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Don't be an ostrich

Five good reasons not to ignore creditor's statutory demands

1. You only have 21 days from the date of service of the statutory demand to pay the debt **or** file and serve an application to set aside the statutory demand. **That's only three weeks**. This is not a lot of time for you to engage solicitors and for them to prepare **and** file **and** serve the application and all necessary affidavits, especially of the matter is complex. Even a delay of one week might irreparably prejudice your business.

2. Once that 21 day period has expired, your company is **deemed to be insolvent**. That means that:

    (a) Whomever issued the statutory demand can file an application in the court to wind up your company and have a liquidator appointed. Most of the time, that is a death blow to your business.

    (b) Your company cannot (in most cases) argue that the debt specified in the statutory demand is not payable and cannot seek to raise a set off or counterclaim against the alleged debt to avoid liquidation.

    (c) Any transactions that the company completes after this time may be insolvent transactions, which leaves you, as director, susceptible to claims against you personally for **insolvent trading** or breaches of your duties as a director.

    (d) If your company is insolvent, every supplier for which you have signed personal guarantees will come after you personally for payment.

3. Even though your company can provide evidence that it is not insolvent so that it is not appropriate for a liquidator to be appointed, in most cases it will only be able to avoid a winding up order if it **also pays the debt** that was specified in the statutory demand, plus the costs of the winding up application.

4. If a winding up application is filed against your company, even if you do make arrangements to settle the payment of the debt, it is likely that a default will be registered with VEDA or some other credit reporting agency. It is difficult to obtain finance where the default noted on your company's credit report is a winding up application.

5. If you wish to argue that the debt specified in the statutory demand is not payable, or that you have a valid set off or counterclaim, you **must** file **and** serve an application to set aside the statutory demand before the 21 day timeframe has expired.

The affidavits that accompany the application **must** contain evidence of **all** matters on which you rely to establish your defence. In most cases, you cannot raise issues or evidence that were not in the affidavits that were filed and served with the application. If your solicitors are rushed, or you forget something in the turmoil created by waiting for a week or more to deal with the statutory demand, you might irreparably prejudice your company's ability to set aside the statutory demand.

A prime example of why **you should not bury your head in the sand** (even for a little while) is the recent decision of *Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd* [2015] ACTSC 288.

In this case, a statutory demand expired on 28 August 2015. On 27 August 2015, solicitors for the company attended the court in order to file an application to set aside the statutory demand. The court notified the solicitors that it would take a few days for the application to be processed and sealed copies provided. The solicitors were told that, despite the urgency, the Registry simply could not provide sealed copies on the spot.

The legislation requires the application and affidavits to not only be filed before 21 days expire; it requires the sealed copies to be **received** by the other party before that expiration. The solicitors delivered unsealed copies of the documents filed by 28 August 2015 in an attempt to comply.

The court found that this was insufficient to comply with the law (even if it wasn't technically the company's fault) and ordered that the application to set aside the statutory demand be dismissed, basically leaving the company with the following choice – pay the debt or be wound up.

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