MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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COVERSHEET

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Information redacted **YES / ~~NO~~** *[select one]*

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Some information has been withheld as it is under active consideration.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet COVID-19 Committee

Urgent insolvency and corporate law changes in response to COVID-19

Proposals

1 This paper recommends changes to insolvency and other corporate governance legislation settings that will support other government policies and programmes in response to the COVID-19 epidemic, such as the multi-billion dollar package in support of business and jobs. The proposals fall into three main categories:

1.1 Temporary changes to insolvency law and directors' duties, which are aimed at increasing the prospects for normally profitable businesses to survive until business conditions start returning to normal.

1.2 Temporarily extending deadlines imposed on companies, incorporated societies, charitable trusts and other entities under legislation and entities' constitutions, for example in relation to holding annual general meetings. These changes would apply retrospectively to 21 March 2020, which is the date that New Zealand moved to COVID-19 Alert Level 2.

1.3 An amendment to the Contract and Commercial Law Act 2017 that will better facilitate the use of electronic signatures.

2 Some of the detail will need to be developed during further consultation with stakeholders and while the legislation is being drafted. We are seeking approval for decisions on these matters to be delegated to the Minister of Finance and the Minister of Commerce and Consumer Affairs.

3 The proposals will also be accompanied by clear and comprehensive guidance material when they are announced.

Insolvency law and directors' duties

4 As a result of the impacts of COVID-19, otherwise profitable and viable companies are facing a real risk of being liquidated in the coming weeks or months because of serious disruption to their businesses. The main issues with current insolvency law settings arising from the disruption are:

4.1 The absence of a simple business survival regime that provides for entities to effectively be placed in hibernation.

4.2 Widespread concerns about companies being voluntarily liquidated prematurely due to directors being personally liable for breaches of two duties under the Companies Act 1993:

4.2.1 Section 135 – Reckless trading: A director must not agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors

4.2.2 Section 136 – A director must not allow the business incurring an obligation unless the director believes on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

5 An environment where directors are too scared to make decisions for fear of repercussions may exacerbate an already precarious economic environment and further delay the much needed circulation of money through the economy. I am proposing the following package of temporary legislative changes to address these and related issues:

5.1 To enact a temporary COVID-19 Business Standstill regime (CBS) which:

5.1.1 encourages early engagement between directors and creditors to come to a plan that a majority of creditors (by number and value) can support;

5.1.2 enables entities to effectively be placed in hibernation until they are able to start trading normally again;

5.1.3 involves a moratorium on the enforcement of existing debts; and

5.1.4 disapplies the clawback provisions under the voidable transactions regime to any new transactions entered into by the company to encourage businesses to keep transacting with it.

5.2 To add safe harbours to the ss 135 and 136 duties.

5.3 To relax the voidable transactions regime (which allows liquidators to claw back payments made to creditors before the commencement of a liquidation) by reducing the period of vulnerability from 2 years to 6 months.

6 I am also proposing a change to the Insolvency Practitioners Act 2019 and the Insolvency Practitioners Regulation (Amendments) Act 2019 that would provide scope for the commencement of insolvency practitioner licensing to be deferred beyond the current start date of 17 June 2020.

7 These proposals are discussed below.

Recommendation #1 – A temporary COVID-19 Business Standstill (CBS) regime

8 I am recommending the enactment of a temporary CBS regime which would provide for businesses to be placed in hibernation. It would:

8.1 encourage directors to talk to their creditors with a view to putting together a simple proposal for putting the business into hibernation;

8.2 give the creditors a month from the date of notification of the proposal to vote on it, with the proposal going ahead if 50% (by number and value) agree;

8.3 provide a one month moratorium on the enforcement of debts from the date the proposal is notified, and a further six month moratorium if the proposal is passed.

