) Ltd* (2001) 19 ACLC 401; [2000] NSWSC 1118, appeal dismissed, but leaving that question open (2001) 19 ACLC 987; [2001] NSWSC 266. However, see *SMEC International v CEMS Engineering Inc* (2001) 38 ACSR 595 at [35], *Process Machinery v CAN 057 260 590* [2002] NSWSC 45 at [33].

¹⁰ Section 109X of the *Corporations Act 2001*.

¹¹ See *Chief Commissioner of Stamp Duties v Paliflex Pty Ltd* (1999) 17 ACLC 467, but Austin J left open the possibility of service of a statutory demand on the registered office would be an abuse of process where the creditor declined to forward a copy to the known new address in order to prevent it coming to the attention of the debtor within the 21 days.

¹² *Polstar Pty Ltd v Agnew* (2007) 25 ACLC 293; [2007] NSWSC 114 (post office box not sufficient until it reaches the recipient); *Jin Xin Investments & Trade (Australia) v ISC Property* (2006) 24 ACLC 281; [2006] NSWSC 7 (ground floor letterbox not sufficient).

The debt that is the subject of the statutory demand must be due and payable. While contingent or prospective creditors¹³ can bring an application for winding up,¹⁴ only creditors who are entitled to immediate payment can serve a statutory demand.¹⁵ A statutory demand can only be issued for a debt¹⁶ exceeding \$2,000.¹⁷ It is not possible to combine several debts owed to more than one creditor¹⁸ in order to get the amount up to \$2,000. Where the statutory demand depends on a judgment, the fact that the judgment is subject to an appeal is not grounds for establishing a genuine dispute,¹⁹ unless that judgment is stayed.²⁰

If the money sought is not a judgment debt then the statutory demand must be accompanied by the affidavit which proves that the debt is due and payable. The affidavit must not predate the demand.²¹ The affidavit must follow Form 7²² and be made by the creditor or a person with the authority of the creditor.²³ While it is not an abuse of process to serve a demand on a company that is clearly solvent,²⁴ it is an abuse of process to serve a demand where the creditor knows there to be a genuine dispute in relation to the debt²⁵ or where the creditor is concurrently pursuing other proceedings in relation to the claim.²⁶

¹³ Which has been defined as 'a person to whom under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date': *Re William Hockley Limited* [1962] 1 WLR 555 per Pennycuik J.

¹⁴ Section 459P(1)(b) of the *Corporations Act 2001*, however they need leave under s.459P(2). All references to sections are references to the *Corporations Act 2001* unless otherwise stated.

¹⁵ For example, money owing on a guarantee that requires demand to be made on the principal debtor, or insurance or endowment moneys that will become payable cannot be the subject of a statutory demand: See generally *Re Bryant Investment Co Limited* [1974] 1 WLR 826.

¹⁶ An entitlement to damages for breach of contract, as opposed to promise under a contract to pay a sum, is not a debt: *Hansmar Investments Pty Ltd v Perpetual Trustee Company Ltd* (2007) 25 ACLC 282; [2007] NSWSC 103.

¹⁷ Section 459E(1) and the definition of 'statutory minimum' in s.9.

¹⁸ *First Line Distribution Pty Limited v Whiley* (1995) 13 ACLC 1216 at 1220.

¹⁹ *Wilden Pty Ltd v Greenco Pty Ltd* (1995) 13 ACLC 1039; *Barclays Australia (Finance) v Mike Gaffikin Marine* (1996) 21 ACSR 235; *Fouracre v Ultra Protective Coatings Pty Ltd* [2004] NSWSC 157 at [25], although see the obiter dicta of Emmett J in *Eumina Investments Pty Ltd v Westpac Banking Corporation* (1998) 84 FCR 454.

²⁰ While a stay is not a genuine dispute, it does constitute "any other reason" why the demand should be set aside under s.459J(1)(b): *Scope Data Systems Pty Ltd v BDO Nelson Parkhill* (2003) 199 ALR 56; [2003] NSWSC 137 at [26].

²¹ *Dolville Pty Ltd v Australian MacFarms Pty Ltd* (1998) 43 NSWLR 717.

²² Rule 5.2 *Supreme Court (Corporations) Rules* ("Rules").

²³ Rule 5.2 of the Rules.

²⁴ *Pacific Communications Rentals Pty Ltd v Walker* (1993) 12 ACLC 5 at 7.

²⁵ *Mann v Goldstein* [1968] 1 WLR 1091.

²⁶ *Portfolio Projects Pty Limited v Oaks Building Co Pty Limited* (1987) 5 ACLC 911, but see *Roy Morgan Research Centre Pty Limited v Wilson Market Research Pty Limited (No 2)* (1996) 14 ACLC 934

The following checklist may prove useful in compiling a complaint demand:

1. Are the amounts all correct, including in the affidavit?
2. Is the description of the debt in the demand precise and accurate?
3. Ensure the date on the demand does not predate the affidavit.
4. Is the address for service stated in the demand in the debtor's state?
5. Are the important notes still in the demand?
6. Does the affidavit depose to the required matters, including that there is no genuine dispute?

