

Covid-19: Changes to Companies Act to support businesses

The Government announced on 3 April 2020 that it will be introducing temporary changes to the Companies Act 1993 in an effort to support businesses facing insolvency as a result of COVID-19.

While the detail of the proposed legislation is not yet available, the temporary changes announced include:

- 1. Directors' Duties Relief.** Directors of companies facing significant liquidity problems because of COVID-19 will be provided a 'safe harbour' to the directors' duties contained in sections 135 (Reckless trading) and 136 (Duty in relation to obligations) of the Companies Act. A safe harbour is a provision in legislation that affords protection from liability or penalty under specified circumstances or if certain conditions are met.

Under sections 135 and 136 of the Companies Act, a director of a company:

- (a) must not agree to the business of the company, or cause or allow the business of the company, to be carried on in a manner likely to create substantial risk of serious loss to the company's creditors; and,
- (b) must not agree to the company incurring an obligation unless the director believes at the time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

The newly created safe harbour provides that decisions by a director to keep trading, as well as any decisions to take on new obligations, over the next six months, will not result in a breach of sections 135 and 136 of the Companies Act 1993 if:

- in the good faith opinion of the directors, the company is facing or is likely to face significant liquidity problems in the next 6 months as a result of the impact of the COVID-19 pandemic on them or their creditors; and
- the company was able to pay its debts as they fell due on 31 December 2019; and
- the directors consider in good faith that it is more likely than not that the company will be able to pay its debts as they fall due within 18 months (for example, because trading conditions are likely to improve or they are likely to be able reach an accommodation with their creditors).

The Government will ask Parliament to agree that the safe harbour be backdated to today's date.

2. Business Debt Hibernation

Existing debts will be able to be placed into hibernation on agreement of at least 50% (by number and value) of their creditors until they are able to start trading normally again.

For a business to be placed in Business Debt Hibernation, directors of a company must first assess whether they meet a newly introduced threshold test. If the threshold test is met, then directors may give notice to creditors that the company be placed into Business Debt Hibernation. There will be a 1 month moratorium on enforcement of debts from the date of notification of the proposal to vote on it, and a further six month moratorium if the proposal is passed.

Business Debt Hibernation would be binding on all creditors other than the entity's employees and would be subject to any conditions agreed with creditors. If the creditors reject the proposal, the directors still have the range of existing options available including trading on, entering voluntary administration and appointing a liquidator.

Business Debt Hibernation will be available to all forms of entity with legal personality (not just companies) and entities that do not have legal personality (i.e. trusts and partnerships).

3. Additional Changes to support business

- Allowing for the use of electronic signatures where necessary due to COVID-19 restrictions, even if their constitution or rules do not allow them to do so.
- Extending deadlines in some corporate governance legislation i.e. for holding AGMs and filing annual returns; and relaxing deadlines for Registrars to carry out certain functions, such as processing applications to reserve company names.
- Giving temporary relief for entities (including incorporated societies, charitable trusts, unincorporated associations and other entities) that are unable to comply with obligations in their constitutions or rules because of the impacts of COVID-19 are absolved from doing so until such a time when it is reasonably able to perform it.

For example, we have been fielding many inquiries regarding whether charities or incorporated societies can postpone their AGM and so the Government's announcement in this area has been a welcome one.

Our general advice to directors and companies

While the safe harbour may give directors and businesses more confidence to keep trading in these extraordinary times rather than prematurely close, directors need to be wary that the Companies Act legislation continues in force and existing duties remain unchanged and must be complied with, including:

- Directors' duty to act in good faith towards the company;
- Conduct must be in the best interests of the company;
- Punishing those who dishonestly incur debts (s380 of the Companies Act)

Directors should be especially cautious of pursuing relief under these changes if the directors realistically think that the company has passed the point of eventual recovery i.e. directors are simply delaying the inevitable to the disadvantage of creditors. Ultimately, any solution will need to balance the interests of both creditors and directors, so proper recording of all key Board decisions and the grounds for them is important.

Businesses are also encouraged to talk to their creditors and banks, as well as access the Government Wage Subsidy scheme. The Business Finance Guarantee Scheme can also offer loans of up to \$500,000 over three years.

For further information and advice, please contact one of our specialists from our **Commercial Law – Business Team**:

Matt Makgill matt.makgill@lewislawyers.co.nz	021 354 103
Lisa Ware lisa.ware@lewislawyers.co.nz	021 803 848
Mayuan Si Mayuan.si@lewislawyers.co.nz	027 660 0660
Lucy Young lucy.young@lewislawyers.co.nz	021 404 695
Donna Lee donna.lee@lewislawyers.co.nz	07 857 0004
Caroline Gregory caroline.gregory@lewislawyers.co.nz	07 823 1768