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# Update Summary

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**UPDATE 113**

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## **McPHERSON'S LAW OF COMPANY LIQUIDATION**

**MGR Gronow KC**

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## Commentary

Michael Gronow KC has updated commentary on Chapter 3 (Creditors' application for a winding-up order). Highlights include the following:

### **Demands for foreign currency and foreign debts**

Although the form prescribed for a statutory demand presumes the debt will be specified in Australian currency, substantial injustice will usually not be caused where the debtor had incurred a debt expressed or quantified in a foreign currency or agreed to make payments in a foreign currency. This is in keeping with the realities of modern commerce in which contracts frequently contain obligations to make payment in foreign currency: *Re Mearth Technology Pty Ltd* [2024] NSWSC 656. See [3.540].

### **Service of statutory demand and any supporting affidavit**

A statutory demand and supporting affidavit can be served on a company by leaving it or them at its registered office or by sending it by post to that office, or delivering a copy personally to a director of the company who resides in Australia or an external territory. Tracking records are, absent reason to doubt their correctness, sufficient to prove service at the time recorded, and there is no reason to treat tracking records by a third-party delivery service differently from the tracking records that are prepared by Australia Post: *Re Mentmore 313 Pty Ltd* [2024] NSWSC 325. See [3.560].

### **Defects in demand**

Authorities concerning the defects in a statutory demand which may give rise to substantial injustice were summarised in *Re Mearth Technology Pty Ltd* [2024] NSWSC 656. See [3.660].

### **“Some other reason” for setting aside demand**

The court's power to set aside a creditor's statutory demand where there is some other reason for it to do so exists to maintain the integrity of the process provided under Pt 5.4 and is to be used to counter an attempt at subversion of the statutory scheme, but is not exercised by reference to subjective notions of fairness: *Re Mearth Technology Pty Ltd* [2024] NSWSC 656. See [3.670].

### **Inclusion of debts not yet due and payable**

The courts have vacillated about whether the question of a debt being due and payable should be dealt with under ss 459H(1)(a), 459J(1)(a) or 459J(1)(b). The inclusion in a demand of a debt that is not due and payable could in appropriate circumstances constitute both “a defect in the demand” under s 459J(1)(a), or “some other reason” to set the demand aside under s 459J(1)(b). See [3.685].

### **Orders on applications to set aside statutory demands (including costs orders)**

In some circumstances costs may be ordered where the creditor continued to defend the application to set the demand aside after being put on notice of a basis that made it unlikely to succeed: *Ballast Holdings Pty Ltd v Leonite Capital LLC (No 2)* [2024] FCA 142. Costs may also be awarded where the creditor agrees to withdraw the demand, but only does so at a late stage: *Progressive Projects Pty Ltd v McCullough Robertson Lawyers* [2024] QSC 39; *Milne Agrigroup Pty Ltd v Inghams Enterprises Pty Ltd* [2024] WASC 23. See [3.700].

### **Discretion to make or refuse winding-up order – general principles**

Where insolvency is established, the discretion to dismiss a winding up application under s 467(1)(a) would only be exercised if some good reason were shown for doing so: *Re Mentmore 313 Pty Ltd* [2024] NSWSC 325. See [3.1200].

### **Related Materials**

ASIC has revised and reissued the following Regulatory Guides:

- Regulatory Guide 16: *External administrators and controllers: Reporting of possible offences and misconduct* (see [25.1000]); and

Regulatory Guide 258: *Registered liquidators: Registration, ongoing obligations, disciplinary actions and insurance requirements* (see [25.3000]).

