**COVID-19 response in New Zealand**

**Introduction**

In March 2020 the New Zealand Government responded to the COVID-19 public health crisis by closing New Zealand’s borders to non-citizens and residents, and imposing a strict four-week lockdown period. These measures have worked to flatten the COVID-19 curve. Lockdown measures have gradually eased from the end of April 2020.[[1]](#footnote-1) Although the public health crisis, for the moment, has passed, the resulting economic consequences are dire. New Zealand and “[m]any countries … are expecting their largest economic downturns in living memory”, and the final impact on the New Zealand economy is “highly uncertain”.[[2]](#footnote-2)

The Government has responded to the economic downturn with an unprecedented recovery package. This includes a wage subsidy scheme[[3]](#footnote-3) which at the time of writing was supporting around 40 percent of the New Zealand workforce.[[4]](#footnote-4) Other measures include a business finance guarantee scheme under which the Government will take on 80% of the default risk of new bank loans made to SMEs for up to a three year period,[[5]](#footnote-5) a temporary tax loss carry-back scheme,[[6]](#footnote-6) and amendments to the *Property Law Act 2007* (NZ) to support commercial lessors and their lessees, and mortgagees and mortgagors.[[7]](#footnote-7) Nevertheless, many businesses, even with Government support, may not survive. The international tourism sector, for example, is shuttered as a result of the border closure. In a sign not only of business failure, but of restructuring to survive the downturn, reported job losses are a daily event.[[8]](#footnote-8)

This note summarises the amendments made to New Zealand’s insolvency law framework by the *COVID-19 Response (Further Management Measures) Legislation Act* 2020 (NZ) in response to the economic effects of the COVID-19 crisis.

**Insolvent Trading Safe Harbour**

The introduction of insolvent trading safe harbour rules was signalled by the Government in early April 2020. The rules apply retrospectively, also as signalled, from 3 April 2020. Their stated purpose is to provide directors of companies facing significant liquidity problems because of the effects of the COVID-19 outbreak with more certainty about the insolvent trading duties in ss 135 and 136 of the *Companies Act 1993* (NZ).[[9]](#footnote-9) It is not a purpose of the new rules “to facilitate the ability of a company that has no realistic prospect of continuing to trade or operate in the medium to long term to defer a decision to enter into liquidation to the detriment of its creditors.”[[10]](#footnote-10)

The new rules apply to companies that as at 31 December 2019 met a cash-flow solvency test (they were able to pay their debts as they became due in the normal course of business),[[11]](#footnote-11) and companies that were incorporated after 1 January 2020 but before 3 April 2020.[[12]](#footnote-12) The rules only apply for a defined period, the “safe harbour period”. The initial safe harbour period runs from 3 April 2020 and ends on the close of 30 September 2020,[[13]](#footnote-13) but may be extended by regulation to end no later than 31 March 2021.[[14]](#footnote-14) There is also provision for the creation by regulation of a new safe harbour period for no more than a further 6 months and ending no later than 30 September 2021.[[15]](#footnote-15) The initial or any new safe harbour period may be revoked or reduced by regulation.[[16]](#footnote-16) Consistent with the intended short-term operation of the new rules, they are to be repealed on 31 May 2022.[[17]](#footnote-17)

The duty to avoid reckless trading in s 135 of the *Companies Act* requires that directors not agree, cause or allow the business of a company to be carried on in a manner likely to create a substantial risk of serious loss to creditors. The scope of this duty cannot be properly understood without reference to explanatory case law. In summary, the duty arises when a company enters “troubled financial waters”.[[18]](#footnote-18) This assessment is informed by determining whether a director’s actions allegedly in breach of s 135 occurred at a time when the company failed to meet the statutory solvency test in s 4 of the Act,[[19]](#footnote-19) that is to say, it failed one or both of the cash flow and balance sheet solvency tests set out in s 4(1). A director’s obligation is then to undertake, on an ongoing basis, a “sober assessment” of the company’s financial position[[20]](#footnote-20) and to respond as would a reasonable director in the same circumstances.

