

Changes to Companies Act 1993 in response to Covid-19



PwC commentary, 4 April 2020

In response to the Covid-19 crisis the Government yesterday announced changes to the Companies Act 1993 (“the Act”) to allow company directors a “safe harbour” from potential adverse claims under sections 135 and 136 of the Act, the introduction of a Business Debt Hibernation regime to allow directors to manage any creditors which arise as a result of the crisis and several other related changes.

PwC supports the thrust of these changes as it is essential in the period of unprecedented uncertainty that directors of otherwise viable companies have the freedom and protection to make the difficult decisions. It is vital that we support good businesses at this time and moving into the future as they will be essential to New Zealand’s regrowth once we are through this restrictive period.

Safe Harbour

For the next six months directors who continue to trade their companies, which includes taking on new obligations, will have a “safe harbour” from potential claims under sections 135 (“Reckless Trading”) and 136 (“Duty in Relation to Obligations”) of the Act provided

- in their opinion, acting in good faith, the company is likely to face significant liquidity problems in the next six months as a result of Covid-19;
- the company was able to pay its debts as they fell due at 31 December 2019; and
- in their opinion, acting in good faith, it is more likely than not that the company will be able to pay its debts as they fall due within 18 months. This may be as a result of improved trading conditions or their genuine belief that they will be able to reach an accommodation with their creditors.

Business Debt Hibernation

The proposed regime is intended to:

- encourage directors to actively speak to their creditors to resolve any debts;
- allow directors to remain in control of their companies;
- provide certainty to ongoing suppliers that payments they receive will not be subject to later challenge;
- be quick, simple and flexible, so that directors can commence the process themselves.

Features of the proposed regime include:

- the provision of standard documentation by the Companies Office to assist in making a compromise proposal;
- a moratorium on the enforcement of debts once a proposal is notified to creditors for up to seven months;
- creditors having a month to vote on the proposal and it will bind all creditors if 50% in number and value support it;
- if creditors do not support the proposal then directors will need to determine what the appropriate next steps for the company are;
- creditors who continue to trade with the company will be protected from having payments for those new supplies overturned if the company is subsequently placed into liquidation, unless those transactions occurred in bad faith;
- the regime will also be available to trusts and partnerships;
- the regime will not be available to licensed insurers, registered banks and non-bank deposit takers, and sole traders.

Other changes:

- reducing the period of vulnerability for voidable transactions from two years to six months;
- deferring the introduction of licensing of insolvency practitioners for up to 12 months;
- allowing the use of electronic signatures, where previously original signatures were required;
- giving Registrars the power to loosen the time frames around certain corporate governance matters. Eg. The holding of AGMS and the filing of annual returns;
- giving entities freedom to temporarily not comply with obligations in their constitutions or rules if Covid-19 prevents them doing so until they are reasonably able to comply;
- allowing entities to use electronic forms of communication, including holding of meetings, even if their rules prohibit them from doing so.

Legislation is still to be drafted to reflect the above changes and the timing of implementation is uncertain at present. In our view, there will be some work to do to refine what is proposed and, as with all these things, the devil will be in the detail. However, we are pleased the Government has listened to the concern expressed by many businesses and is responding quickly.

For more information, please contact:

John Fisk
Partner, Auckland
+64 21 492 052

David Bridgman
Partner, Auckland
+64 21 760 524

Malcolm Hollis
Partner, Canterbury
+64 21 590 422

Lara Bennett
Director, Auckland
+64 21 521 974

Marcus McMillian
Director, Wellington
+64 21 511 6608

Richard Nacey
Director, Wellington
+64 21 765 789