

Departmental Disclosure Statement

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| COVID-19 Response (Further Management Measures) Legislation Bill |
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Department of the Prime Minister and Cabinet.

The agency certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

1 May 2020

Contents

Contents..... 2

Part One: General Policy Statement..... 3

Part Two: Background Material and Policy Information 6

Part Three: Testing of Legislative Content..... 8

Part Four: Significant Legislative Features 12

Appendix One: Further Information Relating to Part Four 17

Part One: General Policy Statement

This Bill is an omnibus Bill that amends more than 1 Act. The Bill introduces 2 tiers of amendments that will assist New Zealand to respond to the wide-ranging effects of COVID-19.

The first tier includes more significant changes that will enable businesses, local government and others to more effectively manage the immediate impacts of the response to COVID-19, and mitigate unnecessary and potentially longer-term impacts on society.

These amendments include -

- changes to insolvency and corporate law to increase the prospects of businesses surviving the COVID-19 response. These amendments include:
 - adding a 'business debt hibernation' regime to allow companies and other entities to enter into agreements with their creditors in relation to existing debt; and
 - adding a safe harbour for insolvency related directors' duties; and
 - extending statutory deadlines; and
 - enabling Registrars to issue exemption notices in relation to compliance with statutory obligations; and
 - providing relief for entities that cannot comply with rules in their constitutions because of COVID-19:
- changes to commercial property law to support businesses and commercial landlords to manage situations where, because of the impact of the response to COVID-19, businesses are unable to pay their rent and landlords are unable to meet their mortgage payments. The amendments extend the notice period and the period lessees must be in arrears before landlords can cancel commercial leases and extend the notice period before mortgagees can exercise certain rights such as to sell or repossess the property:
- changes to paid parental leave in order to allow essential workers to temporarily return to work to assist in the response to COVID-19 without being disadvantaged by losing entitlements to certain leave and payments:
- changes to local government by-election timing by making immediate changes to key time frames for current local government by-elections if certain conditions are met, establishing an Order-in-Council mechanism for making further changes to by-election timing, and enabling chief executives of local authorities to postpone any further by-elections. This will ensure that qualified persons have a reasonable and equal opportunity to stand as a candidate, nominate a candidate, or vote, in local by-elections:
- changes to the Gambling Act 2003, to allow, for a period of 18 months, Countdown Kids Charitable Trust, National Heart Foundation of New Zealand, and Royal New Zealand Coastguard Incorporated to send and receive forms and take payments for their lotteries online or by phone. This provides these organisations with the ability to operate their lotteries despite the effects the outbreak of COVID-19 is likely to have on face-to-face sales.

- changes to the Commerce Act 1986 to allow the Commerce Commission to authorise conduct that may technically breach the restrictions on cartel conduct, but would be of such a benefit to the public that it should be permitted.

The second tier of amendments are minor changes that can be categorised into the following policy objectives:

- deferring new regulatory requirements that would increase burdens or where the Government or businesses may no longer be ready to start by the planned date. These amendments are intended to address the difficulty government agencies or businesses would face in implementing new legislation or requirements that are due to come into force while New Zealand is responding to COVID-19:
- deferring statutory deadlines and other minor exemptions where compliance is not possible or unreasonably burdensome. A number of entities have statutory and other deadlines that cannot be met, or compliance presents an unjustifiable burden when balanced against the focus on other COVID-19 related matters. These amendments provide deferrals or exemptions from these requirements if the matters are not significant and the deferral or exemption is needed to facilitate the response to COVID-19 or to mitigate the impact of COVID-19:
- enabling fast-tracking of legislative powers to mitigate impracticability issues. The response to COVID-19 has created a number of impracticability issues. These amendments are intended to make minor changes to legislation processes to enable their quicker use to mitigate issues relating to COVID-19:
- mitigating problems with legislative compliance due to physical presence requirements and other technological reasons. A number of entities are operating remotely in order to comply with COVID-19 restrictions, which has highlighted problems with the current requirements for physical presence. These amendments will enable alternative methods of compliance while New Zealand is responding to COVID-19.

