

Article Information

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Can a foreign company be wound up in Australia?

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In *Cato Brand Partners Pty Ltd v Air India Ltd* the Supreme Court was required to consider whether or not a foreign company had grounds to challenge an application for a winding up order in circumstances where it had not sought to set aside a statutory demand within the required 21 day period.

The *Corporations Act* in Part 5.4 provides that a debtor has a 21 day period to set aside a statutory demand and if it fails to do so, there is a presumption of insolvency leading to the ability to seek a winding up order. However, in the case of a foreign company Part 5.7 is not so draconian.

The Court found that the foreign company could challenge the winding up order, although it had not sought to set aside the demand and the failure to do so need not be explained. The basis on which the winding up order was challenged included refuting that the debt alleged was in fact owed and proving solvency. In *Cato* the plaintiff was faced with a submission that no debt was due and owing on the grounds that the contract was formed in India (and largely performed in India) and was subject to the laws of India and by virtue of the limitation periods in India, the debt was statute barred. This submission was accepted. Further, the Court found that the defendant was in fact solvent. For these reasons the Court refused to make the winding up order sought.

The decision in *Cato Brand Partners* is relevant to foreign companies having an Australian registered office and otherwise trading in Australia. The preferable course of action is to challenge a statutory demand in the 21 day period set down in the legislation. However, the ramifications of the demand may not necessarily be understood by local staff of the foreign company or, as in the case above, the dealings between the parties took place off-shore some years prior and had no real connection to Australia (other than that the plaintiff was located in Australia). Usefully, the Supreme Court has clarified that while a foreign company can be wound up in Australia, it has a discretion to refuse to make such an order.

The potential ramifications of a winding up order being made in Australia will depend on the extent to which the foreign company's Australian registered office is linked in to the head office, for example through financial arrangements, or whether or not the foreign company has assets in the jurisdiction.