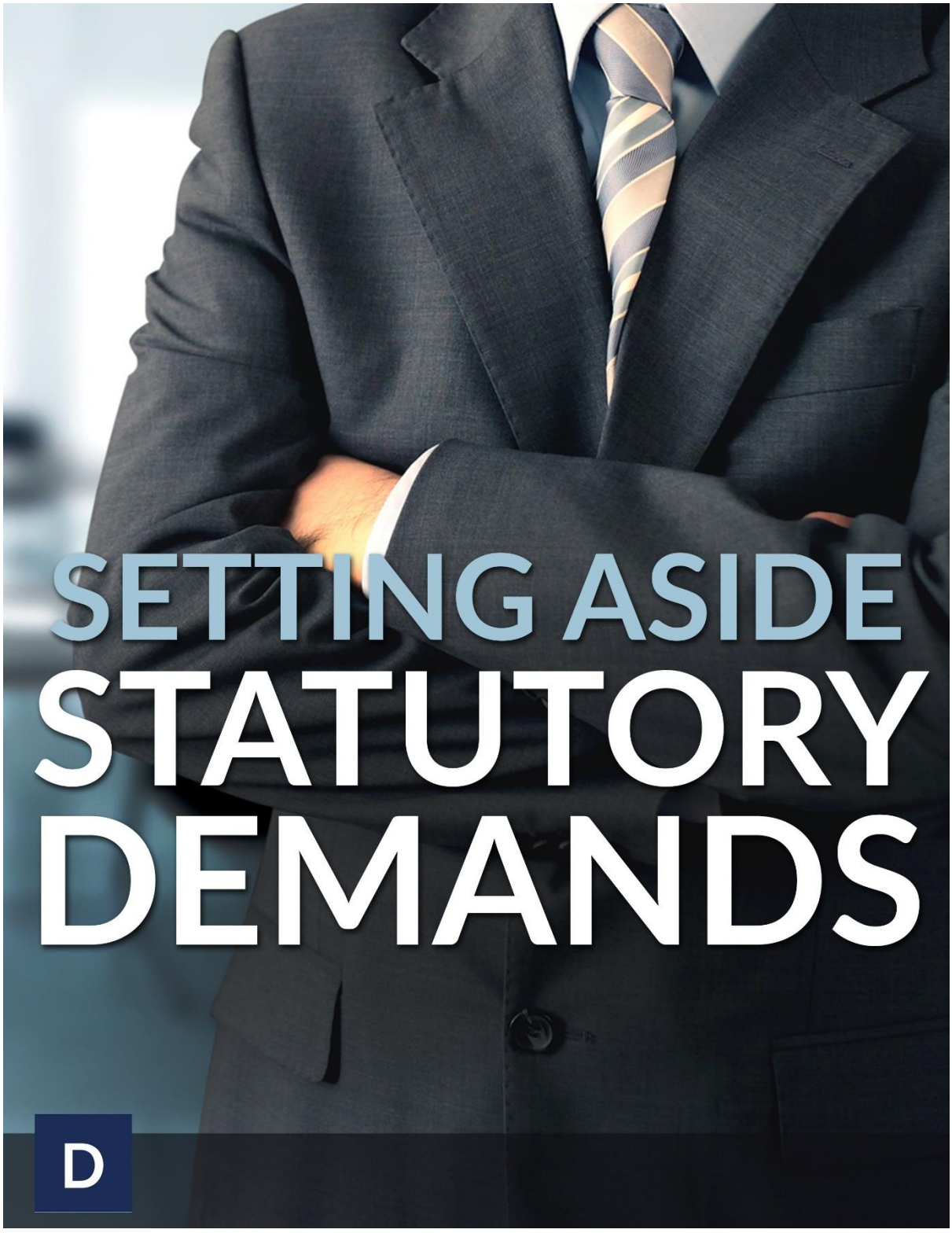

A Complete Guide to Setting Aside a Statutory Demand in Australia

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Setting Aside a Statutory Demand

There are a number of ways in which a statutory demand can be set aside. If you have been served with a statutory demand, you can use one of the following to attempt to get it set aside by the Court or withdrawn by the issuer.

Firstly - if there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates.

Secondly - if the debtor company has an offsetting claim.

Thirdly – there is a defect in the demand, and substantial injustice will be caused unless the demand is set aside.

Lastly - there is some other reason why the demand should be set aside.

The *Corporations Act 2001* (Cth)

Section 459G of the *Corporations Act 2001* (Cth) ("***the Corporations Act***") says:

(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
(2) An application may only be made within 21 days after the demand is so served.
(3) An application is made in accordance with this section only if, within those 21 days:
(a) an affidavit supporting the application is filed with the Court; and
(b) *a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.*

Section 459H(1) of the *Corporations Act* says:

(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:
(a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
(b) that the company has an offsetting claim.

Section 459J(1) of the *Corporations Act* says:

(1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
(a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside.
(b) there is some other reason why the demand should be set aside.

Setting Aside Statutory Demand - Genuine Dispute

This part will detail setting aside a stat demand if there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates.

What is a Genuine Dispute?

In *Moutere Pty Ltd v Deputy Commissioner of Taxation* [2000] NSWSC 379 the Court said:

> *The policy underlying s 459H is that the statutory demand procedure should not be used to coerce a person to pay a disputed amount. A statutory demand is not an instrument of debt collection.*

This means that if there is a genuine dispute, then this is something that should be heard by the Court. But what is the definition of a genuine dispute?

The *Corporations Act* does not define "Genuine Dispute" for the purpose of this part. However this subject has been discussed at length by the Courts.

In *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 McLelland CJ said:

> *It is, however, necessary to consider the meaning of the expression "genuine dispute" … In my opinion that expression connotes a* ***plausible contention*** *requiring investigation.* [sic]

They then went on to conclude:

> *In our view a "genuine" dispute requires that … the dispute be* ***bona fide*** *and* ***truly exist in fact*** *… [and] the grounds for alleging the existence of a dispute are* ***real*** *and* ***not spurious****,* ***hypothetical****,* ***illusory*** *or* ***misconceived****.*

In *Scanhill Pty Ltd v Century 21 Australasia Pty Ltd* [1993] FCA 618 Beazley J said:

> *[T]he test to be applied for the purposes of s 459H is whether the court is satisfied that there is* ***a serious question to be tried****.*

In *John Holland Construction & Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250 Young J said:

> *It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law.* ***Something more than mere assertion*** *is required because if that were not so then anyone could merely say it did not owe a debt.*

In *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACSR 601 Thomas J said:

> *It is often possible to discern the* ***spurious****, and to identify* ***mere bluster*** *or* ***assertion****.*

In *Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd* (1994) 13 ACSR 37 Lockhart J said:

> *[T]he court must be satisfied that there is a dispute that is not plainly* ***vexatious*** *or* ***frivolous****. It must be satisfied that there is a claim that may have* ***some substance****.*

In *CGI Information Systems v Apra Consulting Pty Ltd* [2003] NSWSC 728 Barrett J said:

> *The company will fail … upon the hearing of its s 459G application, that the contentions upon which it seeks to rely in mounting its challenge are so* ***devoid of substance*** *that* ***no further investigation is warranted****. Once the company shows that even one issue has a* ***sufficient degree of cogency*** *to be arguable, a finding of genuine dispute must follow.*

In *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* [2008] VSCA 70 Dodds Streeton JA said, to which Neave JA and Kellam JA agreed:

> *The dispute … should have a sufficient* ***objective existence*** *and* ***prima facie plausibility*** *to distinguish it from a* ***merely spurious claim****,* ***bluster*** *or* ***assertion****, and* ***sufficient factual particularity*** *to exclude the merely* ***fanciful*** *or* ***futile****.*

In *John Shearer Limited and Arrowcrest Group Pty Ltd v Gehl Company* [1995] FCA 1789 Von Doussa, Hill and Tamberlin JJ said:

> *In order to show that a … claim is genuine it must be put forward in* ***good faith***

What is a Genuine Dispute?

