

STATUTORY DEMANDS: PERMANENT INCREASE TO THE STATUTORY MINIMUM

From 1 July 2021, the statutory minimum – the threshold amount for a creditor to issue a statutory demand to a company – has doubled, increasing to \$4,000.

WHAT IS A STATUTORY DEMAND?

A statutory demand is a notice issued pursuant section 459E of the *Corporations Act 2001* (Cth) (**Act**), which enables a creditor to demand payment of a debt or debts (which total figure must at least equal the *statutory minimum*) that is/are due and payable and owed by a debtor company to the creditor. A statutory demand must be in the prescribed form and served on the debtor company as permitted under the Act and/or otherwise permitted at law.

If the debtor company fails to (1) pay the demanded amount, (2) reach an agreement with the creditor about the debt to the creditor's satisfaction, or (3) apply to a Court to have the statutory demand set aside (for example, on the grounds that there is a genuine dispute about the demanded amount) within the *statutory period* after being served with the statutory demand, the debtor company will be presumed to be insolvent and the creditor can make an application to a Court for the debtor company to be wound up in insolvency and a liquidator to be appointed to the debtor company.

INCREASE TO THE STATUTORY MINIMUM

Pursuant to amendments to regulation 5.4.01AAA of the *Corporations Regulations 2021* (Cth) that came into force on 1 July 2021,¹ the *statutory minimum* has been increased from \$2,000 to \$4,000. This increased *statutory minimum* applies to statutory demands served on a company pursuant to section 459E of the Act on or after 1 July 2021.

The effect of the increase to the *statutory minimum* is that any statutory demand served on a company must relate to a debt (being either a single debt or the total of 2 or more debts owed to the creditor by the debtor company) of at least \$4,000. Statutory demands will not be able to be issued for any lesser amount.

Consequent changes have also been made to the relevant prescribed form, so care should be taken when drafting statutory demands.

These amendments do not affect:

1. the *statutory period* of 21 days; (being the length of time a debtor company has, from service of a statutory demand, to pay, compromise or apply to set aside a statutory demand); or
2. the temporary increase to the *statutory minimum* and the *statutory period* for companies *eligible for temporary restructuring relief* under section 458E of the Act (increased to \$20,000 and 6 months, respectively), which will remain in place until 31 July 2021 (meaning that during July 2021, there will be two different *statutory minimums* and *statutory periods*).

¹ Pursuant to the *Corporations Amendment (Statutory Minimum) Regulations 2021* (Cth), which were registered on 28 May 2021.

WHY?

The rationale for increasing the *statutory minimum* for statutory demands is to address the impact of inflation, given that the existing threshold of \$2,000 was set in 1992 (and \$4,000 approximates the present-day equivalent of that figure)² and to help in preventing viable companies suffering from short-term financial difficulties being wound up because of small debts.³

Critics of these amendments have opined that the existing regime is sufficient (with the \$2,000 threshold on par with those in similar jurisdictions, such as the United Kingdom and New Zealand) and noted that, amongst other things, an increase to the *statutory minimum* may only serve to allow unviable (i.e. insolvent) companies to continue to trade for longer, by excluding creditors owed smaller amounts from taking action to wind up those companies, and to increase the cost of providing credit and/or the willingness to provide credit.⁴

It will be interesting to see whether the increase to the *statutory minimum* does indeed have an impact on the number of winding up applications being brought on the grounds of a debtor company failing to comply with a statutory demand, and therefore being presumed to be insolvent, or the availability of credit.

This Alert is intended as general information only. It does not purport to be comprehensive advice or legal advice. Readers must seek professional advice before acting in relation to these matters.

CONTACT DETAILS

If you would like assistance with issuing or responding to a statutory demand, or otherwise recovering a debt owed to you, please contact:



Lisa Calabrese, Partner
lisa.calabrese@finlaysons.com.au
+61 8 8235 7479



Andrew D'Alessandro, Special Counsel
andrew.dalessandro@finlaysons.com.au
+61 8 8235 7529



Stephanie Campbell, Senior Associate
stephanie.campbell@finlaysons.com.au
+61 8 8235 7423

² Explanatory Statement, *Corporations Amendment (Statutory Minimum) Regulations 2021* (Cth).

³ The Hon Josh Frydenberg MP, Treasurer (Cth), and the Hon Michael Sukkar MP, Assistant Treasurer, Minister for Housing, Minister for Homelessness, Social and Community Housing (Cth), 'Further insolvency reforms to support business dynamism' (Joint Media Release, 3 May 2021).

⁴ The Australian Restructuring Insolvency and Turnaround Association, Submission to the Treasury's Consultation Paper *Increasing the Statutory Demand Threshold* dated 15 February 2021 (26 February 2021); The Australian Institute of Credit Management, Submission to the Treasury's Consultation Paper *Increasing the Statutory Demand Threshold* dated 15 February 2021 (5 March 2021).