



PARLIAMENT OF THE COOK ISLANDS

COVID-19 (ECONOMIC RESPONSE) BILL 2020

EXPLANATORY NOTE

This explanatory note relates to the COVID-19 (Economic Response) Bill 2020 as presented to the Parliament of the Cook Islands. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and is intended to indicate its general effect.

General policy statement

Owing to the short timeframe available for developing the specific economic response measures addressed in this Bill, general public consultation has not been undertaken on the proposals in this Bill. However, targeted consultation on the design of the credit initiatives, and impact of the companies legislation and response, has been carried out with a small number of stakeholders.

The policy approach, which is given effect in the Bill, recognises the need to deal with an unprecedented economic situation, with an immediate and substantial negative impact on Cook Islands businesses and their employees, as a direct consequence of the international border closures brought about by the outbreak of COVID-19. The approach also acknowledges that the necessary Government action must be tempered with a legislative response that is temporary, proportionate, logically linked to the objective it seeks to achieve and is plainly in the interests of the Cook Island community.

The objective of the Bill is to assist otherwise profitable and viable businesses, affected by the outbreak of COVID-19, to avail themselves of the Government's credit initiatives, continue trading in the current business environment, and, thereby, preserve their economic value and save jobs.

Clause 1 Title
Provides that, once enacted, the Bill will be called the **COVID-19 (Economic Response) Act 2020**.

Clause 2 Commencement
Stipulates that, once enacted the Bill would commence the day after it is assented to by the Queen's representative. It also sets an expiration period on the Act of 5 years from commencement unless it is repealed sooner by Order in Executive Council or extended by Parliament.

Part 1 – Preliminary matters

Part 1 of the Bill sets out a number of preliminary matters.

Clause 3 Purpose of the Act

Specifies that the purpose of the Bill is to:

- relieve, subject to conditions, directors of stressed companies from liability for certain decisions taken during the outbreak of COVID-19; and
- provide, subject to conditions, a moratorium for a limited period on enforcement of debts owed by businesses; and
- protect persons dealing with companies from having transactions during the outbreak of COVID-19 unwound under voidable transaction provisions in the *Companies Act 2017* (the Companies Act); and
- to provide for loan, guarantee, and indemnity support by the Crown to businesses.

Clause 4 Interpretation

Sets out the definitions of certain terms used in the Bill. In particular, the Bill differentiates between the more specific company, which is a company registered or re-registered under the Companies Act and the more broadly defined entity, which can be a company, a partnership or any other body, whether incorporated or not. It also defines trader, which means an entity or person, including a sole trader, who carries on a business in the Cook Islands.

Clause 5 Protection period

Defines the period 1 March 2020 to 28 February 2021 as the protection period, which can be extended by the Minister for up to six months on two occasions. At the latest, the protection period can be extended to 28 February 2022.

Clause 6 Act binds the Crown

Stipulates that the Bill, once enacted, will bind the Crown.

Part 2 – Directors of stressed companies

Part 2 provides protection, subject to conditions, for directors of stressed companies from liability for certain decisions taken during the outbreak of COVID-19.

Clause 7 Decisions by directors of stressed company protected

Protects directors of stressed companies from liability under section 88 or section 89 of the Companies Act for decisions taken in relation to the company during the protection period. This protection does not extend to decisions made in bad faith or with the intention, or for the purpose, of defrauding or otherwise disadvantaging the creditors of the company.

Clause 8 What is stressed company

Specifies a range of conditions to be met in order for a company to be classified as a stressed company for the purposes of clause 7. In general terms, a stressed company is a company—

- that was trading solvent at 29 February 2020 but becomes trading insolvent during the protection period; and
- the board of which considers in good faith and on reasonable grounds that the trading insolvency is substantially the result of the effects of the outbreak of COVID-19 on 1 or more of matters listed.

Part 3 – Business debt hibernation

Part 3 provides, subject to conditions, a moratorium for a limited period on enforcement of debts owed by businesses. It also provides protection for persons dealing with companies from having transactions during the outbreak of COVID-19 unwound under voidable transaction provisions in the Companies Act.

