



Business trading protection & debt hibernation

Helping businesses trade while avoiding insolvency

Context

From July 2020, the Cook Islands Government launches Phase II of its Economic Response Plan, a range of stimulus measures designed to assist households and businesses survive the ongoing economic impacts of the COVID-19 pandemic, and better position the economy for recovery after the pandemic. Phase II contains a number of tax, training, cash grant and credit initiatives aimed at supporting business continuity, kick-starting growth, and promoting a smarter and greener Cook Islands economy.

Notwithstanding this Government support, many businesses in the Cook Islands face an increasing threat of creditor action and insolvency, with significant potential to impede the key aim of the Government's business stimulus efforts, which is to help businesses weather the economic impacts of the pandemic.

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Summary

The Government is introducing a suite of temporary business trading protection and debt hibernation measures, which are given effect by the [COVID-19 \(Economic Response\) Act 2020](#) (Economic Response Act).



Company director protection

This measure introduces a 'protection period' for directors of financially stressed companies, initially from 1 March 2020 to 28 February 2021, which suspends director liability in

respect of insolvent trading, providing a 'safe harbour' from the duty contained in sections 88 and 89 of the *Companies Act 2017*.

This will provide directors of companies in financial distress with assurance that, if they act responsibly and continue trading in good faith, they will not be found to be in breach of these duties. The protection period can be extended, up to 28 February 2022 at the latest.

What is the protection period?

Section 5 of the Economic Response Act defines the **protection period** as the period from **1 March 2020 to 28 February 2021**. This can be extended by the Minister of Finance for up to six months on two occasions. At the latest, the protection period can be extended to **28 February 2022**.

Voidable transactions protection

This measure disapplies section 279 (insolvent transaction voidable) and section 282 (voidable security) of the *Companies Act 2017* to protect persons dealing with companies from having transactions during the COVID-19 epidemic unwound under voidable transaction provisions.

What is a voidable transaction?

A **voidable transaction** is a payment of money, transfer of property or other transaction from the company's assets to a related or unrelated third party that either occurs at a time when the company was insolvent or otherwise causes a detriment to the company.

Business debt hibernation

This measure introduces a regime that provides eligible businesses (companies, partnerships, sole traders) that file the required notice with a 3-month 'initial' protection period in relation to existing debt. This will allow businesses in financial distress temporary respite from creditors' enforcement action. After a 3-month 'initial' protection period, a 'subsequent' protection period of 6-months is conditional on reaching a binding agreement with the business's creditors.

The Companies Act 2017 and the Economic Response Act

The *Companies Act 2017*, which came into force in December 2019, requires all Cook Islands companies and overseas companies doing business in the Cook Islands to re-register under the new Act by December 9, 2020. Failure to re-register will result in your company being struck off the active register.

In support of this requirement, the trading protection and debt hibernation for companies under the Economic Response Act are only available to those companies that have registered (as a new company since the *Companies Act 2017* came into force) or re-registered (if a company existed before the *Companies Act 2017* came into force).

If you haven't already, get your company registered or re-registered online now

The message to companies not already registered or re-registered on the online Companies Register that wish to take advantage of the company director protection, business debt hibernation or voidable transactions protection, is to do so through the online Companies Register on the Ministry of Justice website (<https://registry.justice.gov.ck/Index.aspx>).

Objective

This suite of measures is part of a concerted effort to provide relief for businesses and directors of companies arising out of trading insolvency caused by the onset of the COVID-19 pandemic. The overarching aim of the Act is to assist otherwise profitable and viable businesses, affected by the crisis, to continue trading in the current business environment, and, thereby, preserve their economic value and save jobs.

Eligibility for company director & voidable transactions protection

There is no application process for either the company director or voidable transaction protection measures. To be eligible for both during the protection period, your company must be registered or re-registered under the *Companies Act 2017*.

