**Corporations Information Sheet 1:**

**Winding Up Proceedings Based on an Unsatisfied Statutory Demand**

**About this Information Sheet**

This Information Sheet has been prepared for litigants who intend to make a winding up application pursuant to s459P of the *Corporations Act 2001* (*Cth*) based on a company's failure to comply with a Statutory Demand.

It is important to note the following:

* this Information Sheet is published as part of a series of information sheets and practical guides and contains links to the most commonly used forms approved or prescribed by the relevant legislation or court rules.
* this Information Sheet contains general information only and is not a substitute for the Corporations Actor the Corporations Rules. To the extent that there is any inconsistency or discrepancy, the Act and Rules as interpreted by the courts prevail.
* while registry staff can provide practical assistance to litigants they cannot provide legal advice or assist with the content of any document. The onus is on the party making the application to undertake their own enquiries and assessment of the legal issues.

References and links to Legislation, Court Rules and Approved Forms:

* [*Corporations Act 2001*](http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/ca2001172/) (Cth) (**Corporations Act**)
* [*Federal Court (Corporations) Rules 2000*](http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_reg/fcr2000337/) (**Corporations Rules**)
* [*Corporations Regulations 2001*](http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_reg/cr2001281/) (**Corporations Regulations**)
* [*Federal Court Rules 2011*](http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_reg/fcr2011186/) (**FCA Rules**)
1. **Nature of Application**
	1. A creditor of a company can make an application to the Court under s459P of the Corporations Actfor orders winding up the company in insolvency under s459A.
	2. The most common basis for an application under s459P is that the subject company has failed to comply with a Statutory Demand and is presumed to be insolvent (s459C(2)(a)).
	3. A summary of the Statutory Demand procedure and the presumption of insolvency is set out below.
2. **Making a Statutory Demand**
	1. A Statutory Demand is a creditor’s formal, written request requiring a company to pay a debt within the statutory period (currently 21 days).
	2. The requirements for making a Statutory Demand are set out in s459E of the [Corporations Act](http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401854?OpenDocument). Relevantly, the demand:
3. must relate to a debt or debts that are due and payable and total at least $4,000
4. must specify the debt and its amount
5. must be in writing, in accordance with the prescribed form, which is Form 509H
6. must require compliance with the demand within the statutory period (currently 21 days) after the demand is served on the company
7. must be signed by or on behalf of the creditor, and
8. if relying on a debt that is not a judgment debt, the demand must be accompanied by an affidavit that verifies the debt is due and payable by the company and complies with the rules (Corporations Form 7 – Affidavit accompanying Statutory Demand). The affidavit verifying the Statutory Demand must not pre-date the Statutory Demand.
	1. A Statutory Demand in the correct form is given effect by serving the demand and any accompanying affidavit on the company. Service would generally be in accordance with s109X of the Corporations Act which provides that a document may be served on a company by leaving it at, or posting it to the company’s registered office or by delivering the document personally to a director who resides in Australia. Where documents are served by prepaid post at the registered office, s29 of the [*Acts Interpretation Act 1901*](https://www.legislation.gov.au/Details/C2019C00028)(Cth)deems a document to be served, subject to the contrary being proven, where there’s direct and admissible proof that the document was posted in an envelope with the correct name and address; proof that the envelope contained the relevant documents to be served; proof that the envelope was prepaid and bore the correct cost of postage and proof that the envelope was placed in the post. Under s160 of the [*Evidence Act 1995*](https://www.legislation.gov.au/Details/C2021C00472)(Cth), a document which is posted is presumed to be served on the seventh working day after posting unless there is contrary evidence. For more information about service see: s109X of the Corporations Act; s29 of the Acts Interpretation Actand s160 of the Evidence Act.
	2. Serving a demand has serious consequences and a creditor should obtain legal advice to ensure it is entitled to make a Statutory Demand.