Genuine dispute

A statutory demand can be set aside if there is a genuine dispute established as to the existence of the debt.²⁷ There have been a number of different articulations of what is meant by 'genuine dispute'. It has been described as something more than '*the spurious, mere bluster or assertion*',²⁸ a '*bona fide dispute that truly exists in fact where the grounds are real and not spurious, hypothetical, illusory or misconceived*'²⁹ and equivalent to a '*serious question to be tried*'.³⁰ However, the preferred test is the test set out by McLelland CJ in Eq in *Eyota Pty Ltd v Hanave Pty Limited*.³¹ McLelland CJ in Eq said:

In my opinion that expression [genuine dispute] connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to [its] truth" (cf Eng Mee Yong v Letchumanan [1980] AC 331 at 341), or "a patently feeble legal argument or an assertion of facts unsupported by evidence"; cf South Australia v Wall (1980) 24 SASR 189 at 194.

where it was held that if a creditor is able to provide a convincing reason why such action is being taken, it will not be viewed as an abuse of process.

²⁷ Section 459G.

²⁸ *Re Morris Catering (Australia) Pty Limited* (1993) 11 ACSR 601 at 605.

²⁹ *Spencer Constructions v G&M Eldridge* (1997) 76 FCR 452 at 464.

³⁰ *Scanhill Pty Limited v Century 21 Australasia Pty Limited* (1993) 12 ACSR 341.

³¹ (1994) 12 ACSR 785.

But it does mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute.

The question of what is required to raise a genuine dispute is a matter for evidence. An affidavit simply setting out the facts on which a company disputes the debt may not be sufficient to establish that the dispute is bona fide for the purposes of McLelland J's test. The affidavit must set out the facts on which that dispute is raised. The demand will be set aside where, on rational grounds, the material indicates an arguable case,³² although stricter attention is given to contentions of law.³³ Where the contentions said to ground the genuine dispute are so devoid of substance that no further investigation is warranted, the application to set it aside will fail.³⁴

It is prudent to act on the dispute said to arise. For example where the company asserts an offsetting claim, it will be more difficult to establish that it is bona fide where the company has not filed a claim in the relevant court or at least articulated it clearly. Establishing a genuine dispute will be harder where that dispute has not been articulated in correspondence between the parties prior to the demand being served.

Offsetting claims

If liability to pay the debt that is the subject of the demand is not disputed, a company can still challenge a demand on the basis that it has an offsetting claim.³⁵ The claim must arise between identical parties, but there is no requirement that it have any connection to the debt set out in the demand. Only claims sounding in debt or damages or other monetary consequences may be taken into account for the purposes of s.459H.³⁶ In seeking to establish an offsetting claim, the comments of Palmer J in *Macleay Nominees Pty Limited v Belle Property East Pty Limited*³⁷ should be kept in mind:

³² *Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No. 2)* [2003] NSWSC 896 at [18].

³³ *Delnorth Pty Ltd v State Bank of New South Wales* (1995) 17 ACSR 379 at 384-385.

³⁴ *Solarite Air Conditioning Pty Ltd v York International Pty Ltd* [2002] NSWSC 411 at [23].

³⁵ Section 459H.

³⁶ *No 96 Factory Bargains Pty Ltd v Kershel Pty Ltd* [2003] NSWSC 146.

³⁷ [2001] NSWSC 473.

In my opinion, a genuine offsetting claim for the purposes of s459H(1) and s 459H(2) [of the Corporations Act] means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. 'Good faith' means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful. In a claim for unliquidated damages for economic loss, the Court will not be able to determine whether the amount claimed is claimed in good faith unless the plaintiff adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. If such evidence is entirely lacking, the Court cannot find that there is a genuine offsetting claim for the purposes of s 459H(1) and s 459H(2).

The requirements to show the basis on which the offsetting claim is to be calculated should not be overlooked. If the party alleging the existence of an offsetting claim does not take steps to quantify it, the application may be dismissed,³⁸ or given a nominal value.³⁹ Where the nature of the offsetting claim has clearly been raised in an affidavit filed and served within the 21 days, the evidence may be supplemented within the *Greywinter* principle.⁴⁰ The key to preserving this ability to supplement the evidence is to ensure that the initial affidavit squarely raises the issue, even if it reads somewhat like a pleading.

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³⁸ *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No2)* (1994) 12 ACLC 490, in which the demand was reduced.

³⁹ *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 21 ACSR 581; *Torrens Aloha Pty Ltd v San Modern Painting Pty Ltd* (2001) 19 ACLC 755; [2001] NSWSC 227.

⁴⁰ *Elm Financial Services Pty Ltd v MacDougal* [2004] NSWSC 570; *Process Machinery v ACN 057 260 590* [2002] NSWSC 45 at [21], but see *Hansmar Investments v Perpetual Trustee Company* (2007) 25 ACLC 282; [2007] NSWSC 103.