The purpose of the duty is not to protect creditors from all loss, but from inappropriate loss arising from directors’ illegitimate risk taking.[[21]](#footnote-21) Insolvent trading does not of itself constitute illegitimate risk taking, but there are limits on the period of time (usually a matter of months) that directors can trade an insolvent company in the hope that things will improve.[[22]](#footnote-22) Whether creditors are aware of the risks they face is also relevant in distinguishing between legitimate and illegitimate risk taking,[[23]](#footnote-23) as is whether a risk of loss is balanced with the potential for gain.[[24]](#footnote-24) It is the risk of inappropriate loss to creditors collectively that is assessed, rather than the risk of loss arising from one transaction.[[25]](#footnote-25) A director’s actions must be assessed in the light of the reality of the commercial choices they faced, rather than with the benefit of hindsight.[[26]](#footnote-26)

The new rules provide a director with an affirmative defence[[27]](#footnote-27) if during the safe harbour period they agree, cause or allows the business of a company to be carried on in any manner.[[28]](#footnote-28) A director will not be in breach of s 135 if, when acting, the director has a good faith opinion that –

1. the company has, or in the next six months is likely to have, significant liquidity problems; and
2. the liquidity problems are, or will be, a result of the effects of COVID-19 on the company, its debtors, or its creditors; and
3. it is more likely than not that the company will be able to pay its due debts on and after … [30 September 2021[[29]](#footnote-29) or any later date prescribed by regulation].

In assessing whether it is more likely than not that the company will be able to pay its debts on and after 30 September 2021, a director may have regard to the likelihood of trading conditions improving; the likelihood of the company reaching an arrangement or other arrangement with its creditors;[[30]](#footnote-30) and any other matter the director considers to be relevant.

It is important for directors and their advisors to be aware of the limitations of the safe harbour rules as they apply to s 135. The amendment is largely limited in its application to directors of companies that met a cash flow solvency test as at 31 December 2019,[[31]](#footnote-31) and to directors of companies within that subset who have the required good faith opinion as to the effects of the COVID-19 outbreak on the company’s liquidity and its likely ability to pay its due debts on or after 30 September 2021. Directors bear the burden of proving that their actions are covered by the new rules.[[32]](#footnote-32) Meeting the terms of the defence will require an ongoing, rather than a one-off, assessment. Although directors may have regard to professional advice,[[33]](#footnote-33) they are still required to assess the ripple effect of the national and/or global economic downturn on the company and its debtors and creditors. Directors may take some comfort from the fact that their actions will be judged in the commercial context in which they were made. Given that Treasury experts have described the final impact of COVID-19 as “highly uncertain”, the bar is unlikely to be set high for a “reasonable director” when making a good faith assessment of the impact of COVID-19 on a particular company. However, looking at the issue through an alternative lens, it may also be that the high degree of uncertainty of outcome will, despite the safe-harbour rules, have a chilling and risk-adverse effect on directors’ decision making.

Directors who cannot discharge the burden of proof with respect to the safe harbour rules will be subject to the full impact of s 135. Claims founded on risk to creditors arising from balance sheet insolvency fall outside the ambit of new rules.[[34]](#footnote-34) Claims for breach of s 135 are often made in conjunction with claims for breach of the duty of good faith (as it applies in an insolvency context where creditors’ interests are included in assessment of what is in the company’s best interests)[[35]](#footnote-35) and the duty of care, skill and diligence.[[36]](#footnote-36) Liquidators and creditors may circumvent the safe-harbour rules by founding a claim on a breach of these other duties.[[37]](#footnote-37)

The second of the insolvent trading duties is the duty in relation to obligations in s 136. Section 136 provides that a director must not agree to 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. Satisfaction of the objective element of this test requires a degree of certainty that the company will be able to perform an obligation when required to do so.[[38]](#footnote-38)

