



GREENWAY CHAMBERS

# Security of Payment in NSW and Creditor's Statutory Demands

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# Security of Payment in NSW and Creditor's Statutory Demands

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Enforcing security of payment legislation via statutory demands

1. Part 1 - Overview by Andrew Girgis:
  - a. Scenario A - SOPA outcome filed as judgment in Court
  - b. Scenario B - SOPA outcome not filed as judgment in Court
2. Part 2 – Statutory demands in Scenario A by Dinesh Ratnam
3. Part 3 – Statutory demands in Scenario B by Declan Byrne





# Interrelationship between Security of Payment and Insolvency

1. SOPA: *Building and Construction Industry of Payment Act 1999* (NSW)
2. Statutory demands: *Corporations Act 2001* (Cth) s 459C(2)(a)
3. SOPA is remedial legislation intended to maintain cash flow.
4. SOPA provides an interim form of relief.
5. SOPA imposes “brutally fast” time limits.
6. SOPA was enacted to eliminate the practice of developers and contractors delaying payment for work carried out by contractors.

*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (**Probuild**) at [36] & [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

### Companies in external administration

1. 2016 – SOPA not available to companies in liquidation:

*Façade Treatment Engineering Limited (in liquidation) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (Warren CJ, Tate and McLeish JJA)

2. February 2019 – SOPA available to companies in liquidation:

*Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation)* [2019] NSWCA 11 (Sackville AJA, Emmett AJA, White, Payne and Leeming JJA agreeing)

2. October 2019 - Section 32B: corporation in liquidation cannot invoke SOPA.

3. Other forms of external administration – uncertain.

### Payment claims and payment schedules

1. Entitlement to serve at least one payment claim each month: s 13(1A)
2. 10 business days to respond (or less if contract provides): s 14(4)(b)(i)

### **Scenario A:** where judgment obtained

1. A failure to pay where there is no payment schedule gives rise to a statutory debt enforceable as a judgment (s 15(2)(a)(i))
2. A failure to pay an adjudicated amount entitles the claimant to obtain a adjudication certificate and file it as a judgment: ss 24-25
3. Statutory demand based on (2) or (3).

### **Scenario B:** where no judgment obtained

1. Where there is liability as a debt but no judgment: s 14(4) c.f s 15(2)(a)(i)
2. Adjudication certificate which is not filed as a judgment: s 24 c.f. s 25
3. Statutory demand more vulnerable to being set aside.



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## ISSUANCE OF A STATUTORY DEMAND – CORPORATIONS ACT 2001, s 459E

### JUDGMENT OBTAINED IN 2 WAYS – THE TYPICAL WAY

- Statutory Debt created under SOPA
- Adjudication Certificate obtained under SOPA



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## 15 Consequences of not paying claimant where no payment schedule

- (1) This section applies if the respondent—
  - (a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
  - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant—
  - (a) may—
    - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
    - (ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, and
  - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—
  - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
  - (b) the respondent is not, in those proceedings, entitled—
    - (i) to bring any cross-claim against the claimant, or
    - (ii) to raise any defence in relation to matters arising under the construction contract.

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## 16 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if—

- (a) a claimant serves a payment claim on a respondent, and
- (b) the respondent provides a payment schedule to the claimant—
  - (i) within the time required by the relevant construction contract, or
  - (ii) within 10 business days after the payment claim is served, whichever time expires earlier, and
- (c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and
- (d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

- (a) may—
  - (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
  - (ii) make an adjudication application under section 17(1)(a)(ii) in relation to the payment claim, and
- (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—

- (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
- (b) the respondent is not, in those proceedings, entitled—
  - (i) to bring any cross-claim against the claimant, or
  - (ii) to raise any defence in relation to matters arising under the construction contract.



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In *Isis Projects Pty Ltd v Clarence Street Ltd* [2004]

NSWSC 222 (29 March 2004), Einstein J held:

[33] “a claimant”, who relies upon the provisions of this section, must prove “that a **valid** payment claim has been served and also clearly prove what is the due date for a progress payment”



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## 25 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
- (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
- (4) If the respondent commences proceedings to have the judgment set aside, the respondent—
  - (a) is not, in those proceedings, entitled—
    - (i) to bring any cross-claim against the claimant, or
    - (ii) to raise any defence in relation to matters arising under the construction contract, or
    - (iii) to challenge the adjudicator's determination, and
  - (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.



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**I have Judgment**

**Where to from here?**



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# **Creditor's Statutory Demand for Payment of Debt**

**aka**

**Statutory Demand – Corporations Act 2001, s 459E**



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## CORPORATIONS ACT 2001, s 459H

- Genuine dispute?
- Offsetting Claim?