The Bill amends or modifies the application of the following legislation:

- Arms Act 1983:
- Biosecurity Act 1993:
- Building Societies Act 1965:
- Charitable Trusts Act 1957:
- Commerce Act 1986:
- Companies Act 1993:
- Consumers' Right to Know (Country of Origin of Food) Act 2018:
- Contract and Commercial Law Act 2017:
- Coroners Act 2006:
- Corrections Act 2004:
- Courts (Remote Participation) Act 2010:
- Credit Contracts and Consumer Finance Act 2003:
- Customs and Excise Act 2018:
- Epidemic Preparedness Act 2006:
- Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act 2019:
- Financial Service Legislation Amendment Act 2019:
- Fire and Emergency New Zealand Act 2017:
- Fisheries Act 1996:

- Food Act 2014:
- Freedom Camping Act 2011:
- Friendly Societies and Credit Unions Act 1982:
- Gambling Act 2003:
- Incorporated Societies Act 1908:
- Industrial and Provident Societies Act 1908:
- Insolvency Act 2006:
- Insolvency Practitioners Regulation Act 2019:
- Insolvency Practitioners Regulation (Amendments) Act 2019:
- Limited Partnerships Act 2008:
- Local Electoral Act 2001:
- Local Government Act 2002:
- Local Government Official Information and Meetings Act 1987:
- Local Government (Rating) Act 2002:
- Māori Community Development Act 1962:
- Māori Fisheries Act 2004:
- Māori Trust Boards Act 1955:
- Mental Health (Compulsory Assessment and Treatment Act) 1992:
- National Animal Identification and Tracing Act 2012:
- Parental Leave and Employment Protection Act 1987:
- Partnership Law Act 2019:
- Property Law Act 2007:
- Resource Management Act 1991:
- Te Ture Whenua Maori Act 1993:
- Unit Titles Act 2010:
- Waste Minimisation Act 2008.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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| 2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill? | [YES] |
| Insolvency and corporate law changes <p>The changes to the voidable transactions regime in the Companies Act 1993 and Insolvency Act 2006 were initiated in response to Report No. 2 of the Insolvency Working Group, on voidable transactions, Ponzi schemes and other corporate insolvency matters. https://www.mbie.govt.nz/assets/be2f35bf5c/review-of-corporate-insolvency-law-2.pdf</p> Commerce Act amendments <p>The Commerce Commission's inability to authorise conduct that may be a technical breach of the cartel prohibition in section 30 of the Commerce Act is outlined in paragraph 12 of the Commerce Commission's draft Authorisation Guidelines, July 2019, which was released for consultation. https://comcom.govt.nz/_data/assets/pdf_file/0018/165123/Draft-revised-Authorisations-Guidelines-9-August-2019.PDF</p> <p>MBIE officials were contacted by some submitters concerned with this outcome. This informed the policy to recommend the amendment in this Bill.</p> Gambling Act amendments <p>The Gambling Act 2003 amendments were part of the 2019 consultation on <i>Online Gambling in New Zealand</i>. The public discussion document can be found here: https://www.dia.govt.nz/diawebsite.nsf/Files/Online-Gambling-Consultation/\$file/Online-Gambling-in-New-Zealand-Discussion-Document.pdf</p> | |

Relevant international treaties

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| 2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty? | [NO] |
| 2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty? | [NO] |

Regulatory impact analysis

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| 2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill? | [YES] |
| Insolvency and corporate law changes <p>A regulatory impact statement was prepared with regards to the changes to the voidable transactions regime in the Companies Act. Note that this statement was prepared with regards to a wider set of changes to the voidable transactions regime, not all of which are being advanced in this Bill. https://www.mbie.govt.nz/dmsdocument/7124-impact-summary-voidable-transactions-clawback-period-for-related-and-unrelated-parties-proactive-release-pdf</p> <p>The Treasury determined that the other corporate governance and insolvency changes in the Bill are a direct Covid-19 response and, therefore, the RIA requirements do not apply with regards to those changes.</p> | |

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| 2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements? | [NO] |
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Insolvency and corporate law changes

The regulatory impact statement with regards to the changes to the voidable transactions regime in the Companies Act 1993 and Insolvency Act 2006 was assessed by the MBIE Regulatory Impact Analysis Review Panel rather than the Treasury.

