

RECOVERING BUSINESS DEBTS WITH CREDITOR'S STATUTORY DEMANDS

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All business owners and managers understand that cashflow and the quick recovery of outstanding fees or invoices is critical to the success of their business.

In particular, a good understanding of the debt recovery options available to your business and when to apply them can make the difference between a profitable month or an ever increasing overdraft.

Provided in this alert is an outline of one of the options for recovering outstanding debts known as a Creditor's Statutory Demand (CSD). In the right circumstances, this can provide you with a cost effective debt recovery method that doesn't require initiating court proceedings.

WHAT IS A CREDITOR'S STATUTORY DEMAND AND WHAT IS ITS EFFECT?

A CSD is a legal document created under the *Corporations Act 2001* (Cth). It allows for a creditor to demand payment from a debtor (company) who owes at least \$2000 that is due and payable. A statutory demand allows a creditor to exercise its rights to formally demand payment without initiating legal proceedings.

Once served, a debtor has 21 days in which to either pay the demand or make an application to the court to have the statutory demand set aside. Should a company fail to respond to the statutory demand, it will be presumed by the courts to be insolvent and could subsequently be wound up relatively quickly.

This is a key strength of using a CSD. The potential impact on a business of being presumed insolvent is a powerful motivator for a debtor to payment.

WHEN CAN YOU USE A CSD?

It can only be used against a company, not an individual or partnership of individuals. A statutory demand can be made if the debt amount is at least \$2000 and due and payable and there is no dispute as to the amount that the debtor owes you. It can be used to demand payment of an outstanding debt, so long as the amount of the debt is known with certainty.

This is important to note - a debt about which there is some uncertainty or dispute will in all likelihood not 'succeed' as a CSD. A judgement debt - that is, a debt arising from a court order - is one example (arguably the very best example) of a debt that is certain and cannot be disputed.

WHAT MUST A STATUTORY DEMAND CONTAIN?

A statutory demand must specify the debt and its amount (and if there is more than one debt then the total amount of all debts owing by the debtor). It must relate to a debt that is due and payable at the date of the demand. It must comply with the requirements under the *Corporations Act 2001* (Cth). The statutory demand must also:

- demand the company pay the debt amount within 21 days after it is served;
- be in writing;
- be in the prescribed form (Form 509H);
- be signed by the creditor or on behalf of the creditor; and
- if it is not a judgment debt it must be accompanied by a supporting affidavit setting out the particulars of the debt owed.

Your lawyer will advise you on the key elements of a CSD and assist you in preparing and swearing the affidavit.

WHAT COMMON MISTAKES CAUSE STATUTORY DEMANDS TO BE SET ASIDE OR DEEMED INVALID?

Certainty of the details of the debt and parties is critical to the success of a CSD. Prior to discussing this with your lawyer you should ensure you have as much detail as possible about the origin of the debt, the company and other parties involved.

Common mistakes resulting in CSDs being set aside or being deemed invalid include:

- Incorrect Parties

It is crucial that the correct parties be named on the statutory demand. Issues often arise with debtors that have multiple entities. Retaining as much information as possible about the debtor, and particularly knowing exactly which company you are dealing with, is critical

- Improper service

The Corporations Act sets out provisions for service. Your lawyer will advise you, or arrange, for proper service to occur. You can assist this process by providing as much information as possible about the company, its directors and its usual place of business or the location of its directors.

- Genuine dispute

A court can set aside a statutory demand if there is a 'genuine dispute' regarding the debt amount. There is no statutory test as to what a 'genuine dispute' is but the courts have come to agree that a genuine dispute exists when there is a serious question to be tried about the size or existence of the debt.

COSTS

Bringing a more 'typical' claim in the courts for the recovery of a debt can be expensive and time consuming. In many cases court claims for debts owed can take years to reach a hearing.

A properly implemented CSD will usually incur less legal fees and be a more aggressive step to take in the recovery of the debt.

A word of warning though - a creditor who serves a CSD that they know will be disputed runs the risk of having costs awarded against them.

The complex workings of a CSD are very simply outlined here however before any decision to serve another party with a statutory demand is made, legal advice should be obtained. In particular you should consult a specialist litigation lawyer so they can determine whether you have the right situation for a CSD and ensure it is implemented effectively and with the best possible chance of recovering your money.

If you have any questions in relation to this bulletin please do not hesitate to contact any of the members of CG Law's litigation team.

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