Company director protection

For company director protection, in addition to registration, your company must meet the ‘stressed company’ criteria in section 8 of the Economic Response Act. This means that your company must:

- have been trading **solvent** as at 29 February 2020; and
- is or becomes **trading insolvent** during the protection period; and
- your board of directors considers, in good faith and on reasonable grounds, that your company’s trading insolvency is substantially due to the effect of the COVID-19 epidemic on one or more of the following—your company’s:
 - level of trading;
 - ability to operate;
 - ability to raise finance;
 - ability to recover debts due and owing by its debtors;
 - any other factor that materially contributes to the company’s normal cashflow.

Limits to protection

Directors will be liable for a decision that is made in bad faith or with the intention, or for the purpose, of defrauding or otherwise disadvantaging the creditors of the company.

Voidable transactions protection

A voidable transaction for a registered company qualifies for protection if it is:

- entered into by the company during the protection period; or
- specifically authorised under an approved arrangement; and
- entered into by all the parties in good faith and at arm’s-length.

Eligibility & how to apply for business debt hibernation

Eligibility

Business debt hibernation arrangements are set out in Part 3 of the Economic Response Act. To be eligible to enter business debt hibernation:

- if a company, you must be registered or re-registered under the *Companies Act 2017*;
- you must have been able to pay its debts as they became due in the normal course of business as at 29 February 2020;
- you have taken the verification steps set out below; and
- you file a business debt hibernation notice (**BDH Notice**) with the Registrar of Companies within the protection period.

Verification

If your business is an entity (i.e. company, partnership etc), your board must resolve to enter business debt hibernation but only after **certifying** in writing that:

- your business was trading solvent as at 29 February 2020; and
- your business is, or in the next 6 months, is likely to be trading insolvent; and
- your board considers in good faith and on reasonable grounds that your business's actual or likely trading insolvency is or will be substantially the result of the effect of COVID-19 on one or more of the following—your business's:
 - level of trading;
 - ability to operate;
 - ability to raise finance;
 - ability to recover debts due and owing by its debtors;
 - any other factor that materially contributes to your business's normal cashflow.

If you are a sole trader, you must **certify** in writing that:

- your business was trading solvent as at 29 February 2020; and
- your business is, or in the next 6 months, is likely to be trading insolvent; and
- you consider in good faith and on reasonable grounds that your business's actual or likely trading insolvency is or will be substantially the result of the effect of COVID-19 on one or more of the following—your business's:
 - level of trading;
 - ability to operate;
 - ability to raise finance;
 - ability to recover debts due and owing by its debtors;
 - any other factor that materially contributes your business's normal cashflow.

Application – filing your BDH Notice for the initial 3-month hibernation

To enter business debt hibernation for the initial 3-month period, you must file an **online BDH Notice** with the Registrar of Companies available through the Ministry of Justice Registry Services website (<https://registry.justice.gov.ck/Index.aspx>). Please do not visit the Ministry of Justice in person as hard copy notices will not be accepted.

The online **BDH Notice** must be submitted:

- in the approved online form; and
- accompanied by a copy of the board resolution and certification; and
- accompanied by the prescribed fee, if any.

Online Business Debt Hibernation portal

The online Business Debt Hibernation portal is currently under construction and we anticipate that it will be open for applications during the week commencing Monday 13 July 2020. Regular updates will be provided at: (<https://registry.justice.gov.ck/Index.aspx>). You should use the time until then to prepare the information and documents you will need to file with your BDH Notice.

Your initial protection period starts when your online **BDH Notice** is filed. You must also, without delay after filing a **BDH notice**, send a copy of the notice to each known creditor of your business.

Subsequent protection beyond the initial 3-month period

If you want to extend the business debt hibernation after the initial 3 months is up, you need to enter into a binding arrangement with your creditors. The process for this is set out in Part 3 of the Economic Response Act.

Timing

The temporary company director and voidable transactions protection measures are available from 7 July 2020, the day the Economic Response Act came into force. Business debt hibernation starts when your online BDH notice is filed.

Budget impact

This measure is not expected to have any direct impact on the budget.

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