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STATUTORY DEMANDS: THE BASICS

INTRODUCTION

Statutory demands are issued by creditors for the payment of a debt which is due and payable (s 459E of the *Corporations Act 2001*, 'the Act'). This guide will summarise the steps to take to make a statutory demand or what to do if a statutory demand has been served on you.

REQUIREMENTS FOR CREDITOR

THE DEBT

The debt must be due and payable (s 459E(1) of the Act) and must be at least \$20,000 (section 9 of the Act). The debt must also have a dollar value and cannot be contingent, hypothetical or prospective.

THE DEMAND

A valid demand must be completed in a manner which is 'substantially compliant'. The courts determine whether a demand is

substantially compliant by assessing whether the party who has received the statutory demand has been misled by the demand. For example, a demand may be considered defective if important words are omitted from the demand or affidavit.

It should be noted that substantial compliance does not equate technical compliance and the court may make allowance for minor errors such as the incorrect naming of a creditor.

The demand must be in writing, be signed by or on behalf of the creditor and must correctly state the debtor's company name and its registered office. It must also specify a place in Australia where the debt can be paid and direct payment to the creditor's solicitors.

Furthermore, if the creditor is a company, the demand must be given under the common seal.

The demand must be expressed in clear, unambiguous terms.

The demand must specify and identify the nature of the debt claimed (s 459E(2)) and if it relates to more than 1 debt, it must specify the total debts claimed. A failure to specify a debt in a demand is a defect, but does not necessarily render the demand invalid.

The demand should not include a claim for unliquidated damages.

Finally, where there are multiple creditors claiming a debt, each director must serve a separate demand. If a creditor serves a demand and also proceeds against the debtor company's director in relation to the same debt, the demand may be set aside.

ATTACHMENTS

The demand must rely on a judgment or an affidavit attached to the demand. If this requirement is not met, then the demand will be set aside.

SERVICE

The demand should be delivered to the registered office of the company or personally delivered to a director of the company who resides in Australia.

If the creditor is aware that the debtor has changed address, the demand must be delivered to the new address. Alternatively, if the creditor is aware that the company no longer occupies the registered address but does not know the company's new address, the demand should be served personally on the director of the company.

Interstate service must be compliant with the rules prescribed in the *Service and Execution of Process Act 1992* (Cth) and should be sent to the registered office of the company. Service is only effective if a copy of Form 1 attached to the demand. Payment must be

made to an address which is in the same jurisdiction in which the demand is served.

REQUIREMENTS FOR A DEBTOR

PAYING THE DEBT

A company can pay the debt or compound or secure the amount owed within 21 days of the date of demand to the creditor's satisfaction. The courts apply an objective test and consider whether the creditor acted reasonably in rejecting a proposal in order to determine whether the creditor has been satisfied.

SETTING THE DEMAND ASIDE

If a company wishes to have a statutory demand set aside (s 459G(3) of the Act) it must apply to the court within 21 days of the service of the demand.

The company must also serve the application and a supporting affidavit at the registered office of the person who made the demand within the 21-day period.

The supporting affidavit should state the reasons for making the application and additional affidavits cannot be served outside the 21-day period.

If multiple demands are served on a company, the company must respond to each demand separately.

REASONS FOR SETTING ASIDE DEMAND

A demand may be set aside if:

- the amount owed is less than the statutory minimum (s 459H of the Act);

- there is a defect in the demand which would cause substantial injustice to the company (s 469J of the Act). Minor irregularities or misstatements do not constitute substantial defects;
- there is some other reason why the demand should be set aside (s 459J) such as a demand containing grossly inflated amounts. Please note that solvency of a company is not a sufficient reason. Also, a demand may not be set aside where there is a defect in the amount claimed; or
- there is a genuine dispute regarding the debt claimed. A genuine dispute exists where the court is satisfied that there is a bona fide dispute which truly exists on grounds which are not spurious, hypothetical, illusory or misconceived.

FAILURE TO COMPLY WITH DEMAND

If the debtor fails to comply with a demand at the end of 21 days after the date of service, a presumption of insolvency arises. This presumption lasts for three months after the demand is served (s 459C(2) of the Act).

The company's time for compliance may be extended if the company plans to set the demand aside (s 459F (2) (a) of the Act). The Court may then either extend the time for compliance or may not extend the time for compliance, in which case compliance ends seven days after the application is finally determined.

If the requirements of the demand are not met within the 21-day period, a creditor can bring a windup application on the basis of insolvency, which may bring the company to a commercial end. The test for insolvency under s 95A of the Corporations Act is whether the

can pay its debts as and when they become due and payable.

A company is presumed to be insolvent if in three months after the day on which a windup application is made: the company failed to comply with a statutory demand, a judgment remains unsatisfied or a receiver and/or manager or controller is appointed, privately or by the Court, to the company (s 459C of the Act).

Clearly, both creditors and alleged debtors ought to be wary of statutory demands. Creditors should pay close attention to the specific requirements of statutory demands. Directors of insolvent trading companies should also be wary of their potential liability for insolvent trading. Directors ought to consider options such as voluntary administration or a creditor's voluntary liquidation.

For more information

For more information on issues relating to liquidate damages, contact our Principal Solicitor/ Director

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