



To: The Epidemic Response Committee

On: COVID-19 Response (Further Management Measures) Legislation Bill

8 May 2020

INTRODUCTION

This submission is from Chapman Tripp Partners, Roger Wallis (pages 2-5), and Lucy Cooper (page 6).

ABOUT CHAPMAN TRIPP

Chapman Tripp is a full service law firm. We have offices in Auckland, Wellington and Christchurch.

Our practice includes providing legal advice on a range of matters proposed to be modified by the COVID-19 Response (Further Management Measures) Legislation Bill (**Bill**).

OVERVIEW

Chapman Tripp supports the intent of the Bill.

General Comments

- Some of the changes should be made permanent – not on expiry of the Epidemic Preparedness Notice (currently 25 June 2020)
 - Electronic technology for Powers of Attorney (Part 4, Schedule 2)
 - Electronic meetings – Part 2 of Bill
 - Unit Titles Act – body corporate meetings (Schedule 12)
- Extended long-stop dates should not become targets
 - e.g. with Insolvency Practitioner Reforms, if the profession is ready the regime should start as soon as possible – especially during a recession.

Electronic technology (Part 2, clause 11)

- **entity** should include an **express trust**
- s 11(2), s 15 should extend to calling a meeting electronically and quorums
- the prohibition on entry into a power of attorney by electronic means should be *removed* rather than amended to permit powers of attorney relating to security interests (Part 4, Schedule 2 of Bill)
- s 391 of the Companies Act 1993 should be amended to enable entities to send notices to shareholders or creditors to an electronic address (as s 391(3)(g) does for body corporate shareholders/creditors) (new provision).

Insolvent trading relation back period

- I personally support the “clawback” period for non-related party voidable transactions being shortened to 6 months rather than 2 years
- The change should provide counterparties dealing with companies in distress more certainty.

**Director safe harbour for reckless trading and incurring of obligations duties
(Schedule 3, new Schedule 12 to Companies Act 1993)**

- We support the safe harbour regime, noting that other key duties – s 131 (good faith, best interests of the company) and s 137 (due care and skill) - still must be complied with
- We suggest the safe harbour commence for decisions made from 25 March 2020 (entry into Level 4) not 3 April 2020 (when Hon. Grant Robertson announced the change)
- Good faith is the right test for directors’ opinion – should not need “more likely than not” – it is challenging to predict solvency for future periods – and good faith judgment rather than a balance of probabilities test is more appropriate
- Cautious about directors being lined up by litigation funded liquidators/third parties, with the benefit of hindsight
- Safe harbour is consistent with the Title (purpose) of the Companies Act 1993
 - (a) **to reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, *the spreading of economic risk, and the taking of business risks; and***
- ss 135 and 136 have not been reviewed by Parliament since enacted in 1993, and the Courts (judicially and extra judicially) have expressed concerns about the drafting – it would be timely for the Minister to seek advice from officials on more permanent reform.

Business Debt Hibernation (Schedule 4, new Schedule 13 to Companies Act 1993)

- We support the regime
- We support the RITANZ (restructuring, Insolvency, Turnaround Association of New Zealand) submissions
- Some of the complexity should be removed – should not need statutory declarations
- It should be permissible to seek a hibernation period of **up to 6 months** (if a business does not need a full 6 months)
- Notice by emails should be facilitated.

Commerce Act provisions (Schedule 2, Part 1)

- Allowing for provisional authorisation for certain arrangements among competitors has real value for the epidemic period, where particular time pressures apply. It will also have value in other situations where there is time pressure (and in which legal certainty is wanted). As such:
 - These should be permanent changes, rather than restricted to the epidemic period. For this to occur it would be preferable to set out substantive criteria for qualifying for a provisional authorisation (the relevant factors in Australia may be a useful guide in this respect – see for example the ACCC’s Guidelines for Authorisation of Conduct (non-merger), 10.3). Making this a permanent feature of the regime would also better align our regime with Australia’s, where interim authorisation is available.
 - Provisional authorisation should be available for all restrictive trade practices, and provisional clearance should be available for collaborative activities, given these arrangements have a number of similar features, and time pressure applies in a similar way.
- However it is important to realise that these process improvements will not in themselves “solve” for the degree of time pressure we are seeing from client groups and sectors needing to move quickly in the public interest, particularly where essential goods and services are concerned. The approach that the Commerce Commission has taken to date, in its willingness to engage quickly and informally, and to exercise its enforcement discretion appropriately, will continue to be an important part of the response.
- It would be a material backward step if the Commerce Commission took the changes in the Bill as a signal that it should alter its approach to date, which has been constructive and responsive, or narrow the range of scenarios in which it is willing to engage informally.
- So the Bill is a good thing, but the Commission has also been responding well and we hope it continues to do so.

092626116/7782084.1

AUCKLAND

23 Albert Street
PO Box 2206, Auckland 1140
New Zealand

T: +64 9 357 9000
F: +64 9 357 9099

WELLINGTON

10 Customhouse Quay
PO Box 993, Wellington 6140
New Zealand

T: +64 4 499 5999
F: +64 4 472 7111

CHRISTCHURCH

60 Cashel Street
PO Box 2510, Christchurch 8140
New Zealand

T: +64 3 353 4130
F: +64 3 365 4587