*The period for compliance with a Statutory Demand*

* 1. If a debtor company is served with a Statutory Demand, it has the statutory period (currently 21 days) after service of the demand to either:
1. comply with the demand, or
2. apply to the Court under s459G of the Corporations Act for an order that the demand be set aside.
	1. Any application under s459G of the Corporations Act to set aside a Statutory Demand must be filed with the Court and served on the creditor within the statutory period (currently 21 days) after service of the demand. The compliance period has been strictly applied by the courts and no extensions of time, or dispensation with these requirements, can be given.
	2. The Court may set aside a Statutory Demand if:
3. there is a genuine dispute as to the debt (s459H(1)(a))
4. the company has an offsetting claim (s459H(1)(b))
5. there is a defect in the demand that will cause substantial injustice unless the demand is set aside (s459J(1)(a), or
6. for some other reason (s459J(1)(b)).
	1. If a company has applied to set aside a Statutory Demand, the time for compliance with the demand will automatically be extended pending the determination of the application (s459F(2)). If the Court sets the Statutory Demand aside, the demand will be of no force or effect and no presumption of insolvency will arise as a result of non-compliance. If, however, the set aside application is dismissed, the time for the company to comply with the demand will be extended until 7 days after the date of the dismissal, unless the Court specifies another period (s459F).
	2. Challenging a Statutory Demand is a complex area of the law. It is important for a company that has been served with a Statutory Demand to obtain legal advice in order to understand its rights and obligations.
7. **Making an Application for a Winding Up Order**
	1. If a company fails to comply with a Statutory Demand within the time provided, the company is presumed insolvent under the Corporations Act. Within three months of the date of non-compliance, the creditor who served the demand may rely on the presumption of insolvency as the basis for an application to the Court for orders winding up the company. The effect of the presumption is that the Court must presume, subject to evidence to the contrary, that the company is insolvent and should be wound up.
	2. In making such an application, a creditor should ensure that the debtor company has in fact failed to comply with the relevant Statutory Demand and that a presumption of insolvency is available.
	3. In calculating the date of a company’s non-compliance with a Statutory Demand, a creditor should take care to determine when the Statutory Demand was effectively and properly served on the company. Where a Statutory Demand was delivered to the registered office, the statutory period would generally start to run from the date it was delivered. Where the Statutory Demand was served by post, time would generally start to run seven working days after the document was posted. There is, however, an extensive body of case law regarding issues of timing and sufficiency of service on companies which will not be dealt with in this Information Sheet (For a general outline on service issues, see discussion in paragraph 2.3 above).
	4. Once winding up proceedings have been commenced, they must be determined within 6 months unless the Court makes an order extending this time period (s459R).

*Steps to be taken before filing*

* 1. No more than 7 days before filing the application, a creditor needs to obtain an extract of the records maintained by the [Australian Securities and Investments Commission](http://www.asic.gov.au/asic/asic.nsf) (ASIC) in relation to the debtor company. The purposes of the search are to ascertain whether there are any pending winding up proceedings, whether the company is already in liquidation and whether the registered office has changed.

*Documents to be prepared*

* 1. Proceedings are commenced by filing with the Court an originating process in accordance with Corporations Form 2. The originating process must attach a copy of the Statutory Demand and any accompanying affidavit verifying the debt as required under s459E(3). The entity filing the originating process is referred to as the 'Plaintiff'. The debtor company the subject of the proceedings is referred to as the 'Defendant'.
	2. The originating process must be supported by affidavit evidence of certain matters. The affidavit or affidavits in support must:
1. Contain details of how and when the Statutory Demand was served on the company
2. Contain details of the failure of the company to comply with the Statutory Demand
3. State whether and, if so, to what extent the debt, or each of the debts, to which the Statutory Demand relates is still due and payable at the date when the affidavit is made, and
4. Annex a copy of the ASIC extract (which must be obtained no more than 7 days before the filing of the originating process.
	1. The affidavits in support should be completed using Form 59. A sample affidavit is set out in [Note 2 of Schedule 3](https://www.legislation.gov.au/Details/F2015C00394) of the [Corporations Rules](http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401139?OpenDocument).

*Filing the originating process with the Court*

* 1. The plaintiff should lodge all required documents electronically through the Court’s eLodgment system. For more information on eLodgment and the Court’s Online Services, refer to section 7 of this Information Sheet.
	2. If the documents lodged are in the correct form they will be accepted for filing and processed. The documents will be endorsed by the Court and the application given a hearing date. Through eLodgment, an applicant can access the endorsed versions of the documents, which can be printed or emailed for the purposes of service.

*Filing fee*

* 1. A fee is payable for filing a winding up application. Different amounts are payable depending on whether the applicant is a corporation or an individual. Filing and other fees are prescribed in Schedule 1 – Part 1 *Federal Court and Federal Circuit and Family Court Regulations 2012*. More information on fees can be found in the [Fees section of the Court’s website](http://www.fedcourt.gov.au/forms-and-fees/court-fees/fees).
	2. If a plaintiff cannot afford the fee, they may be able to ask the Court to exempt them from having to pay it, or to defer the time for its payment. Information and the form to be used to request the Court to either exempt or defer payment can be obtained from the registry or found on the Court’s website.