A genuine dispute therefore SHOULD:

1. Show a plausible contention requiring investigation;
2. Be bona fide, genuine and real;
3. Be in good faith and show a prima facie plausibility;
4. Truly exist in fact, and contain a serious question to be tried;
5. Be something more than mere bluster or mere assertion;
6. Be a claim that may have some substance;
7. Have a sufficient degree of cogency to be arguable;
8. Have objective existence; and
9. Have sufficient factual particularity.

What is Not a Genuine Dispute

A genuine dispute therefore SHOULD NOT:

1. Be spurious, hypothetical, illusory or misconceived;
2. Be plainly vexatious or frivolous;
3. Be so devoid of substance that no further investigation is warranted;
4. Be merely spurious claim, bluster or assertion; and
5. Be merely fanciful or futile.

Affidavit in support of Application

If you intend to attempt to show that a genuine dispute exists, then you will need to annex sufficient evidence to your affidavit in support.

An affidavit which just sets out the facts in relation to the dispute will probably not be sufficient to establish that the dispute is a genuine dispute, pursuant to the cases above.

For example, if you are alleging that building work is defective and that is why the debt arose, then a specialist report provided by a construction expert, annexed to the affidavit, should be enough.

Withdrawing the Statutory Demand

If you have been served with a statutory demand, and you allege that there is a genuine dispute as to the existence or quantum of the debt, then you should ask the issuing party to withdraw the statutory demand.

If you have a genuine dispute, tell the issuing party, and advise them that if they do not withdraw the demand, that you will be making an application to have the demand set aside. You may be able to tender this letter on an application for costs if you are successful.

Application to Set Aside a Statutory Demand

One of the most common grounds for an application setting aside a statutory demand is the existence of a genuine dispute.

The onus is on the Applicant, who is alleging the genuine dispute, to provide the evidence needed in support of that allegation.

Whether you have been served with an application attempting to set aside your statutory demand, or you need to make the application, then it is very important that you contact a statutory demand lawyer immediately. The Courts have interpreted the twenty one (21) day time limit very strictly and it is vital that you do not get caught out.

A statutory demand lawyer will be able to assess whether your dispute is a genuine dispute pursuant to the case law in this area, or advise you if any of the other ways to set aside could be more beneficial.

If your company has been served with a statutory demand then you should contact one of our statutory demand lawyers today.

Setting Aside Statutory Demand – Offsetting Claim

This part will detail setting aside a stat demand if there is an offsetting claim which is a genuine claim for damages, which can be quantified in a monetary amount, which can then offset the amount claimed in the statutory demand.

What is an Offsetting Claim?

Section 459H(5) of the *Corporations Act* defines offsetting claim to mean:

> *"offsetting claim" means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).*

So the salient points to consider are:

1. The claim must be genuine;
2. The claim must be a counterclaim, set-off or cross-demand;
3. The claim need not arise out of the same transaction.

This part will explain how the Courts have treated these points.

The Claim must be Genuine

An offsetting claim must be "*genuine*" in the sense of being authentic or bona fide.

In In *Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation* [2006] SASC 91, Debelle J said:

> *The test whether an offsetting claim exists is the same as for a genuine dispute, that is to say, the claim must be bona fide and truly exist in fact and that the grounds for alleging the existence of the dispute are real and not spurious, hypothetical, illusory or misconceived. The issue is whether the offsetting claim is bona fide, real or not spurious.*

In *Intag Microelectronics Pty Ltd v Awa Ltd* (1995) 18 ACSR 284, Young J refers to the judgment of Master McLaughlin in *Advance Ship Design Pty Ltd v Ryan* (1995) 16 ACSR 129 and said:

> *I agree with what the learned master there said, that "The mere fact that the plaintiff has filed process does not mean that the plaintiff has a claim in" the amount claimed. The claim must be one which the court can see, without looking too deeply at the issues that may arise, has some real chances of success.*

In the Queensland Supreme Court case of *Childcare Providers Pty Ltd v Bright Horizons Australia Childcare Pty Ltd* [2017] QSC 307, Holmes CJ said:

> *The test for whether an offsetting claim is genuine under s 459H(1)(b) is not different from that for whether there is a "genuine dispute" under s 459H(1)(a). Various*

adjectives have been used to express the idea of what is, and is not, genuine; for example, whether:

"The claim [is] bona fide and truly exist[s] in fact and ... the grounds for alleging the existence of the dispute are real and not spurious, hypothetical, illusory or misconceived."

In *Re Duncan; Ex parte Modlin* [1917] NSWStRp 77, Street J said:

It is not necessary for the judgment debtor in applications under this section to show that there are reasonable grounds for believing that he will establish his cross-action. All that a debtor need show in this respect is that he has a bona fide claim which he is fairly entitled to litigate.

In *Scanhill Pty Ltd v Century 21 Australasia Pty Ltd* [1993] FCA 618, Beazley J said:

It is noteworthy that the references to the requirement of the existence of a "genuine dispute" or "genuine claim" are similar to the test propounded by Street J in Re Duncan; Ex parte Modlin (supra) … In my opinion the test to be applied for the purposes of s459H is whether the court is satisfied that there is a serious question to be tried that the applicant has an offsetting claim.

In *John Shearer Limited and Arrowcrest Group Pty Ltd v Gehl Company* [1995] FCA 1789 in their joint decision, Von Doussa, Hill & Tamberlin JJ said:

In order to show that an offsetting claim is genuine it must be put forward in good faith. There must be something more than a mere assertion.

Therefore, for an offsetting claim to be provably genuine, it must:

1. Be bona fide;
2. Be a claim a debtor must be entitled to litigate;
3. Truly exist in fact and be real;
4. Have a real chance of success;
5. Must have a serious question to be tried; and
6. Must be put forward in good faith.

Subsequently, for an offsetting claim to be provably genuine, it must not:

1. Be spurious;
2. Be hypothetical;
3. Be illusory;
4. Be misconceived; and
5. Be a mere assertion as to a claim.

The claim must be a Counterclaim, Set-off or Cross-demand

The definitions of the words "*Counterclaim*", "*Set-off*" and "*Cross-demand*" have been given some consideration by the Courts.

