

## The Power of a Statutory Demand

---

If you are in business, whether you are a company director, manager, accountant or advisor, you should understand the power of a Statutory Demand.

This article explains what Statutory Demands are and why they are such a powerful and efficient weapon for **collecting debts**. We will also explain what you must do, and do fast, if you are served with a Statutory Demand. In practice, the process of issuing a Statutory Demand as a means of collecting debts is now commonly used, although it was originally intended to be the first step in an application to wind up an insolvent company.

The Corporations Act deems a company to be insolvent if, having received a Statutory Demand, the company fails to pay the creditor or have the Statutory Demand set aside by a court. It is easy to see how a Statutory Demand places immense pressure on a company to pay its debts.

### Insolvency

The most common basis for placing a company into liquidation is insolvency. Just as an individual can be made bankrupt, so a company can be wound up and brought to a commercial end. Whereas an individual continues to live and breathe through and after bankruptcy and the slate is wiped clean, a company that is wound up will usually cease to exist at all.

The test of whether or not a company is insolvent is whether or not the company is able to pay its debts as and when they become due and payable.

### Valid Statutory Demands

Statutory Demands can only be served for debts of at least \$2,000 and can only be served upon companies. A person trading under a business name without the use of a company cannot be served with a Statutory Demand.

The debt cannot be *in dispute*. This means that, for example, if the other party claims the goods delivered were incorrect, or not of merchantable quality, and that they should therefore not have to pay for them, then there is a dispute. Also, if there is a claim against you by the company, then this can be used as a basis to 'offset' the amount claimed. Statutory Demands in these circumstances cannot assist you. On the other hand, if you are on the receiving end of a Statutory Demand, it may be possible to resist

it by raising an on offsetting claim. Company directors, managers, accountants and people in credit control can all benefit from knowing how to minimise the grounds for the debtor company to claim there is a genuine dispute. For example, if you are being asked by a debtor company for more time to pay a debt, it is prudent to ask the person you are dealing with to put it in writing and confirm they are authorised by the company to do so. This will make it much harder for them to claim subsequently that there is a 'genuine dispute'.

In addition, you have to be able to put a dollar value on the debt and the debt amount must be at least \$2,000.

The Statutory Demand document claiming the demand must be in the prescribed form, must be in writing and must be signed by or on behalf of the creditor. It must correctly state the debtor's company's name and its registered office and it must specify a place in Australia where the debt can be paid. It is permissible to specify that payment be made to the creditor's solicitors.

The Statutory Demand requires the company to pay the debt or secure or compound the amount owed *within 21 days* of receiving the Statutory Demand "to the creditor's satisfaction". It is for the Court to decide whether a creditor acted reasonably by rejecting a debtor's proposal.

### **Judgment does not need to be obtained**

One of the significant advantages of Statutory Demands is that it is *not* necessary to first get judgment against the debtor company. So if there is no genuine dispute about the debt, then serving a Statutory Demand is a faster and more efficient than the alternative of first commencing a legal action.

If a judgment has not first been obtained then there must be an affidavit accompanying the Statutory Demand which verifies that the debt is due and payable and complies with the relevant rules. If the Statutory Demand does not rely on a judgment and it is not accompanied by an affidavit verifying the debt, it will be set aside.

### **How a Statutory Demand is served**

A Statutory Demand must be properly served. It can be served by leaving it at the registered office of the debtor company, sending it by post to that office or delivering a copy of the Statutory Demand personally to a director of the company who resides in Australia.

Where a creditor becomes aware that the company no longer occupies the registered address and the creditor is aware of the new address, then he or she should bring the Statutory Demand to the notice of the company at that new address.

Accountants need to be very careful here. Often accounting firms are the registered offices for many of their clients. Should they receive a Statutory Demand and fail to

deal with the document properly, or simply ignore it, then the accountants themselves could be liable in negligence.

### **Resisting a Statutory Demand**

If a company wishes to have a Statutory Demand set aside, it must apply to the Court *within 21 days of receiving* the Statutory Demand. The application must be supported by an affidavit. The application and affidavit must also be served upon the creditor within the same 21 day period.

The supporting affidavit should state *all* the grounds for making the application, rather than simply making an assertion that the debt is not due. If the affidavit is insufficient, it *cannot* be supplemented by a late affidavit served outside the 21 day period.

There are strict rules about how an application to set a Statutory Demand aside must be served, especially if the creditor is in another State.

### **Reasons for setting aside a Statutory Demand**

A Statutory Demand will only be set aside if the amount owed is in fact owed less than the statutory minimum; if the debtor has an offsetting claim; if there is a defect in the demand that would cause substantial injustice; or if there is some other, generally technical, reason why the demand should be set aside.

A Statutory Demand which has a defect can only be set aside where it causes substantial injustice. It will not be set aside if it constitutes a demand within the terms of the Corporations Act and the defect is only a minor irregularity or misstatement.

### **Risks in Statutory Demands for both debtors and creditors**

From a debtor's point of view, a problem with Statutory Demands is that once the time for compliance with the demand has expired, unless there is a valid application filed and served to set the demand aside, *there is absolutely no opportunity of contesting the demand* and the debtor must either pay the debt and legal fees or risk being wound up.

A creditor using a Statutory Demand as a quick means of a debt recovery can likewise have the whole thing blow up in its face. Where there is no judgment already obtained, all a debtor has to show to set aside a demand is that a genuine dispute exists. This is why it is prudent to get written debtor concessions, if possible, at an early point. If the Statutory Demand is successfully set aside by the debtor, the Court will usually order the creditor to pay the debtor's legal costs.

If there is no dispute, then normally the only thing left for the debtor company to do is urgently negotiate payment of the debt, often including payment of the creditor's legal costs.

## Conclusion

Statutory Demands can be a very effective and powerful tool for a creditor. Using a Statutory Demand can be cheaper, faster and more efficient in recovering debts than other methods and, if done properly, will force a debtor to act and act quickly.

There are significant risks for both creditors and debtors when serving or responding to Statutory Demands. These risks can be minimised by seeking legal advice as early as possible.

If you require more information or if you need assistance and advice on how to handle any debt matters, please call us on (03) 9347 0355 or email [info@schembrilawyers.com.au](mailto:info@schembrilawyers.com.au) today.



Incorporating the practices  
of O'Brien & Galante and  
Conlan Lawyers

### ESSENDON OFFICE:

Suite 6, Level 2  
200-202 Buckley Street,  
Essendon, Victoria 3040  
DX 33601, Essendon  
PO Box 88, Essendon 3040  
Tel: (03) 9331 3144  
Fax: (03) 9331 3166

### CARLTON OFFICE:

Level 1  
135-139 Cardigan Street,  
Carlton, Victoria 3053  
DX 95308, Carlton MBE  
PO Box 63, Carlton South 3053  
Tel: (03) 9347 0355  
Fax: (03) 9347 0366

[www.schembrilawyers.com.au](http://www.schembrilawyers.com.au)  
[info@schembrilawyers.com.au](mailto:info@schembrilawyers.com.au)

Schembri & Co Lawyers Pty Ltd  
ABN 49 103 404 995