



McDonald
Vague

business recovery partners

GUIDE TO STATUTORY DEMANDS

We provide **positive solutions** for businesses

Advice. Results. Sorted



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1 WHAT IS A STATUTORY DEMAND?

The statutory demand process provides a quick procedure for ensuring payment, or for at least achieving some knowledge on whether payment is possible. This process is intended to be a first step in making an application to put a company into liquidation when a company genuinely cannot pay.

Statutory demands are written documents and must contain the following information:

- How much must be paid
- When payment must be made for example, immediately or within 15 working days
- What will happen if the demand is ignored
- Details of who they can contact about the demand
- Their right to dispute (disagree with) the demand within 10 working days

The demand must:

- Be in respect of a debt that is due and is not less than the prescribed amount
- Be served on the company

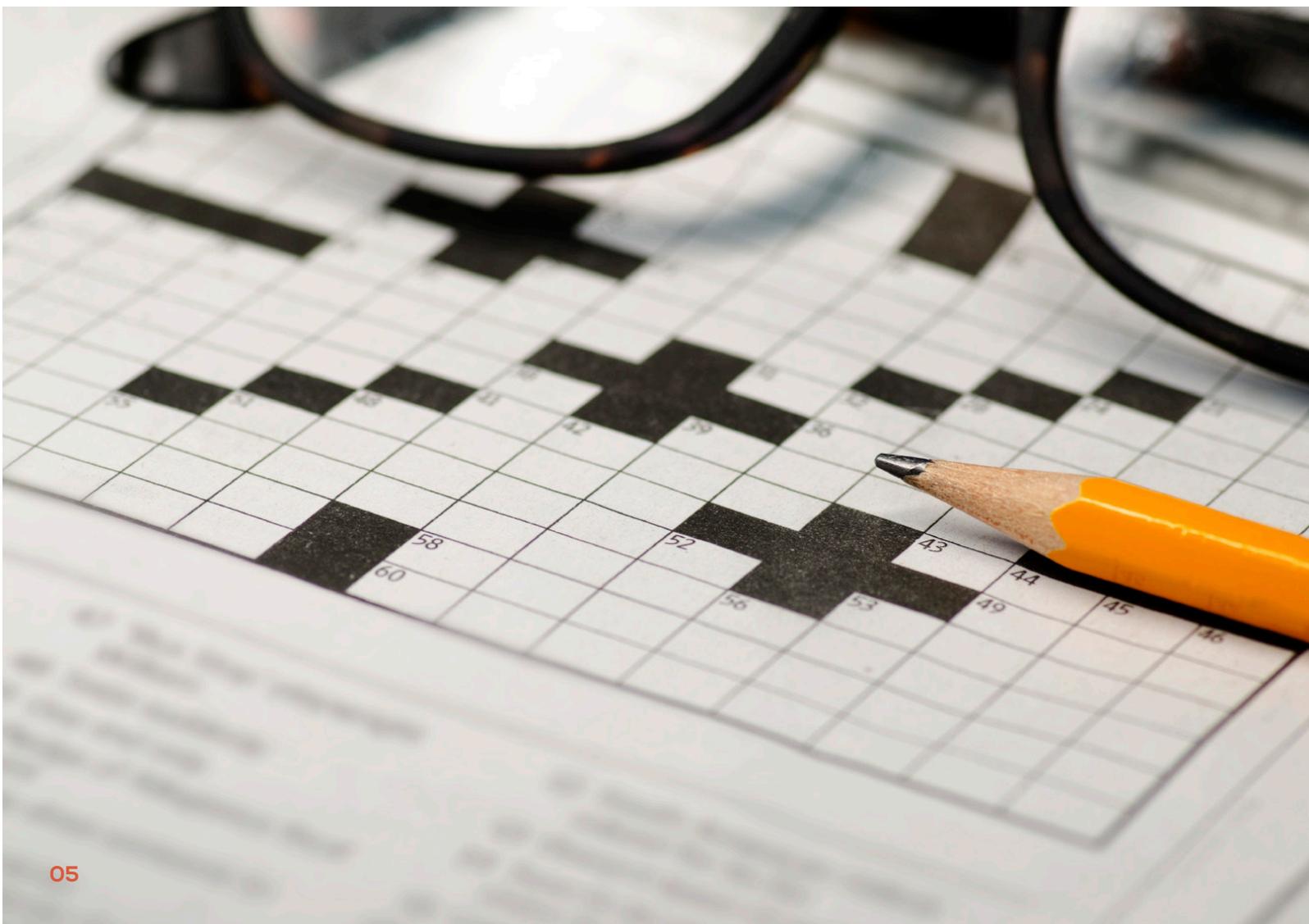
If you are owed a debt and that debt is not in dispute and you suspect the company you have been trading with may be insolvent, you can issue a statutory demand against the company.

