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# INTRODUCTION

- A solvent company may be wound up under Part 5.5 Corporations Act.
- The company is no longer required - it is wound up and surplus assets are distributed to members.
- An insolvent company may be wound up under Part 5.4B Corporations Act.
- Liquidation is *“a process whereby the assets of a company are collected and realised, the resulting proceeds are applied in discharging all debts and liabilities, and any balance which remains after paying the costs and expenses of winding is distributed among the members according to their rights and interest, or otherwise dealt with as the constitution of the company directs”* - McPherson’s Law of Company Liquidation.



# PURPOSES OF LIQUIDATION

- To provide a procedure for the equitable and fair distribution of the assets of the debtor company amongst its creditors.
- There is also a social purpose in winding up insolvent companies - to put an end to the company's trading and wind up its affairs in an orderly fashion.
- There can be investigation of the company's affairs, particularly the circumstances which led to insolvency. Investigation may disclose any unfair dispositions of property.
- In company liquidation there is no "*fresh start*" for the company as there is in personal bankruptcy - the company goes out of existence at the end of the liquidation process.



# COMPULSORY WINDING UP

- Under Section [459P](#) of the Act the following may apply to the court for a company to be wound up in insolvency:
  - (a) the company;
  - (b) a creditor;
  - (c) a contributory;
  - (d) a director;
  - (e) a liquidator or provisional liquidator of the company;
  - (f) ASIC;
  - (g) a prescribed agency.



# COMPULSORY WINDING UP

- The leave of the court is required by the following:
  - (a) a person who is a creditor only because of a contingent or prospective debt;
  - (b) a contributory;
  - (c) a director;
  - (d) ASIC.
- The court may give leave if satisfied that there is a prima facie case that the company is insolvent.



## PRESUMPTIONS OF INSOLVENCY - SECTION 459C

- (2) The Court must presume that the company is insolvent if, during or after the three (3) months ending on the day when the application was made:
- (a) the company failed (as defined by Section [459F](#)) to comply with a statutory demand; or
  - (b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or
  - (c) a receiver, or receiver and manager, of the property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or
  - (d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a charge; or
  - (e) a person entered into possession, or assumed control, of such property for such a purpose; or
  - (f) a person was appointed so to enter into possession or assume control (whether as agent for the chargee or for the company).



## APPLICATION MUST BE MADE WITHIN 3 MONTHS

- Any application for winding up must be filed with the court within 3 months of the last date for compliance with the statutory demand, or other presumed insolvency event.
- This is to be contrasted with bankruptcy where the petition must be filed within 6 months of the date of the commission of the act of bankruptcy.
- If the presumptions are invoked the company is regarded as insolvent unless the company proves to the contrary.



# STATUTORY DEMANDS

- The most common way to prove insolvency.
- The equivalent of a Bankruptcy Notice - demands must be expressed in clear, correct and unambiguous terms.
- A Demand must tell the debtor company in clear terms what amounts are due, whether they include interest or not, and if so, the amount.





## FORM OF DEMAND - SECTION 459E

The statutory demand:

- (a) if it relates to a single debt - must specify the debt and its amount; and
- (b) if it relates to two or more debts - must specify the total of the amounts of the debts; and
- (c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days after the demand is served on the company; and
- (d) must be in writing; and
- (e) must be in the prescribed form (if any); and
- (f) must be signed by or on behalf of the creditor.



# THE CREDITOR'S DEBT

- Valid demands can only be issued by creditors who have a debt due and payable and which is recoverable by enforcement action.
- Consequently the debt cannot be contingent or prospective or unliquidated.
- The debt must total at least the statutory minimum, presently \$2,000.
- A creditor may not serve a demand at the same time as taking proceedings against the directors in relation to the same debt - this is an abuse of process.
- The demand need not be based on a money judgment (unlike a Bankruptcy Notice).
- Where there is no judgment the demand must be accompanied by an affidavit which verifies the debt is due and payable.



