

# Government to introduce new 'safe harbour' exemption to director's insolvency duties under the Companies Act 1993 and other temporary measures

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In our article, published earlier this week, we discussed whether it was time for New Zealand to follow Australia and the United Kingdom and allow directors some breathing space in relation to insolvent trading duties.

The government has today announced that it will introduce changes to the Companies Act 1993 ('**Act**') to help companies facing insolvency due to the COVID-19 pandemic. The temporary measures include:

- Giving directors of companies facing significant liquidity problems because of COVID-19 a 'safe harbour' from insolvency duties under sections 135 and 136 of the Act;
- Enabling businesses affected by COVID-19 to place existing debts into 'hibernation' until they are able to start trading normally again;
- Allowing the use of electronic signatures where necessary due to COVID-19 restrictions;
- Giving the Registrar of Companies the power to temporarily extend statutory deadlines imposed on companies, incorporated societies, charitable trusts and other entities; and
- Giving temporary relief for entities that are unable to comply with requirements in their constitutions or rules because of COVID-19.

The government proposes to make some of these changes retrospective. The proposed move to place debts into hibernation will require the agreement of 50% of a company's creditors. The Minister of Finance, Grant Robertson, said that "going into a business debt hibernation will give businesses the space to talk to their creditors about prioritising paying some debts, and deferring others for six months."

Mr Robertson said that the measures "will support the government's work to cushion the economic impact for New Zealand and to support businesses and protect jobs and incomes."

## Our comments

The government's announcement is a positive step to help struggling businesses and concerned directors. The relief offered is not, of course, a 'free pass' for directors – they still need to act in good faith and in the best interests of the company.

The Business Debt Hibernation regime will be unique in New Zealand law, although it is likely to share some features with creditors' compromises and voluntary administration, one of which is a moratorium on enforcement action. The regime will provide welcome breathing room for many businesses, but may also trigger cash-flow troubles for others.

The proposed use of electronic signatures, the ability for the Registrar of Companies to temporarily extend

compliance deadlines, and relief for entities that cannot comply with their constitution or rules because of COVID-19, are all sensible measures. Discretion and flexibility are needed in relation to many legal requirements and rules during these unprecedented times.

Parliament will need to pass legislation to enact the proposed changes and we look forward to a swift passage of the legislation when it is introduced.

If you are concerned about your obligations as a director, please get in touch with the authors of this article, who can advise you on your options.

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