In *Re a Bankruptcy Notice* (1934) 1 Ch 431, Lord Hanworth MR said:

"I turn, therefore, to what to my mind is the wider word, 'cross-demand'. If a cross-demand is only to be interpreted as meaning something which could have been

> *introduced into the action by way of counterclaim, it adds nothing to the word 'counterclaim'. 'Cross-demand' seems to me to be a word introduced in order to give a wider ambit to the meaning of these claims, something that would not be described, certainly, as a set-off, something that could not have been brought in the action, something that still lies outside a counterclaim, but is of a nature which can be specified and which is of such a nature that it equals or exceeds the amount of the judgment debt. I do not desire to say what 'cross-demand' may include, but it is not difficult to say that it does not include a claim of such uncertain nature as appears in these Chancery proceedings."*

So, "*Counterclaim*" and "*Set-off*" have been defined more narrowly than "*Cross-demand*", which has been defined with "*considerable width*".

In *John Shearer Limited and Arrowcrest Group Pty Ltd v Gehl Company* [1995] FCA 1789 in their joint decision, Von Doussa, Hill & Tamberlin JJ said:

> *The word "cross-demand" is a word of considerable width. While the words "counterclaim" and "set-off" are technical words, the meanings of which are confined, the same is not true of the word "cross-demand". That is not a technical term.*

Then went on to say:

> *It would seem to follow that in the context of the Law … a cross-demand will include any claim for damages … which is for a monetary amount capable of quantification whether or not it arises out of the same transaction or circumstances as the debt to which the statutory demand relates.*

So, a cross demand includes:

1. Any claim for damages;
2. Which is for a monetary amount capable of quantification; and
3. It need not arise out of the same transaction or circumstances as the debt to which the statutory demand relates.

These will be discussed further below.

An offsetting claim must be a claim with a monetary amount.

A cross demand can be any claim in debt or damages which is quantifiable as a monetary amount to offset the amount of the statutory demand.

In *Chase Manhattan Bank Australia Limited v Oscty Pty Limited* [1995] FCA 1208, Lingren J said:

> *Only a claim which is capable of being quantified as an amount of money can qualify as an "offsetting claim".*

In *96 Factory Bargains Pty Ltd v Kershel Pty Ltd* [2003] NSWSC 146, Barrett J said:

> *[W]hile the definition of "offsetting claim" in s.459H(5) refers, in general terms, to a claim "by way of counterclaim, set-off or cross-demand", it is clearly contemplated by the section as a whole that the claim must be one capable of being quantified in money terms. It need not be a liquidated claim but it must be one to which a monetary liability can be attached. This is because of the directive in s.459H(2) that the court determine,*

> *among other things, "the amount of that claim" or, where there are several claims, "the total of the amounts of those claims". It follows that only claims sounding in debt or damages or other monetary consequences) may be taken into account for the purposes of s.459H.*

In *BMG Poseidon Corp Pty Ltd v Adelaide Bank Limited; In the Matter of BMG Poseidon Corp Pty Ltd (No 2)* [2009] FCA 404, Foster J said:

> *The expression offsetting claim is defined in s 459H(5) … Although the expression may well include an unliquidated claim, that claim must be capable of being quantified as an amount of money.*

In the matter of J Group Constructions Pty Ltd [2015] NSWSC 1607, Robb J determined that the Applicant's cross demand was:

> *not a cross-claim for a money sum which will exceed or reduce the amount of the demand. The cross-claim must be capable of being quantified in money terms before it can qualify as a genuine offsetting claim*

Following these cases, it is clear that in order to "offset" the amount claimed, the cross claim must be a claim that can be quantified in money, to enable that amount to be applied to the amount claimed in the statutory demand.

A Cross Demand must Exist at the time of the Hearing

In *Noroton v Sydney Land* [1999] NSWSC 192, Austin J said:

> *In my opinion s 459H speaks from the date of the hearing rather than the date of service of the demand, so that an offsetting claim which arises after the demand is served and even after the proceedings to set it aside are commenced, but before the hearing, is to be taken into account.*

In the matter of Riva NSW Proprietary Limited [2016] NSWSC 1954, Brereton J said:

> *It is well-established that to be within s 459H, an offsetting claim must be one that the company presently has against the creditor as at the date of the hearing of the s 459G application, not one that it merely may have in the future, nor one that is statute barred so as to no longer exist.*

In the matter of Oztec Pty Limited [2012] NSWSC 1234, Black J said:

> *An offsetting claim may include a claim which arises after the proceedings to set aside the Demand are filed but prior to the hearing.*

So, an offsetting claim does not need to exist at the time of the alleged debt, or at the time of service of the statutory demand, or at the time of the making of the application to set the demand aside. The offsetting claim must exist at the time of the hearing of the application.

A Cross Demand need not arise out of the same Transaction

A cross demand need not arise from the debt dispute giving rise to the statutory demand. A cross demand can arise from any claim in debt or damages.

In In *John Shearer Limited and Arrowcrest Group Pty Ltd v Gehl Company* [1995] FCA 1789 in their joint decision, Von Doussa, Hill & Tamberlin JJ said:

> *There can be no doubt that a claim for damages under the Trade Practices Act or for breach of an implied contractual term will satisfy the description of a cross-demand and thus be an off-setting claim, whether or not it could be relied upon as a defence by way of counter-claim or set-off in proceedings on a bill of exchange on which the person claiming damages is liable.*

In *Fleur De Lys Pty Limited v Jarrett* [2004] FCA 1357, Hely J said:

> *The authorities establish that a claim for unliquidated damages can be an offsetting claim, although the company must adduce some evidence to show the amount of the claim or claims … An 'offsetting claim' is not confined to a debt which is presently due and payable.*

Some Examples of Claims for Damages

In *Seduce Pty Ltd -v- The Trust Company (Australia) Ltd* [2015] WASC 441 the plaintiff alleged that it had an offsetting claim for misleading and or deceptive conduct.

In *Enviro Systems Renewable Resources Ltd (Receivers & Managers Appointed) v Westpac Banking Corp* [2015] SASC 59 the Plaintiff alleged that the defendant engaged in unconscionable conduct within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth).

In *Australian Cinemas Pty Limited v Australian Executor Trustees Limited* [2011] FCA 927 the Plaintiff alleged that the Defendant (also the Lessor) had breached the Lease, leading to a loss of earnings.

In *Childcare Providers Pty Ltd v Bright Horizons Australia Childcare Pty Ltd* [2017] QSC 307 Childcare Providers alleged "offsetting claim" was in the nature of a counterclaim; for damages for diminution in value of the centres, which it alleges has occurred during the period they were operated by Bright Horizons.

In *Watts v Adelaide Bank Limited* [2009] FCAFC 169 the Plaintiff alleged that the bank had sold their property at less than its true value.

In *ABC Constructions No 1 Pty Ltd v. Bonelli Constructions Pty Ltd* [2016] QSC 35 the Plaintiff claimed damages for considerable rectification costs.

Other things to Consider

The offsetting claim must be against the entity who made the statutory demand.

In *Canpoint International Pty Ltd v Anar International Pvt Ltd* [2008] FCA 4, Stone J said:

One point should be made quite clear at the outset - an offsetting claim under s 459H must be a claim against the person who made the statutory demand, in this case the defendant company.

The offsetting claim must be made against the issuing entity in the same capacity as the statutory demand.

In *PCH Group Ltd v Hallbridge Pty Ltd* (2002) 20 ACLC 1298, Master Sanderson agrees with the submissions made that:

Any offsetting claim relied on by the plaintiff … must be mutual and in the same right as that brought by the creditor against (the plaintiff). The plaintiff does not satisfy this requirement because the claim made in the statutory demand is made in (the defendant's) capacity as the trustee for a trust, whereas the alleged offsetting claim is against (the defendant) in its own capacity.

