1. **Statutory Demands**

**Pitfalls for your clients on either side of the fence**

Lately I have been asked about the key elements of Statutory Demands – how they work, when they are appropriate to use and how to possibly defend one in the event one is received. So I felt it would be beneficial to put together this overview for our readers out there.

If you have a client who is thinking about issuing a Statutory Demand, or may have received one, I am sure you will find this article to be useful.

**Background**

The technical elements of a Statutory Demand are set out in section 459E of the *Corporations Act 2001* and briefly, are as follows:

1. A Statutory Demand is served on a company, most commonly at its registered office (note that Statutory Demands do not apply to an individual – the equivalent in the personal insolvency world is a Bankruptcy Notice, and it works is a similar way to a Statutory Demand)
2. In a Statutory Demand there is a statutory minimum to be owed to the creditor by the debtor of $2,000
3. The form must:
   1. specify the amount owed in an unambiguous and clearly quantified way, so as to avoid the risk of having the demand set aside; and
   2. specify a period of no less than 21 days for the debtor to pay up following service of the demand; and
   3. be in writing; and
   4. be signed by, or on behalf of, the creditor.
4. If the debt is not a judgement debt, that is a debt that has been ruled on by a Court as being owed, the form must be accompanied by an affidavit that:
   1. verifies the debt; and
   2. complies with the rules – those being the rules of the relevant Court (i.e. Supreme Court of Western Australia, Federal Court of Australia etc.).

In practice, there are a number of interesting considerations that arise in relation to Statutory Demands.

**Service**

The most common means of service is by leaving the Statutory Demand at the company’s registered office, or by delivering a copy personally to a director of the company.

If a creditor is aware that the company no longer resides at a particular registered office and the creditor knows the details of the new address, then the new address should be used.

**Statutory Demands can be ‘set aside’**

If a client issues or receives a Statutory Demand and one or more of the circumstances discussed below exist, they should be aware that the Statutory Demand can be ‘set aside’ by the Court.

If the intention is to apply to have the Statutory Demand set aside, an application must be made under section 459G within the 21 days following the service of the demand. So time is of the essence – do not delay.

The application must be more substantive than simply “this debt is not owed”. In fact, an affidavit must be filed with the application that contains details about why the demand is refuted and it must be as complete as possible – an affidavit or a supplementary affidavit filed after the 21 days has expired will not be considered by the Court.

The reasons that a Court may set aside a Statutory Demand include:

* The debt is less that the statutory minimum of $2,000 (section 459H)
* There is a defect in the Statutory Demand that would cause substantial injustice if it were not to be set aside (section 459J(1)(a))
  + A minor defect or irregularity would most likely not be seen as fatal, however the overall impact of the defect can be a subjective call in the eyes of the Court
* There is some other reason why the demand should be set aside (section 459J(1)(b))

One of the most common reasons to set aside a Statutory Demand is the existence of a ‘genuine dispute’ as to the whole quantum or nature of the debt. This means that the dispute must be genuine and the grounds for disputing the entire debt must not be spurious, hypothetical, illusory or misconceived (credit for those clever words goes to Austin J in Goldspar Australia Pty Limited v KSW Design Group Pty Limited [1998] NSWSC 502).

**Presumption of insolvency in a subsequent winding up application**

Aside from eliciting a payment, which is the ideal outcome for a creditor that is owed the money, a Statutory Demand that later expires can be used as a ‘presumption of insolvency’ in a winding up application to be heard before a Court. Section 459C lists the presumptions that the Court must adhere to, however there is a three month limit to be aware of.

In other words, a winding up application commenced by a creditor can rely on the debtor’s failure to comply with a Statutory Demand as a presumption of insolvency only if the winding up application is lodged within three months of service of the Statutory Demand. QUERY ON WHETHER THIS IS AFTER THE EXPIRY OF THE DEMAND

Recipients of Statutory Demands should also be aware that once a winding up application is filed, directors and shareholders cannot voluntarily resolve to place the company into liquidation.

The only voluntary formal option once a winding up petition has been filed with the Court is to appoint a Voluntary Administrator, however the Court would need to be satisfied that the Voluntary Administration and a subsequent Deed of Company Arrangement proposal was a viable and realistic option, which would result in a stay of the winding up application.