The new rules apply to a director who, during the safe harbour period,[[39]](#footnote-39) agrees to the company incurring an obligation and at this time has the good faith opinion that the company has, or in the next six months is likely to have, significant liquidity problems.[[40]](#footnote-40) A director is deemed to have reasonable grounds to believe that the company will be able to perform the obligation when it is required to so if the director, in good faith, is of the opinion that –[[41]](#footnote-41)

1. the liquidity problems are, or will be, a result of the effects of COVID-19 on the company, its debtors, or its creditors; and
2. it is more likely than not that the company will be able to pay its due debts on and after … [30 September 2021[[42]](#footnote-42) or any later date prescribed by regulation].

For the purposes of making the opinion required in para (b) above, a director may have regard to the likelihood of trading conditions improving; the likelihood of the company reaching a compromise or other arrangement with its creditors; and any other matter the director considers to be relevant.

The safe harbour rules as they apply to s 136 are subject to the same limitations as apply in respect of s 135.

**Business debt hibernation**

Like the insolvent trading safe harbour rules, the enactment of a new “rescue” collective insolvency procedure,[[43]](#footnote-43) business debt hibernation (BDH), was signalled by the Government in early April 2020. The new procedure is a hybrid between two collective rescue procedures available to companies under the *Companies Act –* voluntary administration[[44]](#footnote-44) and pt 14 compromises with creditors.[[45]](#footnote-45) With specified exceptions,[[46]](#footnote-46) the regime is available to companies and other entities (including limited partnerships, partnerships, other body corporates and unincorporated associations).[[47]](#footnote-47) An entity may not enter into BDH after 24 December 2020 or any later date prescribed by regulation,[[48]](#footnote-48) but this rule does not terminate a BDH entered into prior to either of these times.[[49]](#footnote-49)

BDH has two stated purposes. The first is to provide for the business, property and affairs of an entity that is suffering, or may suffer, significant liquidity problems as a result of the COVID-19 outbreak to operate in a way that (a) maximises the chances of the entity, or as much as possible of its business, continuing in existence; or (b) if it is not possible for the entity or its business to continue in existence, results in a better return for the entity’s creditors than would result from the immediate liquidation of the entity.[[50]](#footnote-50) This purposes mirrors that of the voluntary administration scheme under pt 15A of the *Companies Act*. An additional purpose is to give an entity some temporary protections relating to its debts in order to give it an opportunity to develop, with its creditors, a longer-term approach to its liquidity problems.[[51]](#footnote-51) It is expressly stated not to be a purpose to allow for the cancellation of any of the debts of the entity, or to allow for a creditor’s rights to be varied in any significant way after the end of a temporary period of protection.[[52]](#footnote-52) BDH thus does not permit the kind of long-term and significant restructuring available under the compromise and voluntary administration regimes in the *Companies Act*. It is also not a purpose of the new regime to facilitate the ability of an entity that has no realistic prospect of continuing to trade or operate in the medium or long term to defer a decision to enter into liquidation to the detriment of its creditors.[[53]](#footnote-53)

The term “creditor” is defined to include secured creditors, but to exclude creditors who are owed or must be paid an “excluded debt”. “Excluded debt” is defined to include a debt incurred after an entity’s entry into BDH; wages, salaries or other amounts payable to employees in connection with their employment relationships; and amounts payable to the Commissioner of Inland Revenue (including PAYE, child support, student loan repayments, kiwisaver contributions and amounts payable under an instalment arrangement made with the Commissioner). Although an entity entering BDH may gain time relief from its obligations arising with respect non-excluded debts, it must remain able to pay its excluded debts as they fall due or risk forced entry into liquidation, voluntary administration, or the appointment of a receiver.

