



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Extending COVID-19 related corporate governance relief for businesses and other legal entities	Date to be published	31 May 2022

List of documents that have been proactively released

Date	Title	Author
31 March 2022	Extending COVID-19 related corporate governance relief for businesses and other legal entities	Office of the Minister of Commerce and Consumer Affairs
4 April 2022	CAB-22-MIN-0108.01 - Extending COVID-19 related Corporate Governance Relief for Businesses and other Legal Entities	Cabinet Office

Information redacted

NO

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In Confidence

Office of the Minister of Finance

Office of the Minister of Commerce and Consumer Affairs

Cabinet Legislation Committee

Extending COVID-19 related corporate governance relief for businesses and other legal entities

Proposal

- 1 This paper seeks authorisation for submission to the Executive Council of:
 - 1.1 the COVID-19 Response (Requirements For Entities - Modifications and Exemptions) (Extension) Order 2022;
 - 1.2 the Contract and Commercial Law (COVID-19 - Extension of Modification Relating to Powers of Attorney) Order 2022.

Relation to government priorities

- 2 This proposal – to extend COVID-19 corporate governance relief for six months – supports the Government’s COVID-19 response and complements the COVID-19 Protection Framework traffic light system.

Executive Summary

- 3 Temporary modifications to legislation are currently in place to help businesses and other entities continue to function effectively and meet their legal and compliance obligations while COVID-19 is in the community. These include permitting electronic communications, meetings and signatures and giving powers to certain Registrars, Ministers and Judges to grant exemptions and relief from corporate compliance obligations. The measures apply across a broad spectrum of organisations including businesses, Māori organisations and community groups.
- 4 With the provisions set to expire soon, the Minister of Finance and I, acting jointly, (the “**Joint Ministers**”) recommend that the provisions be extended for six months through Orders in Council to complement and support the COVID-19 Protection Framework.

Policy

Background

- 5 In response to the uncertainty and challenges arising from COVID-19, the Government put in place temporary modifications to legislation to help businesses and other entities continue to function effectively and meet their legal and compliance obligations. The measures can assist where it is difficult, impossible or undesirable for people to meet in person, or attend workplaces as they usually would. The relief

applies across a broad spectrum of organisations including businesses, post settlement governance entities and other Māori organisations, as well as local sports clubs and community groups.

- 6 The temporary measures comprise of:
 - 6.1 allowing people to communicate and meet electronically, even if an entity's constitution does not allow for this, and enabling entities to make temporary changes to their governance rules (Part 2 of the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020 (the “**Modifications and Exemptions Act**”));
 - 6.2 enabling Registrars, Ministers and the Chief Judge of the Māori Land Court to grant exemptions and relief from compliance obligations where appropriate (Part 3 of the Modifications and Exemptions Act);
 - 6.3 allowing people to use electronic signatures for certain commercial contracts, which normally require a handwritten signature (Sections 240A to 240E of the Contract and Commercial Law Act 2017 (the “**Contract and Commercial Law Act**”)).
- 7 The temporary legislation was introduced in 2020, then extended by Orders in Council, after which it expired. The relief was reinstated by the COVID-19 Response (Management Measures) Legislation Act 2021 for the 2021 COVID-19 outbreak for a six-month period [CAB-21-MIN-0353]. This came into effect on 3 November 2021, with the option to extend for up to a further six months by Orders in Council.
- 8 With the current relief due to expire at the beginning of May 2022, we have considered whether it should be extended and consulted with all the Ministers responsible for the Acts that the extension would have an impact on (as set out in **Annex 1**).

There are three options available

- 9 The following three options are available in respect of each element of the relief:
 - 9.1 extend the operation of the relief for the maximum six-month period (our preferred option);
 - 9.2 provide a limited extension of the relief for a shorter period;
 - 9.3 allow the amendments to expire.

The threshold test for an extension is met

- 10 To recommend extending the relief, the Joint Ministers need to be satisfied in respect of each element that:
 - 10.1 it is necessary or desirable to do so to address the effects of COVID-19;

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10.2 the period of the extension is no longer than is reasonably necessary to address the matters that gave rise to it.¹

11 The Joint Ministers have agreed that an extension is necessary or desirable to address the effects of COVID-19. In the current circumstances, with COVID-19 spreading in the community, our view is that it is desirable for all parts of the relief to be extended, for all entity types, for the maximum period of six months.

These measures complement and support the COVID-19 Protection Framework

12 With COVID-19 in the community causing widespread disruption in New Zealand, the underlying rationale for this temporary legislation remains very strong. While the COVID-19 Protection Framework traffic light system provides a level of certainty and stability, extending the operation of all the current relief for a further six months is desirable as a complementary measure.

13 We consider that the following matters on their own or in concert, may make it impossible or difficult for in person meetings to go ahead or for organisations to operate effectively over the coming months:

13.1 we are still seeing high levels of Omicron cases and it is uncertain how long this will impact the community;

13.2 restrictions like stay at home orders, closure of premises and restriction on movement are still possible;

13.3 some people, particularly those who are vulnerable, will be reticent and cautious about attending meetings in person, while COVID-19 is the community.