9 The key benefits of this proposal is that it:

9.1 allows for the directors to retain control of the company, rather than passing control to an insolvency practitioner;

9.2 provides certainty to new creditors that they won't have to repay any money they receive, so as to encourage businesses to continue transacting with businesses in CBS;

9.3 be simple and flexible so that it can be enacted quickly, and businesses can readily apply it to their circumstances without having to obtain legal advice.

10 The Companies Office will place simple and comprehensive information on the Companies Office website. This will include a fill-in-the-box form that entities will be able to complete in order to make a standstill proposal to their creditors.

11 The proposal, if agreed to, would be binding on all creditors other than the entity's employees. The moratorium on the enforcement of debts would mean that, while creditors are deciding whether or not to allow a business to enter CBS they will be prevented from racing to the High Court to take enforcement action against the company while the outcome of the vote is uncertain. If the proposal is rejected, the directors would still have the range of existing options available including trading on, entering voluntary administration and appointing a liquidator.

12 The CBS would be a hybrid of two existing business turnaround regimes in the Companies Act, with some modifications:

12.1 voluntary administration, which suspends creditors' rights for a time, but requires control to be passed to an insolvency practitioner and is not simple to access;

12.2 the compromise regime, which is more simple and allows the directors to retain control, but does not suspend creditors rights.

13 While a business is in CBS it would be able to continue to trade, subject to any restrictions agreed with its creditors.

14 In order to encourage businesses to continue to transact with a company that has entered CBS, any further payments, or dispositions of property, made by the company to third party creditors would be exempt from the voidable transactions regime. This exemption will not extend to related parties. This means anyone continuing to trade with the company will not have to worry about a liquidator seeking to unwind transactions if the company is later placed into liquidation. This exemption would be subject to a condition that the transaction was entered into in good faith by both parties, on arm's length terms and without the intent to deprive the existing creditors of the company.

15 With the exceptions referred to in the next paragraph, the CBS would 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).

Entities that the CBS will not apply to

16 I am proposing that the CBS will not apply to:

16.1 sole traders, because there is no practical means for including them. Sole traders who become insolvent are subject to the Insolvency Act 2006 (which covers personal insolvency) because there is no separation between the trader's business finances and their personal finances.

16.2 licensed insurers, registered banks and non-bank deposit takers. These classes of entity are prudentially regulated by the Reserve Bank of New Zealand. There are risks that allowing those entities to be within the scope of the CBS would be incompatible with prudential regulation settings and inconsistent with regulatory

powers that the Reserve Bank might choose to exercise, with consequential financial stability risks.

17 Some entities or businesses that are regulated under other legislation may also need to be excluded. WITHHELD - UNDER ACTIVE CONSIDERATION I am seeking approval for the Minister of Finance and Minister of Commerce and Consumer Affairs to make decisions on further possible exclusions.

Recommendation #2 – adding a safe harbour in relation to insolvency-related duties

18 I am proposing the addition of a safe harbour to provide directors with greater certainty about compliance with the two insolvency-related directors' duties when considering whether or not a company should take on new obligations or keep trading.

19 This safe harbour should be enacted for a six month period with the ability of that period to be extended once only by Order in Council, to allow for the uncertain length of economic disruption caused by COVID-19.This will deem their decisions to keep on trading for the next six months, as well as any decisions they make to take on any new obligations over the next six months, to be reasonable if:

19.1 in the good faith opinion of the directors the company is facing or is likely to face significant liquidity problems in the next six months as a result of the impact of the COVID-19 pandemic on them, their creditors or their debtors;

19.2 the company was able to pay its debts as they fell due on 31 December 2019; and

19.3 the directors, in good faith, consider 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 to reach an accommodation with their creditors).

20 This safe harbour will similarly not apply to licensed insurers, registered banks and non-bank deposit takers on the basis that those classes of entity are prudentially regulated by the Reserve Bank of New Zealand.

Recommendation #3 – changes to the voidable transactions regime

21 Last year Cabinet made decisions on a number of insolvency law-related matters [CAB-19-MIN-0491.01 refers]. These reforms were to be included in an Insolvency Law Reform Bill. WITHHELD - UNDER ACTIVE CONSIDERATION The intention had been to release an exposure draft of the Bill in August 2020.

