

# Increasing the statutory demand threshold TMA Australia Submissions

4 March 2021

## General Comments

The Turnaround Management Association Australia (**TMAA**) welcomes the opportunity to comment on the Government's consultation as to whether to permanently raise the minimum threshold at which creditors can issue and serve a statutory demand on a company.

As is well-known, a statutory demand is a document being a formal demand, served on a debtor company pursuant to Pt 5.4 (and, specifically s 459E) of the *Corporations Act 2001* (Cth) (**Act**). The purpose of the service by a creditor on a company of the statutory demand is to facilitate proof of a company's inability to pay its debts by creating a rebuttable statutory presumption of insolvency in the event that a company fails to comply with the demand that has been properly served. In practice, where a debtor company so fails to respond, the affected creditor will then rely upon that presumption of insolvency to apply to the court for the debtor company to be wound up in insolvency. This is a very common way for a company to enter liquidation.

Most relevantly for the present purposes, a statutory demand can be issued on a company for a debt that is due and payable where the demand is in respect of a debt not less than the prescribed amount which is currently \$2,000.00. At present, a debtor company is required to pay the debt claimed or secure or compound for it to the reasonable satisfaction of the creditor within 21 days of service of the demand.

On 25 March 2020, in response to the ongoing COVID-19 pandemic and the economic impact caused, the prescribed amount in respect of which a statutory demand could be issued, was temporarily increased to \$20,000.00 and the timeframe by which a debtor company could respond was increased from 21 days to six months. In short, the intention underlying these changes was to ameliorate the risks that such actions might push into formal insolvency businesses that were otherwise viable. These temporary changes expired on 31 December 2020, after which the small business insolvency reforms commenced.

As part of these reforms, consultation is now being undertaken as to the appropriateness of permanently raising the minimum threshold at which creditors can issue a statutory demand. Other than the temporary increase for COVID-19, this monetary threshold has not, since its introduction in 1992, been increased (through indexation or otherwise).

No.	Question	Response
1.	<i>Should the threshold at which a statutory demand can be issued on a company be increased?</i>	<p>Whilst it is a balancing act, in terms of debtor/creditor protection it is notable that the statutory minimum threshold has decreased in real terms where the prescribed amount has not been increased over the years to keep up with inflation.</p> <p>This, together with the commercial costs of issuing and defending a statutory demand in addition to possible costs associated with any application to contest the statutory demand in court if disputed by the debtor recipient company, retaining the statutory prescribed amount to</p>

		<p>the minimum amount of \$2,000.00 makes little sense commercially. Therefore, a higher threshold figure is practical, given these costs associated with running statutory demand processes (including, applications to set aside a demand).</p> <p>We set out below the following reasons as to why the TMAA is of the view that there should be an increase in the statutory prescribed amount:</p> <ul style="list-style-type: none"> <li>(a) the threshold has not changed in real terms, other than temporarily during the COVID-19 pandemic, for a considerable period of time (such that, in real terms, the threshold should not be at least around \$3,900.00);</li> <li>(b) a threshold of \$10,000.00 still provides access to the statutory demand process as a means of seeing relatively small debts paid, including as part of debt negotiations, while avoiding the use of the process and attendant business costs and risks, in attempts to recover relatively nominal debts;</li> <li>(c) at the statutory prescribed amount of \$2000.00 a company with a short term cash problem should not be exposed to the added expense of defending a statutory demand (particularly if frivolous) and the consequences of a potential acceleration event with its financier lenders; and</li> <li>(d) the threshold of \$2,000.00 is no longer 'fit for purpose'.</li> </ul>
2.	<p><i>Threshold is increased, to what amount it should be increased and why?</i></p>	<p>The TMAA is of the view that it should be increased to \$10,000.00 for the reasons set out above.</p> <p><b>There should not be a different threshold for a statutory demand issued in relation to a judgment</b></p> <p>As noted above, sometimes a statutory demand may be issued as a means of enforcing a small claims judgment. For this reason, and also because the existence of a judgment debt means that there can be no genuine dispute in relation to the debt, it has been suggested by some that there should be a different statutory prescribed amount for a statutory demand issued where a creditor has obtained a judgment debt.</p> <p>In TMAA's submission, the mandating of different minimum statutory thresholds in either context is not desirable. This is principally because to do so would give rise to uncertainty and confusion, thereby increasing the overall costs of the regime. It may be preferable for a</p>