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| 2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements? | [NO] |
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Extent of impact analysis available

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| 2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill? | [NO] |
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| 2.5. For the policy to be given effect by this Bill, is there analysis available on: | |
| (a) the size of the potential costs and benefits? | [NO] |
| (b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth? | [NO] |

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| 2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by: | |
| (a) the level of effective compliance or non-compliance with applicable obligations or standards? | [NO] |
| (b) the nature and level of regulator effort put into encouraging or securing compliance? | [NO] |

Insolvency and corporate law changes

Business Debt Hibernation is a voluntary measure. The extent of the benefits will depend on the number of businesses that choose to take advantage of it.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

Insolvency and Corporate law changes

MBIE has no reason to consider that any of the changes would be inconsistent with international obligations. Other governments have been making similar changes to their insolvency policies and laws in response to COVID-19.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Consideration has been given to the impacts of the response to the COVID-19 outbreak on Treaty obligations. The provisions in the Bill are consistent with the Treaty.

Insolvency and Corporate Law changes

Te Puni Kokiri and Te Arawhiti support the government's decisions to include a range of Māori governance entities within the modification and exemption regimes.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

[NO]

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

[YES]

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

[YES]

Insolvency and Corporate law changes

The Business Debt Hibernation (BDH) regime, which is in Schedule 4 and will add a new Schedule 13 to the Companies Act, includes the following offence provisions, which apply to the directors of the company, with a maximum fine of \$10,000 in each case:

- Failure to send a copy of a notice about entering BDH to every known creditor (see clause 7(5) of new Schedule 13 of the Companies Act 1993).
- Failure to prepare a certificate of the result of the vote about whether creditors approved an arrangement (clause 26(3)).
- Failure to notify all known creditors of the result of the vote (clause 27(2)).
- Failure to notify all known creditors of a decisive related party creditor vote (clause 34(5)).
- Failure to notify the Registrar that an entity in BDH has entered another formal insolvency process (clause 71(4)).

Creditors will have the ability to apply to the High Court for relief from aspects of the BDH regime. In particular:

- The ability for related party creditors to vote on any proposal to enter into an extended moratorium on payment of debts (see clause 31 of new Schedule 13 of the Companies Act 1993).
- The ability to order that a resolution be set aside or treated as having passed where the court decides that related party should be allowed to vote (see clause 33 of new Schedule 13 of the Companies Act 1993).
- The ability to order that a resolution be set aside or treated as having passed where the court decides that a related party should not have voted (see clause 34 of new Schedule 13 of the Companies Act 1993).
- The ability to order that a creditor is not bound by a moratorium on enforcement between an entity and its creditors (see clause 36 of new Schedule 13 of the Companies Act 1993).
- Consent to enforcing a charge against, recovering property from, or otherwise taking proceedings against an entity in BDH in relation to recovery of a debt (see clauses 37 - 39 of new Schedule 13 of the Companies Act 1993).

The power to grant relief from compliance with procedural or administrative obligations imposed by Court order will be exercised by the Chief Judge of the Māori Land Court in relation to incorporations and trusts registered under Te Ture Whenua Māori Act 1993 (see clause 31).

Commerce Act Amendments

Part 1 of Schedule 2 of the Bill will extend the types of matters that may be heard by the High Court in respect of determinations by the Commerce Commission.

The Bill extends the jurisdiction of the Commerce Commission to authorise arrangements that may contain technical contraventions of the prohibition against cartels in section 30 of the Commerce Act. The Commerce Commission will also have a new discretion in relation to applications for authorisation of restrictive trade practices to:

- issue a provisional authorisation pending its full determination, and
- waive the requirement to issue a draft determination for consultation before making its final determination.

A provisional authorisation or determination of an application for authorisation related to section 30 arrangements may be subject to appeal in the same way as any other determination of the Commission relating to applications of authorisation for restrictive trade practices (section 91 of the Commerce Act). The Commerce Commission's exercise of its discretion will also be subject to judicial review.

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| 3.4.1. Was the Ministry of Justice consulted about these provisions? | [YES] |
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Insolvency and Corporate Law changes

The consultation with the Ministry of Justice consisted of MBIE providing information in writing about the offence provisions, having follow-up conversation and a confirmation reply from the Ministry of Justice.

The Ministry of Justice was also consulted on the power for the Chief Judge of the Māori Land Court to grant relief.

Commerce Act Amendments

The Ministry of Justice was not consulted, as the proposal is to retain the rights to judicial review and rights of appeal for these new Commerce Commission determinations. MBIE does not anticipate that this expanded jurisdiction will result in a material increase in appeals to the High Court. The Commerce Commission is a very experienced agency with established processes and procedures for the exercise of any discretion.

