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Legal Alert

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Service of Documents on Australian Companies

Key Summary

In this article, we take a look at a key factor in any enforcement process brought against an Australian corporate debtor – achieving effective service of documents on the company.

Without confirmation that documents have been properly served, a Court will not allow any step to be taken to enforce a debt against a corporate debtor and the onus is on the creditor to satisfy the Court that the relevant documents and/or notice have been properly served on a corporate debtor.

Introduction

Recently, Palmer J, in the matter of Woodgate v Garard Pty Ltd [2010] NSWSC 508, noted that effective service of documents on an Australian company is an everyday matter, and that any inconsistency or uncertainty associated with service gives rise to an opportunity to raise disputes, often causing substantial delays and increased costs.

How then, does one accomplish "effective service" on an Australian company?

The Legislation – Service Requirements

Generally, a document to be served on a company falls within two main categories:

- for a process of a Court or Tribunal in Australia, e.g. a Statement of Claim or Subpoena – the effective methods of service are prescribed by s9 of the Service and Execution of Process Act 1992 (**SEPA**); and
- for a document arising under the Corporations Act 2001 (Cth) (**Corporations Act**), e.g. a Statutory Demand (s459E of the Corporations Act) – the effective methods of service are prescribed by s109X of the Corporations Act and by s28A of the Acts Interpretation Act 1901 (Cth) (**AIA**).

The terms of s109X of the Corporations Act, s28 of the AIA, and s9 of the SEPA are broadly the same in respect to the service of a document on an Australian company such that a document may be served by:

- leaving it at or posting it to the company's registered office;
- delivering a copy personally to a director of the company who resides in Australia; or
- if a liquidator or administrator of the company has been appointed, by leaving it at or posting it to the address of the liquidator's or administrator's office, which is the most recent such address as has been lodged with ASIC.

The terms of each of those sections do not affect any other provision of the Acts within which they are found or of any other law that permits, or which empowers a Court to authorise, for a document to be served in a different way.

Effective or "Good" Service

In Woodgate v Garard, whilst ruling in the context of a Statutory Demand issued to a corporate debtor, Palmer J considered in detail the question of how "good" service of documents on an Australian company is achieved. His Honour highlighted a number of the clear principles set out in the judicial authorities in respect to whether "good" service of documents has been made on an Australian company, including:

- in the case of documents required to be served on an Australian company pursuant to s109X of the Corporations Act and s28A of the AIA, once service in a mode prescribed by those sections is proved by a creditor no further proof of service is required, nor is there any requirement for proof of whether the document has actually come to the attention of the company;

- where service is effected by leaving the document at the company's registered office:

  - the date of service of the document is the date on which the document was left at the registered office – not when it comes to someone's attention;

  - it makes no difference whether the document was left at the registered office during or outside normal business hours, or even during or outside the hours in which that registered office is kept open; and

- the modes of service prescribed in s109X of the Corporations Act and s28 of the AIA are not exclusive of other modes of service – if a creditor uses another mode of service on an Australian company and it can be shown to the satisfaction of the Court that the document actually came to the attention of an officer of the company who was either expressly or implicitly authorised by the company to deal directly and responsively with the document, or with documents of that nature, it may nevertheless be "good" service.

"Effective Informal Service Rule"

The third principle identified above by Palmer J arises in the context of the meaning of "service", such that the document in question must come to the notice of the company for which it is intended.

As noted above, if a document is served in accordance with the terms of s109X of the Corporations Act, s28 of the AIA, or s9 of the SEPA, the Court only requires proof that the document has been delivered in accordance with the terms of the relevant section. The Court does not require any proof that the document has actually come to the notice of the company for which it is intended.

If the document is served in some other manner, the Court may still apply a pragmatic approach to the question of whether effective service of a document has occurred. This approach avoids the absurd situation of the Court being required to hold that a company, which on its own admission accepts that it received the document, has not been effectively served with that document. Applying a pragmatic approach may result in the means by which a company obtained the document as being seen as essentially immaterial.

In order to be deemed effective, service of documents effected by a method other than that prescribed by the relevant legislation is reliant on what is known as the "effective informal service rule". In Woodgate v Garard, in the context of the rule's application to the service of documents on Australian companies, Palmer J noted that:

- a party invoking the effective informal service rule bears the onus of proving when the document came to the actual attention of a responsible officer of the company. In view of the serious consequences which may attend from the service of documents on a company, the Court will not lightly draw inferences or make assumptions as to the time of service;

- where a document comes to the actual attention of the sole director of a company it will be presumed that, unless a strong case to the contrary is shown, the director is the responsible officer and that service is good;

- in the case of a company with more than one director, the Court may require proof the director or directors to whose attention the document has come is or are the responsible officer or officers of that company to deal with the matters included in the document; and

- there is no special exception to the effective informal service rule in the case of service by e-mail or facsimile – the ultimate question remains whether that mode of service actually brought the document to the attention of a responsible officer of the company.

Service of Statutory Demands – an Important Discretion

Statutory Demands are documents created and served pursuant to the Corporations Act and, if properly prepared and served, can have relatively swift and significant consequences for a corporate debtor.

As previously noted, for documents arising under the Corporations Act, s109X of that Act and s28 of the AIA prescribe how such documents can be served. However, in the case of a Statutory Demand, the Court may, in its discretion and in the interests of justice, set aside the Statutory Demand even if it has been served by a creditor in accordance with the mode prescribed in those sections, if the creditor:

- knows at the time of service, or before the time for complying with the Statutory Demand expires, that the Statutory Demand has not actually come to the attention of the company debtor;

- knows that the company debtor would dispute the Statutory Demand if made aware of it;

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- refrains from bringing the Statutory Demand to the actual notice of a responsible officer of the debtor company within the time for complying with the Statutory Demand; and

- relies on the good service of the Statutory Demand and the presumption of insolvency arising under s459C(2)(a) of the Corporations Act.

It is relevant to note that whilst the Court can take such step, it will do so based on a want (or lack) of fair notice to the company debtor, and not because of a want of good service.

Conclusion

When taking steps to enforce claims against Australian companies, creditors are strongly recommended to fully consider and meet all service requirements. Failure to do so may result in the enforcement process failing at the first hurdle, leading not only to frustration as a consequence of having to re-start the process, but also to the possibility of adverse cost orders being made against the creditor and a lowering of the prospects for recovering the claim which the creditor is seeking to enforce.

This article was prepared by Colin Brown, a partner in our insolvency and reconstruction team. We invite you to contact Colin, or Michael O'Neill, should you have any questions or require any further information about the matters discussed in this article.

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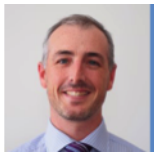

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