



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
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Consultation Document

Consultation on proposed exemptions to the Companies Act 1993 under the COVID-19 Response (Requirements For Entities – Modifications and Exemptions) Act 2020

December 2020

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How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the proposed exemptions discussed in this document by 5pm on **Friday 8 January 2021**.

Your submission may respond to any or all of these proposed exemptions. Where possible, please include evidence to support your views.

Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the e-mail accompanying your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to fra@companies.govt.nz.

Please direct any questions that you have in relation to the submissions process to fra@companies.govt.nz.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to the Registrar of Companies on exemptions to procedural and administrative requirements in the Companies Act. We may contact submitters directly if we require clarification of any matters in submissions.

Release of information

MBIE intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

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Introduction

The Ministry of Business, Innovation and Employment is consulting on behalf of the Registrar of Companies on proposed exemptions from the Companies Act 1993.

The proposal is the result of the Registrar believing that it is necessary and desirable to provide for exemptions where compliance with certain procedural and administrative matters in the Companies Act is and was:

- unduly onerous or burdensome because of the effects of COVID-19; or
- not reasonably capable or being complied with, or complied with fully, because of the effects of COVID-19.

The Registrar has the power to grant these proposed exemptions under section 26 of the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act 2020 (the COVID Act).

Section 28 of the COVID Act requires public consultation on any proposed exemptions.

Exemption Powers

Section 26 of the COVID Act allows the responsible Registrar to exempt classes of persons from compliance with any provisions of a specified Act on any terms and conditions they see fit. Specified enactments, as defined in section 5 of the COVID Act, includes the Companies Act. The responsible Registrar means the Registrar defined in the Companies Act, i.e. the Registrar of Companies (Registrar).¹

The Registrar was given these powers as a direct consequence of COVID-19 and its effects, which continue to this day. The Registrar believes that the proposed exemptions are needed to not only protect companies and overseas companies from further effects of COVID-19, but also to protect companies and overseas companies who have breached certain procedural and administrative matters in the Companies Act as a result of the effects of COVID-19.

Section 31 of the COVID Act allows for exemptions to apply retrospectively to acts and omissions that occurred on or after 21 March 2020. This recognises that New Zealand first moved to a COVID-19 alert level on 21 March 2020, and subsequently entered lockdown on 23 March 2020.

¹ COVID Act, section 6(5).

The Registrar believes that in order to effectively address the effects of COVID-19, the proposed exemptions should apply retrospectively to acts and omissions that occurred on or after 21 March 2020. This means that, providing certain conditions are met, the proposed exemptions can apply to breaches of a number of Companies Act requirements that occurred before the proposed exemptions come into force. If the proposed exemptions are granted, they will be granted by issuing a notice.

The COVID Act will be repealed automatically on 31 March 2021. This means that any exemptions will cease to have effect after 31 March 2021. This deadline cannot be extended unless Parliament amends the COVID Act. Therefore, we are not consulting on the appropriateness of the 31 March 2021 deadline.

Consultation

The Registrar is required to consult on the proposed exemptions with either the public generally or with the persons or representatives of persons that the Registrar considers appropriate given the proposed effect of the exemptions.² The Registrar invites comments to be made on the proposed exemptions.

² COVID Act, section 28(1)(a).

Proposal 1: Extending time frame requirements in relation to holding annual meetings

Companies Act provision relating to the proposed exemption

Section 120(1) of the Companies Act requires the board of directors of companies to call an annual meeting to be held:

- not later than 6 months after the balance date of the company; and
- not later than 15 months after the previous annual meeting.

Section 120(2) requires that a company's first annual meeting must be held not later than 18 months after its registration.

Proposed exemption

The proposed exemption provides a 6 month extension of time to meet the requirements in section 120 of the Companies Act.

The board of directors of companies would have to call, or have called, an annual meeting to be held:

- not later than 12 months after the balance date of the company; and
- not later than 21 months after the previous annual meeting.

For a company's first annual meeting, the exemption allows the annual meeting to be held not later than 24 months after its registration.

Before a company can rely on the exemption, the majority of its directors must believe, on reasonable grounds, that:

- compliance with the annual meeting time frame requirements in the Companies Act is unduly onerous or burdensome because of the effects of COVID-19; or
- the annual meeting time frame requirements in the Companies Act are not reasonably capable of being complied with, or complied with fully, because of the effects of COVID-19.

The exemption would expire on 31 March 2021.

Effect of exemption

- Extend the time limit for companies to hold their annual meetings
- Ensure that companies who held annual meetings late, but within the period of time allowed under these proposed exemptions, will not face proceedings seeking consequential relief under section 172 for their failure to hold the meeting within the prescribed period
- Allow for an extension if another COVID-19 lockdown or other related effects impacts the ability for companies to hold annual meetings.