Privacy issues

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| 3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information? | [NO] |
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| 3.5.1. Was the Privacy Commissioner consulted about these provisions? | [NO] |
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External consultation

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| 3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill? | [YES] |
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Insolvency and Corporate law changes

The changes to the voidable transactions regime in the Companies Act 1993 were initiated in response to Report No. 2 of the Insolvency Working Group, on voidable transactions, Ponzi schemes and other corporate insolvency matters. This report was publicly consulted on.

MBIE provided a draft of the BDH provisions to the New Zealand Bankers' Association, Institute of Directors of New Zealand, Recovery, Insolvency and Turnaround Association of New Zealand, and barristers and solicitors who specialise in insolvency and commercial law. Their comments were taken into consideration in preparing follow-up drafting instructions.

The policy behind the safe harbour for the duties in sections 135 and 136 of the Companies Act 1993 was tested with corporate governance experts and stakeholders.

Commerce Act amendments

The Commerce Commission was consulted on the policy to be given effect by this Bill and during drafting of Part 1 of the Schedule to the Bill.

Local government legislation amendments

Amendments to local government legislation were consulted on with Local Government New Zealand, the Society of Local Government Managers and the Office of the Auditor-General.

Other testing of proposals

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| 3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete? | [YES] |
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Consultation with the relevant departments was conducted.

Commerce Act Amendments

The Australian Competition and Consumer Commission is able to issue interim authorisations (referred to as provisional authorisations in this Bill) and authorise technical contraventions of the cartel provisions. The Australian experience provided a precedent that enables MBIE officials to have confidence in the workability of these provisions as a means of responding to COVID-19 impacts in the economy.

Part Four: Significant Legislative Features

Compulsory acquisition of private property

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| 4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property? | [NO] |
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Charges in the nature of a tax

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| 4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax? | [YES] |
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Commerce Act Amendments

The Bill allows the Commerce Commission to waive the application fee payable by parties seeking authorisation during the epidemic period for an arrangement to which section 30 or 27 of the Commerce Act may apply. This application fee is \$36,800 (including GST) and may have imposed an undue barrier to some parties seeking authorisation at this time. The application fee is not intended to cover the full costs of the Commerce Commission in making a determination given the potential public interest from these arrangements.

Retrospective effect

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| 4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively? | [YES] |
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Insolvency and Corporate law changes

The Bill provides for retrospective application in relation to:

Modifications: Clause 14 provides for entities to modify certain requirements or restrictions in their constitutions or rules if the entity's governing officers believe, on reasonable grounds that (a) it is not reasonably practical to comply with the requirement or restriction because of the outbreak of COVID-19, and (b) the modification goes not further than is reasonable in the circumstances. Clause 17 provides that this relief can apply retrospectively to the date that New Zealand went to alert level 2 (21 March 2020).

Exemptions: Clauses 26-28 provide for independent persons (Registrars, Ministers and the Chief Judge of the Māori Land Court) to grant class exemptions modifying certain statutory procedural or administrative matters that are (a) unduly onerous or burdensome, or (b) cannot be reasonably complied with owing to the effects of COVID-19. Clause 32 provides for exemptions to apply retrospectively to 21 March 2020.

Safe harbour: Clause 6 of Schedule 2 provides temporarily for new Schedule 12 of the Companies Act 1993. It creates a safe harbour from two insolvency-related directors' duties. Clause 4 of new Schedule 12 provides that the safe harbour will operate retrospectively to the date of the announcement of these proposals (3 April 2020).

Protection: Clause 46 of new Schedule 13 of the Companies Act 1993 provides protection to a business that goes into BDH within 10 days of the commencement of the Act against the enforcement of charges by a creditor within that period. This is to protect against the risk that creditors will rush to enforce their rights in advance of the legislation coming into force. Creditors doing this risks defeating the purpose of the provisions, which is to avoid businesses that would otherwise be viable being forced into liquidation.

The retrospectivity to the date that New Zealand went into alert level 2 is considered to be justified in relation to **modifications and exemptions** because some entities have not been able to comply with requirements since that date (e.g. to hold annual general meetings). The Bill includes protections against the misuse of these powers, including the criteria outlined above and the powers are temporary.