*Subpart 1—General***Clause 9 Purpose of business debt hibernation**

Stipulates that the purpose of entering business debt hibernation (BDH) is to allow a trader (a business entity structured as a company, partnership, sole trader or any other body) to enjoy a moratorium on enforcement by its creditors.

Clause 10 Meaning of BDH notice, creditor, and excluded debt

Sets out a range of definitions of terms used in this Part, including what constitutes a creditor, which includes the Collector of Inland Revenue.

Clause 11 Debts that are excluded from BDH

Specifies debts that do not qualify for protection. This includes debts incurred after the BDH notice is filed and amounts deducted or withheld from an employee's salary or wages under tax or child support legislation and not paid to the Collector of Inland Revenue. It also provides for other debts to be excluded in regulations.

Clause 12 Requirements for entering BDH

Sets out a threefold test for a trader to enter BDH. First, it was able to pay its debts as of 29 February 2020. Second, the trader has taken the verification steps in clause 13, and third, the trader files a BDH notice within the protection period. Crucially, the trader enters BDH when the notice is filed.

- Clause 13 Trader verification steps**
Sets out a range of matters that must be certified in writing before entering BDH. If the trader is an entity, the board must resolve to enter BDH and certify in respect of a number of specified matters. A person who is a sole trader is responsible for the required certification. The matters to be certified include that the trader was solvent on 29 February 2020, is or is likely to be trading insolvent over the next 6 months and that the insolvency is substantially due to the effects of the outbreak of COVID-19.
- Clause 14 BDH notice**
Specifies that a BDH notice must be filed with the Registrar as required by section 37, and accompanied by a clause 13 board resolution and certification or sole trader certification, and the prescribed fee.
- Clause 15 Notice to creditors of entering BDH**
Requires a trader to send a copy of the BDH notice to the trader's creditors without delay after filing the notice.
- Clause 16 Initial protection**
Specifies that the initial protection period from creditor enforcement action is 3 months from the date the BDH notice is filed. It also specifies the range of matters concerning the trader's property (including land) that are subject to protection during this initial period. Importantly, this protection does not apply in relation to Court orders or where the trader gives written consent.
- Clause 17 Subsequent protection**
Provides for protection for an additional 6 months beyond the initial period where the trader has entered into a binding arrangement with its creditors. This subsequent protection does not apply to a secured creditor that has a charge on or over the whole, or substantially the whole, of the property of the trader.
- Subpart 2— Arrangement with creditors*
- Clause 18 Arrangement with creditors**
Sets out the procedure for a trader to give notice of a proposed arrangement to its creditors.
- Clause 19 Notice of proposed arrangement**
Specifies the matters that must be included by a trader in its notice of proposed arrangement to its creditors. A key requirement is that the notice must describe the proposed arrangement in sufficient detail to enable a creditor to form a reasoned judgment in relation to it. Another key requirement is that that notice must provide details relating to voting on the arrangement.

Clause 20 Approval of arrangement

Specifies that an arrangement is approved if a majority in number and value of the creditors who are entitled to vote, vote in favour of the arrangement. If approved, the board or the sole trader, as the case may be, is required to certify the result, file the certificate with the Registrar and send a copy of the certificate to each creditor.

Clause 21 Effect of approval of arrangement

Stipulates that an arrangement approved under clause 20 binds the trader and all its creditors to whom a notice of the proposed arrangement was sent under clause 18. It also continues the protection of the entity under clause 17 until the end of the subsequent protection period.

*Subpart 3—Voidable transactions provisions disapplied***Clause 22 Interpretation for this subpart**

Sets out the definitions of certain terms used in this subpart of the Bill.

Clause 23 Voidable transactions provisions disapplied

Stipulates that voidable transactions provisions in the Companies Act 2017 do not apply to a transaction given by a company that is in BDH if the requirements set out in clause 24 are met.

Clause 24 Requirements for disapplying voidable transactions provisions

Sets out the details of transactions that qualify for the disapplication of the voidable transactions provisions in the Companies Act 2017. A transaction qualifies if it is entered into by the company during the protection period under clause 5 or specifically authorised under an approved arrangement; and is entered into by all the parties in good faith and at arm's-length.

Part 4 – Business loan facilities and guarantees

Part 4 provides for the Financial Secretary, on behalf of the Crown, to enter into loan, guarantee or indemnity contracts to support businesses.