Although BDH does not require the appointment (and consequent expense) of an insolvency practitioner, so that control remains with the entity’s board, the procedural entry and ongoing requirements are considerable. The Companies Office has drafted detailed information and standard forms for use by entities and their advisors,[[54]](#footnote-54) but procedural requirements and the limited time period in which the new regime is intended to operate mean that it is likely to be taken up only by entities acting with professional advice (and only then after weighing up alternative insolvency procedures) and with sufficient numbers of non-excluded debts to make entering BDH a more viable option than negotiating a private work-out with its creditors.

*Entry into BDH*

The decision to enter BDH rests with the entity’s board[[55]](#footnote-55) but only if three cumulative criteria are met:[[56]](#footnote-56)

* as at 31 December 2019 the entity was able to pay its debts as they became due in the normal course of business; and
* at least 80% of the entity’s directors[[57]](#footnote-57) vote in favour of the resolution to enter BDH; and
* each director voting in favour of the entry into BDH signs a certificate stating that the company was able to pay its debts as they became due on 31 December 2019, and that it is the director’s good faith opinion that (a) the entity has, or in the next six months is likely to have, significant liquidity problems; (b) the liquidity problems are, or will be, a result of the effects of COVID-19 on the entity, its debtors, or its creditors; and (c) it is more likely than not that the entity will be able to pay its due debts on and after 30 September 2020 or any later prescribed date. In making the assessment under (c),[[58]](#footnote-58) a director may have regard to the likelihood of trading conditions improving; the likelihood of creditors approving an arrangement under the BDH regime (or the entity reaching a compromise or other arrangement with its creditors); and any other matter the director thinks relevant.[[59]](#footnote-59)

An entity enters BDH by delivering to the Registrar of Companies (the Registrar) a notice that states that the entity’s board has agreed to it entering BDH.[[60]](#footnote-60) The board must also send to each of the entity’s known creditors a copy of the notice delivered to the Registrar plus other specified information.[[61]](#footnote-61) The specified information includes at least a high-level description of a proposed arrangement between the entity and its creditors that is intended to address the entity’s significant liquidity problems; a statement of the amount owed, or estimated to be owed, to the creditor receiving the notice; and a list of the entity’s known creditors together with the amount owing (or estimated to be owing) to each and the total amount owing (or estimated to be owed) to all creditors.[[62]](#footnote-62)

*Protections for an entity in BDH*

From the time that the entity enters into BDH (which is from the time that the entity delivers the notice to this effect to the Registrar), it has the benefit of the protections specified in pt 5 of the statutory scheme.[[63]](#footnote-63) These generally apply for one month (or earlier if creditors do not approve board proposed arrangement) and for an additional six months if creditors do approve an arrangement.[[64]](#footnote-64) The protections are lost if the entity enters another collective insolvency procedure under the Companies Act or a receiver is appointed,[[65]](#footnote-65) and in a number of other specified circumstances.[[66]](#footnote-66) Significantly, the protections do not apply to a general security holder or to the debts owed to a general security holder. A general security holder is defined as a secured creditor that holds a charge (or 2 or more charges which together constitute a charge) over the whole or substantially the whole of the property of the entity.[[67]](#footnote-67) A general security holder (and any receiver they appoint) may enforce[[68]](#footnote-68) their charge(s).[[69]](#footnote-69) The protections in pt 5 also do not apply to excluded debts.[[70]](#footnote-70)

The protections listed below apply during the BDH protection period(s), and largely reflect those available to a company in voluntary administration.

* Subject to exceptions for charges over perishable property and where the enforcement process under a charge has begun before an entity’s entry into BDH,[[71]](#footnote-71) charges over the entity’s property must not be enforced except with the permission of the High Court (the Court) or in accordance with an arrangement approved by creditors.[[72]](#footnote-72)
* Subject to specified exceptions for recovery of property begun before an entity’s entry into BDH and recovery of perishable property,[[73]](#footnote-73) owners and lessors must not recover property used by the entity except with the entity’s written consent, the permission of the Court, or in accordance with an arrangement approved by creditors.[[74]](#footnote-74)
* Proceedings must not be begun or commenced in connection with a debt or in relation to the entity’s property except with the entity’s written consent, the permission of the Court, or in accordance with an arrangement approved by creditors.[[75]](#footnote-75)
* An enforcement process in relation to the entity’s property must not be begun or continued except with the permission of the Court.[[76]](#footnote-76)
* Except with the Court’s permission, a guarantee of the liability of the entity must not be enforced against a director, shareholder or other member of the entity, or against their relative or spouse.[[77]](#footnote-77)

