



Law Council
OF AUSTRALIA

Business Law Section

Senator the Hon Mathias Cormann
Minister for Finance and Acting Assistant Treasurer,
Parliament House,
CANBERRA ACT 2600
Via email

26 July 2014

Dear Minister,

Genuine Steps Under the Civil Dispute Resolution Act 2011 ('Act') and Winding Up Proceedings

1. This submission, concerning the conflict between the requirements under the *Civil Dispute Resolution Act 2011* ('Act') and the 21 day time constraint imposed in applying to set aside a statutory demand under section 459G of the *Corporations Act 2001* (C'th) ("Corporations Act"), is made by the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia (the Committee)
2. The Committee is made up of senior legal practitioners working in the insolvency area across Australia who specialise in the insolvency and reconstruction field.
3. The Committee wishes to raise with you the decision of *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys (No 2)* [2012] FCA 977 which has raised some difficult practical issues with respect to the operation of the 'genuine steps' requirement under Act in the context of the issue of, and an application to set aside, a statutory demand under the Corporations Act. Similar issues also arise with respect to the application of the *Civil Dispute Resolution Act* in the context of applications made in the Federal Court with respect to the *Bankruptcy Act 1966* (Cth) ("Bankruptcy Act").
4. The Committee supports an amendment to Regulation 4 of the *Civil Dispute Resolution Regulations 2011*, to provide for its extension so that:
 - (a) the issuing of a statutory demand under section 459E and an application under section 459G of the *Corporations Act* to set aside a statutory demand; and
 - (b) the making of an application under sections 41(6A), (6C) and (7) of the *Bankruptcy Act* to set aside a bankruptcy notice or extend time for compliance,

are excluded proceedings for the purposes of section 17 of the Act.

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Submission

5. The *Superior IP* decision raises two important issues with respect to the operation of the Act in the context of statutory demands:
 - (a) that proceedings are commenced for the purpose of the Act at the time of issuing the statutory demand [at 8], and by implication that genuine steps to resolve the dispute ought to be taken prior to service of a statutory demand.
 - (b) that prior to making an application to set aside a statutory demand under section 459G of the *Corporations Act*, genuine steps to resolve the dispute ought to be taken [at 10 & 11].
6. Statutory demands are a well understood and important tool in facilitating the proof of a company's inability to pay its debts. They are intended to facilitate a quick resolution of the issue of insolvency and provide a rebuttable statutory presumption of insolvency. In this context, uncertainty with respect to the process of issuing and applying to set aside a statutory demand ought to be avoided.
7. The issue of uncertainty arises in the first instance in that it is impossible for a person issuing a statutory demand to know whether it is necessary for them to comply with the Act at the time when the statutory demand is served under section 459E of the *Corporations Act*. The application of the Act is entirely dependent on whether the recipient decides to commence an application to set aside the statutory demand under section 459G and whether it makes the application in a Federal or Supreme Court. If the latter, the Act has no application.
8. Even if the Act could apply (because an application to set aside is made in a Federal court), the issuer of the statutory demand cannot meet the requirement under section 6 of the Act to file a genuine steps statement at the time of instituting civil proceedings. There are no instituted civil proceedings in a court at the time of service of the statutory demand. Further, given the express statutory right under section 459E of the *Corporations Act* to issue a statutory demand there is no place for the Act to fetter that right.
9. Any uncertainty created by the *Superior IP* decision as to whether the Act might apply to the issue of a statutory demand needs to be removed.
10. The application of the Act to applications under section 459G of the *Corporations Act* to set aside statutory demands gives rise to a conflict of laws. Section 459G gives a recipient of a statutory demand a right to apply to a Federal or Supreme Court to set it aside, unfettered by any obligation to undertake genuine steps.
11. Given the express power under section 459G of the *Corporations Act* to set aside a statutory demand, and the fact that the Act may never have any application to such an application if proceedings were commenced in a state Supreme Court, the obligation with respect to taking genuine steps to resolve disputes prior to lodging such an application ought not apply.
12. As was recognised in *Superior IP* [at 10], it is “somewhat unrealistic and incongruous” to expect a recipient of a statutory demand to take genuine steps under the Act in light of the time constraints imposed by the *Corporations Act* and

the recipient's fraught position in having to defend its future existence. Further, the exclusion of statutory demand proceedings under Part 5.4 of the Corporation Act from the Act would be entirely consistent with the fact that an application to wind up a company under section 459A, which is the principal object of serving a statutory demand under section 459E, is already an excluded proceeding under the Act.

13. Similar issues arise in the context of applications to set aside bankruptcy notices under the Bankruptcy Act. Section 27 of the Bankruptcy Act states that the Federal Court and the Federal Magistrates Court have concurrent jurisdiction in bankruptcy. Sections 41(6A), (6C) and (7) of the Bankruptcy Act provides an unfettered right for a person served with a *Bankruptcy Notice* to make an application to the Federal Court to set it aside. Sections 41(6A) and (6C) also provide a right to make an application to the Federal Court to extend time for compliance with a bankruptcy notice.
14. An obligation to comply with the Act, is again contrary to the express rights provided under sections 41(6A), (6C) and (7) of the Bankruptcy Act.

Conclusion and further contact

15. The Committee would be pleased to discuss any aspect of this submission.
16. Please contact the chair of the Committee, Michael Lhuede on 03 8665 5506 if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John SK', with a long horizontal flourish extending to the right.

John Keeves
Chairman, Business Law Section