# SERVICE

- Section [109X](#) requires the demand to be served on the company by:
  - leaving it at, or posting it to, its registered office;
  - delivering a copy of the document personally to a director of the company who resides in Australia;
  - the date of service is critical, as the company has 21 days after service to file any application to set aside the demand;
  - any means of service which actually brings a document to the attention of a company will be valid.



# COMPLIANCE WITH THE DEMAND

The debtor company may pay the debt demanded, or secure or compound the debt to the creditor's reasonable satisfaction.

- If it fails to do so, its insolvency is presumed.
- The creditor may use that presumed insolvency to base a winding up application to the court.
- The company fails to comply with the demand at the end of the 21 days after service.
- The court may extend the time for compliance if the debtor makes application to set aside the demand.
- The extension of time order must be made before time is expired.



# SETTING ASIDE A STATUTORY DEMAND

- If there is a genuine dispute about the existence of the debt.
- If the company has an offsetting claim.
- *S 459H(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.*
- If there is a defect in the demand and substantial injustice will be caused if the demand is not set aside.
- If there is some other reason why the demand should be set aside.



# GENUINE DISPUTE - s 459H(1)(a)

- The genuine dispute must relate to the existence or amount of the debt.
- The court's task is simply to determine the genuineness of a dispute and not the likely result of it.
- The expression "genuine dispute" "connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the 'serious question to be tried' criterion which arises on an application for an interlocutory injunction".
- Cross-examination will rarely be allowed.



# OFFSETTING CLAIMS - s 459H(1)(b)

- Defined in Section [459H\(5\)](#) to mean a genuine claim the company has, as opposed to will have, against the person serving the demand by way of counter-claim, set-off or cross-demand.
- The offsetting claim must exist at the date of the hearing of the application to set aside the statutory demand.
- A claim for unliquidated damages may constitute an offsetting claim.
- The offsetting claim must be genuine in the sense of being authentic or bona fide.
- The company does not have to adduce all of its evidence but must identify the appropriate evidence showing the genuineness of the offsetting claim.



## DEFECT IN THE DEMAND - s 459J(1)(a)

- The ordinary usage of “defect” means “a lack or absence of something necessary or essential for completeness, a shortcoming or deficiency, an imperfection”.
- Minor defects will not usually justify the setting aside of a statutory demand - there must be “substantial injustice”.
- A demand which is likely to mislead, confuse or fail to properly inform a debtor will most likely cause substantial injustice.
- A statutory demand which showed two completely different amounts being claimed by the creditor was defective - *Main Camp v Australian Rural* (2002) 20 ACLC 726.





# SOME OTHER REASON - s 459J(1)(b)

- Failure to accompany a statutory demand with an affidavit required by Section [459E\(3\)](#).
- Failure by the creditor to provide proper evidence eg. failing to verify that the debt is due and payable.
- Where the accompanying affidavit is not sworn contemporaneously with a statutory demand.
- The fact that a company may be solvent is not relevant to setting aside a statutory demand.



## AFFIDAVIT IN SUPPORT OF APPLICATION TO SET ASIDE DEMAND

- Should provide an evidentiary basis substantiating the grounds put forward by the company for setting aside the demand.
- A bare claim or mere assertion that the debt is disputed is not sufficient.
- The affidavit should have annexed to it a copy of the demand.



## FILING AND SERVING THE APPLICATION TO SET ASIDE DEMAND

- An originating process and an affidavit in support should be filed together.
- Both must be filed and served on the person who served the demand within 21 days after the demand is served.
- The 21 day time limit for making an application to set aside a statutory demand cannot be extended.
- An originating process must be in accordance with Form 2 and state each section of the Corporations Act under which the proceeding is brought. It must also state the relief sought.



# WINDING UP PROCEDURES

- The date of filing the originating process (Form 2) fixes the relation-back day in respect of alleged voidable transactions.
- Application must be served on the company within fourteen (14) days of filing and no later than five (5) days before the date fixed for the hearing.
- Application must set out particulars of the service of the demand and non-compliance and attach a copy of the demand.
- Application must be accompanied by an affidavit verifying that the debt is due and payable.
- Application must be determined by the court within six (6) months of being made, although this time period may be extended.



