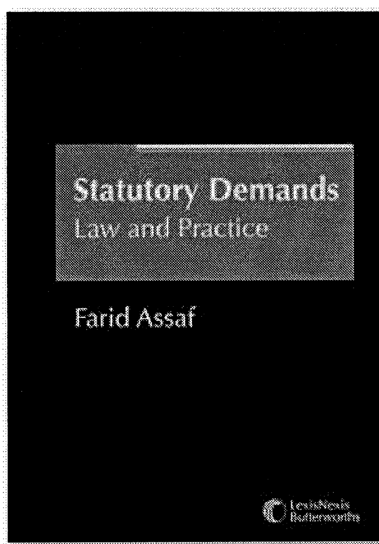
Statutory Demands

Farid Assaf | Butterworths | 2008



This book, by Farid Assaf, of Blackstone Chambers, was officially launched by Justice Robert Austin on 16 October 2008. What follows are Justice Austin's remarks on the occasion of the launch.

When Farid invited me to write a foreword to his book, my first reaction was surprise that the humble statutory demand had been judged worthy of a 483 page exposition. After all, most statutory demand cases are short applications before the Corporations List judge or an associate justice, typically two hour cases or even less, where the facts and issues are in a narrow compass and the case is often disposed of by ex tempore judgment.

But even brief reflection, confirmed by dipping into Farid's treatise, demonstrates the shallowness and inaccuracy of that initial reaction. The body of case law on statutory demands deserves to be noticed and studied carefully for several reasons.

First, the statutory demand has proved itself to be a highly efficient, indeed an indispensable tool, assisting courts to make the crucial decision about insolvency in a winding up application. In my foreword to Farid's book, I quote from Justice Palmer's judgment in *Hall v Poolman* to show how difficult it is, when the company is still afloat but contending with the waves, to distinguish between a temporary lack of liquidity and an endemic shortage of working capital. Think how much more difficult that task has become for financial companies in the credit crisis, which has made it so difficult to attribute a value to synthetic finance instruments, and where marking to market might amount to recognising a catastrophic loss.

Failure to meet a statutory demand gives the court a presumption of insolvency, which is very often determinative of the outcome of the winding up application. Winding up applications based on statutory demands are high-volume business for the court and if insolvency had to be proved in every case, the system would become jammed. And so there is no better contributor than the statutory demand to the 'just, quick and cheap' administration of justice in commercial litigation.

Secondly, statutory demand cases are the most common contested applications in corporations matters. In the Supreme Court of New South Wales, where the Corporations List judge sits every day, he typically fields two or three statutory demand applications each week, and an associate justice also deals with statutory demand cases. Since our court accounts for 42 or 43 per cent of the corporations work in the Australian judicial system, we can calculate that nationally there must be about five or six statutory demand cases every week of the year. They probably have a greater propensity to run to full hearing than other litigation, often because the creditor finds it hard to accept that the court's role in the typical case is not to decide whether the debt is owing but only whether there is a genuine dispute about it.

Because the cases tend to run, and there are so many of them, and most of them become accessible on the internet and in specialist law reports, we now have a very substantial body of case law to contend with. Judges expect counsel to be fully abreast of relevant case law. And so a clearly organised, coherent and thorough analysis of the cases will be of great utility, almost on a daily basis, for barristers and solicitors who practise in the field of corporate insolvency, as well as for insolvency practitioners. Farid's work has addressed the profession's need admirably.

Farid's work goes beyond practical utility in two ways. First, study and analysis of the statutory demand cases is inherently interesting for everyone who is interested in the rapid development of legal ideas through the litigation process, as a matter of 'applied' jurisprudence. I have elaborated on this point in my foreword to Farid's book.

Secondly, statutory demand cases have a propensity to throw up for judicial decision some very interesting questions of commercial law. This point must be put into context. Statutory demand cases are typically about small businesses such as building or subcontracting companies, often run by a sole proprietor or the proprietor and spouse. What is at stake is vitally important for the parties, but there are normally no consequences for the global, national or even local economy. Typically, therefore, the cases are not commercially significant. Not surprisingly, they do not grab the attention of the media. But if you study Farid's book, you will be struck by the range of important legal issues that have arisen. Let me give a few examples.

In the year 2000 I had to consider whether Suncorp's statutory demand upon the Korean Daewoo Corporation's Australian subsidiary was valid though expressed in US dollars. Amongst the cases I consulted was *Le Case de Mixt Moneys; Gilbert v Brett*, decided in 1604, as well as Dr Mann's treatise on money published in 1938. In the same vein, Farid's research on the meaning of 'debt' has taken him to Professor Simpson's history of the action of assumpsit. Well before the Cross-Border Insolvency Act and the UNCITRAL Model Law, I had to consider, in the same case, whether to set aside the statutory demand so as to give breathing space to the international administrators of Daewoo who were trying to develop a global workout plan that would include a proposal for its Australian subsidiary.

In the *Standard Commodities* case in 2005 Justice Barrett decided that a statutory demand could be issued for the Australian currency equivalent of an award in the creditor's favour in a French court expressed in euros, observing that nothing in the Corporations Act required that the debt be payable in Australia.

In the *Hansmar Investments* case in 2007 Justice White held that a vendor of real property could issue a statutory demand to the purchaser for the difference between the sale price and the vendor's resale price after the purchaser had failed to complete, since the contract for sale treated the vendor's claim to liquidated damages as a debt due and payable.

A much more important judgment than any of these, in the scheme of things, was the High Court's decision in *Deputy Commissioner of Taxation v Broadbeach Properties* [2008] HCA 41. The question was whether the commissioner could issue a statutory demand for recovery of GST, interest and penalties, and for income-tax arising from a default assessment, given that the taxpayers had challenged the assessments and had commenced review proceedings under Part IVC of the Taxation Administration Act. You will immediately realise how important that question is for the administration of the tax system and the economic welfare of taxpayers. The High Court held unanimously that the commission's notice of assessment conclusively demonstrated that the amounts identified in the assessments were correct, and consequently those amounts were debts for which the commissioner could issue statutory demands.

In summary, Farid has given us a publication that is not only very useful in a professional sense, but is also a publication that will be satisfying for those of us who love the law. He deserves every success.

By RP Austin