An entity may apply for a Court order applicable during the period beginning not earlier than the date on which the notice of the proposed arrangement was sent to creditors and ending not later than five working days after the date on which notice was sent of the result of voting on it. The Court may order that proceedings in relation to a debt owing by the entity be stayed or that a creditor refrain from taking any other measure to enforce payment of a debt owed by the entity.[[78]](#footnote-78) Such orders may not be made in relation to a debt owed by the entity to a general security holder, or any excluded debt.[[79]](#footnote-79)

*Exemption from operation of insolvent transaction and prejudicial disposition regimes*

A transaction entered into by an entity in BDH is exempt from the insolvent transaction rules in the *Companies Act* and the prejudicial disposition rules in subpt 6 of pt 6 of the *Property Law Act 2007* (NZ) if specified conditions are met.[[80]](#footnote-80) The first of the conditions is that either the transaction was entered into during the protection period,[[81]](#footnote-81) or was specifically authorised by an arrangement approved by creditors.[[82]](#footnote-82) The second is that the transaction is entered into by all parties in good faith, and on arm’s-length terms.[[83]](#footnote-83)

*Arrangement approved by creditors*

As noted above, an entity’s board must send notice to its creditors of the entity’s entry into BDH.[[84]](#footnote-84) Upon entry into BDH, the entity has the protections described above, but these cease after one month unless the entity’s creditors vote to approve an arrangement.[[85]](#footnote-85) For the purposes of the BDH scheme, “creditor” is defined to include a secured creditor[[86]](#footnote-86) and a person who, in a liquidation under the *Companies Act*, would be entitled to claim that a debt or liability is owing to them.[[87]](#footnote-87) Excluded from the definition are persons who are owed or must be paid an excluded debt. The definition of “excluded debt” is broad and, in addition to any excluded debt later prescribed by regulation, includes a debt incurred after an entity enters BDH; salary wages or other amounts owed to an employee in connection with an employment relationship; and amounts that the entity must pay to the Commissioner of Inland Revenue (including PAYE, child support payments, student loan repayments, kiwisaver contributions, and amounts payment under an instalment arrangement reached with the Commissioner).[[88]](#footnote-88)

Unlike voluntary administration, but akin to the process where a company proposes a compromise with its creditors, it is the entity that prepares the proposed arrangement that creditors will vote on. A proposed arrangement may have the following effects:[[89]](#footnote-89)

1. reducing the amount of any payment to be made by the entity to a creditor during the protection period (without a consequential change being made to an annual interest rate):
2. postponing, during a protection period, the dates on which payments are to be made by the entity to a creditor (without a consequential change being made to the annual interest rate or annual interest rates):
3. preventing the exercise of any of the creditor’s powers, or restricting any of the creditor’s rights, to enforce payment of the due debt during the protection period.

Significant restructuring cannot be achieved as cancellation of all or part of a debt that is owing by the entity to a creditor is not permitted.[[90]](#footnote-90) Other prohibited effects are varying the rights of a creditor or the terms of a debt,[[91]](#footnote-91) and preventing the exercise of a creditor’s powers or restricting the exercise of any of a creditor’s rights after the end of the protection period.[[92]](#footnote-92)

The entity must send to each known creditor[[93]](#footnote-93) a notice setting out prescribed information about the arrangement (and this largely mirrors the information that a company must provide to its creditors about a proposed compromise) and which requests that creditors vote on a resolution to approve the arrangement.[[94]](#footnote-94) The notice must be sent and received by creditors not less than five working days before the voting date.[[95]](#footnote-95) The voting date must be before the one month expiry period that starts on the date on which the entity enters BDH.[[96]](#footnote-96)