22 One of the more significant changes relates to the voidable transactions regime, which allows a liquidator to claw back payments made to creditors prior to the commencement of the liquidation, in certain circumstances. Among other things, Cabinet agreed to reduce the period of vulnerability in relation to voidable transactions from two years before the liquidation commenced to six months where the debtor company and the creditor are unrelated parties.

23 We are recommending that this change be made via the legislation proposed in this paper. It would provide potentially significant benefits, given the large number of liquidations that are likely to result due to the COVID-19 epidemic.

Recommendation #4 – provide scope for insolvency practitioner licensing to be delayed

24 The Insolvency Practitioners Regulation Act 2019 (IPR Act) and the Insolvency Practitioners Regulation (Amendments) Act 2019 are scheduled to come into force on 17 June 2020. Neither Act provides scope for changing that date. Although 17 June remains achievable, unpredictability associated with COVID-19 means that implementation may have to be deferred. I consider that it would be prudent to provide scope for the commencement date to be delayed for up to 12 months.

25 The licensing regime under the IPR Act is reliant on there being one or more accredited bodies in place before 17 June 2020. If an accredited body is unable to be appointed before that date insolvency practitioners will be unable to be appointed as liquidators, receivers, or administrators until such a body is appointed and they successfully apply to be licensed. This will mean that no new processes would be able to be commenced. This includes secured creditors not being able to enforce their rights by appointing a receiver. While an accredited body could be appointed after that date, there could be no retrospective application of that accreditation.

Background on the purpose of the IPR Act and its implementation

26 The purpose of the IPR Act is to introduce a coregulatory insolvency practitioner licensing regime, with the Registrar of Companies being responsible for independent oversight and professional bodies for frontline regulation. Before licensing can come into force, the Registrar of Companies will need to accredit at least one professional body to carry out frontline regulation functions.

27 Chartered Accountants Australia and New Zealand (**CAANZ**), supported by the Recovery, Insolvency and Turnaround Association of New Zealand (**RITANZ**), is intending to apply. So is CPA Australia. All three have indicated that they are working hard to meet the current timeline and are committed to the underlying policies and principles. They have noted the likely upturn in insolvency-related activity, and the importance of a professional, well-run insolvency profession in which the public can have trust and confidence.

28 Companies Office staff are also continuing work to implement the necessary technical, financial, legal and other considerations necessary to accredit the professional bodies and operationalise the IPR Act. Nevertheless, there is a risk that the timeframes will not be able to be met if, for example, key people were to become unavailable due to illness or family circumstances.

Recommendation #5 – Extending deadlines

Statutory deadlines

29 There is a need to exempt a range of entities from deadlines in corporate governance legislation or in their own constitutions or rules. In some cases the deadlines cannot be met (e.g. because compliance would contravene the COVID-19 lockdown rules). In other cases greater flexibility should be allowed because people have much more important things to worry about.

30 These obligations appear in the Companies Act 1993, Limited Partnerships Act 2007, Incorporated Societies Act 1908, Charitable Trusts Act 1957 and a number of other Acts that provide for the incorporation and/or regulation of small numbers of entities (e.g. the Building Societies Act 1965). The obligations relate to such matters as:

30.1 deadlines for holding annual general meetings (AGMs);

30.2 deadlines in relation to filing annual returns and audited financial statements;

30.3 requirements to appoint auditors; and

30.4 deadlines for the Companies Office to perform certain statutory functions, such as processing company name reservation applications.

31 These issues have not arisen under some other legislation, such as the Financial Markets Conduct Act 2013 (FMC Act) and the Charities Act 2005, because they include class exemption-making powers. The Financial Markets Authority and DIA Charities Services have already used their powers under these Acts to respond to COVID-19.