		<p>judgment creditor to utilise the more traditional forms of enforcement of a judgment debt such as a writ of execution or a garnishee notice.</p> <p><b>Alignment with thresholds under small business liquidation processes and security of payment regimes is not desirable</b></p> <p>Following the preceding, it should also be noted that other possible changes include alignment of the statutory prescribed amount with other such statutory prescribed amounts existing under the regime regulating liquidation of small businesses, or even under security of payments legislation.</p> <p>Ultimately, TMAA submits that alignment to any such thresholds is not desirable. This is for at least the following two reasons:</p> <ul style="list-style-type: none"> <li>(a) first, to do so would be productive of ambiguity and confusion; and</li> <li>(b) second, the rationales underpinning those various aspects of the small business insolvency regime, and also security of payments legislation, are quite different to those rationales underlying statutory demands.</li> </ul> <p><b>Alignment with the threshold for personal bankruptcy is not necessarily desirable</b></p> <p>As noted by Treasury, until 2010, there was alignment between the statutory prescribed amount for issuing a corporate statutory demand and the threshold for initiating bankruptcy proceedings against an individual. However, in 2010, the threshold for the latter process was increased to \$5,000.00 and later, as of 1 January 2021, to \$10,000.00.</p> <p>It is to be noted that, as part of the Government's temporary COVID-19 pandemic measures, the thresholds for both processes were temporarily brought back into alignment (at \$20,000.00).</p> <p>TMAA accepts the desirability in having both thresholds set at the same monetary value, noting that consistency makes for a more readily understood regime. This concern is particularly acute for sole traders and owners of small businesses.</p> <p>However, while recognising these concerns, ultimately, it must be recognised that companies are not individuals. The consequences of applying to wind up a company are very different to the personal consequences for an individual becoming bankrupt.</p> <p>This is so even recognising that, particularly in the context of small business, owners may have given personal guarantees secured by personal assets. Again, it is to be emphasised that enforcement of such personal guarantees is quite different to bankruptcy.</p> <p>For these reasons, it is submitted that alignment to the statutory prescribed amount for the issue of a personal bankruptcy notice is a neutral consideration.</p>
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3.	<i>If the threshold is increased, when should this change come into effect?</i>	<p>Finally, if there is to be an increase to the statutory prescribed amount, any such change should be effective from 1 July 2021.</p> <p>In this regard, simplicity is of principal concern, noting that dates that do not align with financial years, calendar years, or some other event of general significance, tend to be more confusing and should be avoided. Likewise, it is obviously undesirable that any change to the threshold have retrospective effect.</p>
4.	<i>What will be the impacts of increasing the threshold</i>	<p>While recognising that increasing the statutory prescribed amount will reduce the ability of some creditors to take action against a debtor company through the issuing of a statutory demand, it must be recognised that commercial and practical constraints do, in many cases, already operate to make the issuing of a demand at, or near, the present \$2,000 impractical and uncommercial. For this reason, it is submitted that, in cases of this kind, increasing the statutory prescribed amount will not, in practice, have a considerable negative impact, such that this is not a strong factor militating against those other reasons identified above and throughout.</p> <p>Likewise, it seems unlikely that increasing the statutory prescribed amount will have the widespread consequence that creditors may decide to manage risks of non-payment by dealing with a would-be debtor company on less favourable terms (such as higher interest rates, more limited payments terms, and/or cash on delivery). Indeed, again noting those already existing practical concerns mentioned above, it is likely that, even at the current statutory prescribed amount of \$2,000.00, commercial and practical considerations mean that such business practices are commonly used to ameliorate risks of this kind as and when identified.</p> <p>In this connection, however, it should be noted that some small business may, from time to time, be owed small sums (&lt; \$2,000.00) from a significant number of debtors, such that overall the inability to realise those debts may present significant solvency concerns for the</p>

		<p>entity. The TMAA accepts this concern, but again we note that, ultimately, a balance must be struck and a threshold figure decided upon.</p> <p>As to suggestions that increasing the monetary statutory prescribed amount will create a perception that small claims judgments are 'worthless' or cannot be enforced, it must be recalled that there do exist alternative mechanisms by which a judgment creditor may enforce a judgment. In this connection, it may be argued by some observers and stakeholders that using a statutory demand for this purpose is, at least arguably, an abuse of process.</p> <p>Finally, as to suggestions that the \$2000.00 statutory prescribed amount remains appropriate on the basis that if a company is unable even to pay \$2,000.00 then this indicates significant problems for that company as a going concern, at least two points are noted. First, there may be other reasons why the company has not, or cannot, pay, other than medium-term to long-term solvency. Second, even if this is so, the current, now very low, statutory prescribed amount undermines the overall efficacy of the statutory demand regime.</p>
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