This is not a simple process and our observation is that the Courts are increasingly ordering companies should go into liquidation, despite a Voluntary Administrator having been appointed after the filing of a winding up application but before the Court hearing to wind up the company.

**Key takeaways to be aware of**

Statutory Demands should be respected. This means that they should only be issued as part of a genuine debt recovery process or challenged where a genuine dispute exists.

Creditors ought to be aware that Statutory Demands can be set aside, so it is time and money well spent to get the ducks lined up before the demand is served.

Debtors should be aware of their options to set aside a Statutory Demand and critically the timeframe to do so, i.e. within the 21 day Statutory Demand period. Failure to comply means the creditor may commence a winding up application to wind up the debtor company.

If you have a client who has any queries about Statutory Demands, please feel free to get in touch with me. I am happy to be a sounding board on any issues that may come up in relation to any insolvency matters.

Disclaimer

Please note that this article does not constitute legal advice and you should not rely upon it. You should always consult your legal representatives on matters of this nature. We at HLB Mann Judd Insolvency WA are happy to put you in contact with legal specialists who deal with these matters. Please feel free to contact us on 08 9215 7900 if you require any further assistance.

1. **Travelling during bankruptcy**

**Dispelling the myths**

Let’s face it – personal bankruptcy is not great. I have written articles in the past about how the regime works and the positive (yes, positive) and negative aspects about going bankrupt.

A common question that comes up when I meet people, which can often prove to be the biggest area of concern, relates to a bankrupt’s ability to travel internationally.

As the saying goes, a little bit of knowledge is a dangerous thing, and it can prove quite unsettling when someone learns, from an unreliable source, that they cannot travel overseas if they become bankrupt.

Aside from holidays, a major pain point for people is the incorrect perception that they will be unable to travel overseas to attend a wedding, care for a sick relation or sadly, attend a funeral of a family member or friend.

The thing is, a bankrupt individual can travel overseas – they just need to get their Trustee’s permission first.

How is permission obtained? It’s quite easy – you just need to provide the following details:

* The **reason** for travel (holiday, work conference etc.)
* The **dates** of travel and the **countries** that will be visited
* **Contact details** for whilst you are away
* Being up to date with any **income contributions** that may be due for payment
* **Who is paying** for the trip (and if it is not you, a letter from the party that is paying)
* If travelling for work, **evidence from your employer** as to the reasons for the travel

The points above are all centred around establishing that the bankrupt person is not a flight risk, that they are not fibbing on their income questionnaires about how much they are earning and that if they do owe their estate some money, they are all square before leaving the country.

For example, if a bankrupt person reports income resulting in no contributions to their estate, a first class trip throughout Europe for a month will raise suspicions from their Trustee about what is really going on.

Additionally, if an individual owes money to their estate for income contributions, their Trustee will normally insist that the payments are caught up before allowing the person to travel.

So if you are contemplating bankruptcy and international travel is a particularly concerning consideration for you, I trust that this article has allayed your worries.

If you have any questions about how this article may apply to your circumstances, please feel free to pick up the phone and give me a call.

1. **Data Privacy Day**

**Is your system protected?**

The 28th of January was international Data Privacy Day and it served as a reminder to all of us how easily a sophisticated hacker could access private data or bring a computer network to its knees.

Here are some quick and simple tips to avoid befalling one of these cyber pirates:

* Email red flags
  + The time of the email – would your boss really send you an email at 2am?
  + Irregular language, such as ‘wire transfer’ (US) as opposed to ‘EFT’ (Australia)
  + Poor grammar in an email, indicating that English may not be the writer’s first language
  + Strange requests from people inside (or outside) your organisation, such as funds transfers, or requests for personal details
* Email vigilance
  + Do not open an email from someone that you do not know
  + Do not open unknown attachments
  + Check the domain name attached to an email address – if it looks suspicious, it may be a fake account
* Virus protection
  + Install a firewall
  + Maintain anti-virus software
  + Make sure your computer software and hardware is up to date
  + Check that your work and home Wi-Fi is safe and secure
* Client communications
  + Follow up a request to change bank account details with a phone call
* Avoid PC risks
  + Internet cafes
  + Public Wi-Fi networks
  + Cold calls

False emails can look pretty convincing nowadays, and it only takes one innocent click on a link to unleash fury on your IT environment.

So be aware – always – and heed the advice above. It could save you a whole lot of pain in the long run.