Application for Offsetting Claim

Section 459H(2) of the *Corporations Act* says:

(2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

Admitted total – Offsetting total

where:

"admitted total" means:

(a) the admitted amount of the debt; or

(b) the total of the respective admitted amounts of the debts;

as the case requires, to which the demand relates.

"offsetting total" means:

(a) if the Court is satisfied that the company has only one offsetting claim--the amount of that claim; or

(b) if the Court is satisfied that the company has 2 or more offsetting claims--the total of the amounts of those claims; or

(c) otherwise--a nil amount.

Section 459H(3) and (4) of the *Corporations Act* say:

(3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.

(4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

If the substantiated amount is less than the statutory minimum (currently $2,000.00) then the Court can set aside the statutory demand. However, if the substantiated amount is more than the statutory minimum (currently $2,000.00), the court will usually exercise its discretion to vary the statutory demand.

Setting Aside Statutory Demand – Defect in Demand

A defect in the statutory demand forms the basis of just one of the ways in which a statutory demand can be set aside. This part will detail setting aside a stat demand if there is a defect in the demand which will cause substantial injustice unless it is set aside.

Setting Aside a Statutory Demand

So, you are able to apply to the Court for an order setting aside the statutory demand if the demand contains a defect, which will cause substantial injustice.

So the salient points to consider are:

1. What is considered a defect in the demand? and
2. What is substantial injustice?

This part will explain how the Courts have treated these points.

Defect in the Demand

Section 9 of the *Corporations Act* defines the word "*defect*" to mean:

> *"**defect** ", in relation to a statutory demand, includes:*
>
> *(a) an irregularity; and*
>
> *(b) a misstatement of an amount or total; and*
>
> *(c) a misdescription of a debt or other matter; and*
>
> *(d) a misdescription of a person or entity.*

The form of the statutory demand is Form 509H as contained in Schedule 2 of the *Corporations Regulations 2001* (Cth). See below

Misstatement of a Debt, Amount, or Total

A defect in the description of the debt in a demand would occur if the description does not correctly identify the debt so that the director of the company could assess whether there was or is a genuine dispute as to the existence of the debt.

In *LSI Australia v LSI Holdings; LSI Australia v LSI Consulting* [2007] NSWSC 1406 Austin J said:

> *If the demand is so vague or ambiguous that it fails to identify, to a reasonable person in the shoes of a director of the debtor company, the general nature of the debt to a sufficient degree that the director can assess whether there is a genuine dispute as to*

> *the existence or amount of the debt or an offsetting claim, then there is a lack of something necessary for completeness, and therefore a defect in the demand.*

In this case the schedule of the demand said:

> *Amount due owing and payable by the Debtor to the Creditor in accordance with the Accounts of the Debtor: $99,825.44.*

If an alleged debtor is unable to particularise the debt (or debts) to which the demand related, then they may be unable to avail themselves of the right to set the demand aside under section 459H(1)(a) and (b) of the *Corporations Act* and therefore substantial injustice may be caused.

In *Condor Asset Management Ltd v Excelsior Eastern Ltd* [2005] NSWSC 1139 Barrett J said:

> *[T]he company on which the demand is served must be able to identify with precision the debt – or each and every one of the several debts – upon which a statutory demand is based. Failure to provide the means of such identification means that the company is denied the ability even to begin to consider whether s.459H(1)(a) provides a ground for challenge. A company in that position suffers severe prejudice; and that prejudice must, of its nature, mean that there will be, in terms of s.459J(1)(a), "substantial injustice" unless the demand is set aside.*

Multiple Debts

If the demand amount is for a number of different debts with the debtor company, then each of the debts must be sufficiently particularised separately to enable the debtor company to identify each debt. It may not be enough to simply add the total amount owing without a breakdown of the separate components of the debt amount.

In *Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation* (1995) 55 FCR 562 Lindgren J said:

> *Clearly, a statutory demand relating to two or more debts must give a 'description' of the individual debts and state their amounts as well as state the total of those amounts.*

His Honour then said as to whether substantial injustice will follow:

> *[This] must … be addressed in context; and it is clear that a defect will not be productive of 'substantial injustice' if the demand, viewed in the light of what the company already knows or ought reasonably be expected to know, contains sufficient information to assess its liability for the amounts demanded. ...*

Obvious Mistake

Where the description of the debt in the schedule of the demand misstated the year of the agreement under which the debt was owed, has been held to be a "defect" in the demand, but not one that would cause substantial injustice. For example if a typographical error stated the unpaid invoice date as 1918 instead of 2018.

In *Plate Impressions Pty Ltd v JRL Consortium Group Pty Ltd* [2016] QSC 274 Burns J said:

> *[I]t cannot be seriously suggested that the defect in the demand has caused any injustice, let alone substantial injustice. The mistake as to the year of the agreement was an obvious one.*

A "defect" in the demand may not be one that would cause substantial injustice if the amount was set out and from the dealings between the parties the company was aware as to what it related to.

In *Lemar Nominees P/L t/a GJ Gardner Homes (Mackay) v Shuttlewood* [2000] QSC 142 White J said:

> *Notwithstanding the misdescription of the debt the amount is set out and from the dealings between the parties the company was aware as to what it related. Technical difficulties cannot be relied upon to set aside a statutory demand where commercial justice requires that the not occur*

Debt must be Due and Payable

Section 459E(1) of the *Corporations Act* says:

> *(1) A person may serve on a company a demand relating to:*
> *(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*
> *(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.*

The debt (or debts) must be due and payable, and therefore if the debt is not due and payable at the date of the statutory demand then this may be a defect which may cause substantial injustice.

In *Portrait Express (Sales) P/L v Kodak (Australasia) P/L; Olan Mills Studio v Kodak (Australasia) P/L* [1996] NSWSC 199 Bryson J said:

> *In my opinion the inclusion in the Statutory Demands of requirements for payment of significant sums of money which were not due for payment within the period available for compliance was an injustice to the plaintiffs.*

The Court decided that the plaintiff would have been put under a lot of pressure to pay money that was not due and payable, or put under the financial burden to start proceedings to set the demand aside. It was the operation of these "*oppressive requirements*" which was said to cause the substantial injustice.

Interest Calculation

The particularisation of the principal debt or debts, and the application of interest, if not sufficiently itemised and differentiated, may allow the statutory demand to be set aside.

In *Topfelt Pty Limited v State Bank of New South Wales Limited* [1993] FCA 589 Lockhart J said:

If the creditors wish to have the benefit of the presumption of insolvency, the least they can do is to tell the debtor companies in clear terms what amounts are due, whether they include interest or not, and, if so, the amount … In all the circumstances I am satisfied that the defects in the statutory demand in this case are of such a kind and magnitude that they constitute good reasons why the demand should be set aside.