Other considerations support a six-month extension being appropriate at this time

14 In addition to the current COVID-19 landscape, we consider that the following considerations support extending the legislation for six months:

14.1 if the temporary legislation is not renewed and allowed to lapse, it could not be easily and quickly re-enacted as that would require a further Act of Parliament;

14.2 the risk of any harm resulting from this temporary legislation is low. Officials have advised that they are not aware of any issues arising from having these measures in place.

The other options are not desirable or practical

15 In circumstances where the pandemic is ongoing and the Omicron outbreak has momentum, we consider that the legislation should not be allowed to expire and an extension should not be limited in time to less than six months or in any other way.

¹ The test is set out at section 42B(6) of the Modifications and Exemptions Act and section 240C(3) of the Contract and Commercial Law Act.

- 16 If the legislation expires in May 2022, or is not renewed in respect of some of the provisions, there is a risk entities will not be able to carry on their business effectively. It may lead to entities being unable to comply with the law and their compliance obligations and may result in uncertainties around the validity of contracts and the outcome of votes.
- 17 We consider that a six-month extension from May 2022 appears to be commensurate with the current COVID-19 situation.

What happens when the legislation expires at the end of October 2022?

- 18 The provisions of both the Contract and Commercial Law Act and Modifications and Exemptions Act can only be extended for one six-month period by Orders in Council. However there may be a need for some, or all, of the current relief beyond that. We will need to consider extending this relief again via primary legislation. Officials from the Ministry of Business, Innovation and Employment and other agencies will monitor the COVID-19 situation from a corporate governance perspective and will provide further advice as appropriate.

Timing and 28-day rule

- 19 Subject to Cabinet's agreement, the Orders in Council will be submitted to the Executive Council for signature on 4 April 2022, notified in the Gazette on 6 April 2022, and come into effect:
- 19.1 for the Modifications and Exemptions Act, on 30 April 2022;
 - 19.2 for the Contract and Commercial Law Act, on 2 May 2022.
- 20 Even if these timeframes are met, it will be necessary to exempt both sets of regulations from compliance with the 28-day rule so that the Orders can come into force before the expiry of the current legislation. We are seeking a waiver from Cabinet on the basis that the Orders:
- 20.1 will have little or no effect on the public, or will confer only benefits on the public;
 - 20.2 are made in response to an emergency.

Compliance

- 21 The Orders in Council comply with the following:
- 21.1 the principles of the Treaty of Waitangi;
 - 21.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 21.3 the principles and guidelines set out in the Privacy Act 2020;
 - 21.4 relevant international standards and obligations;

21.5 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

Financial Implications

22 There are no financial implications for the recommendations in this paper.

Legislative Implications

23 Primary legislation is not required to implement the proposals in this paper.

Regulations Review Committee

24 There are no anticipated grounds for the Regulations Review Committee to draw the Orders in Council to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

25 Parliamentary Counsel has certified both Orders as being in order for submission to Executive Council provided that our joint recommendation to make each Order has been made in accordance with the requirements of the relevant empowering Act.

26 Our recommendations are made in accordance with the empowering Acts.

Impact Analysis

Regulatory Impact Statement

27 Treasury's Regulatory Impact Analysis team has determined that the proposal to extend COVID-19 temporary relief for legal entities for six months is exempt from the requirement to provide a Regulatory Impact Statement. This decision has been made on the grounds that it is intended to manage the direct actions taken to protect the public in response to a declared emergency event and intended to temporarily enable alternative methods of legislative compliance in situations where a declared emergency has made compliance with the existing legislative requirements impossible, impractical or unreasonably burdensome.

Climate Implications of Policy Assessment

28 A Climate Implications of Policy Assessment is not required for these proposals as they will have only minor, or negligible, direct impacts on emissions due to untaken travel.

Population Implications

29 These temporary provisions are important for Māori entities, some of which have stringent governance criteria, requirements for large hui and detailed procedures for changing their rules.

30 The proposals are also likely to be beneficial to people living in isolated rural communities who might otherwise have to travel great distances to attend meetings in

person or sign contracts. The same applies to those with disabilities and vulnerabilities that could limit the accessibility of conventional processes or certain locations. These benefits would apply under usual circumstances, but are even more important in the current pandemic context.

- 31 They do raise possible issues of digital exclusion if people are not able to access the technology to support the new measures or are not confident using it. The proposals do not prevent conventional approaches being used, so these will still be available for people who prefer to use them.

Consultation

Ministerial consultation

- 32 The Modifications and Exemptions Act requires that, before making a decision on an extension recommendation, the Joint Ministers must consult the Ministers responsible for the Acts the extension would concern.
- 33 In this regard, we have consulted the Minister for Crown-Māori Relations, the Minister for Māori Development, the Minister of Justice and the Minister of Oceans and Fisheries (the “**Affected Ministers**”). The Affected Ministers were all supportive of the proposals and our recommendation to extend corporate governance relief for six months.

