

## Serving a Statutory Demand by Post

### Introduction

This update looks at recent cases about serving a Creditor's Statutory Demand. The decisions in recent cases raise the bar in terms of what is required to be proved when seeking to wind up a company for non compliance with a Statutory Demand.

Postal service may seem to be easy to get right, but if done incorrectly or evidence of it is dealt with "lazily", then real problems can arise for the serving party. The application may be dismissed, critical time in the process lost, and costs may be awarded against the applicant.

Although the cases discussed deal with the service of a statutory demand, the decisions apply equally to other processes such as serving a Claim or Originating Application where service by post is available.

### Statutory Demands and insolvency

One reason that statutory demands are challenged is that once a company is served with one it is fighting for its life. A statutory demand is a document that can be served on a company that owes more than \$2,000.

A company is deemed to be insolvent if, having received a statutory demand, it fails to comply with the demand within 21 days. A company may be wound up if it is insolvent.

One common way to serve a statutory demand is by post. Section 109X of the Corporations Act (Cth) provides that a document may be served on a company's registered office by post by properly addressing, prepaying and posting the document as a letter to the company's registered office, with service being deemed effected 4 business days later.

### Old practice

On the application to wind up the company for non-compliance with a statutory demand the applicant must provide an affidavit of service of the statutory demand on the company.

Until recently the courts seem to have been satisfied with affidavits in which the person swears to having "caused the demand to be sent" under cover of a letter on a particular date sent to the company's registered office.

This is no longer good enough and it has been held that statements of this kind are hearsay evidence and cannot be relied on in Court.

### Green Global - decision of the Queensland Supreme Court

The applicant applied to wind up Green Global in insolvency for non-compliance with a statutory demand which had purportedly been served on the company's registered address by pre-paid ordinary post.

The evidence adduced by the applicant creditor, regarding service of the statutory demand was contained in an affidavit of service of its solicitor: This affidavit deposed to "causing a letter to be sent (attaching the relevant documents) to the registered office in accordance with the provisions of the Corporations Act."

The question that arose was whether or not there was sufficient proof of posting to invoke the presumption created by s109X of the Corporations Act.

Justice Daubney held that:

1. There was no direct evidence of what appeared on the face of the envelope;
2. There was no express statement that the letter and documents were put into any envelope;
3. There was no evidence of the amount or value of any franking or stamp;
4. There was no direct evidence that anyone lodged any stamped or franked envelope (and its contents) at any post office or in any post box.

The above failings led His Honour to find that there was “no evidence of the process within the applicant’s solicitor’s office which could give any basis for concluding that the posting of the documents actually occurred”.

As a result the presumption of insolvency was void and the winding up application was dismissed with the Applicant being ordered to pay the Respondent’s costs of the application.

Quite apart from the unpleasant matter of a costs Order to deal with, the Creditor had lost all the time involved since starting the demand process and had to start again.

The above decision of the Queensland Supreme Court was subsequently applied in *Brown v Bluestone Property Services Pty Ltd* [2010] NSWSC 869, *Renegade Rigging Pty Ltd v Hanlon Nominees Pty Ltd* [2010] VSC 385 & *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd* [2010] FCA 1223.

## **Practical notes - what must be shown to establish service**

What must be proved when serving by post is that:

1. The envelope was pre-paid; and bore the correct postage;
2. The envelope bore the correct name and address (the registered office of the company);
3. The relevant document to be served was contained in the envelope; and
4. The envelope was posted.

Evidence of a system for posting mail, including for the collection of mail articles by a contractor to deliver articles to Australia Post, or of the usual procedure within the solicitor’s or creditor’s office in respect of mail, with evidence that the usual procedure was followed on the relevant day, may also be appropriate.

## **Conclusion**

The above authorities demonstrate the Courts’ strict approach to the evidence required in support of an application to Wind Up a company and the importance of ensuring the evidential requirements are followed at all stages of formal recovery proceedings.

**This article was produced by Herbert Geer.  
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