

## Statutory Demands - Recovering Debts

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Cash flow is a fundamental factor determining the economic health and viability of building contractors and subcontractors. Knowledge of the *Corporations Law* provides a useful tool for balancing the account books.

Section 459E of the *Corporations Law* provides a procedure for a person who is owed money by a company (a "creditor") to demand the payment of that money within 21 days. If the amount is not paid (or alternative arrangements made to the reasonable satisfaction of the creditor) the company is deemed to be insolvent and may be placed into liquidation upon an application being made to an appropriate court.

Given the consequences of non-compliance, the statutory demand procedure provides a very powerful weapon for a creditor seeking the repayment of a debt from a company.

There are a number of limitations upon the use of statutory demands including:

- (1) a statutory demand may only be issued for a debt which exceeds \$2,000;
- (2) the demand must be in the form which is set out in regulations made under the *Corporations Law*. Amongst other matters, the form needs to be completed to set out the name of the creditor, the amount of the debt and a description of the general nature of the debt;
- (3) the demand must be signed by the creditor or a duly authorised representative of the creditor;
- (4) in cases where the debt is not a judgment debt, the statutory demand must be accompanied by an affidavit sworn by the creditor or an appropriately authorised representative of the creditor; and
- (5) the demand must be served on the company at its registered office or upon at least 2 of the company's directors.

The *Corporations Law* sets out a procedure for a person who receives a statutory demand to apply to the court for it to be set aside. The usual basis for such an application is that the amount claimed in the statutory

demand is not owing or that the debtor has some other claim against the creditor which would reduce the amount owing to the creditor to less than \$2,000.

The court will set aside a demand if the company is able to prove that there is a bona fide dispute concerning the existence of the debt or the company's cross claim. If the demand is set aside by the court, the court will usually order the creditor to pay the costs of the application by the company.

It is also possible for the company to make an application to the court objecting to part of the debt payable. In this case, the court is required to determine the amount of the debt which is not subject to a bona fide dispute. If the amount determined by the court to be owing is more than \$2,000, the court will vary the demand by substituting the amount determined (and extend the date for compliance with the demand).

The application must be supported by one or more affidavits which provide evidence of the reason for the statutory demand to be set aside. Given the very short time period in which the application is able to be made, it is critical that a company receiving a statutory demand who wishes to have it set aside act immediately.

The High Court, on 23 August 1995 in its decision of *David Grant for Grant and Co Pty Ltd v Westpac Banking Corporation* confirmed that the 21 day period to set aside a statutory demand under Section 459G cannot now be extended. This clarifies numerous conflicting state supreme court decisions concerning a debtor's application made under Section 459G made after the 21 day time period.

Knowledge of statutory demand procedures in the *Corporations Law* can be used as a useful lever to resolve outstanding invoice, recover moneys and help balance cash flow. □