32 I am proposing that Registrars under various corporate governance statutes be provided with an exemption making power modelled on the FMC Act provisions. This will provide Registrars with the flexibility to make the exemptions as necessary and vary them as circumstances change.

Obligations under constitutions

33 Some entities, particularly incorporated societies and charitable trusts, are having similar compliance issues under their constitutions or rules. For example, some societies are unable to meet deadlines for holding AGMs within constitutional deadlines because their constitutions do not provide for them to be held electronically.

34 We are therefore recommending the inclusion of a power that will permit entities to override their constitutions or rules. We do not see a role for MBIE registry staff in this regard because it is up to individual entities to manage their own affairs. There would also be moral hazard risks if the Registrar was required to exercise such powers. I am recommending, therefore, the inclusion of a provision to the effect that an entity is absolved from a requirement to perform an obligation by a date set under its constitution or rules if it cannot perform the obligation by that date because of the impacts of COVID-19. The entity would be:

34.1 absolved from performing that obligation until such time as it is reasonably able to perform it; or

34.2 permitted to hold meetings and communicate electronically even if their constitutions or rules do not provide for it.

Obligations on MBIE registry staff

35 Various enactments impose obligations on Registrars to perform certain functions within a specified deadline. For example, the Registrar of Companies has a limited period to respond to applications for reserving a company name. This and other requirements are impractical at present.

36 I am therefore recommending that the Registrars be relieved from those requirements. Officials have not yet finalised a list. I am seeking approval for the Minister of Finance and Minister of Commerce and Consumer Affairs to approve the list.

Recommendation #6: Flexibility with temporary deadlines

37 Many of the proposals in this paper are intended to last for a fixed six month period. This time limit is based on assumptions around the current scale of disruption lasting for a relatively short amount of time. However, no one knows whether this assumption is correct, and deadlines might have to be extended. I am proposing that a power be included in the Bill that would provide for one or more of the deadlines to be extended by Order in Council. This

power would need to be subject to one or more criteria to ensure that the extension was being implemented for sound reasons.

38 It is likely that the 28 day rule would need to be waived in relation to any such Order.

Recommendation #7: Electronic signatures

39 The Contract and Commercial Law Act 2017 states that a legal requirement for a signature is met by an electronic signature subject to certain conditions. However, those provisions do not apply to powers of attorney.

40 I understand from officials that there is a concern among some lawyers that this is preventing businesses from entering into security agreements with their banks because those agreements routinely contain powers of attorney. This is a barrier to achieving desirable outcomes in the current circumstances. I am therefore recommending that the electronic transaction provisions in the Contract and Commercial Law Act 2017 temporarily be able to be applied to the entry into security agreements containing powers of attorney.

41 The existing protections in that Act relating to the reliability of electronic signatures will continue to apply. This will guard against the potential abuse of this change.

Recommendation #8: Retrospective application

42 We are recommending that the changes recommended in relation to directors' duties and deadlines will have retrospective application. The changes need to be backdated to:

42.1 the date that the government announces this set of decisions in relation to directors' duties. Retrospectivity is an essential part of providing certainty and a degree of comfort to businesses and individuals.

42.2 21 March 2020, being the date that the COVID-19 Stage 2 Alert was announced. Some entities have not been able to meet statutory and constitutional deadlines since that date.

Developments in Australia

43 Several countries have made or signalled insolvency law-related legislative changes in response to COVID-19, including Australia, which enacted the Coronavirus Economic Response Package Omnibus Act 2020 (CERPO Act) on 24 March 2020. **Appendix 1** outlines the main changes to Australian Insolvency and Corporations legislation that are contained within the CERPO Act.

44 My safe harbour (recommendation #2 above) and deadline extension (recommendation #6) proposals above are conceptually similar to two of the changes made in Australia but aim to achieve the outcomes in different ways, reflecting differences in our statutory settings.