Defect in the Names of the Parties

In *Re Macro Constructions Pty Ltd* [1994] 2 Qd R 31 Derrington J said:

> *There is abundant authority that … the courts will require strict compliance by an alleged creditor with the technical formal requirements of a notice of this kind. The reason is the draconian consequences to the company because default of compliance with the notice will render it vulnerable to a winding-up … However the quality of strictness of compliance has been the subject of discussion in various authorities … Not every error will attract invalidity and, for example, the court will look to see whether, on a fair construction of the notice, the creditor company is or is not named … [I]f the error is slight and does not in any substantial way frustrate the statutory provisions relating to this procedure or deprive the company of a right, the notice will not be held to be invalid.*

In *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 17 ACSR 662 the issues were:

1. The statutory demand did not have the correct name of the creditor;
2. The statutory demand did not include the ABN of the creditor; and
3. The statutory demand did not include an address for service in the same State in which the statutory demand was served.

In this case, the demand was set aside. Senior Master Mahony said:

> *[T]he statutory demand the subject of this proceeding will be set aside under s 459j(1)(b) because of the significance of the defects in the demand, albeit not productive in this case of "substantial injustice" to the applicant to which s 459j(1)(a) could apply.*

The Creditor then reissued an amended statutory demand in its correct name, which was again subject to an application to set it aside.

This application was *Scandon Pty Ltd v Powermate (Australia) Pty Ltd* (1995) 19 ACSR 120 in which the re-issued amended demand:

1. Included an address for service of the respondent in Victoria (by way of a town agent);
2. Included the correct name of the creditor company; but
3. Again did not include the creditor company's ACN.

In this matter, Senior Master Mahony dismissed the application to set the statutory demand aside observing that the defect was not substantial enough to cause injustice as the parties can be clearly identified.

Correct Number of Creditors

If two (2) or more creditors are owed a joint debt, then it is important for the debtor company to be able to identify the creditors, and it is important for both creditors to sign the statutory demand for payment.

In *Gone Farming v Long* [2001] NSWSC 816 Master Macready said:

> *If it is necessary for two creditors to sue then clearly there are two creditors in respect of one debt and both of them … would have to have made the demand … There is a defect in the demand in that only one has been named in the demand … There is also another defect in that if both are creditors in respect of the one debt, there has been non-compliance with s 459E(2)(f) which requires the creditors to sign the demand. Defects in creditors names certainly can be a defect within the section … In the present case I think it is an important matter and I think there is some injustice … Accordingly I propose to set aside the demand.*

There are also a number of cases in which an application to set the statutory demand aside because of a defect in the demand have been dismissed.

Dismissed Applications for Defects in the Demand

The case law involving applications to set a statutory demand aside because of a defect in the demand includes:

1. Where the notes and warning have been deleted;
2. Whether the demand is so defective it becomes a nullity;
3. The omission of an address for service for interstate demands;
4. The omission of a statement that debt was due and payable;
5. The omission of a signature from a statutory demand;

We explain the cases and distinguish them from the above.

Where the Notes or Warning have been Deleted

The notes at the bottom of the statutory demand are not to be deleted from the demand, but are to be included in the statutory demand. But have the deletion of the notes caused a demand to be set aside?

In *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell and Sons Pty Ltd* [1994] FCA 1059 Hill J discussed whether the omission of the notes provided that the demand was not actually a demand, and if it was a statutory demand, then if the omission constituted a defect:

> *If [this] question [can] be answered in the affirmative, then it seems to me to follow, the present not being admittedly a case where injustice would be caused by leaving the demand on foot but nevertheless a case covered only with what s.459J(2) would term a "mere defect", that the application must be dismissed. The omission of those words is a defect in the ordinary sense of the word and thus a defect for the purposes of s.9*

> *… Accordingly I would dismiss the application and order the applicant to pay the respondent's costs of it.*

Whether the omission of the "Warning" box in the stat demand is a defect which would cause substantial injustice was discussed in *McElligott v Boyce & Ors* [2011] QCA 117 following New South Wales Court of Appeal case *Randall v Chepan* [2009] NSWSC 783 where Muir J said:

> *The absence of the warning statement has been held not to require the setting aside of a statutory demand.*

These cases show that a defect from the omission of the Notes or the Warning in the demand are not in-and-of-themselves enough to cause substantial injustice. However, the particular facts of any further matter, in context, may allow a demand to be set aside.

Whether the Demand is a Nullity

Whether a statutory demand is still a demand because an omission was further discussed in *Inter Mining Pty Ltd v Lake Johnston Pty Ltd, in the matter of Lake Johnston Pty Ltd* [2013] FCA 915 where an argument was made that the omission of the "Warning" in the demand, like the omission of the "Notes" in the demand, is substantial enough to give the effect of not being a statutory demand, and therefore a nullity.

The Applicant in this case tried to make the argument:

> *whether the omission of the Warning was something more substantial than a 'defect' or 'irregularity' and rendered the demand a nullity. Lake Johnston says that the question considered was not whether the demand was liable to be set aside but the anterior question of whether it was a demand at all.*

The Court decided that because section 9 of the *Corporations Act* states that "statutory demand" means … a document that is, or purports to be, a demand served under section 459E, and that the word 'purport' bears its usual meaning of 'profess' or 'claim'.

Therefore following a number of precedents the Court decided that:

> *In the present case, no one receiving the document could have been in any doubt that it was, or purported to be, a demand under s 459E CA. That is very clear from the text of the document.*

The precedent cases set the bar very high as it relates to a demand being a nullity, as outlined in *Inter Mining Pty Ltd v Lake Johnston Pty Ltd, in the matter of Lake Johnston Pty Ltd* [2013] FCA 915 at 42:

1. A demand may be so fundamentally defective that it would not be treated as a statutory demand and, therefore, it will be a nullity;
2. However, that can only occur in the 'very rare' case where the demand falls outside anything that could be a purported demand for the purpose of the s 9 definition of statutory demand;
3. The deficiencies would have to be of a 'gross and exceptional character'; and
4. Since Kalamunda it has been accepted that if a demand professes or claims to be a demand served under s 459E, then it is a statutory demand notwithstanding any defects.

The omission of an address for service for interstate demands

Form 509H requires that a statutory demand has to include an address for service in the State in which the demand is served on the debtor company.

In *Re Ad-a-Cab Holdings Pty Ltd* [1997] 2 Qd R 115 the Court held that:

> *That a failure to specify in a statutory demand an address for service in the State in which it was served did not require the demand to be set aside under s. 459J unless that failure would cause substantial injustice.*

So again, the omission in-and-of-itself is not a defect in the demand which gives rise to an immediate right to set the demand aside.

This case is to be distinguished from *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 17 ACSR 662 above, because the facts of that matter allowed the demand to be set aside, because of the incorrect address for service, and a number of other defects in the demand.

Re Ad-a-Cab Holdings Pty Ltd was discussed and cited as the correct authority in *Daewoo v Suncorp-Metway* [2000] NSWSC 35.

Note – if you are serving a statutory demand interstate, you must comply with the requirements of the *Service and Execution of Process Act 1992* (Cth).

The omission of a statement that debt was due and payable

The statement that the debt is due and payable is distinct from the debt actually being due and payable as argued in *Portrait Express (Sales) P/L v Kodak (Australasia) P/L; Olan Mills Studio v Kodak (Australasia) P/L* [1996] NSWSC 199 above.

In *Panel Tech Industries (Australia) Pty Ltd v Australia Skyreach Equipment Pty Ltd* (2003) 200 ALR 321 an argument was put forward that there was a defect in the demand and the accompanying affidavit because both the demand and the affidavit omitted a statement that the amount was due and payable.