*Serving the originating process*

* 1. The plaintiff must arrange for a sealed copy of the Originating Process and supporting affidavits to be served on the defendant company within 14 days of filing the application in the Court (s 465A) and not less than 5 days before the hearing date (rule 2.7). Service would generally be in accordance with s109X of the Corporations Act which provides that a document may be served on a company by leaving it at, or posting it to the company’s registered office or by delivering the document personally to a director who resides in Australia. Refer to paragraph 2.3 above for a general outline of issues relating to service of documents on a company in winding up matters.
	2. The plaintiff must also arrange for an affidavit to be filed with the Court providing evidence of how and when the Originating Process and supporting affidavits were served on the company.
1. **Steps to be taken before the hearing**

*Notification to ASIC of application*

* 1. The plaintiff must lodge notice (Corporations Regulations Form 519) with ASIC of the application for winding up orders by no later than 10.30 am on the next business day after filing of the Originating Process.
	2. Before the hearing of the winding up application, the plaintiff must prove that ASIC was notified of the application. This is generally done on affidavit. A copy of the Form 519 must be attached to the affidavit.

*Obtaining consent of liquidator*

* 1. The plaintiff must obtain the consent of a registered liquidator to act as liquidator if a winding up order is made. A current list of registered liquidators can be obtained from ASIC.
	2. The Consent to Act as Liquidator (Form 8) should be filed before the hearing. A copy of the consent must be served on the company at least 1 day before the hearing. The Court will not make a winding up order until the plaintiff has obtained a registered liquidator’s consent to be appointed as the liquidator.

*Publishing notice of application*

* 1. The plaintiff must also publish notice of its application on the Insolvency Notices page of the ASIC website. This must be done at least 3 days after the application was served on the company and at least 7 days before the hearing of the application (rule 5.6).
	2. Before the hearing of the application, the plaintiff must file with the Court an affidavit verifying that the notice was published on the ASIC website. A copy of the published notice must be attached to the affidavit.
1. **Hearing of the Originating Process**
	1. At the listing of the Originating Process before the Court, the defendant company may appear to request an adjournment or oppose the making of winding up orders. If it intends to do so, it will usually be required to file and serve a notice of appearance and/or a notice stating its grounds of opposition, preferably supported by an affidavit.
	2. Where the winding up application is not opposed, the Court will usually make a winding up order if it is satisfied that the following formal requirements under the Corporations Actand Corporations Ruleshave been met:
2. that the plaintiff has standing as a creditor of the company
3. that the Company is presumed insolvent because of non-compliance with a Statutory Demand
4. that the presumption has not been rebutted by evidence of the company’s solvency, and
5. that the plaintiff has complied with all steps required by the rules, including: service of all relevant documents on the defendant, obtaining the consent of an official liquidator, lodgment of notice at ASIC, and publication of notice of the proceedings on the ASIC insolvency notices page.

*Note:* CorporationsInformation Sheet 2: Winding Up Checklist sets out the matters to be proved at the hearing.

* 1. Even if the requisite matters are established, the Court may adjourn or dismiss the originating process, or make any other interim order that it thinks fit (s467(1)).
	2. Upon the making of a winding up order, a plaintiff will ordinarily be awarded their costs of the application. The Court’s usual practice is to fix costs at the hearing. If a costs order is sought, the plaintiff should, before the hearing, file a statement of costs and disbursements (commonly by reference to the short form amount set out in the Schedule 3 to the FCA Rules). No fee is payable on filing a statement of costs and disbursements.
	3. If a winding up order is made, it will be produced by the Court electronically and will be available online via the Commonwealth Courts Portal (CCP) within 24 hours.
1. **Steps to be taken after the hearing if a Winding Up Order is made**
	1. The plaintiff will be able to obtain a copy of the Winding Up Order made through the Commonwealth Courts Portal (CCP). Information about registering for the CCP is available on the Court's website.

*Notification of liquidator*

* 1. The plaintiff should contact the liquidator and inform them of the order no later than the day after the day the winding up order is made.

*Notification of ASIC*

* 1. Within 2 business days of the making of the order, the plaintiff should lodge with [ASIC](http://www.asic.gov.au/asic/asic.nsf) a notice of the making of the order which states the date on which the order was made and the name and address of the liquidator. The plaintiff can use Corporations Regulations Form 519 to do this.

*Other Matters*

* 1. Within 7 days of the winding up order, the plaintiff should also serve a copy of the order on the company and on any other person the Court may have directed.