

CREDITOR'S STATUTORY DEMANDS: Unwelcome Christmas Presents

Especially at Christmas and New Year, Creditor's Statutory Demands can be a challenge. We take a little time to give a refresher on this document, which demands that a company pay a debt within 21 days (or apply to have the Creditor's Statutory Demand set aside in that time).

The 21 day period continues to run over the holiday period of Christmas and New Year, and it cannot be extended. That is why when you served a Demand, you may find that Christmas is your best friend. On the other hand, if you receive a Demand, you can end up with a giant (and expensive) headache.

13 December 2019

WHAT IS A CREDITOR'S STATUTORY DEMAND?

A Creditor's Statutory Demand is a demand for a company to make payment often accompanied by a short affidavit as to how the debt arose. It is a unique document sanctioned by the *Corporations Act 2001*. It is not a "letter of demand". Nor is it a document that begins a legal proceeding (such as a "Complaint" in the Magistrates' Court, or "Writ" in the Supreme Court).

Instead, a Creditor's Statutory Demand is a notice under the *Corporations Act* that a creditor can send to a debtor company that owes it \$2,000 or more, which gives the debtor company 21 days to either:

- pay the debt; or
- come to an agreement with the creditor (such as a payment plan); or
- make an application to "set aside" the Creditor's Statutory Demand – this application is made in either the Federal Court or Supreme Court. (See section 459F of the *Corporations Act*).

If none of these three things are done strictly within the 21 day period, then the debtor company is deemed to be insolvent (unable to pay its debts as and when they fall due); and the creditor can apply to the Federal Court or Supreme Court to wind up the company and have a liquidator appointed.

Creditor's Statutory Demands are often sent for undisputed debts arising from invoices (for goods or services), or under loan agreements. A Creditor's Statutory Demand may also be sent if a debtor company has not complied with a court order to pay money (a "judgment debt").

Service of a Creditor's Statutory Demand can be: (1) by hand delivery (to an Australian resident company director, or the company's registered office); or (2) by post to the company's registered office.

WHY IS THIS SUCH A BIG DEAL AT CHRISTMAS AND NEW YEAR?

If within 21 days of receiving a Creditor's Statutory Demand the company does not respond in one of the three ways set out above, it is deemed insolvent and can be wound up. That can be a big ask given not only is this a recognised holiday period, but there are also 3 public holidays and 3 weekends during this 21 day period.

So, if a demand is served on 23 December, one of the 3 actions set out above must have taken place by 13 January or you are in a world of trouble. And, if an application to set aside is required, this can take a considerable amount of time to prepare.

I have had directors fail to act on such Creditor's Statutory Demands over holiday periods, only to find themselves in the Supreme Court facing winding up proceedings for a relatively small amount of money.

I acted for a director who overlooked both the Creditor's Statutory Demand and the Court documents filed in support of appointing a liquidator to her company. It turned out that her company was entirely solvent with a significant land bank holdings, and no debt. The costs of applying to the Supreme Court to set aside the liquidation ran to tens of thousands of dollars for the Liquidators and creditors costs alone. All for a debt of less than \$6,000 which the director disputed, but had to pay.

So, as soon as you receive a Creditor's Statutory Demand – even over the coming holidays – you need to deal with it.

WHAT CAN YOU DO?

Ensure that your arrangements for receiving and dealing with mail will continue to function over the holidays. If your registered office is care of a professional (such as an accountant), satisfy yourself that they have arrangements in place to ensure that mail is opened and actioned over the holidays.

Brand Partners' office will close at lunchtime on Tuesday 24 December 2019, and re-open on Monday 6 January 2020. However, we are available via email for emergencies over the holiday period.

Please contact Jeremy Brand or James Greentree if you wish to discuss any issues that arise for you out of this article.

FURTHER INFORMATION

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