It was decided in this case that because the invoices annexed to the affidavit contained the words “amount due” that substantial injustice would not be caused reading all of the documents together. Barrett J said:

> *In the circumstances, substantial injustice would not be caused on account of the omission of the words “due and payable” from the statutory demand. Nor did the omission of those words from the accompanying affidavit constitute a reason why the demand should be set aside.*

The omission of a signature from a statutory demand

In *Noy's Works Pty Ltd (Formerly Noy's Castings Pty Ltd) v Allcast Pty Ltd* [2005] WASC 185 an application was made to set aside the demand, or to nullify the demand because the issuer omitted the signature and the date from the demand. Master Newnes said:

> *I do not accept that the omission of the signature has the drastic consequences contended for by the defendant. It was obviously inadvertent. That a demand for payment was made by the plaintiff was plain from the text of the statutory demand. The omission of the signature was simply a defect within the meaning of s 9, as was the omission of the date of the accompanying affidavit. Of course, as no application was brought to set aside the statutory demand within the time required by s 459G of the Act, the question of whether the omission of the signature caused substantial injustice does not arise. I might say, however, that had that question arisen, I cannot for the moment conceive how the omission of the signature could of itself give rise to substantial injustice.*

As you can see from the article above, a demand will only be set aside if substantial injustice will be caused to the debtor company if it is not set aside.

The main reasons that substantial injustice would be caused is if the debtor company is not able to rely on the provisions of section 459H(1)(a) of the *Corporations Act* – being the misdescription of the debt in the first instance, or the misdescription of the parties in the second instance.

However, an application to set aside a statutory demand for a defect in the demand will depend on the particulars of your matter.

Some Other Reason for Setting Aside a Demand

"Some other reason" forms the final basis in which a statutory demand can be set aside. This part will detail setting aside a statutory demand if there is some other reason to do so, what the Courts have said are "other reasons" and the legislative intent of this part of the *Corporations Act*.

What does "some other reason" Mean?

From the outset, this looks like a very broad term, so it is important to look at the intention of the drafters of this section of legislation and what they intended by the amendments to the legislation.

The *Corporate Law Reform Bill 1992 Explanatory Memorandum* says at 686 and 687:

> *686. The Harmer Report proposed that a demand may be set aside if the Court is satisfied that*
>
> *• there is a substantial dispute as to whether the debt is owing;*
>
> *• the company appears to have a counter claim which may exceed the amount of the debt; or*
>
> *• the demand ought to be set aside on other grounds.*
>
> *687. This last general power would enable the Court to take account of matters such as improper or invalid service and mistakes or misstatements in the notice of demand, in circumstances where this would significantly prejudice any party.*

The intention of the legislation has been found to be a very important factor in determining what is considered to be "some other reason" and what has not.

In *Meehan & v Glazier Holdings Pty Limited* [2005] NSWCA 24 Santow JA Tobias JA Young CJ in Eq said:

> *[t]here must be "sound or positive ground or good reason" to set aside the statutory demand for "some other reason", which was consistent with the legislative intent of Pt 5.4 of the Act.*

In *Portrait Express (Sales) P/L v Kodak (Australasia) P/L; Olan Mills Studio v Kodak (Australasia) P/L* [1996] NSWSC 199 Bryson J said:

> *As substantial injustice is required for a decision under para.(a) and is not referred to in para.(b) it must be intended that there be some difference in their operation. The Court should not act under para.(b), which is discretionary, unless the decision to do so is supported by some sound or positive ground or good reason which is relevant to the purposes for which the power exists.*

In *CP York Holdings Pty Ltd v The Food Improvers Pty Ltd* [2009] NSWSC 409 Barrett J said:

> *[t]he court should not act under s 459J(1)(b) in the absence of "some sound or positive ground or good reason which is relevant to the purposes for which the power exists". The power exists to maintain the integrity of the Part 5.4 process. It should be used as*

necessary and appropriate to counter attempted subversion of the statutory scheme. And as Young CJ in Eq said, subjective notions of what is fair play no part.

So, the cases seem to narrow the scope of "*some other reason*" by saying:

(1) There must be sound or positive ground;
(2) There must be a good reason;
(3) It need not be fair nor cause substantial injustice (as per s459J(1)(a);
(4) The grounds and reasons must be maintain the integrity of the statutory demand process; and
(5) It must maintain the legislative intention of Part 5.4 process

So, what types of "other reasons" have been held to allow an application for setting aside a statutory demand?

Reasons contained in the Affidavit in Support

There have been a number of instances in which errors or omissions in the supporting affidavit accompanying the statutory demand has been determined as "some other reason" pursuant to s459J(1)(b) of the *Corporations Act*.

These have been

(1) The witness did not sign the affidavit correctly;
(2) The deponent did not swear or affirm all of the elements required by section 459E(3) of the *Corporations Act*, and by the *Rules*;
(3) The affidavit was sworn or affirmed by a deponent who did not have knowledge of the relevant facts;
(4) The affidavit was sworn or affirmed on a date pre-dating the date on the statutory demand;
(5) Failure of the deponent to depose to the fact that the debt is due and payable; and
(6) Failure of the deponent to depose to the fact that there is no genuine dispute in relation to the debt.

I will address these points below.

Unsigned Affidavit by Witness

Rule 436 of the *Uniform Civil Procedure Rules 1999* (QLD) ("***the UCPR***") says:

> *(1) An affidavit may, unless the court orders otherwise, be filed despite an irregularity in form, including a failure to use the approved form.*
>
> *(2) An affidavit may, with the leave of the court, be used despite an irregularity in form and the affidavit must have on it a memorandum by the court or the appropriate associate or clerk that it was used by leave.*
>
> *(3) An affidavit used under subrule (2) is afterwards taken as a regular affidavit.*

Rule 29.07 of the *Federal Court Rules 2011* (CTH) says:

A party must apply for the leave of the Court to use an affidavit that has not been filed, or that has been filed but is irregular in form.

So, a question for the Courts to determine is if the lack of a signature from a witness, is an irregularity in form, or does it render the affidavit void.

In *Fastlink Calling Pty Ltd v Macquarie Telecom Pty Ltd* [2008] NSWSC 299 the irregularity of the affidavit was because of the lack of signature from the solicitor witness. Barrett J said:

> *[a]n affidavit which is irregular may be used in proceedings if the court so allows. If Ms Jebril's purported affidavit is shown by extrinsic evidence to have been sworn before Mr Chouman, it will, for reasons stated, be properly regarded as an affidavit, albeit one in which there is an "irregularity of form" as mentioned in rule 35.1. Its use in court will then be dependent upon a grant of leave under that rule. But, as I have said, its character as an affidavit – and therefore as a document of the kind contemplated and required by s 459G(3)(a) of the Corporations Act – will be established.*

If an affidavit is not signed by the witness, then the use of further evidence to prove that it was in fact witnessed on the date in the affidavit may be given leave to be used, and the statutory demand may not be set aside.