Inter-departmental consultation

- 34 The following agencies have been consulted on this paper: Treasury, Ministry of Primary Industries, Ministry of Justice, the Office for Māori Crown Relations - Te Arawhiti and Te Puni Kōkiri (**TPK**). Department of the Prime Minister and Cabinet has also been made aware of the proposals.
- 35 All of the agencies consulted agree that it is necessary or desirable that these temporary provisions are extended for a further six months, owing to the ongoing impact of COVID-19 on entities.

Public consultation

- 36 Targeted consultation on the proposals in this paper was undertaken with relevant stakeholders to gauge their views on extending the relief. These stakeholders include individuals from a range of affected entities and industry groups, as well as legal experts.
- 37 We are advised that the tenor of the response has been strongly in favour of an extension, with stakeholders particularly citing the ongoing effects and uncertainties arising from COVID-19, the efficacy of this relief in alleviating some of the issues they face and the importance of having the option of using electronic means at this time. We have not been pointed to any downside in renewing the legislation.

Communications

- 38 If Cabinet agrees to the provisions being extended (or decide that they should lapse), websites where entities will seek information, such as the Companies Office and TPK's website, will be updated after the Cabinet minute is finalised.

Proactive Release

- 39 The Joint Ministers will proactively release this paper within 30 business days of decisions being confirmed by Cabinet, subject to any redactions as appropriate under the Official Information Act 1982.

Recommendations

The Minister of Finance and the Minister of Commerce and Consumer Affairs recommend that the Committee:

- 1 **note** that in November 2021, in response to the uncertainty and challenges arising from the 2021 COVID-19 outbreak, the Government reinstated temporary modifications to legislation to help businesses and other entities continue to function effectively and meet their legal and compliance obligations [CAB-21-MIN-0353];
- 2 **note** that these corporate governance relief provisions in the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020 (“**Modifications and Exemptions Act**”) and the Contract and Commercial Law Act 2017 (“**Contract and Commercial Law Act**”) are currently set to expire on 30 April and 2 May 2022 respectively;
- 3 **note** that this relief can be extended for up to six months by Orders in Council if the Minister of Finance and the Minister of Commerce and Consumer Affairs (the “**Joint Ministers**”) consider that it is necessary or desirable to do so and the extension period is reasonable for the matters they seek to address;
- 4 **note** that the Joint Ministers consider that the test for extending Parts 2 and 3 of the Modifications and Exemptions Act until the close of 30 October 2022 has been met and they recommend doing so;
- 5 **note** that the Joint Ministers consider the test for extending the modification in the Contract and Commercial Law Act until the close of 2 November 2022 has been met and they recommend doing so;
- 6 **note** that other Ministers whose portfolios are affected by the proposals - the Minister for Māori Crown Relations, the Minister for Māori Development, the Minister of Justice and the Minister of Oceans and Fisheries – have been consulted as required by the legislation and each is supportive of these proposals and our joint decisions;
- 7 **authorise** the submission to the Executive Council of Orders in Council for signature on 4 April 2022, to be notified in the Gazette on 6 April 2022 as follows:
 - 7.1 the COVID-19 Response (Requirements For Entities - Modifications and Exemptions) (Extension) Order 2022;

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- 7.2 the Contract and Commercial Law (COVID-19 - Extension of Modification Relating to Powers of Attorney) Order 2022.
- 8 **note** that, by authorising submission to the Executive Council of the two Orders in Council above, you are agreeing to give effect to the decisions of the Joint Ministers to extend the relief in Parts 2 and 3 of the Modifications and Exemptions Act and the modification in the Contract and Commercial Law Act for six months;
- 9 **note** that a waiver to the 28-day rule is required so that the Orders in Council can come into force before the expiry date of the current legislation;
- 10 **agree** to a waiver of the 28-day rule on the basis that the Orders in Council:
- 10.1 will have little or no effect on the public, or will confer only benefits on the public;
- 10.2 are made in response to an emergency.
- 11 **note** that the Orders in Council will come into effect:
- 11.1 for the Modifications and Exemptions Act, on 30 April 2022;
- 11.2 for the Contract and Commercial Law Act, on 2 May 2022.

Authorised for lodgement

Hon Grant Robertson
Minister of Finance

Hon Dr David Clark
Minister for Commerce and Consumer Affairs

Annex One: Relevant Acts of Parliament

Under the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020, relevant Registrars or Ministers may grant exemptions from compliance with statutory provisions in any of the following 12 Acts of Parliament:

Building Societies Act 1965
Charitable Trusts Act 1957
Companies Act 1993
Friendly Societies and Credit Unions Act 1982
Incorporated Societies Act 1908
Industrial and Provident Societies Act 1908
Limited Partnerships Act 2008
Māori Community Development Act 1962
Māori Fisheries Act 2004
Māori Trust Boards Act 1955
Partnership Law Act 2019
Te Ture Whenua Māori Act 1993