Clause 25 Interpretation for this Part

Sets out the definitions of certain terms used in this Part of the Bill. In particular:

- BCCF loan means a loan contract entered into by the Crown under the business continuity credit facility;
- BGLP guarantee means a guarantee given by the Crown to secure a BGLP loan;
- BGLP indemnity means an indemnity given by the Crown indemnifying a bank against losses arising from default under a BGLP loan;
- BGLP loan means a loan made under the business growth loan program.

Subpart 2—BCCF loans

- Clause 26 Financial Secretary may make BCCF loans**
Provides for the Financial Secretary to enter into a BCCF loan contract with a person, subject to establishing the identity of the loan applicant, the loan applicant meeting the BCCF eligibility criteria and the loan application being received between the date the loan terms are published and 30 September 2020. It also requires the loan contract to be on the terms and conditions as published.
- Clause 27 Financial secretary must publish BCCF criteria and loan terms**
Requires the Financial Secretary to publish details of the BCCF arrangements, eligibility criteria and loan terms and conditions on the Ministry of Finance and Economic Management website on or before 14 July 2020.
- Clause 28 Agent to administer facility**
Provides for the Financial Secretary to engage the Bank of the Cook Islands under an agency agreement to administer the credit facility.
- Clause 29 Minister must report to Parliament**
Requires the Minister of Finance to report to Parliament no later than 31 October 2020 on the number of concluded loan contracts, the total amount of loan money disbursed, and the total amount of loan money approved but not disbursed.
- Clause 30 Disclosure not required**
Stipulates that the Crown is not required to provide disclosure to an applicant for a BCCF loan despite any provision in an act or regulations to the contrary.
- Clause 31 Section 58 MFEM Act disappplied**
Disapplies section 58 of the MFEM Act in relation to the authority of the Financial Secretary to make a BCCF loan under this subpart of the Bill.

Subpart 3—BGLP guarantees and BGLP indemnities

- Clause 32 Financial Secretary may give BGLP guarantee or indemnity**
Provides for the Financial Secretary to give a BGLP guarantee or indemnity to a commercial bank carrying on business in the Cook Islands. This is subject to the guarantee or indemnity securing a BGLP loan by the bank, establishing the identity of the borrower, the borrower meeting the BGLP eligibility criteria and the funds borrowed under the loan being drawn down between the date the BGLP loan terms are published and 30 June 2021.
- Clause 33 Financial secretary must publish BGLF criteria and loan terms**
Requires the Financial Secretary to publish details of the BGLF arrangements, eligibility criteria and loan terms and conditions on the Ministry of Finance and Economic Management website on or before 31 July 2020.

- Clause 34 Minister must report to Parliament**
Requires the Minister of Finance to report to Parliament after 30 September 2020 and then quarterly to 30 June 2021 on BGLP guarantees and indemnities and the total amount of the Crown liability under them.
- Clause 35 Sections 59 and 60 MFEM Act disapplied**
Disapplies section 59 and 60 of the MFEM Act in relation to the authority of the Financial Secretary to give a BGLF guarantee or BGLF indemnity under this subpart of the Bill.

Part 5 – Miscellaneous

Part 5 deals with a number of miscellaneous matters, including the making of regulations.

- Clause 36 MFEM Act does not prevail**
Stipulates that, despite section 68 of the MFEM Act, a provision of that Act does not prevail over a provision of the Bill in the event of a conflict between them.
- Clause 37 Format for filing notice or document**
Requires that notices and documents must be filed using the format comprising the data field contained in the online registry maintained by the Registrar for that notice or document, or in accordance with regulations.
- Clause 38 Regulations**
Provides a broad power for the Queen’s Representative, by Order in Executive Council, to make regulations for the purposes of the Bill. The power includes prescribing fees, determining filing and notice arrangements and prescribing a kind of debt or claim for the purposes of clause 11.
- Clause 39 Transitional regulations**
Provides a power for the Queen’s Representative, by Order in Executive Council, to make regulations that provide transitional arrangements for businesses and other persons affected by the provisions in the Bill, to facilitate the implementation of any regulations, or for other matters necessary of for the orderly implementation of the Bill, once enacted.
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