Financial Implications

45 There are financial implications in relation to extending deadlines (recommendation #6) because entities are required to pay fees and levies when lodging annual returns and financial statements. Those fees and levies are used for a range of purposes, including funding statutory functions carried out by the Companies Office and contributing to non-departmental funding provided to the Financial Markets Authority and External Reporting Board.

46 This revenue will no longer be collected while those lodging applications are able to defer their filings. In addition, it is not simply a matter of the collection of those fees and levies

being delayed. Many entities will have gone out of business in the period that filing is delayed. This can be expected to reduce the amount of revenue collected to contribute to the funding of these statutory functions. The memorandum account managed by the Companies Office is currently in surplus and could offset a degree of revenue reduction.

47 The Inland Revenue Department is also a significant creditor of many businesses. The CBS proposal could result in payments which would otherwise be made to the Inland Revenue Department being delayed. That said, Inland Revenue supports the CBS proposal, which fits within their administrative approach in dealing with customers who cannot meet to tax obligations as they fall due because of COVID-19.

Legislative Implications

48 I have been advised that none of the proposed changes fit with the criteria for inclusion in an Order in Council under the Epidemic Preparedness Act 2006. I am, therefore, recommending separate legislation.

49 At this stage it appears that two bills will be needed. Although I stated above that the intention is to make the CBS simple for businesses to use, the legislative drafting of the regime will not be as simple. Subject to any further advice I might receive on this matter, I am proposing:

49.1 One Bill, which will give effect to all of the policy recommendations contained in this paper other than the CBS. This Bill would be fast-tracked.

49.2 Another Bill giving effect to the CBS proposal.

Impact Analysis

50 The Treasury has determined that this is a direct Covid-19 response and has suspended the RIA requirements in accordance with CAB-20-MIN-0138. The Treasury has worked with MBIE to ensure relevant analysis is included in this paper.

51 I consider it is clear that the CIPA requirements do not apply to these proposals.

Population Implications

52 No significant population implications arise from the proposals in this paper.

Human Rights

53 We are proposing that the insolvency and deadline extension proposals be applied retrospectively for the reasons given earlier in this paper. The proposals in this paper are otherwise consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

54 MBIE has consulted on this paper with the Treasury, Reserve Bank of New Zealand, Inland Revenue Department, Department of Internal Affairs and Crown Law.

55 The Reserve Bank notes that where an otherwise viable business is facing temporary liquidity problems, as a result of COVID-19, they would expect their bank and other creditors to consider options to make credit available before CBS became necessary. The most likely approach, and the one that the Reserve Bank would encourage banks and businesses to follow, would be to make use of the Business Finance Guarantee Scheme, extending a

(government-guaranteed) working capital loan to the firm to tide them over their liquidity issue.

56 MBIE has also consulted with the Institute of Directors, RITANZ, insolvency experts from two major law firms and one of the Big 4 accounting firms, a former High Court judge who is an expert in insolvency law, and two lawyers who are not-for-profit sector specialists.

Communications

57 An effective communications strategy is essential to making these reforms Communications MBIE, along with key trusted stakeholders, is working on a comprehensive communications and education package to accompany these changes. Announcement of the changes will be accompanied by strong messaging that:

57.1 The best outcome for the economy will be achieved by directors and creditors working together to achieve the best outcomes for individual companies and their suppliers and other creditors

57.2 Companies should continue to pay their debts where possible, and take advantage of the Government's business assistance package

57.3 Directors need to keep their other duties under the Companies Act at the forefront of their minds, including the duty to act in good faith and what they believe to be the best interests of the company

57.4 If there is no prospect of a company recovering from the current circumstances, it should appoint a liquidator sooner rather than later to avoid the amount of debt ballooning.

57.5 MBIE is preparing pro-forma documents that will step, in easy accessible terms, directors through what they need to do to access CBS. This will include short-form documentation that directors can send to creditors. Through its Companies Office and Business.govt.nz websites, MBIE will provide advice and guidance to both directors and creditors. The Institute of Directors is also preparing guidance and resources for businesses.