The Minister of Finance and Minister of Commerce and Consumer Affairs have publically stated that the **safe harbour** provisions would apply retrospectively to 3 April 2020 when they announced the temporary insolvency and corporate governance law changes on that date. This approach was taken because it was clear that some directors were being very risk averse and not entering into commitments that would keep their businesses operating out of concern that they would be personally liable if the company subsequently failed.

Property Act amendments

The amendments to the Property Law Act will have retrospective to apply to any notices to cancel leases or exercise powers under a mortgage issued after 1 April 2020. The Bill will retrospectively extend notice periods in existing notices. Any action to enforce a landlord or mortgagee's rights based on a notice issued after 1 April that is contrary to the extended time periods will be treated as a breach of the sections.

Parental Leave changes

The changes to the Parental Leave and Employment Protection Act 1987 apply retrospectively, from 25 March 2020, which will affect those who were 'COVID-19 response workers' (as defined in the Bill) before the Bill came into effect. The Bill does not retrospectively impose obligations or negatively affect the rights or freedoms of these people. The Bill retrospectively allows further rights to these people, by allowing them to retain the entitlement to certain parental leave payments, rights and protections, despite having already temporarily returned to work due to circumstances related to the COVID-19 outbreak.

Food Act

While the Food Act amendment is retrospective, this is for the benefit of food businesses i.e. it does not impose any obligations retrospectively or adversely affect rights and freedoms.

Strict liability or reversal of the usual burden of proof for offences

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| 4.4. Does this Bill: | |
| (a) create or amend a strict or absolute liability offence? | [YES] |
| (b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding? | [NO] |

Insolvency and Corporate Law changes

The new offence provisions identified in section 3.4 above in relation to BDH are all strict liability offences. This approach has been taken for two reasons.

First, BDH suspends creditors' rights of enforcement during the moratorium period. Therefore, a failure to advise creditors, or give them incorrect or unreliable information can have serious adverse consequences for individual creditors, particularly if they have been incorrectly told that their enforcement rights have been suspended.

Second, there is a need to incentivise directors to adopt appropriate precautions to prevent contraventions.

The existing provisions in the Companies Act addressing the potential harshness of strict liability offences will apply to these new offences (section 376 of the Companies Act 1993). These provisions provide a defence where a director can show that:

- All reasonable and proper steps were taken to ensure that the requirements of the companies Act 1993 would be complied with;
- They took all reasonable and proper steps to ensure that the board or the company complied with the requirements of the Companies Act 1993; or
- In the circumstances they could not reasonably have been expected to take steps to ensure that the board or the company complied with the requirements of this Act.

Civil or criminal immunity

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| 4.5. Does this Bill create or amend a civil or criminal immunity for any person? | [NO] |
| <p>Commerce Act Amendments</p> <p>The Bill provides that the prohibition in section 30 relating to entering into a contract does not apply to a contract that is subject to a condition that the cartel provision does not come into force unless and until authorisation is granted to give effect to it and that an application is made for that authorisation within 15 working days after the contract is entered into. This amendment allows parties a short period of time to enter into contracts subject to obtaining authorisation by the Commerce Commission.</p> | |

Significant decision-making powers

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| 4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests? | [YES] |
| <p>Insolvency and Corporate law changes</p> <p>Responsible Registrars and Ministers, and the Māori Land Court are given powers to exempt or suspend classes of entities from certain procedural and administrative requirements. These powers are necessary given that it is not reasonably practicable to perform the obligations due to the disruption caused by COVID-19.</p> <p>Fisheries Act 1996 - section 79 Fisheries Act amendment gives the Chief Executive power to cease the suspension of fishing permits and enter into a repayment agreement. This is necessary to provide relief to commercial fishers affected by COVID-19.</p> <p>Local Government Act 2002 - The Bill will amend the special consultative procedure in the Local Government Act 2002 so that local authorities may take a modified approach if it is satisfied that to do so is necessary or desirable to support measures taken to contain or mitigate the outbreak of COVID-19 or its effects.</p> | |

Powers to make delegated legislation

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| 4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation? | [YES] |
| See Appendix One | |

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| 4.8. Does this Bill create or amend any other powers to make delegated legislation? | [YES] |
| <p>This Bill amends the process for making changes to the Responsible Lending Code in the Credit Contracts and Consumer Finance Act 2003. Currently there is a required period of 28 days after notification for changes to the Code to come into effect. Urgent changes to the code are required in the context of COVID-19 which the amendment provides for by allowing changes to the Code to come into effect the day after they are notified in the Gazette. This amendment will last for 3 months.</p> <p>New section 73AB to be inserted into the Local Electoral Act 2001 enables the Governor-General, by Order in Council, to specify a later date for certain statutory dates relating to a local by-election or poll.</p> | |

