

**LOOK BEFORE YOU  
ISSUE—THE PERILS  
OF USING STATUTORY  
DEMANDS TO ENFORCE  
DETERMINATIONS  
UNDER THE BUILDING  
AND CONSTRUCTION  
INDUSTRY SECURITY OF  
PAYMENT ACT**

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**INTRODUCTION**

The statutory demand process under the *Corporations Act* is one mechanism by which a party may seek to enforce a determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the *Security of Payment Act*) because the adjudicated amount relates to a debt that the company the subject of the determination owes to the party and is due and payable. As a fast and inexpensive method of debt collection, it is a well worn path for creditors.

However, a long line of New South Wales court decisions that have set aside or varied statutory demands for judgment debts obtained under the *Security of Payment Act* suggest that in this context statutory demands need to be approached with caution. Despite their common usage, the constant presence of offsetting claims and arguments contesting liability for the amount owed in the construction industry means that a judgment debt arising from the *Security of Payment Act* commonly cannot be enforced with a statutory demand.

**INTERPLAY BETWEEN  
THE SECURITY OF  
PAYMENT ACT AND THE  
CORPORATIONS ACT**

One of the key aims of the *Security of Payment Act* was put in place machinery to ensure the prompt payment of progress claims. To this end, s 25(4) of the *Security of Payment Act* provides that a party applying to set aside a judgment debt enforcing payment of an adjudicated amount is precluded from disputing the existence of the debt or raising an offsetting claim, ensuring that a respondent who wants to raise these matters must do so in a payment schedule in response to a payment claim under the *Security of Payment Act*.

However, this does not prevent a plaintiff seeking to set aside or vary a statutory demand under ss 459G and 459H of the *Corporations Act* by establishing a 'genuine dispute' between the parties as to the existence or amount of a debt or an 'offsetting claim'.

In *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553, Campbell J at paragraph [20] rejected the argument that if it were possible to set aside a statutory demand founded on a judgment debt arising from an adjudication determination, the objective of the *Security of Payment Act* would be frustrated. He noted that there are other means of enforcement, short of a winding up action, which are open to a judgment creditor, and it is not possible 'for the terms of a Commonwealth Act, the *Corporations Act 2001* [Cth], to be construed, or limited, by reference to the intention implicit in a State Act'.

**STATUTORY DEMANDS  
AND THE SECURITY OF  
PAYMENT ACT**

The availability of grounds on which to set aside or vary statutory demands has greatly reduced the effectiveness of statutory demands as an enforcement mechanism for debts arising under the operation of the *Security of Payment Act*.

One of the reasons for this is that the test for establishing that there is a 'genuine dispute' about the existence or amount of the debt the subject of the statutory demand is not an onerous one to meet. Adopting the approach of the Full Federal Court in *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] 76 FCR 452, Master Macready in *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* [2003] NSWSC 929 at paragraph

[16] 'held that a genuine dispute requires that 'the dispute be bona fide and truly exist in fact' and that the 'grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived'. Courts do not have to identify the likely result of a dispute or offsetting claim.

The same test is applied in determining whether the company has an offsetting claim. The task of a plaintiff seeking to show an 'offsetting claim' for the purposes of s 459H(1)(b) and (2) was described by Palmer J in *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743 at paragraph [18] as requiring:

*...a claim on a cause of action advanced in good faith, for an amount claimed in good faith', where good faith meant 'arguable on the basis of facts asserted with sufficient particularity to enable the court to determine that the claim is not fanciful.*

The statutory demand process under the *Corporations Act* plays out uniquely in the context of the statutory regime governing security of payments. Adjudications under the *Security of Payment Act* often take place in circumstances where parties are in an existing dispute in relation to some aspect of the work being completed or a dispute arises subsequent to a determination, where the recipient of a statutory demand is more likely than not to raise the issue of a 'genuine dispute' in relation to the adjudicated amount or an offsetting claim. Most adjudication processes under the *Security of Payment Act* involve both contractors and proprietors setting out evidence in support of their arguments. Consequently, it has been observed that in these circumstances there is even more force in accepting the suggestion

that where there are genuinely held assertions on either side there is either a genuine dispute or an offsetting claim.

It is also worth bearing in mind 'that the scheme in respect of statutory demands comprehends offsetting claims of all descriptions and not only ones in some way connected to the claim in the demand': *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* [2003] NSWSC 929 per Master Macready at paragraph [26].

Decided cases show that attempts by contractors to compel payment of debts arising as a result of the operation of the *Security of Payment Act* via the service of a statutory demand have been largely unsuccessful for these reasons.

In *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284, conflicting affidavit evidence as to conversations between representatives of the plaintiff and the defendant was held to be sufficient to demonstrate that the existence of the contract alleged by the defendant which supported its statutory demand was open to question and gave rise to a genuine dispute. The statutory demand issued by the defendant was consequently set aside. Similarly, in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186 the plaintiff successfully identified an offsetting claim by reference to anomalies in invoices provided from the defendant to the plaintiff, thereby obtaining an order that the statutory demand be set aside

It is generally not open for a party seeking to enforce a statutory demand to argue that an offsetting claim is not a genuine offsetting claim because some of the matters relating to it were referred to by the adjudicator and they have been disposed of by

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