Why the proposed exemption is necessary or desirable, and appropriate

Companies have struggled to hold their annual meetings due to the effects of COVID-19, especially due to the lockdowns that occurred during 2020. The proposed exemption allows an additional 6 months to meet these requirements, which the Registrar feels will appropriately address the effects of COVID-19. Therefore, the Registrar believes that it is necessary, desirable and appropriate to extend the time frame for companies to hold their annual meeting in order to ensure that companies face no repercussions for failing to hold their annual meeting within the required time frame.

If companies want to rely on the exemption, they will need to meet certain proposed conditions that are set out below.

Proposal 2: Extending time frame requirements for financial reporting duties

Companies Act provisions relating to the proposed exemption

The Companies Act has a number of financial reporting requirements. The proposed exemptions will apply to the following provisions:

- Section 201 – the preparation of financial statements; and
- Section 202 – the preparation of group financial statements; and
- Section 207E – the delivery of financial statements and auditor’s report for registration.

A proposed exemption will also apply to section 204(1) and (2) (the preparation of financial statements by overseas companies for their large New Zealand business) if an overseas company is exempted from sections 201 or 202.

The company or overseas company must comply with these provisions within five months of its balance date.

Proposed exemption

The Registrar has proposed exemptions which allow companies or overseas companies to comply with the reporting requirements as soon as practicable after the five month period.

Before a company or overseas company can rely on the exemption, the majority of its directors must believe, on reasonable grounds, that:

- compliance with the financial reporting time frames in the Companies Act is unduly onerous or burdensome because of the effects of COVID-19; or
- the financial reporting time frames in the Companies Act are not reasonably capable of being complied with, or complied with fully, because of the effects of COVID-19.

The exemption would expire on 31 March 2021.

Effect of exemption

- Allow companies or overseas companies extra time to meet financial reporting requirements
- Remove sanctions for failing to meet financial reporting deadlines (including deadlines as early as 21 March 2020) as long as companies and overseas companies comply with the financial reporting requirements as soon as practicable after the 5 month deadline.

Why the proposed exemption is necessary or desirable, and appropriate

Companies and overseas companies have struggled to meet their reporting requirements due to the effects of COVID-19. Overseas companies in particular are still feeling the effects of COVID-19 and may struggle to meet these requirements due to the COVID-19 related effects they are currently facing. Companies in New Zealand will have struggled to meet these requirements during and after the various lockdowns and some companies will still be feeling the effects of COVID-19 on reporting requirements.

The Registrar believes the exemption should allow companies and overseas companies to comply with reporting requirements 'as soon as practicable' instead of providing a blanket time extension. The Registrar believes the fluid approach is desirable and appropriate due to

the unpredictable nature of the COVID-19 lockdowns and the various lockdown restriction that overseas companies have faced.

If companies or overseas companies want to rely on the exemption, they will need to meet certain proposed conditions that are set out below.

Proposal 3: Altering time frame requirements for annual reports

Companies Act provisions relating to the proposed exemption

Section 208 of the Companies Act requires companies to prepare an annual report on the affairs of the company within five months after the balance date of the company.

Section 209 of the Companies Act requires companies to send a copy of the annual report to shareholders not less than 20 working days before the date fixed for holding the annual meeting of shareholders.

Proposed exemption

The Registrar has proposed an exemption to section 208 to allow companies to prepare an annual report within 11 months after the balance date of the company.

The Registrar has also proposed an exemption to section 209 to allow companies to send a copy of the annual report to shareholders not less than 10 working days before the date fixed for the annual meeting.

Before a company can rely on the exemption the majority of the directors must believe, on reasonable grounds, that:

- compliance with the annual reporting time frames in the Companies Act is unduly onerous or burdensome because of the effects of COVID-19; or
- the annual reporting time frames in the Companies Act are not reasonably capable of being complied with, or complied with fully, because of the effects of COVID-19.

The exemption would expire on 31 March 2021.

Effect of exemption

- Allow companies a greater period of time to prepare annual reports

- Allow companies to send out a copy of the annual report at a date closer to the annual meeting
- Remove sanctions if companies fail, or have failed, to meet the annual reporting time frames in the Companies Act.

Why the proposed exemption is necessary or desirable, and appropriate

The Registrar believes that companies have faced significant hurdles to prepare annual reports due to the effects of COVID-19. This has caused a flow-on effect regarding the ability of companies to send a copy of the report to shareholders. The Registrar believes that to address these effects, which include but are not limited to lockdowns impacting the ability to obtain the information and the increased pressure on companies post lockdown, it is appropriate and necessary to alter the time frames.

The Registrar has fielded concerns from companies who felt that meeting the prescribed time frames in the Act was unduly onerous given the effects of COVID-19. The Registrar believes that it is necessary to alter the timeframes accordingly to ensure that companies are able to provide the information to shareholders but equally so that shareholders receive the information within a reasonable time frame in order to be fully informed at the annual meeting.

If companies want to rely on the exemption, they will need to meet certain proposed conditions that are set out below.