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# Genuine Dispute

**Does it matter – STRICTLY SPEAKING - NO!**



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In the matter of J Group Constructions Pty Ltd [2015] NSWSC 1607

Robb J at [88]:

*“The threshold for establishing either a genuine dispute, or a genuine offsetting claim, is a relatively low one, and it is sufficient that there is a serious question to be tried based on a cause of action advanced in good faith for an amount claimed in good faith, such as not to be frivolous or vexatious.”*



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In the matter of Douglas Aerospace Pty Ltd [2015] NSWSC 167

Brereton J at [76]:

“It is difficult to see how a debt arising under s 14(4), which creates a statutory liability upon the failure to provide a payment schedule, could be the subject of a genuine dispute, if the conditions in s 15(1) are satisfied, regardless of any underlying dispute. As it seems to me, the only way in which a “genuine dispute” could be raised in respect of such a debt would be by disputing whether the circumstances referred to in s 15(1) existed.”



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In the matter of J Group Constructions Pty Ltd [2015] NSWSC 1607

*“It must be accepted, with respect, that so long as a statutory debt created by the Security of Payment Act exists, or a judgment issued under that Act remains in force, a company which is so indebted cannot genuinely dispute the existence of the debt for the purposes of s 495H(1)(a) of the Corporations Act. Furthermore, on the basis of the second of the reasons given in Diploma Construction, proceedings that only seek to set aside the debt or any judgment founded on the debt under the Security of Payment Act will not be an offsetting claim, because there cannot be an “offsetting amount” for the purposes of s 459H(2), so that the company will not have an offsetting claim within s 459H(1)(b).”*



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In the matter of J Group Constructions Pty Ltd [2015] NSWSC 1607

Robb J at [93]:

*“The most significant feature of Douglas Aerospace for the purposes of the present case is the ruling by Brereton J, following the decision of the Court of Appeal of Western Australia in Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91, that where a party serves a statutory demand based upon a judgment obtained by filing an adjudication certificate following an adjudication under the Security of Payment Act, the company served with the statutory demand cannot claim that it has a genuine dispute as to the existence of the debt for the purposes of s 459H(2)(a), where the company’s only right is to assert that the underlying debt the subject of the adjudication certificate has not arisen under the contract. The company can mount an offsetting claim under s 459H(1)(b) if it has a counterclaim, set off or cross demand that does not deny the debt, but asserts a countervailing liability: see Douglas Aerospace at [98]”*





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Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014]

WASCA 91

Pullin JA at [61]:

*“The question is whether there is a debt. If there is a debt which is due and payable by reason of the State legislation, then there is no “fictional state of affairs”.”*



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## CORPORATIONS ACT 2001

s 459H(1)(b) - “that the company has an offsetting claim”

Definition of “offsetting claim” – “a genuine claim that the company has against the respondent by way of a counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates.”



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## Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91

Pullin JA at [68]:

There is no doubt that the recipient of a statutory notice may successfully apply to set aside a statutory demand based on an adjudicator's determination or a consequent judgment if it has offsetting claims arising from transactions separate from those that give rise to a judgment debt based upon an adjudication under the Act: *Demir Pty Ltd v Graf Plumbing Pty Ltd* [\[2004\] NSWSC 553](#) [17] (Campbell J).

## In the matter of Douglas Aerospace Pty Ltd [2015] NSWSC 167

Brereton J at [93]:

*“Thirdly, as to offsetting claims, the authorities on BACISOPA are uniformly consistent with general principle relating to offsetting claims, holding that a “true” offsetting claim – for example, a cross-claim for damages for negligence or breach of contract, or the recovery by way of restitution of amounts already allegedly overpaid – may be relied on to set aside a statutory demand founded on an adjudication certificate. That is because the effect of s 459H(1)(b) is that any claim the company has against the creditor falls within the definition of offsetting claim, and this is unaffected by any special features of the debt that founds the demand.”*



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In the matter of Douglas Aerospace Pty Ltd [2015] NSWSC 167

Brereton J at [98]:

*“In my view, a curial proceeding in which a party to a construction contract seeks, by way of enforcing its contractual rights, a declaration that an adjudicated amount is not truly due and payable is in a position closely analogous to one who applies to set aside a judgment, or to appeal from a judgment – essentially, the contention is that the adjudication, and thus the judgment founded on it, is wrong. Despite the width of the concept of “offsetting claim”, it has never been thought to extend to an appeal from, or application to set aside, a judgment. In the absence of payment of an amount of which restitution might be claimed, there is nothing to be set off against the judgment debt, but only a contention that the adjudication is in error. A contention that a debt does not exist is not a “counterclaim, set-off or cross-demand”. Such a contention denies the debt, whereas a counterclaim, set-off or cross-demand admits it, but asserts that there is a countervailing liability. That the curial proceedings might produce a different result is no different from an appeal. The general principle that an appeal or application to set aside a judgment does not found a genuine dispute, or (at least without more) provide some other reason to set aside a demand, supports the conclusion that a claim that an adjudication does not reflect the true contractual rights of the parties does not amount to an offsetting claim.”*





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## CORPORATIONS ACT 2001, s 459J

- Defect, substantial injustice
- Some other reason



## Overview

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1. Unusual Circumstances (ie. no judgment)
2. Some practical tips



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## Basic requirements for issuing a statutory demand

1. Debt
2. Due and payable
3. Above the threshold

.... but what's a debt?