Depending on your terms of trade, a statutory demand will require the debtor to pay you the outstanding debt, interest on the debt, and the legal costs for issuing the statutory demand. The purpose of a statutory demand is to determine whether the creditor can pay and not that they are liable to pay.

2 THE STATUTORY DEMAND PROCESS

It is important to get the statutory demand process right and it is advisable to instruct a lawyer who has ethical obligations to ensure the correct steps are taken rather than issuing the demand yourself or a debt collection agency taking responsibility. It is however an abuse of process if the statutory demand option is taken when there is no prospect of the company being placed into liquidation.

Before serving a statutory demand it is sensible to ensure that the debt is not in dispute. Sending a formal demand so any dispute can be raised will give you an opportunity to settle the debt without any further action being taken. If, however, the debt is disputed you can file proceedings at the District or High Court and seek judgement on the claim.



3 STEP 1 - SERVING A STATUTORY DEMAND FOR A DEBT

A statutory demand must be in writing and should be served on the debtor company's registered office. The demand must require the company to pay the debt, to secure the debt or to settle it in some way.

If the debtor does not pay the amount claimed within 15 working days, you can apply to put the company into liquidation.

This is a powerful tool as it is quite likely the debtor will go to lengths to ensure that other creditors are not aware of liquidation proceedings pending or in progress. The company has 15 working days after being served to comply with the notice.

The statutory demand must specify exactly what amount is owed (and it must be over \$1,000). The document specifies when the sum must be paid and provides the alternatives to full payment. This must be done within 15 working days of the date of service of the demand, or such longer period if the High Court orders.

Once a statutory demand is served on the debtor company, the debtor has 10 working days to dispute the debt by filing an application to set aside the demand or pay the debt within 15 working days.

4 STEP 2 - APPLYING TO THE COURT TO PLACE THE DEBTOR INTO LIQUIDATION

In the event the debt is neither disputed nor paid, then, on the expiry of 15 working days the debtor company is deemed to be insolvent and the creditor can apply to the Court to place the debtor into liquidation. Once this has been done then the debtor must prove to the Court that it is solvent.

If the company is unable to pay then a liquidation with a Court appointed liquidator will follow, or, the shareholders within 10 working days of being served have an ability to appoint a liquidator by a shareholder resolution.

The decision on whether the company is placed into liquidation is the Courts. The Court may only put a company into liquidation and appoint a liquidator if the Court is satisfied that the company is unable to pay its debts, or the company, or the board of the company, has persistently or seriously failed to comply with the Companies Act 1993, or the company does not comply with section 10 (essential requirements), or it is just and equitable that the company be put into liquidation.



5 ALTERNATIVES TO PAYING A STATUTORY DEMAND IN FULL

There are a number of options available to paying the demand in full including:

- **Compounding** or coming to an agreement with a creditor. The most usual form of compounding is an acceptable offer of payment by instalments. It can also be an offer of a deferred payment or a request to defer filing of a winding up proceedings.
- **A company compromise** is an agreement between the company and various creditors that gives the company an opportunity to survive by avoiding liquidation and trading out of financial difficulty. In order to reach a compromise a majority in number representing 75% in value of each class of creditor voting in favour of such a resolution is required (at a meeting of creditors). Once agreement is reached, all debts are frozen and no creditor can take action against the company during the term of the compromise. The outcome could be creditors are repaid either in full or in part and over time. It is specifically a good option if the business is solid and is in financial difficulty but customers and suppliers are prepared to provide support.

6 HOW TO SERVE A STATUTORY DEMAND

A statutory demand to qualify as being served on the company either must be delivered to a person named as a director on the New Zealand Companies register, to an employee of the company at the company's head office or principal place of business, be left at the company's registered office or address of service, and in accordance with directions as to service by the Court, or in accordance with any agreement made with the company.

It is recommended that the document is served by a document server.



7 DISPUTING A STATUTORY DEMAND

There are a number of options available to paying the demand in full including:

If a debtor can show that a defence, counter claim or a set-off equal to the amount claimed in the demand exists, not only can a demand be set aside but the aggrieved creditor will be ordered to pay the debtor's costs and will be no closer to collecting the debt.

A Court may set aside a statutory demand if the application is made within 10 working days of the date of service of the demand and the application was served on the creditor within 10 working days of the date of service of the demand.

The service of a statutory demand process can give great leverage to getting paid quickly, however if a debt is disputed or the company that owes the money is not in financial difficulty the process is used at your own peril.



8 WINDING UP PROCEEDINGS

Following the expiry of 15 working days from date of service of the statutory demand, the applicant creditor may issue proceedings in the High Court to wind up the company.

Applications may be brought on a number of grounds, the most important being that the company is unable to pay its debts. There are a number of factors that the Court will take into account when deciding whether or not to make a liquidation order. The Court has a discretion as to whether or not to make the order.