In *Carb Royale Pty Ltd v Tonkin* [2000] VSC 399, Senior Master Mahony said:

> *If it [the affidavit] is not made before a person authorised to administer an oath or affirmation for an affidavit, the document, despite its form, will not be an affidavit; and the statutory demand will be liable to be set aside on that ground alone.*

Deponent did not Swear or Affirm all of the Elements Required

Section 459E(3) of the *Corporations Act* says:

> *(3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:*
>
> *(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and*
>
> *(b) complies with the rules.*

The "*rules*" stated referenced in 459E(3) above are rules of the Federal Court or the Supreme Court of your State. Rule 5.2 of the *Federal Court (Corporations) Rules 2000* (CTH) ("***the Corporations Rules***") says:

> *For the purposes of subsection 459E (3) of the Corporations Act, the affidavit accompanying a statutory demand relating to a debt, or debts, owed by a company must:*
>
> *(a) be in accordance with Form 7 and state the matters mentioned in that Form; and*
>
> *(b) be made by the creditor or by a person with the authority of the creditor or creditors; and*
>
> *(c) not state a proceeding number, or refer to a Court proceeding, in any heading or title to the affidavit.*

Form 7 is a draft which must be adhered to as much as possible.

Paragraph 5 of the Form 7 affidavit says:

> *I believe that there is no genuine dispute about the existence or amount of the debt.*

One of the elements required under the *Corporations Act*, the *Corporations Rules*, and the Form 7 is that the person must depose that there is no genuine dispute.

Failure to Depose that there is no Genuine Dispute

In *Frayson Pty Ltd -v- Stirfry Enterprises Pty Ltd* [2008] WASC 301 Master Sanderson said:

> *It is difficult to imagine that anything could be more straightforward than adapting this pro forma affidavit, having it sworn by an appropriate person and serving it with the statutory demand. After all, r 5.2 says that the affidavit 'must' be in accordance with Form 7. But for some reason, the defendant in this case did not follow Form 7*
>
> *… In my view, par 4 of the affidavit in this case does not satisfy the requirements of Form 7 and, on this basis, the demand ought be set aside.*

In *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd* [2001] WASCA 299 Miller J with whom Wallwork J and Burchett AUJ agreed said:

> *[t]he failure by the deponent to the affidavit to state that there is no genuine dispute between the parties was a crucial and substantive omission … It was, in my view, essential that the affidavit accompanying the statutory demand comply with Form 7 and include this particular sworn allegation. The failure to do so was rightly categorised by the Master as a fundamental failure and one giving rise to a substantial injustice. For these reasons I would dismiss the second and third grounds of appeal.*

Another of the elements required under the *Corporations Act*, the *Corporations Rules*, and the Form 7 is that the person must depose that the debt is due and payable.

Failure to Depose that the Debt is Due and Payable

In *Main Camp v Australian Rural* [2002] NSWSC 219 Barrett J dismissed an appeal from the lower Court by saying:

> *The failure to specify in the affidavit that the claimed debt was "due and payable" (whether in those words or in others conveying the same message) … caused an essential statutory element to be omitted … The Master was correct in regarding these as matters both justifying and requiring setting aside of the demand pursuant to s.459J … Appeal dismissed.*

So, the affidavit must contain a statement by a person with knowledge of the relevant facts, that there is no dispute as to the debt, and that the debt is due and payable.

But what have the Courts said about an affidavit by a person with knowledge of the relevant facts?

No Knowledge of the Relevant Facts

Rule 5.2(b) of the *Corporations Rules* allows an affidavit to *be made by the creditor or by a person with the authority of the creditor or creditors.*

However, the Courts have said that the person making the affidavit must have direct knowledge of the relevant facts.

In *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 15 ACSR 433 McLelland CJ in Eq said:

> *The requirement of that rule, as to the identity of … the person who must put his or her oath or solemn affirmation to the relevant matters … is the person associated with the creditor who is most likely to have direct knowledge of those matters.*

In *Delta Beta Pty Ltd v Vissers* (1996) 20 ACSR 583 an affidavit was sworn / affirmed by a solicitor for the creditor company. Nicholson J said before setting aside the demand:

> *In my opinion the circumstances of this case make it appropriate for the defect in the affidavit to ground a sufficient "other reason" within s 459J(1)(b) of the Corporations Law for the reason that the hearsay assertions of the deponent bring to the statutory demand a verisimilitude to which it is not entitled … In my opinion, that circumstance raises the defect in the affidavit beyond a mere defect and to one of significance in all the circumstances of this case.*

Best practice, the director or CFO of the creditor company should swear or affirm the affidavit in support, someone who can depose to direct knowledge of the debt, the debt is due and payable, and that there is no genuine dispute.

Another instance where the affidavit can fail when supporting a statutory demand is where the affidavit is sworn or affirmed by a deponent, days before the date of the demand.

Affidavit pre-dating the Date on the Statutory Demand

There are different decisions in the Courts as to whether a supporting affidavit is sworn or affirmed days before the date of the statutory demand.

Some decisions say that this is a defect in the demand and other decisions say that this could be some other reason pursuant to section 459J(1)(b).

In *Wildtown Holdings Pty Ltd v Rural Traders Company Ltd* [2002] WASCA 196 an appeal was allowed, and the statutory demand was set aside. Templeman J with whom Steytler J and Miller J agreed said:

> *In my view … [a]n affidavit executed two days before a statutory demand cannot verify that demand.*

In *Technology Licensing Ltd v. Climit Pty Ltd* [2001] QSC 84 Chesterman J said:

> *A statutory demand can only be issued with respect to a debt that is due and payable at the time of the demand. Section 459E(3) clearly intends that the demand be verified by an affidavit that speaks to the circumstances existing at the time when demand is*

> *made. Proof that a debt was owed on 15 December is not proof that it was owed on 19 December.*

In *Ri-Co Holdings (Australia) Pty Ltd v. Allied Sandblasters Pty Ltd; Ri-Co Holdings (Australia) Pty Ltd v Beutel* [2009] QSC 122 Wilson J said:

> *The affidavit pre-dating the demand notice is no mere 'defect'. The affidavit is, in form and substance, ineffective to verify the demand.*

There are a number of ways in which a defect in the supporting affidavit can be fatal to a statutory demand.

What about other decisions which found that a demand can be set aside for "some other reason"?

A statutory demand may also be set aside if the statutory demand was made for an improper purpose; and the demand was served on debtor has proof of solvency.

These matters are discussed below.

The Statutory Demand was made for an Improper Purpose

If the demand was issued or maintained with unconscionable conduct, or for an abuse of process, or the demand had given rise to substantial injustice.

In *Hoare Bros Pty Ltd v Deputy Commissioner of Taxation* [1996] FCA 78 Black CJ, Einfeld and Sackville JJ said:

> *In the present case, Olney J implied that he would have been prepared to exercise the discretion in the Company's favour, had it been shown that the Commissioner's conduct was unconscionable, was an abuse of process, or had given rise to substantial injustice.*

This was followed in *Professional Services Of Australia Pty Ltd -v- Lean* [2018] WASC 28 where

> *A court may set aside a demand under s 459J(1)(b) if it is satisfied there is 'some other reason' why the demand should be set aside. Section 459J(1)(b) confers a wide discretion. Section 459J(1)(b) extends to conduct that may be described as unconscionable, an abuse of process, or which give rise to substantial injustice*

It is also an improper purpose to serve a statutory demand on a company which is plainly solvent.

