

NEW ZEALAND MERGERS & ACQUISITIONS COVID-19 SPECIAL EDITION



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NZX: FREE UP CAPITAL RAISING RULES

With the “state of emergency” and business freeze caused by COVID-19 the NZX has relaxed various Listing Rules until 31 October 2020 to make capital raising easier. The related rules cover:

- the share placement “cap” is lifted from 15% to 25% (LR 4.5.1);
- the limit per registered holder in a share purchase plan is increased from \$15,000 to \$50,000 (LR 4.3.1); and
- timing requirements for rights issues to existing shareholders are shortened.

TAKEOVERS PANEL EXEMPTION GRANTED

The Takeovers Panel has issued a temporary class exemption to facilitate Code companies raising capital via placements and pro-rata or non pro-rata allotments.

FINANCIAL MARKETS AUTHORITY (FMA) AND NZX REGULATION (NZX) EXTENDS DEADLINE

The FMA and the NZX have extended the filing deadlines for financial statements and annual reports by two months for entities and schemes with balance dates between 31 December 2019 and 31 July 2020. This comes as the FMA also determined to provide relief for affected restricted schemes which allows for an additional two months to provide confirmation notices to members. NZX also announced that equity and debt issuers will be granted up to an additional 30 days to prepare and release results announcements.

OVERSEAS INVESTMENT ACT (OIA)

Unlike Australia, there has been NO change to the Overseas Investment Rules (especially thresholds applying) as a result of COVID-19.

NZ COMPANIES ACT AND COVID-19: TEMPORARY RELIEF ANNOUNCED

Extraordinary times call for extraordinary measures. Recent proposed changes to the Companies Act 1993 (“Act”) are the latest example of the New Zealand Government adopting this mantra in efforts to protect businesses from the financial impact of COVID-19.

Current Director Duties

Directors of a New Zealand company are subject to certain duties concerning the company’s solvency. In particular, the Act provides that directors must not agree to:

- a company’s business being carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors (or to cause or allow the same); or
- a company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

These duties are owed by directors to the company. Where these duties are breached, directors can be ordered to repay money to the company with interest. This potentially leaves directors’ personal assets vulnerable - such exposure can encourage directors to prematurely wind up an insolvent company.

Extended Use of Electronic Signatures

Electronic signatures are widely used in New Zealand for commercial agreements and company secretarial matters e.g. board / shareholder resolutions. The Contract and Commercial Law Act 2017 (“CCLA”) prohibits use of electronic signatures for certain documents including Powers of Attorney. The CCLA is expected to be amended to allow electronic signatures to be used for security agreements containing Powers of Attorney.

Proposed Temporary Relief

On 3 April 2020, the Government announced proposed changes to the Act that offer directors greater protection from personal liability for insolvent companies. The proposed changes are intended to be temporary and include:

- A 'safe harbour' for directors: 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:
 - 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 the company or its creditors; and
 - the company was able to pay its debts as they fell due on 31 December 2019; and
 - 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 (e.g. because trading conditions are likely to improve or they are likely to be able to reach an accommodation with creditors).

New Debt Hibernation Choice

Business Debt Hibernation: Existing debts can be placed into hibernation until the company is able to trade normally again with directors retaining control of the company. Key features include:

- creditors will have a month from the date of notification of the company's proposal to vote on it, with the proposal going ahead if 50% (by number and value) agree. The proposal will then bind all creditors (other than employees);
- 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;
- changes to the voidable transactions regime to give comfort to third party creditors (but not creditors related to the company) who trade with the company in good faith that payments they receive will not be clawed back in any later liquidation; and
- the scheme will be available to all forms of entity with legal personality e.g. limited partnerships and entities that do not have legal personality e.g. trusts.

Powers for the Registrar of Companies to Extend Company Compliance Deadlines

Including deadlines for holding AGMs and filing annual returns and possibly also financial statement filing deadlines. The Companies Office has already announced that it will not take any enforcement action against companies for non-compliance with filing obligations where circumstances related to COVID-19 affect the companies' ability to meet deadlines.

Relief from Compliance with Certain Requirements in Company Constitutions

Little detail has been provided. It is likely that leniency will be given on requirements concerning electronic communications e.g. meetings by video conference, where constitutions do not already allow this.

Proposal Anticipated to be Retrospective

These measures are intended to support directors in efforts to maintain financially viable companies in the current environment. The Government announced it will ask Parliament to agree to retrospectively apply the changes, in particular the 'safe harbour' for directors, from 3 April 2020. Similar relief has already been introduced in Australia and the United Kingdom.

Ongoing Obligations to Apply

Despite the above relief, directors continue to owe duties to the company. Pursuant to the Act, directors must also act in good faith in what he or she believes to be in the company's best interest, directors must exercise powers for a proper purpose and directors must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances.

EMPLOYMENT ISSUES

For guidance from our employment team click [here](#).

FURTHER INFORMATION

An amendment bill including the proposed changes is yet to be introduced to Parliament.

If you have any queries on complying with director duties, or on the proposed changes, our Corporate Team at Quigg Partners would be pleased to assist you.

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