

NEWSLETTER

Legal Up-Date

August 2005

JUST, QUICK AND CHEAP – AMENDMENTS TO CIVIL PROCEDURE IN THE NSW LOCAL, DISTRICT AND SUPREME COURTS

The Civil Procedure Act came into force in NSW on 1 June 2005. The Act aims to provide for the first time in New South Wales, one set of rules to govern the general running of civil proceedings in the Local, District and Supreme Courts and the Dust Disease Tribunal. The new rules should also result in modernising the State courts by allowing for electronic filing, lodgement and communications between the court and the parties in the proceedings.

As solicitors we only recommend litigation as a last resort. But sometimes it is the only means by which a dispute can be resolved. People who have had the unfortunate experience of going to court would know that current court procedures are cumbersome and antiquated. The rules can be highly structured, resulting in unnecessary delays in all too many instances. The new rules will hopefully assist in reducing the time frame of proceedings. Some of the features of the new rules are:

- procedures for more extensive preliminary discovery including discovery orders against non-parties;
- electronic case management procedures providing for the filing and serving of documents electronically;
- a procedure for expert witnesses to give their oral evidence at trial, in succession or simultaneously, in a conversational setting;
- a defendant can now plead a set off of any debt owed by the plaintiff against the plaintiff's claim; and
- encouragement of a range of alternative dispute resolution procedures together with granting the court power to order mediation. This is a significant change as previously, mediation would only be directed by the court with the parties' consent.

With the consolidation of the provisions about civil procedure into one Act and one set of rules relating to the Local, District and Supreme Courts and the new electronic case management, litigation will hopefully be simpler and efficient, and achieve a more cost effective outcome for the client.

If you have any questions in relation to litigation, please contact our litigation and insolvency specialist, Alison Drayton (adrayton@schweizer.com.au), Senior Associate.

SETTING ASIDE STATUTORY DEMANDS

The Corporations Act 2001 (the Act) provides a regime for creditors to apply to the courts to wind up a company if a company is unable to pay its debts as they fall due. One of the

mechanisms by which a creditor can initiate the winding up of a company is by a deemed insolvency. A company is deemed insolvent if a creditor serves a Statutory Demand pursuant to section 459E of the Act and the company fails to comply with the statutory demand within the prescribed 21 day period. To be able to serve a statutory demand, a creditor must be owed a debt or debts that are due and payable and total at least \$2,000.00.

The Act does not permit several creditors to combine their debts to get the amount over the \$2,000.00 mark. Further, the debt must be one that is "due and payable". This means that the creditor must be entitled to immediate payment. The debt must not be contingent or payable at some point in the future. If there is no due date for payment of a debt, the creditor must make a formal demand for repayment of the debt and, only when the debtor fails to pay it within the specified time period, can the creditor serve a Statutory Demand for payment of the debt.

If the debt in question is not a judgment debt, that is, it is not an award of money following a court order, the affidavit accompanying the Statutory Demand must show that the debt is in fact due and payable.

Where there is a genuine dispute between the debtor and the creditor in relation to the debt, then the creditor may be prevented from utilising a Statutory Demand to compel payment of the debt as this may amount to an abuse of the court's process. A creditor may be guilty of abusing the court's process if it can be inferred that a Statutory Demand was used for the improper purpose of trying to force the debtor into paying the money under threat of winding up the company in the event of failure to pay the money.

A Statutory Demand served on the debtor may be set aside in certain circumstances – usually where there is a genuine dispute between the parties. A debtor has 21 days from the date the Statutory Demand is served to apply to the court for it to be set aside; and must be careful to ensure that the 21 day period is strictly adhered to because it is almost impossible to get the period extended.

To set a Statutory Demand aside, the debtor must file in court and serve on the creditor an application supported by an affidavit. The affidavit must contain evidence as to why the Statutory Demand should be set aside in accordance with section 459G of the Act. The grounds on which a Statutory Demand can be set aside are contained in sections 459H and 459J of the Act, namely:

- there is a genuine dispute between the debtor and creditor about the existence of the debt;
- the debtor has an offsetting claim against the creditor;

- because of a defect in the Statutory Demand, substantial injustice will be caused unless the demand is set aside; and/or
- there is some other reason why the demand should be set aside.

If there is a genuine dispute as to the existence or amount of the debt, it is not enough for the affidavit merely to contain an assertion of the dispute. The affidavit must set out the factual grounds relied on to show that there is in fact a dispute in question.

Please contact Alison Drayton (adrayton@schweizer.com.au) if you have questions about the Statutory Demand regime under the Act.

DISCRETIONARY TRUSTS – A RE-CAP

A Trust is a relationship where a person or company (the Trustee) is under an obligation to deal with property owned by the Trust (the Trust Property) for the benefit of some other person(s) (the Beneficiaries). The terms of the obligations are defined by the Trust Deed.

A Trust typically involves three elements:

1. the Trustee who can either be a person or a company and is the legal owner of the trust property;
2. the Trust Property or the Trust Fund; and
3. the Beneficiaries who are the people for whose benefit the Trustee holds the Trust Property.

If the Trust is a Discretionary Trust, then the trust will involve two additional elements:

4. the Appointor – the person who has the power under the Trust Deed to remove the Trustee and appoint another Trustee or to otherwise vary the Trust Deed; and
5. the Settlor – the person who provides the initial funds to establish the Trust (we usually recommend at least \$250.00).

A Discretionary Trust is a type of trust under which the Trustee has the discretion to distribute the income and/or the capital of the Trust to any of the Beneficiaries. The Trustee may decide not to distribute to some of the Beneficiaries and, in distributing the income and/or capital, may decide the amount that is to be distributed and to which of the Beneficiaries.

Discretionary Trusts are often used in connection with running small businesses or used as investment vehicles. They are a useful vehicle for minimising taxation and for income protection purposes.

The typical advantages of Discretionary Trusts are:

- there may be considerable taxation advantages although this depends on the current tax law;
- they allow for income streaming; and

- limited liability.

The typical disadvantages of Discretionary Trusts are:

- possible capital gains tax implications;
- inability to distribute tax losses; and
- establishment and administration costs.

Please contact Norbert Schweizer, Partner (nschweizer@schweizer.com.au), if you have any questions about trusts.

INTRODUCING BEATRICE STUBER:



Beatrice joined the firm in 2001 as a Swiss Law Consultant. In 1998, she graduated with a Lic. Iur. Degree “magna cum laude” from the University of Berne, Switzerland. In 2000, she completed her postgraduate Notarial studies in Berne, finishing first in her year. Beatrice practiced commercial, corporate, tax and inheritance law in Switzerland before moving to Australia at the end of 2000.

Beatrice acts for a number of corporations and individuals whose matters involve both Australian Swiss laws. She particularly practises in Swiss inheritance, estate, family, tax and corporate law, and in Australian inheritance, estate and commercial law. Beatrice holds a Diploma in Law from the Legal Practitioners’ Admission Board. She was admitted as a solicitor in NSW in 2003.

Outside law, Beatrice is heavily involved in many community groups. She is the honorary secretary of the Swiss Community Care Society (SCCS) and a member of the Swiss Australian Chamber of Commerce and Industry.

Languages: English, German, Swiss German, French, Italian (conversational).

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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