The notice of winding up application must include:

- The winding up notice
- A supporting affidavit
- A statement of claim and notice of proceeding

The documents must be filed within 30 working days of the debtor company being in default after being served with a statutory demand, (i.e. 45 working days after service).

A date of hearing is allocated and documents must be served within 15 working days of the date of hearing. Advertisements must be placed in a daily newspaper in the area and in the New Zealand Gazette at least five working days before the hearing but cannot be placed until at least five working days after service.

It is not surprising that if a debtor is going to pay the debt before the hearing, they will do so before the creditor gets a chance to advertise.

9 COURT APPOINTED LIQUIDATION

Once a liquidator is appointed the liquidator will represent the interests of all creditors and seek to collect and realise the company assets, discharge liabilities and distribute any funds in accordance with the provisions of the Companies Act 1993 and Personal Property Securities Act 1999. The liquidator appointed is usually determined by the creditor. A consent to act must be gained prior to the Court proceedings.

10 OPTIONS FOR COMPANIES WHO HAVE BEEN SERVED WITH A STATUTORY DEMAND - UNDISPUTED DEBT

- Do nothing and ultimately face liquidation proceedings
- Pay the amount owing
- Enter into an informal compromise reaching a full and final settlement for an agreed sum - over a term or upfront - and possibly from sources not available should the company face liquidation (however be wary of insolvent transactions)
- Offer a formal company compromise under Part 14 of the Companies Act 1993 - offering all creditors a payment arrangement on "compromise debt" and trade terms for ongoing trading
- Offer assets as a form of security
- Enter into a shareholder resolution placing the company into a voluntary liquidation. Note this option is only available to shareholders within 10 working days of service of the notice of winding up. The voluntary liquidation process is generally less stressful as the entire procedure is well planned and the directors can assist and guide the liquidator.

11 DISPUTED DEBTS

A statutory demand should not be used where the debt is subject to a dispute. Where there is a dispute, legal action should be taken. Currently, individuals and businesses with civil claims can go to a Disputes Tribunal if the disputed amount is \$15,000 or less (or \$20,000 or less if all parties agree).

12 CONTACT US

If you are facing the threat of a winding up notice, or are considering a voluntary liquidation, please contact our office to assist you/your client. If you are the creditor and have commenced winding up

proceedings we would be very pleased to consent to act on the appointment.

The solicitor acting for you will need a consent from a liquidation specialist.





13 ABOUT MCDONALD VAGUE

At McDonald Vague we provide positive solutions and practical advice for businesses facing challenges. We focus on resolving stressful situations quickly and efficiently. McDonald Vague is New Zealand's leading business recovery, turnaround and insolvency firm, and has been in existence for over 20 years. Our value proposition is simple - we achieve the best possible outcome for you. We are known for our track record of proven results and our commitment to:

- **Responsible fee management**
- **Maximising returns**
- **Access to Directors**

We are results focused. We help to facilitate business's return to health to preserve value. Or, if the business is untenable we will work quickly and efficiently to structure outcomes to minimise losses.

Trust and integrity form the basis of all our relationships

We're down to earth and easy to work with. We believe in open communication, listening well, being respectful, keeping you informed and always being available and responsive. We are a mid-sized firm with the resources to handle major projects, but very personal when it comes to our client relationships. We strictly follow professional rules and ethics, and offer independence, service and integrity. We provide guidance and support during stressful situations.

National resources and capabilities

We have around 16 full-time people on our staff. This includes two Directors and many senior and highly qualified professionals. We also have a number of experienced consultants that we can call upon as and when required. Our offices are located in Auckland and Hamilton but we work throughout New Zealand.

We are a member of Chartered Accountants Australia and New Zealand (CAANZ), Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ) and NZCA (an association of independent Chartered Accountants).

We are able to undertake assignments anywhere in New Zealand and can align with a local NZCA firm for assistance. McDonald Vague will still control the assignment and ensure the same high level of expertise and service is maintained. Our clients benefit from the associated firm's local experience, as well as more cost effective fees as our travel expenses are reduced.

A wealth of experience

We have experience working with struggling businesses and companies facing challenges in virtually every business sector. Some areas we have particular experience in are:

- **Property and construction**
- **Agribusiness**
- **Hospitality**
- **Financial services**
- **Retail**

MORE INFORMATION

For further information on any of the options outlined in this brochure, or to discuss your own company's situation, please contact one of our Directors or insolvency managers. Our advice is provided confidentially and does not commit you to appointing us in any formal capacity.

KEY CONTACTS



Boris van Delden

Director

DDI (09) 306 3342

Mobile 021 900 659

Email bvandelden@mvp.co.nz



Peri Finnigan

Director

DDI (09) 303 9519

Mobile 021 900 657

Email pfinnigan@mvp.co.nz



Iain McLennan

Director

DDI (09) 303 9512

Mobile 021 664 556

Email: imclennan@mvp.co.nz



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