

GENERAL GUIDE – WIND UP PROCEEDINGS

For a creditor to make application to the Supreme Court for the wind up of a company under the Corporation Act 2001, the debt must be for more than \$2000.00 and the creditor must first serve a “Creditors Statutory Demand” for payment of a debt.

There are two basis’s on which you can prepare the Statutory Demand and both carry some element of risk and potential cost against the applicant. The safest, and most common basis on which to make your demand is upon a “proven debt”. A proven debt is basically a judgment debt, a debt where you have previously filed a claim against the party in court and have received a formal court judgement against the debtor.

The second option is to base your Statutory Demand upon an affidavit made by the applicant stating that the debt is genuinely owed and no known bona fide dispute exists regarding the total debt being claimed. If there is a known dispute over the debt you should not under any circumstances risk basing your Statutory Demand on an affidavit. A solicitor will generally prepare the affidavit for you at the same time as preparing the Statutory Demand notice.

Once prepared, Nexus will arrange for service of the Statutory Demand upon the registered office of the company and usually upon the Director of the Directors to ensure they are aware of proceedings against them their company.

If the debtor fails to pay the amount demanded within 21 days of the service of the document (generally a further 2 days is allowed if the document is served by post) then the company is in default of the notice and is deemed under the Corporations Act 2001 to be insolvent. This is more a technical definition than it is an “actual” definition. The process required to have the matter determined by the Court and liquidators appointed is significantly more complex.

Solicitors will prepare an application to the Supreme Court on your behalf asking the court to set down a date for a hearing to appoint liquidators (called a “return date”). Once the date is set down an advertisement is run in the public notices section of the newspaper closest to the place where the company operates from advising of the date for the hearing.

In between times a solicitor will generally take nominations from one or more liquidators who are prepared to take on the task of administering the liquidation.

Your solicitor attends at the court on the return date and asks the Court to appoint a liquidator. The court will generally make the order and liquidator will take immediate steps to secure the assets of the company and notify its creditors of their appointment.

It is very important that you consider the following points before you decide to commence these proceedings:

- The process is quite costly, you can expect to outlay around \$5,500.00 +GST in costs from beginning to end provided the application goes unopposed. Solicitors will generally require around 60% of the estimated costs to be paid up front prior to commencing action to cover outlays and advertising, this included the court filing fee.
- The costs that you outlay in winding up the company are considered a priority debt in the liquidation and rank before the liquidator’s own fees along with most other creditors. In other words you stand a reasonably good chance in most circumstances of getting your legal costs back after the liquidation. This is not guaranteed though, if there are no assets to be realised from the liquidation, you may not get your costs back.
- If the company you are taking the action against applies to the court to have the demand or application set aside you will incur additional costs. You may choose to abandon your application at this point but in doing so you leave yourself exposed to a costs order from the other party where you may be held liable for their legal costs in opposing the application. If you choose to fight their application to set aside the demand you will incur additional legal costs from the solicitor representing you. These costs cannot be estimated until the individual circumstances are known in each case.
- The debt that you are seeking payment of does not elevate in priority just because you are the petitioning creditor, if your debt is currently unsecured, then you will rank with all other unsecured creditors in the liquidation. The only priority you receive is for the costs you incur in the liquidation process.
- There are no absolutes in the wind up process, there are no guarantees and you must be prepared to fight on once you make the decision to take this path. Remember the aim is not necessarily to liquidate the company, but rather to bring them to the table to settle the debt before the company is wound up in insolvency.
- There is a rule that states that the statutory demand process is NOT to be used as a method of debt collection, it is in fact designed to test the solvency of a company. Lawyers opposing an application will often argue that the demand should be set aside because it was made for the purpose of debt collection. We point this out only to demonstrate how complex and at times contradictory these rules can be.

We are happy to discuss the process with you in more detail any time, our aim is to secure payment of the money owed to you in the most effective way possible, and remember, we only get paid when you get paid.