Unlike approval of a compromise with creditors under the *Companies Act,* or when creditors decide the fate of a company in voluntary administration, the holding of a creditors’ meeting to approve an arrangement is voluntary.[[97]](#footnote-97) The notice given to creditors may provide for alternative voting methods (including electronic voting)[[98]](#footnote-98) such as, for example, that a creditor may email its vote to a particular email address before a particular time on a particular date.[[99]](#footnote-99)

An arrangement is approved if a majority by number and value of creditors vote in favour of it[[100]](#footnote-100) and all other prescribed requirements are met.[[101]](#footnote-101) In this calculation, and unless the Court orders otherwise, related creditor’s votes are disregarded.[[102]](#footnote-102) The value attributed to creditors must not include any excluded debt.[[103]](#footnote-103) The duty of receiving and counting votes falls on a person authorised by the entity,[[104]](#footnote-104) who must certify proper completion of this task and prepare a certificate of the result of the vote.[[105]](#footnote-105) The board must notify the Registrar and creditors of the result of the vote.[[106]](#footnote-106)

An arrangement approved by creditors is binding on the entity and all creditors who received notice of it.[[107]](#footnote-107)

An arrangement, once approved, may be varied in accordance with the specified procedure.[[108]](#footnote-108)

The entity may seek directions of the Court in relation to procedural requirements.[[109]](#footnote-109) In a protection borrowed from compromises with creditors under the *Companies Act,* individual creditors may seek a Court order that they not be bound by an arrangement approved by creditors.[[110]](#footnote-110)

**Voidable Transactions**

The final amendment to New Zealand’s insolvency framework made by the *COVID-19 (Further Management Measures) Legislation Act 2020* is to the time limits within which liquidators (under the *Companies Act 1993)* and the Official Assignee (under the *Insolvency Act 2006*) may act to set aside insolvent transactions and voidable charges entered into with non-related parties. The amendments apply to liquidations and bankruptcies commencing on or after 15 May 2020.[[111]](#footnote-111) They bring into force just one of a raft of changes to the voidable transaction rules that were signalled late in 2019.[[112]](#footnote-112) In summary, a liquidator or Official Assignee may now only set aside insolvent transactions and voidable charges entered into with non-related parties in the restricted period of six months prior to the commencement of a liquidation or bankruptcy.[[113]](#footnote-113) A liquidator or the Official Assignee may act to set aside insolvent transactions and voidable charges entered into with related parties in the related party period of two years prior to commencement of bankruptcy or liquidation.[[114]](#footnote-114)