Any other unusual provisions or features

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| 4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment? | [NO] |
| <p>Insolvency and Corporate Law changes</p> <p>The BDH regime has the effect of deferring the property rights of creditors of an entity that enters BDH. The Bill makes it clear that no creditors' rights can be extinguished without their express consent. Nevertheless, deferral of a creditor's ability to enforce their rights could have a significant, if temporary, impact on their financial position. This potential consequence is an inherent aspect of the BDH regime, which emphasises the potentially greater benefit to the economy as a whole of assisting otherwise successful businesses to continue trading following the disruption caused by COVID-19 and associated restrictions.</p> <p>Clause 36 of new Schedule 13 seeks to provide some protection to a creditor whom a BDH arrangement would be unfairly prejudicial.</p> | |

Appendix One: Further Information Relating to Part Four

Clause 43 provides for regulations to be made that have the effect of:

- adding matters to the list of matters in constitutions or rules that may be modified by entities (clause 15)
- adding matters to the list of matters in constitutions or rules that may not be modified by entities (clause 16)
- removing matters from the list in clause 15
- adding or removing matters from the list of procedural or administrative matters in specified legislation in respect of which Responsible Registrars and Ministers exemption may be granted.

These regulations can be made on the recommendation of the Minister of Finance and the Minister of Commerce and Consumer Affairs, acting jointly. Preconditions apply to the recommendations that expand an entity's ability to make modifications. For example, before recommending regulations prescribing additional matters that may be modified, the Ministers must be satisfied that the matters are not inconsistent with the list in clause 16(1)(a) to (g) of matters that cannot be modified (which includes, for example, the objects or purpose of the entity).

These provisions reflect that there has been insufficient time carry out policy work, meaning that there are risks that the lists are either incomplete, or that some items on the list are too broad.

Clause 43 provides for regulations to be made extending the temporary modification and exemption measures for one prescribed further period of up to six months, through to 31 March 2021. Clause 43(6) states that the Minister of Finance and Minister of Commerce and Consumer Affairs may only recommend that such an order be made if they are satisfied that:

- the order is necessary and desirable to address the effects of COVID-19; and
- the period of the extension is no longer than is reasonably necessary to address the matters that give rise to the extension.

The powers to extend the modification and exemption provisions by Order in Council have been included because it is impossible to anticipate how long COVID-19 will impact on entities' ability to comply with procedural and administrative obligations under statute and their own constitutions.

New section 395B of the Companies Act 1993 (inserted by clause 6 of Schedule 2) provides for the making of regulations to:

- extend or reactivate the safe harbour provisions. This regulation making power is time constrained and the safe harbour period will not be able to be extended or reactivated beyond 30 September 2021.
- determine how the business debt hibernation regime will apply in specific circumstances including:
 - confining the scope of that regime (for example to limit the types of entities which are able to enter hibernation),
 - excluding certain types of debt from the regime,
 - prescribing transitional, savings or related provisions,

- setting or adjusting a range of technical and procedural requirements

These regulations can be made on the recommendation of the Minister of Finance and the Minister of Commerce and Consumer Affairs, acting jointly. Preconditions apply to some of these recommendations. For example, before recommending regulations on the types of entity that may enter into BDH the Ministers must have regards to the purposes of the BDH regime and the effect of any regulation on the creditors of entities that have significant liquidity problems and the integrity of corporate insolvency law. In addition, Ministers may only recommend the making of regulations setting transitional, savings, or related provisions in connection with an entity ceasing to be an entity in BDH if they are satisfied that that the regulations are necessary or desirable for the orderly transition of an entity out of being an entity in BDH.

New section 218B of the Contract and Commercial Law Act 2017 (inserted by clause 19 of Schedule 2) provides that the temporary application of the electronic transactions provisions in that Act to deeds, that creates a power of attorney in connection with a security interest, may be extended by regulation. These regulations can be made on the recommendation of the Minister of Finance and the Minister of Commerce and Consumer Affairs, acting jointly provided they are satisfied that the extension is necessary or desirable to address the effects of COVID-19, and is no longer than is reasonably necessary address those effects.