Proposal 4: Exemptions to various procedural and administrative matters in Part 15A of the Companies Act

Companies Act provisions relating to the proposed exemptions

Part 15A of the Companies Act prescribes general requirements for voluntary administration, including relating to the conduct of creditor meetings. The proposed exemptions relate to the following administrative and procedural matters in relation to these meetings:

- Section 239AK – meetings are to be conducted in person and postal votes are required to be cast by sending a marked voting paper (see Schedule 5, clause 7(4) of the Companies Act); and
- Sections 239AL, 239AO and 239AU – notices must be provided in writing (and there is no clear provision for electronic notices).

Proposed exemption

The Registrar proposes the following exemptions to these procedural and administrative requirements:

- Allow the administrator of a company to conduct meetings under section 239AK using audio, or audio and visual means; and
- Allow electronic votes to be counted as if they were postal votes under section 239AK (see Schedule 5, clause 7 of the Companies Act); and
- Allow for electronic notices to be used instead of written notices under section sections 239AL, 239AO and 239AU.

Before the administrator can rely on the exemptions, the administrator must believe, on reasonable grounds, that:

- compliance with the prescribed procedural or administrative requirements in the Companies Act is unduly onerous or burdensome because of the effects of COVID-19; or
- the prescribed procedural or administrative requirements in the Companies Act are not reasonably capable of being complied with, or complied with fully, because of the effects of COVID-19.

The exemption would expire on 31 March 2021.

Effect of exemptions

- Provide clarity by allowing meetings of creditors to be held by audio, or audio and visual means and allowing for electronic voting
- Ensure meetings and voting can happen during lockdowns
- Ensure a creditor's vote is counted if the creditor voted using electronic means
- Ensure that meetings held electronically will not breach certain procedural and administrative requirements, especially meetings held during previous lockdowns.

Why the proposed exemption is necessary or desirable, and appropriate

The Registrar believes that expressly allowing for electronic meetings and voting is necessary and desirable. The Companies Act does not clearly permit electronic meetings, voting and notices in Part 15A, and the Registrar believes that an express exemption is desirable to ensure that meetings held during the COVID-19 lockdown are specifically provided for.

The Registrar believes that this exemption is necessary and desirable to address the effects of COVID-19. Travel restrictions and social distancing made meeting in person impossible during the various lockdowns New Zealand has faced. The Registrar believes that it is necessary and appropriate for an exemption to ensure that meetings and votes cast during these lockdowns maintain their full effect, as well as potentially prepare for any future lockdowns.

The Registrar also believes it is necessary and appropriate to allow administrators to provide notices via electronic means. To fall under section 224 of the Contract and Commercial Law Act, which provides that written information can be sent via electronic means, the individuals receiving the information must consent to receiving the information via electronic means.

The Registrar believes it is desirable and appropriate to allow notices to be given in electronic form regardless of consent, to ensure all creditors receive the information. Due to the limited nature of the exemptions, the removal of the consent requirement is unlikely to affect a large number of individuals.

The Registrar believes that sending notices in writing is and was particularly difficult due to the effects of COVID-19, especially during the various lockdowns. Thus, the Registrar believes it is necessary and desirable to exempt the requirement to send notices in writing to ensure that all creditors are able to receive the required information.

The use of the exemption is also subject to the proposed conditions described below.

Proposed conditions to apply to all proposed exemptions

The Registrar considers that in order to use the exemption, the directors or administrators should have to meet certain conditions.

The first condition is that before companies or overseas companies or administrators can rely on the exemption, the majority of the directors or administrator must believe, on reasonable grounds, that:

- compliance with the relevant provision of the Companies Act is unduly onerous or burdensome because of the effects of COVID-19; or
- the relevant provision of the Companies Act is not reasonably capable of being complied with, or complied with fully, because of the effects of COVID-19.

The Registrar also proposes that the following conditions must be met:

- the company, overseas company, or administrator must prepare a notice, signed by the majority of directors (if applicable) or the administrator (if applicable) stating that they are relying on the exemption; and
- the notice must include the reasons why they believe they qualify for the exemption under the first condition (described above); and
- they must lodge the notice with the Registrar as soon as practicable after the directors or administrators decide to rely on an exemption; and
- that notice cannot be lodged after 31 March 2021.

These requirements will discourage misuse of the exemptions by those who failed to comply with Companies Act requirements but were not so affected by COVID-19 that it would be unduly onerous for them to comply, and they would be reasonably capable of complying.

For notices that are to apply to acts or omissions that occurred prior to the commencement of the proposed exemption notice, the time of deciding to rely on the exemption is when directors or administrators decided to rely on the exemption and not at the time of failing to meet the relevant requirement in the Companies Act.

The effect of these proposed conditions are:

- the Registrar is notified that companies, overseas companies or administrators are using the exemption and will not enforce the breaches of the relevant provision, to the extent that the breaches fall within the scope of the proposed exemptions; and
- companies, overseas companies and administrators will not be liable for breaches of the Companies Act to the extent that the breaches fall within the scope of the proposed exemptions.