

COVID-19: Changes to the Companies Act 1993 and insolvency relief

The Government has announced that it will be introducing legislation to make changes to the Companies Act to help businesses facing insolvency due to COVID-19 to remain viable.

We are broadly supportive of these changes which are a pragmatic response to the crisis and follow similar steps taken in other countries.

The key changes are summarised below.

Directors' duties - safe harbour

Directors' are to be provided with a safe harbour from their solvency related duties under sections 135 (reckless trading) and 136 (incurring of obligations) of the Companies Act. This removes their potential personal liability for breach of these duties.

Directors' decisions to keep on trading, as well as decisions to take on new obligations, over the next 6 months will not result in a breach of duties if:

1. 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;
2. the company was able to pay its debts as they fell due on 31 December 2019; and
3. 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 to reach an accommodation with their creditors).

Business Debt Hibernation

A Business Debt Hibernation regime is to be introduced into the Companies Act. This regime is intended to:

- encourage directors to talk to their creditors with a view to putting together a simple proposal for putting the business into hibernation;
- allow for the directors to retain control of the company;
- provide certainty to new creditors that they won't have to repay any money they receive, so as to encourage businesses to continue transacting; and
- be simple and flexible so that it can be enacted quickly.

Key features of the proposal are that:

- directors can put a Business Debt Hibernation proposal to their creditors (once a threshold to be specified is met);
- creditors will have 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; and
- there will be 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.

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. While a business is in Business Debt Hibernation it would be able to continue to trade, subject to any restrictions agreed with creditors as a condition of entering into it.

In order to encourage businesses to continue to transact with a company that has entered Business Debt Hibernation, it is proposed that any further

COVID-19: Changes to the Companies Act 1993 and insolvency relief (Continued)

payments, or dispositions of property, made by the company to third party creditors (but not related parties) would be exempt from the voidable transactions regime. 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.

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). It will not, however, extend to licensed insurers, registered banks and non-bank deposit takers, and sole traders.

Further changes

In addition, the following changes have also been proposed:

- allowing the use of electronic signatures where necessary due to COVID-19 restrictions;
- giving the Registrar of Companies the power to temporarily extend deadlines imposed on companies, incorporated societies, charitable trusts and other entities; and
- giving temporary relief for entities that are unable to comply with requirements in their constitutions or rules because of COVID-19.

The Government will need to introduce legislation to give effect to these changes. We will update you on this process as it develops.

Want to know more?

If you have any questions about changes to the Companies Act 1993 and insolvency relief as a result of COVID-19, please contact our specialist [Insolvency Recovery](#) and [Corporate](#) Teams.