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STATUTORY DEMANDS AND THEIR USE IN THE CONSTRUCTION INDUSTRY

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1. What is a Creditor's Statutory Demand?

A Creditor's Statutory Demand **(Statutory Demand)** is a demand issued on a company under the *Corporations Act 2001* (Cth) **(Corporations Act)** demanding payment of a debt or debts totalling at least $4,000 within 21 days from the date of service *.

It is a formal form with an accompanying affidavit and their contents are prescribed by the Corporations Act and Regulations.

Failure to pay or comply with a Statutory Demand can result in the Creditor applying to the Court to wind up the Debtor Company in insolvency.

** There is temporary relief available for financially distressed businesses due to the Covid-19 pandemic. Elements of this package includes a temporary increase in the monetary threshold and the time to respond to Statutory Demands .*

2. A Debtor Company's options when served with a Creditor's Statutory Demand

Once served with a Statutory Demand, a Debtor Company's options are to:

1. pay the debt;
2. contact the Creditor and agree on an arrangement to pay the debt (eg. a settlement and/or a payment plan); or
3. apply to the Court to set the Statutory Demand aside.

3. Grounds to set a Statutory Demand aside

A Debtor Company can apply for an order to set a Statutory Demand aside if:

1. there is a **genuine dispute** about the existence or amount of the debt. The Court looks for a dispute that is bona fide, truly exists, and "the grounds are real and not spurious, hypothetical, illusory or misconceived", and involves "a serious question to be tried", which is a fairly low bar;

2. the debtor company has an **<u>offsetting claim</u>** against the Creditor. The Court looks for *"a serious question as to the existence of an offsetting claim or an issue deserving of a hearing"* and that the claim *"is made in good faith and is arguable and not frivolous or vexatious"*, which is also a fairly low bar;

3. there is a defect in the demand which causes "substantial injustice" unless the demand is set aside. Examples include where a verifying affidavit is not attached to the Statutory Demand and/or there are issues with the identification of the parties, the particulars of various debts or the calculation of interest; and/or

4. there is some other reason why the demand should be set aside. Examples include that the Statutory Demand was not served properly or where a party has not followed a dispute resolution procedure stipulated in a contract.

Any application to set aside a Statutory Demand needs to be made within the 21 day expiry period – therefore, **<u>timing is crucial.</u>**

4. Genuine Disputes in the Construction Industry

The following are some examples of genuine disputes that may be available to parties in the construction industry to set aside a Statutory Demand:

1. The Creditor has issued invoices or payment claims that do not comply with the requirements of the relevant contract and/or the *Building and Construction Industry Security of Payment Act 1999* (NSW);

2. The amount claimed is an overclaim;

3. The goods and/or services upon which the claim is were not provided or were not fit for purpose;

4. There are substantial defects in the work carried out by the party that issued the Statutory Demand; and/or

5. The Creditor has repudiated the relevant construction contract for example, by unlawfully suspending works and/or the contract with the Creditor has been terminated.

5. Offsetting Claims in the Construction Industry

The following are some examples of offsetting claims that may be available to parties in the construction industry to set aside a Statutory Demand:

1. Additional costs incurred as a result of replacing the Creditor with another contractor where the Creditor has unlawfully suspended its works and/or the contract with the Creditor has been terminated;

2. Liquidated damages and possibly other delay damages a result of the Creditor's failure to achieve practical completion by the date for practical completion;

3. Damages levied by an up-stream contractor or principal due to the Creditor's delays, including for example finance and land costs; and

4. Costs of rectifying defective work of the Creditor (this argument was recently successful in the Supreme Court of NSW case of *In the matter of HWC Contracting Pty Ltd* [2021] NSWSC 1684);

It is also vital to prove the value of the offsetting claim, as was held in the recent Supreme Court of NSW case of *In the matter of Macarthur Projects Pty Ltd* [2021] NSWSC 1705.

6. Key Take-Aways

In issuing Statutory Demands, care has to be taken to:

1. establish that the claim is not the subject of a genuine dispute;

2. ensure there is no offsetting claim that the Debtor Company can raise;

3. ensure that all formal requirements of Statutory Demands in accordance with the Corporations Act and the Corporations Regulations, including service, are followed.

If a party is served with a Statutory Demand, they should:

1. act quickly, given the 21 day period in which the demand expires;

2. seek legal advice on any grounds to set the Statutory Demand Aside; and

3. pay the debt, come to a settlement or agree on payment terms, or make an application to set the Statutory Demand aside if appropriate.

CONTACT US

For more information or assistance call **Anish Wilson** at Kreisson on **(02) 8239 6500** or email at **excellence@kreisson.com.au**.