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## Statutory demands based on statutory debts

Where no judgment obtained:

- *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395 per Austin J
- *Aldoga Aluminium v De Silva Starr Pty Ltd* [2005] NSWSC 284 per Palmer J

How have the more recent cases treated these early decisions?





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## Statutory demands based on adjudication certificate

Where certificate not registered:

- *Khouzame v All Seasons Air Pty Ltd* [2015] FCAFC 28
  - noting that s25(2) of the SOP Act requires an application to register an adjudication certificate as a judgment be accompanied by a verifying affidavit, what is the consequence of such an affidavit not being provided?

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## Some practical tips

### **Basics of bringing an application to set aside a statutory demand based on having an offsetting claim**

- Originating process / affidavit
- Affidavit needs to set out basis for the claim
  - Best practice would be to have commenced proceedings detailing that offsetting claim or at least annexing draft pleadings to the affidavit

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## Some practical tips

### **Verifying affidavit**

- *Ming Tian Real Property Pty Ltd v SGS Platinum Pty Ltd*  
[2020] NSWSC 212

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## Some practical tips

### **Verifying affidavit**

*“[34] Whilst a statutory demand based on a judgment obtained under s 25 of the SOPA is a judgment debt and does not require verification by affidavit: Re Cooperbrown Pty Ltd [\[2019\] NSWSC 1341](#) at [31]-[32] (Black J), the position is different where the purported “judgment” under s 25 of the SOPA includes amounts which are not stated in the adjudication certificate, such as filing fees for the filing of the adjudication certificate with the court, or interest from the date of the adjudication certificate to the time the certificate is filed as a judgment. Nothing in s 25(1) of the SOPA authorises the inclusion of such amounts in the deemed judgment created by that provision.”*



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## Some practical tips

### **Verifying affidavit**

*“[35] In Re Cooperbrown , Black J held at [16] that the inclusion of such amounts in a judgment under s 25 of the SOPA deprived the “judgment debt” arising under s 25(1) of the exception that would be otherwise available under s 459E(3) of the Corporations Act... ”*



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## Some practical tips

### **Verifying affidavit**

*"His Honour continued at [17]:*

*This has the necessary consequence that part of the amount claimed in the Demand is not properly characterised as a judgment debt, although it was included in the form of order issued by the Fairfield Local Court. The requirement for verification of a debt claimed in a creditor's statutory demand by affidavit, where it is not a judgment debt, is an important aspect of the regime established under Pt 5.4 of the Corporations Act : Wildtown Holdings Pty Ltd v Rural Traders Co Ltd [\[2002\] WASCA 196](#); (2002) 172 FLR 35 at 39-40; Kisimul Holdings Pty Ltd v Clear Position Pty Ltd [\[2014\] NSWCA 262](#) ."*



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## Some practical tips

### **Threshold for establishing an offsetting claim**

Court must be satisfied that there is:

- a “serious question to be tried”: see *Scanhill v Century 21 Australasia* [Pty Ltd (1993) 47 FCR 451] at 467
- “an issue deserving of a hearing”: see *Chase Manhattan Bank Australia Limited v Oscty Pty Limited* [1995] FCA 1208



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Some practical tips

## **Threshold for establishing an offsetting claim**

The claim must be made in good faith: *Macleay Nominees v Belle Property East Pty Ltd* [2001] NSWSC 743

Meaning?





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## Some practical tips

### **Threshold for establishing an offsetting claim**

*“This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit “however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be” not having “sufficient prima facie plausibility to merit further investigation as to [its] truth”, or “a patently feeble legal argument or an assertion of facts unsupported by evidence”.”*

McLelland CJ in Eq in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787



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## Some practical tips

### **Threshold for establishing an offsetting claim**

*"... The dispute or off-setting claim should have a sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile. ..."*

*TR Administration Pty Ltd v  
Frank Marchetti & Sons Pty Ltd  
[2008] VSCA 70*



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# Some closing thoughts



# Questions?

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1. Raise hand - move your mouse over the screen and select the 'raise hand' option in the center of the task bar
2. Chat box - type your question into the chat box in StarLeaf or YouTube and we will read it out on your behalf

