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## PITFALLS OF WIND UP NOTICE PROCEDURE By Justin Cotton, Partner, Lovegrove & Lord Lawyers

As a debt collection mechanism, it is a flawed concept.

A winding up application is generally used as an enforcement procedure after a judgment has been obtained at court or VCAT.

Once you file a wind up application, and you force a liquidation, it is likely the entire "empire" of the debtor will come crashing down.

A "wind up" will crystallise a termination (in most standard building contracts), and the creditor may just become an unsecured creditor in a throng of other creditors.

Once liquidation occurs, there may be no funds to satisfy the debt.

### *Preferred option for debt recovery*

Manage your debtors to ensure they do not owe you too much over too long a period of time before you get paid.

As a Builder, this may mean keeping a tight rein of contract administration.

Being prepared to suspend works under the contract, or issue a notice of default, if payment is outstanding for too long.

Ensure that you have documentation of variations, or seek evidence of an owner's capacity to pay.

### *Winding Up Orders*

An application to "wind a company up in insolvency".

These are filed with an application and affidavit. It comes after a **statutory demand** has not been set aside or otherwise settled within 21 days.

An application to wind up the company is made. The failure to comply with the statutory demand compels the Court to presume the company is insolvent.

The affidavit must disclose grounds for the winding up order to be made and evidence of the debt. Failure to

comply with the statutory demand is good evidence.

A winding up application (with affidavit) and statutory demands are technical documents and you should seek legal assistance in preparing, filing and serving them.

If the statutory demand is flawed, the later wind up application may also be defective.

### *Procedure*

A complaint or application will be filed at a court or at VCAT (domestic building).

Once a judgment is entered, that judgment will be sealed and is an enforceable debt.

However, even with a judgment you are still not a secured creditor (such as the ATO, a mortgagee, or an employee).

The usual procedure is: Judgment – Statutory Demand – Wind Up Application

### *Statutory Demand*

A statutory demand will normally be served at a Company's registered office, and also has an affidavit to support it.

The supporting affidavit must verify that the debt is due and owing as at that time, and state there is no genuine dispute about the debt.

The statutory demand will make demand for payment of the debt (must be over \$2,000) within 21 days after the notice is served on the Company.

Alternatively the Company may make arrangement to secure or compound (compromise) the debt within 21 days. An example would be to agree to enter into an instalment arrangement.

The Statutory Demand must notify the Company of:

- (i) the consequences of failure to comply with the demand; and

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- (ii) must advise how the Company can apply to set aside the statutory demand.

### *Applications to set aside Statutory Demands*

If the Statutory Demand is disputed the debtor must make an application to the Supreme Court of Victoria or the Federal Court of Australia seeking to set aside the Statutory Demand.

Such an application must be made within 21 days of receiving the Statutory Demand.

### *Applications to Wind Up a Company*

This may be made after a Statutory Demand has been served and it:

- (i) has not been set aside; or
- (ii) otherwise settled,

within 21 days after service.

An application may be made to the Supreme Court to wind up the Company, with an application and affidavit.

The affidavit will verify that the debt is due and owing, and the Statutory Demand was served and remains unsatisfied.

The Company's failure to comply with the Statutory Demand forces the Court to presume that the Company is insolvent.

Unless the Company can rebut the presumption of insolvency, a Wind Up order will be made by the Court.

### *Pitfalls*

- (i) The Wind Up application should be prepared, filed and served in accordance with all legal requirements and court rules;
- (ii) The application should be based on a valid and correct Statutory Demand that has not been complied with or set aside;
- (iii) It may all be too late, it is the ambulance at the bottom of the cliff.

Whether you wish to make an application, **or** on the receiving end of an application, you should seek legal advice promptly if you have not already.

Accounting advice may also be required at the Statutory Demand stage to see whether a compromise can be made, eg payment over time.

*Justin is a partner in the dispute resolution sector of the firm. To find out more about Justin click [here](#).*

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