# WINDING UP PROCEDURES

- The applicant should obtain the consent in writing of an official liquidator before the hearing.
- Notice of the application must be publicised in relevant newspapers - [Supreme Court \(Corporations\) Rule 2.11](#).
- Notice of the application should be lodged with ASIC.



## OPPOSITION TO THE WINDING UP - SECTION 465C

- Any person wishing to support or oppose the application must file a Notice of Intention to Appear - [Supreme Court \(Corporations\) Rule 2.9\(2\)](#).
- This must contain any grounds of opposition and must be accompanied by an affidavit.
- It is the company, through its directors, which defends the winding up application.



# INJUNCTION TO PREVENT WINDING UP

- The company may seek an injunction to prevent the filing and advertising of an application to wind up - this is to prevent damage to reputation.
- A winding up application on the basis of a genuinely disputed debt is regarded as an abuse of process.
- The court must be satisfied there is a serious question to be tried and consider the balance of convenience.
- The court considers the extent of the damage if the injunction is not granted and the likely damage that the creditor will suffer if the injunction is granted.



# THE HEARING

- The court may do any of the following:
  - grant a winding up order - Section [459A](#).
  - dismiss the application even if a ground has been proved - Section 467(1)(a).
  - adjourn the hearing conditionally or unconditionally - Section [467](#)(1)(b).
  - make an interim or other order - Section [467](#)(1)(c).





# COURT'S DISCRETION

- The court may refuse to make a winding up order in certain circumstances.
- If there is a bona fide dispute based on a substantial ground concerning the debt - leave is required, as the company should have challenged the statutory demand in the manner provided by the legislation.
- Abuse of process:
  - the proceedings to wind up are bound to fail;
  - the applicant has an object other than securing a winding up order eg to thwart family law proceedings brought by a wife against her husband (director);
  - issues will arise in the proceedings of a kind inappropriate for determination in such proceedings (eg a substantial contest in relation to the existence of the debt);
  - the creditor is already making a parallel claim against the company in other proceedings.



# COURT'S DISCRETION

- Tender of payment.
- Opposition to the order by creditors - the right to a winding up belongs to the class of unsecured creditors, so all are entitled to be consulted.
- Section [547](#) - grants the court a discretion to have regard to the wishes of the creditors.
- Already subject to a winding up order.
- Section [459S](#) - a company is unable, without leave of the court, to oppose the application on a ground which could have been raised to apply to set aside the demand. This involves investigation of whether the dispute about the debt is material relevant to proving that the company is solvent.



# COURT'S DISCRETION

- The debt must, on the company's case, make the difference between a finding of solvency and a finding of insolvency; it is not enough that, depending on what other findings are made, the debt may be relevant to the question of solvency.



## SUBSTITUTING CREDITOR - SECTION 465B

- If the company pays out the applicant's debt, the court has power to order the substitution of another creditor as the applicant for a winding up.
- After substitution the application proceeds as if the person who is substituted were the original applicant.



# THE ORDER FOR WINDING UP

- If the court orders the winding up it will appoint an official liquidator who is nominated by the creditor - Section [472](#).
- It is usual to allow the applicant to have its costs paid out of the assets of the company - Section [466\(2\)](#).
- The day on which the winding up order is made is usually the commencement of the winding up - Section [513A\(e\)](#).
- The day on which the application to wind up was filed generally becomes the “relation-back day” - Section 9.
- The applicant must lodge with ASIC notice of the order and must place public notices of the order.



# THE ORDER FOR WINDING UP

- After being appointed the liquidator is authorised to get in the company's property - Section [474](#). Such property does not vest in the liquidator. The liquidator is the agent of the company. The liquidator administers the property and affairs of the company for the benefit of the creditors.

