

Tips and Tricks for Successful Enforcement of Judgments



Preliminary points

Statutory demands

Bankruptcy notices

Suspension orders: Staying the execution of a judgment

Closing remarks

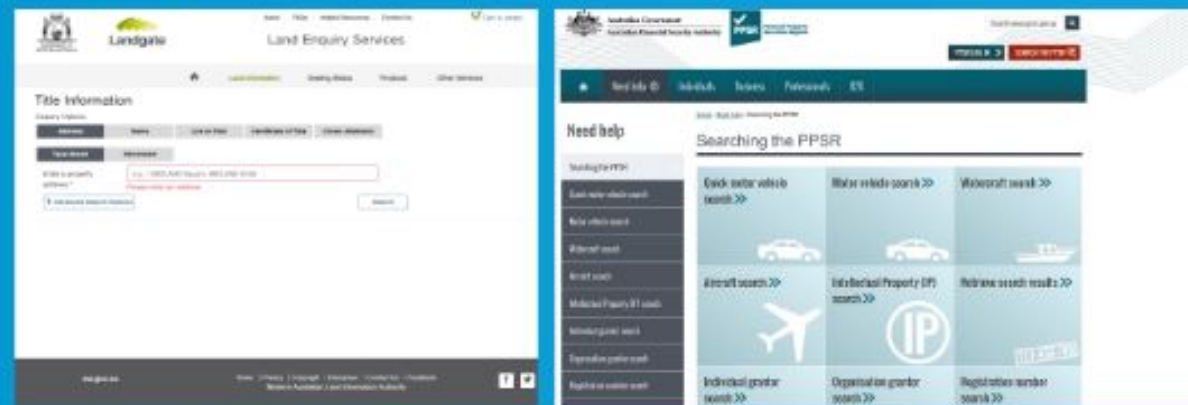
The Law Society
OF WESTERN AUSTRALIA



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Preliminary points

- Tailor-made approach.
 - Landgate search.
 - PPSA search.
 - Dun and Bradstreet Credit Report.
 - Speak to your client on their views.
- Be prepared.



Statutory Demands:

- The enforcement option of choice for aggrieved company creditors.
- However, not to be used as a debt-collection device.
- Adopt a conservative approach.



**Not be used as a
debt-collection
device**

**Adopt a
conservative
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However, not to be used as a debt-collection device.

- *“That purpose [of the statutory demand regime] is to provide a means whereby the insolvency of a company may be established for the purposes of an application to wind up that company. **Its purpose is not to provide a means whereby those claiming a genuinely disputed debt can avoid the obligation of establishing their entitlement to that debt in a court of appropriate jurisdiction by placing commercial pressure on the party resisting payment.** There is a clear inference from the evidence that Createc's purpose in issuing the statutory demand was the improper purpose of using the statutory demand process to enforce payment of a debt which it knew to be genuinely disputed. That is an abuse of process.”*

Createc Pty Ltd v Design Signs Pty Ltd [2009] WASCA 85; 71 ACSR 602 per Martin CJ at [2].

- Be wary of the eager client - **manage their expectations.**



Adopt a conservative approach

- **Issue a regular letter of demand** first referring to a statutory demand being issued for non-compliance. Why? Additional costs protection in any application to set it aside.
- **Don't include claims for interest:** A statutory demand may be set aside where there is a "defect" in the demand or for some other reason: Section 459J(1) *Corporations Act* 2001 (Cth). Examples of defects include misleading or ambiguous descriptions of debt.
- Generally in my view, the statutory demand process should be **reserved for circumstances where the indebtedness is beyond doubt**. Examples include judgment debts, but also acknowledgments of debt and circumstances where the debtor has admitted the monies are owed in writing.
- The statutory demand should be **served personally** and not by post if it can be avoided: *Esperance Cattle Company Pty Ltd v Mills Oakley Lawyers (A Partnership)* [2016] WASC 283.

Bankruptcy notices

- Quasi - criminal consequences.
- Only applies to final judgments and final orders: s41 *Bankruptcy Act* 1966 (Cth).
- Can be done all online through AFSA website.
- Often forgotten - can be served via email: Regulation 16.01(1)(e)(ii). However, the legal presumption that the bankruptcy notice has been served by email is rebuttable. Best practice is to get a delivery and read receipt. If you have other modes of service available to you, then use them too.
- Don't include claims for interest: a bankruptcy notice may be set aside if there is a defect in the form or content of the notice.
In order to be defective, the defect must make the notice confusing, misleading or otherwise unfairly prejudicial to the debtor: *Adams v Lambert* (2006) 228 CLR 409.



Suspension orders

The starting point

S.15 of the *Civil Judgments Enforcement Act*

What constitutes special circumstances in the context of a counter-claim?

What constitutes special circumstances in the context of an appeal?

The starting point:

A successful party is entitled to enforce their judgment pending an appeal.

- ‘...the general rule, reflected in all the decided cases, is that prima facie the successful litigant at first instance is entitled to the fruits of the judgment despite the initiation of an appeal by the unsuccessful party’ [3], Murray and Parker JJ.



S.15 of the Civil Judgments Enforcement Act:

- (1) A person against whom a judgment is given may apply for an order suspending the enforcement of all or part of the judgment to —
 1. the court that gave the judgment; or
 2. a court that is dealing with an appeal against the judgment.

...

- (3) On such an application, the court may only make such an order if there are **special circumstances** that justify doing so.

What constitutes special circumstances in the context of an appeal?

- It is a high bar. In the context of an appeal, the leading decision is *Eastland Technology Australia Pty Ltd v Whisson* (2003) 28 WAR 308.
- Is the suspension order needed to preserve the subject matter or the integrity of the litigation?
- If so, does the appeal have reasonable prospects of success?
- If so, does the balance of convenience lie in favour of the applicant?
- If all of those elements are met, the suspension order will likely be granted.
- (cf. *Town of Port Hedland v Reece William Hodder by Next Friend Elaine Georgina Hodder* [2012] WASCA 9)



What constitutes special circumstances in the context of a counter-claim?

Leading decision: *State Bank of Victoria v Parry* [1989] WAR 240 at 244-247.

The Court will consider:

- The nature of the plaintiff's claim.
- The extent of the identity between the parties.
- The interrelationship of the respective claims (same subject matter, suspension order more likely).
- The strength or merits of the defendant's (or related party's) claim (stronger the claim, suspension order more likely).
- The size of the defendant's (or related party's) claim relative to the plaintiff's claim (greater the claim, suspension order more likely).
- The likely delay before the merits of the defendant's (or related party's) claim will be adjudicated: *Habitat 1 Pty Ltd v Formby* [No 3] [2018] WASC 66.
- The prejudice to the plaintiff if it is denied the fruits of the judgment until the defendant's (or related party's) claims are determined.
- The risk of prejudice to the defendant if he or she makes payment to the plaintiff under the judgment. Can the plaintiff satisfy any judgment in the counterclaim?



Closing remarks

It's important to manage your client's expectations:

- Bankruptcy notices and statutory demands are a highly technical area of law with little room for error. Practitioners should adopt a conservative approach (cf. comments made by Vaughan J and also Martin CJ referred to above).
- It will always be difficult to displace the ordinary rule that a party is entitled to the fruits of their judgment – consider whether you are likely to obtain a favourable exercise of the Court's discretion having regard to the tests in *Eastland Technology Australia Pty Ltd* and *State Bank of Victoria v Parry* set out above.