Proactive Release

58 It is unclear when this paper will be proactively released.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

Insolvency law and directors' duties

1 Agree to make the following changes to the Companies Act 1993:

1.1 Add a temporary COVID-19 Business Standstill regime (CBS) that would allow companies and other entities to enter into agreements with their creditors in relation to existing debt.

1.2 Add a temporary safe harbour, deeming decisions to keep on trading, as well as any decisions made to take on any new obligations over the next 6 months, to be reasonable if:

1.2.1 in the good faith opinion of the directors the company is facing or is likely to face significant liquidity problems in the next six months as a result of the impact of the COVID-19 pandemic on them, their creditors or their debtors;

1.2.2 the company was able to pay its debts as they fell due on 31 December 2019; and

1.2.3 the directors, in good faith, consider 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 to reach an accommodation with their creditors).

2 Note that Cabinet agreed, among other insolvency-related reforms, to reduce the period of vulnerability under the voidable transactions regime from two years to six months where the debtor company and the creditor are unrelated parties [CAB-19-MIN-0491.01 refers]

3 Agree to implement the period of vulnerability change under the legislation proposed in this paper.

4 Agree to amend the Contract and Commercial Law Act 2017 so that the provisions in that Act relating to electronic signatures apply to security agreements containing powers of attorney.

Insolvency practitioner licensing

5 Note that the Insolvency Practitioners Regulation Act 2019 and the Insolvency Practitioners Regulation (Amendments) Act 2019 are scheduled to come into force on 17 June 2020.

6 Note that this start date is still being targeted, but it would be prudent to provide for the date to be extended should there be unexpected COVID-19-related delays.

7 Agree to include a provision that would allow for the commencement of the Insolvency Practitioners Regulation Act 2019 and the Insolvency Practitioners Regulation (Amendments) Act 2019 to be deferred for up to 12 months.

Extending statutory deadlines

8 Note that many statutory deadlines in corporate governance legislation, relating to such matters as holding annual general meetings and filing annual returns should be relaxed because they are unachievable or are relatively unimportant in the current circumstances.

9 Note that there are powers to make exemption notices in relation to statutory obligations under some Acts (e.g. the Financial Markets Conduct Act 2013 and the Charities Act 2005) but not others (e.g. the Companies Act 1993).

10 Agree to provide the relevant Registrars with a temporary power to issue exemption notices relating to compliance with statutory obligations under the Companies Act 1993, Limited Partnerships Act 2007, Incorporated Societies Act 1908, Charitable Trusts Act 1957 and various other statutes.

11 Agree to temporarily relax deadlines for Registrars under various Acts to carry out certain functions, such as processing applications to reserve company names.

12 Note that relief from certain obligations, such as lodging annual returns, will have adverse financial implications because there are associated fees and levies.

Non-compliance with entity constitutions

13 Note that some incorporated societies, charitable trusts, unincorporated associations and other entities are unable to comply with obligations in their constitutions or rules in relation to such matters as appointing auditors and holding annual general meetings.

14 Agree to include changes that would provide temporary relief:

14.1 to the effect that an entity which cannot perform an obligation under its constitution or rules because of the impacts of COVID-19 is absolved from the obligation until such a time when it is reasonably able to perform it;

14.2 permitting electronic communications, including electronic meetings, even if their constitutions or rules do not provide for it.

General recommendations

15 Note that retrospectively validating the safe harbour and deadline relief changes will:

15.1 reduce stress and increase certainty for financially distressed individuals and their families, and for directors, officers and employees of for-profit and not-for-profit entities;

15.2 promote business confidence.

16 Agree to provide for the retrospective validation of the changes in paragraphs 1.2, 10, 11 and 14 to the extent that is necessary or desirable.

17 Note that these proposals have been developed rapidly, with limited targeted consultation and may need to be varied to be fully effective.