In *Owners Corp SP66609 v Perpetual Trustee Co Ltd* [2010] NSWSC 497 the Supreme Court discussed the fact that the defendant has just overlooked service of statutory demand and the plaintiff took advantage of the oversight, knowing that the debt was disputed, and filed a winding up application against an obviously solvent defendant. Palmer J said:

> *[t]he Statutory Demand process is not to be used for the coercive collecting of disputed debts from solvent companies … [t]he creditor should save its time and money by eschewing statutory demand litigation and commencing debt recovery proceedings immediately.*

The statutory demand procedure should not be used to pressure or coerce a person into paying a disputed amount.

In *Moutere v Dct* [2000] NSWSC 379 Austin J said:

> *A statutory demand is not an instrument of debt collection. By analogy, the Commissioner should not use the statutory demand procedure to apply coercive pressure to a taxpayer who genuinely objects to the Commissioner's decision. To do so would be to take unfair advantage of those provisions of the taxation legislation which say that an amount owing in consequence of the Commissioner's decision is recoverable, notwithstanding that an objection has been lodged against the decision.*

Following on from above, the Courts have said that proof of the solvency of a debtor company does not establish "*some other reason*" however, proof of solvency may support an inference that the statutory demand was served for a purpose which was improper.

Proof of Solvency

In *Master Paving Pty Ltd v Heading Contractors Pty Ltd* (1997) 15 ACLC 1025 Lander J said:

> *The solvency of the recipient of the statutory demand is not a relevant matter for an application to set aside the statutory demand under s 459G and could not provide some other reason why the demand should be set aside … The question of solvency therefore is not a question that can be raised in an application to set aside a statutory demand but can always be raised at the time of the application for winding up, whether or not the defendant company did in the time prescribed make application to set aside the statutory demand.*

In *Paperlinx Limited v Skidmore* [2004] FCA 1624 Finkelstein J said:

> *In deciding whether a person is threatening a winding-up application for an improper purpose it is quite legitimate, indeed it will often be necessary, to enquire into the solvency of the company.*

The legislation does not consider the ability to wind up company's which are not insolvent, and so by continuing against a clearly solvent company is an abuse of process.

If you need to set aside a statutory demand then time is very much of the essence. It is vital that you contact a statutory demand lawyer. There could be serious cost consequences if you do not.

The Form 509H

Below is a form 509H taken from Schedule 2 of the Regulations for your information only. If you want to be sure that you have the correct version, go to the Regulations and get it from there.

Form 509H

(paragraph 459E(2)(e))

Corporations Act 2001

CREDITOR'S STATUTORY DEMAND FOR PAYMENT OF DEBT

To (name and A.C.N. or A.R.B.N. of debtor company) of (address of the company's registered office)

1. The company owes (name) of (address) ("the creditor")

* the amount of $(insert amount), being the amount of the debt described in the Schedule.

* the amount of $(insert total amount), being the total of the amounts of the debts described in the Schedule.

* 2. The amount is due and payable by the company.

* 2. Attached is the affidavit of (insert name of deponent of the affidavit) , dated (insert date of affidavit), verifying that the amount is due and payable by the company

3. The creditor requires the company, within 21 days after service on the company of this demand:

(a) to pay to the creditor the * amount of the debt/ * total of the amounts of the debts; or

(b) to secure or compound for the * amount of the debt/ * total of the amounts of the debts, to the creditor's reasonable satisfaction.

4. The creditor may rely on a failure to comply with this demand within the period for compliance set out in subsection 459F(2) as grounds for an application to a court having jurisdiction under the Corporations Act 2001 for the winding up of the company.

5. Section 459G of the Corporations Act 2001 provides that a company served with a demand may apply to a court having jurisdiction under the Corporations Act 2001 for an order setting the demand aside. An application must be made within 21 days after the demand is served and, within the same period:

(a) an affidavit supporting the application must be filed with the court; and

(b) a copy of the application and a copy of the affidavit must be served on the person who served the demand.

A failure to respond to a statutory demand can have very serious consequences for a company. In particular, it may result in the company being placed in liquidation and control of the company passing to the liquidator of the company.

6. The address of the creditor for service of copies of any application and affidavit is (insert the address for service of the documents in the State or Territory in which the demand is served on the company, being, if solicitors are acting for the creditor, the address of the solicitors).

SCHEDULE

Description of the debt Amount of the debt

(indicate if it is a judgment debt, giving the name of the court and the date of the order)

* Total Amount

Dated:

signed:

Print name: capacity:

Corporation or partnership name (if applicable):

NOTES:

1. The form must be signed by the creditor or the creditor's solicitor. It may be signed on behalf of a partnership by a partner, and on behalf of a corporation by a director or by the secretary or an executive officer of the corporation.

2. The amount of the debt or, if there is more than one debt, the total of the amounts of the debts, must exceed the statutory minimum of $2,000.

3. Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:

(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and

(b) complies with the rules.

4. A person may make a demand relating to a debt that is owed to the person as assignee.

5. This form was amended in 2006 as part of amendments of the Corporations Regulations 2001 . For the period of 12 months after the commencement of those amendments a person may comply with paragraph 459E(2)(e) of the Corporations Act 2001 in relation to a statutory demand for payment of debt by using:

(a) the version of this form that was in force immediately before the commencement of the amendments; or

(b) this version of the form.

* Omit if inapplicable

The Form 7

Below is a Form 7 is for your information only. If you want a current up-to-date version then you can download it from the Federal Court website.

Form 7 Affidavit accompanying statutory demand
(rule 5.2)

[*Name of creditor(s)*]

Creditor(s)

[*Name of debtor company*]

Debtor company

I, [*name*] of [*address and occupation*], *say on oath/*affirm [*or* ***** make oath and say***/**** solemnly and sincerely declare and affirm]:

1 I am [*state deponent's relationship to the creditor(s), eg, 'the creditor', '(name), one of the creditors', 'a director of the creditor', 'a director of (name), one of the creditors'*] in respect of *a debt of $[*amount*]/*debts totalling $[*amount*] owed by [*name of debtor company*] to *it/*them relating to [*state nature of debt, or debts, ensuring that what is stated corresponds with the description of the debt, or debts, to be given in the proposed statutory demand, with which this affidavit is to be served on the debtor company*].

2 [*If the deponent is not the creditor, state the facts entitling the deponent to make the affidavit, eg 'I am authorised by the creditor(s) to make this affidavit on its/their behalf*].

3 [*State the source of the deponent's knowledge of the matters stated in the affidavit in relation to the debt or each of the debts, eg 'I am the person who, on behalf of the creditor(s), had the dealings with the debtor company that gave rise to the debt', 'I have inspected the business records of the creditor in relation to the debtor company's account with the creditor'*].

4 *The debt/*The total of the amounts of the debts, mentioned in paragraph 1 of this affidavit, is due and payable by the debtor company.

5 I believe that there is no genuine dispute about the existence or amount of the *debt/*any of the debts.

*Sworn/*affirmed at: [*place of swearing or affirmation*] on [*date*]
OR

*Sworn/*affirmed by the above-named deponent at: [*place of swearing or affirmation*] this day of [*month*] [*year*]

.....

Signature of deponent

Before me:

Signature and designation of

person before whom deponent

swears or affirms affidavit

* *Omit if not applicable*

> *Note* The form of the opening words and the jurat of this affidavit may be changed to conform to the form of affidavit used in a particular State or Territory — see rule 2.6.