

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing**

#### *Corporations Act 2001*

#### *Corporations Amendment (Statutory Minimum) Regulations 2021*

The *Corporations Act 2001* (the Act) provides that the regulations may prescribe a statutory minimum threshold for a statutory demand.

Section 1364 the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Corporations Amendment (Statutory Minimum) Regulations 2021* (the Regulations) permanently increase the dollar amount at which a creditor can issue a statutory demand to a company that owes the creditor money. This amount, known as the 'statutory minimum', has been increased from \$2,000 to \$4,000, to account for the impact of inflation. The statutory minimum for companies eligible for temporary restructuring relief under section 458E of the Act is unchanged.

A creditor makes a statutory demand when they issue a formal, written request under section 459E of the Act requiring a debtor company to pay a debt. Where a company cannot pay the statutory demand it becomes proof of the company's inability to pay its debts. A company's failure to respond to a demand within the 21 day statutory period is a common way for a company to enter liquidation.

A statutory demand must be for debts totalling at least the statutory minimum. The statutory minimum is defined in the Act to be \$2,000, unless another figure is prescribed. On 1 January 2021 amendments to the *Corporations Regulations 2001* commenced that prescribed a figure of \$20,000 for companies that are eligible for temporary restructuring relief. This was in response to the economic impact of COVID-19. This threshold only applies for the period that a company is eligible, as outlined in section 458E of the Act. The provisions that prescribe the temporary \$20,000 threshold end on 31 July 2021.

The Government undertook public consultation on increasing the statutory minimum from 15 February to 5 March 2021. The Government also asked stakeholders for their views on when any increase to the threshold should commence.

The Regulations prescribe a figure of \$4,000 as the statutory minimum. The Regulations commence on 1 July 2021, and apply in relation to statutory demands served on or after 1 July 2021.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. Details of the Regulations are set out in Attachment A.

LGFC approval has been obtained.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for this proposal as it is no more than a minor impact.

A statement of Compatibility with Human Rights is at [Attachment B](#).

**Details of the Corporations Amendment (Statutory Minimum) Regulations 2021**

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Corporations Amendment (Statutory Minimum) Regulations 2021* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commences on the later of: the day after the instrument is registered on the Federal Register of Legislation; and 1 July 2021.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1

This item amends the heading of section 5.4.01AAA to reflect the amendments made to the rest of the section.

Item 2

This item prescribes the statutory minimum threshold as \$4,000.

Item 3

This item preserves the intent of the previous subsection 5.4.01AAA(3), that the temporary statutory minimum threshold of \$20,000 for companies eligible for temporary restructuring relief ends on 31 July 2021.

The previous subsection 5.4.01AAA(3) repealed the whole section on 31 July 2021. This is no longer appropriate as the section is being used to prescribe a permanent statutory minimum threshold as well as a temporary threshold. Item 3 amends subsection 5.4.01AAA(3) to instead provide that paragraphs (1)(a) and (2)(a) do not apply to statutory demands served on or after 1 August 2021.

The effect of this is that during July 2021 there will be two different threshold amounts, but that from 1 August 2021 the statutory minimum for everyone is \$4,000.

#### Item 4

This item amends the second note of the form that a statutory demand is issued in, under paragraph 459(2)(e) of the Act. This note, in Schedule 2 of the *Corporations Regulations 2001*, is amended to say that the statutory minimum is \$4,000.

#### Item 5

This item provides that the permanent statutory minimum threshold of \$4,000 applies in relation to statutory demands served on or after 1 July 2021.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Corporations Amendment (Statutory Minimum) Regulations 2021***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

This Legislative Instrument lifts the statutory minimum threshold from \$2,000 to \$4,000. This change will apply in relation to statutory demands issued on or after 1 July 2021. A company's failure to pay a statutory demand above this threshold can be used as proof of a company's inability to pay its debts, and therefore as a way to enter insolvency.

#### **Human rights implications**

On balance, this Legislative Instrument positively engages the right to justice.

Where a company cannot pay a statutory demand it becomes proof of the company's inability to pay its debts. The failure to pay a statutory demand creates a rebuttable statutory presumption of insolvency. Section 588G of the *Corporations Act 2001* provides a positive duty on the directors of a company not to trade while insolvent, and attaches civil and criminal penalties for breaches. With the previous statutory minimum of \$2,000 set in 1992 and not adjusted for inflation, it could be argued that it has been getting easier to reverse the right of persons to be treated as innocent until proven guilty. This amendment could therefore be seen as rectifying the decline of the right to justice.

A statutory demand may also unnecessarily push a company into a court-ordered liquidation, where that company has long term viability and has a chance at a successful restructure. Because the previous threshold had not been adjusted to account for the impact of inflation, it could be argued that a company's right to a fair hearing has been shrinking. Again, this amendment could be seen as rectifying the gradual decline of the right to justice.

However, this amendment could also be seen as negatively impacting creditors' rights to a fair hearing. Increasing the minimum threshold at which creditors can issue a statutory demand will reduce the ability of some creditors to take action against debtor companies. This view must be balanced against the positions above, that it has been getting easier for these creditors over time as the value of money changes. The increase to the statutory minimum is in line with the change in inflation, and returns the threshold to a level equivalent to the threshold set in 1992.

## **Conclusion**

This Legislative Instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.