18 Agree to authorise the Minister of Finance and Minister of Commerce and Consumer Affairs:

18.1 to modify or rescind the decisions in paragraphs 1, 10,11 and 14;

18.2 to make other changes that will support the intent of paragraphs 1 to 14.

19 Agree to include an Order in Council-making power to extend deadlines in relation to the temporary measures that are recommended above.

Legislative implications

20 Note that the recommended changes are urgent.

21 Note that none of the recommended changes fit with the criteria for making Orders in Council under the Epidemic Preparedness Act 2006.

22 Agree, subject to advice from Parliamentary Counsel Office, to implement the changes by way of:

22.1 One Bill giving effect to all of the required legislative changes other than the proposed COVID-19 Business Standstill regime (CBS).

22.2 A second Bill giving effect to the CBS.

Communications

23 Note that there will be a wide-ranging communications programme publicising the agreed changes, which will target the business community, the not-for-profit sector and professional advisers.

24 Note that MBIE will proactively release this paper, but it is not clear when that will be able to happen.

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs

Appendix 1: Insolvency and corporate law changes in Australia

Insolvent trading

1 Several countries have already made or signalled insolvency law-related legislative changes in response to COVID-19, including Australia, which enacted the Coronavirus Economic Response Omnibus Package Act 2020 (CERPO Act) on 24 March 2020. The CERPO Act includes an amendment to the *Corporations Act 2001* which provides a safe harbour in relation to a directors' and officers' duty to not trade while insolvent. It states that:

1.1 the duty does not apply for a six month period (or any longer period prescribed by regulations) if the debt is incurred in the ordinary course of the company's business;

1.2 the evidential burden lies on a person who wishes to rely on the safe harbour in a proceeding for, or relating to a contravention of the duty;

1.3 the safe harbour is taken to have never applied in relation to a person and a debt in the circumstances prescribed by regulations.

2 The Australian changes need to be seen in the context of their insolvency-related duty, which is much more strict than the two New Zealand creditor protection duties. Unlike in Australia, there is no specific duty on New Zealand directors to not allow a company to trade while insolvent. The duties in New Zealand are principles-based and provide scope for directors to exercise judgment.

3 I do not consider that the safe harbour change made in Australia fits with New Zealand's circumstances. The alternative safe harbour proposed earlier in this paper has been designed to fit with the New Zealand duties.

Other changes in Australia

4 The CERPO Act includes other temporary changes to insolvency law settings in response to COVID-19:

4.1 Providing the Treasurer with the temporary ability to set aside business compliance requirements imposed by the Corporations Act 2001 to deal with unforeseen events that arise as a result of the Coronavirus health crisis.

4.2 A temporary increase in the threshold at which creditors can issue a statutory demand on a company from $2,000 to $20,000, along with increasing the time for companies to respond to statutory demands they receive from 21 days to 6 months.

4.3 Making the same temporary changes to the dollar amounts and response time changes in relation to bankruptcy proceedings.

Comment on applicability to New Zealand

5 The exemption notice power proposed earlier in this paper is much the same as the Australian changes giving the Treasurer the ability to set aside compliance requirements. The main difference in New Zealand is that Registrars appointed under the State Sector Act 1988 would exercise the powers, not a Minister of the Crown.

6 I have not proposed the equivalent of the two Australian changes relating to statutory demands because they do not fit with New Zealand's circumstances. $20,000 is a very substantial amount for many small New Zealand businesses. If the $1,000 amount in New Zealand law was to be changed, then I would not recommend that it be increased to any more than $5,000.

7 Increasing the minimum amount also raises questions about how to transition back down from the higher minimum amount to the current minimum, which is $1,000 in New Zealand. It would be unusual for a company that has been trading while insolvent to be immediately solvent again once the temporary changes are lifted.

8 In addition, extending the current 15 working day limit in New Zealand (which can be extended by the High Court, on application) to 6 months would effectively place the statutory demand system in hiatus because there would be no point in issuing them.