1. See [www.covid19.govt.nz/](http://www.covid19.govt.nz/). [↑](#footnote-ref-1)
2. The Treasury, *Budget Economic and Fiscal Update 2020,* New Zealand Government, 14 May 2020, at 3. [↑](#footnote-ref-2)
3. See “Wage Subsidy Scheme” at [www.employment.govt.nz/leave-and-holidays/other-types-of leave/coronavirus-workplace/wage-subsidy/](http://www.employment.govt.nz/leave-and-holidays/other-types-of%20leave/coronavirus-workplace/wage-subsidy/). [↑](#footnote-ref-3)
4. “A million workers supported by Government wage subsidy” Press release by Minister of Finance, Hon Grant Robertson, and Minister of Social Development, Hon Carmel Sepuloni, 7 April 2020, [www.beehive](http://www.beehive).govt.nz. [↑](#footnote-ref-4)
5. See “Business finance guarantee scheme” at [www.business.govt.nz/covid-19/business-finance-guarantee-scheme](http://www.business.govt.nz/covid-19/business-finance-guarantee-scheme). [↑](#footnote-ref-5)
6. See [www.ird.govt.nz/covid-19/business-and-organisations/temporary-loss-carry-back-scheme](http://www.ird.govt.nz/covid-19/business-and-organisations/temporary-loss-carry-back-scheme). [↑](#footnote-ref-6)
7. *Property Law Act 2007* (NZ), ss 120A-120E, 129A-129E, 245A-245E. [↑](#footnote-ref-7)
8. For a summary, see “Employment Indicators” at www. [www.stats.govt.nz/information-releases/employment-indicators-april-2020](https://www.stats.govt.nz/information-releases/employment-indicators-april-2020). [↑](#footnote-ref-8)
9. *Companies Act 1993* (NZ), sch 14, cl 1. [↑](#footnote-ref-9)
10. *Companies Act 1993* (NZ), sch 12, cl 2. [↑](#footnote-ref-10)
11. This is a duplication of the cash-flow test of solvency in the statutory solvency test in s 4(1)(a) of the *Companies Act 1993* (NZ). [↑](#footnote-ref-11)
12. *Companies Act 1993* (NZ), sch 12, cl 4(1). Note, however, that certain companies are excluded from the operation of the safe harbour rules, including registered banks and non-bank deposit takers, and companies incorporated after 3 April 2020: sch 12, c 4(2). [↑](#footnote-ref-12)
13. *Companies Act 1993* (NZ), sch 12, cl 5(1)(a), (2)(a). [↑](#footnote-ref-13)
14. *Companies Act 1993* (NZ), sch 12, cl 10(1)(a). [↑](#footnote-ref-14)
15. *Companies Act 1993* (NZ), sch 12, cl 10(1)(b). [↑](#footnote-ref-15)
16. *Companies Act 1993* (NZ), sch 12, cl 10(3). [↑](#footnote-ref-16)
17. *Companies Act 1993* (NZ), s 138B(2). [↑](#footnote-ref-17)
18. *Mason v Lewis* [2006] 3 NZLR 225 (CA) at [51]. [↑](#footnote-ref-18)
19. Note, however, that this is a judicial innovation, as there is no statutory direction for the solvency test in s 4 of the *Companies Act* to be used for this purpose. The statutory solvency test generally applies as a creditor protection mechanism when a company is making a distribution (defined in s 2) to its shareholders: see *Companies Act 1993* (NZ)*,* s 52(1). [↑](#footnote-ref-19)
20. Ibid. [↑](#footnote-ref-20)
21. Ibid at [49]-[50]. [↑](#footnote-ref-21)
22. *Traveller v Lower* (2004) 9 NZCLC 263,570 (HC) at [125]. [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. *Cooper v Debut Homes Ltd (in liq)* [2019] NZCA 39 at [32]. [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. *Cooper v Debut Homes Ltd (in liq)* [2019] NZCA 39 at [33]. [↑](#footnote-ref-26)
27. The new rules are in addition to the reasonable reliance defence in s 138 of the *Companies Act 1993* (NZ). [↑](#footnote-ref-27)
28. Companies Act 1993 (NZ), sch 12, cl 6(1). [↑](#footnote-ref-28)
29. Companies Act 1993 (NZ), sch 12, cl 6(3). [↑](#footnote-ref-29)
30. These arrangements include the new COVID-19 business debt hibernation scheme in sch 13 of the *Companies Act 1993* (NZ) and summarised below. [↑](#footnote-ref-30)
31. The safe harbour rules also apply to companies incorporated between1 January 2020 and 2 April 2020, but not to other specified types of companies: *Companies Act 1993* (NZ), sch 12, cl 4(1),(2). [↑](#footnote-ref-31)
32. *Companies Act 1993* (NZ), sch 12, cl 8. [↑](#footnote-ref-32)
33. *Companies Act 1993* (NZ), s 138. [↑](#footnote-ref-33)
34. See, for example, *Mainzeal Property & Construction Ltd (in liq) v Yan* [2019] NZHC 255 (HC). [↑](#footnote-ref-34)
35. *Companies Act 1993* (NZ), s 131(1); *Sojourner v Robb* [2007] NZCA 493, [2008] 1 NZLR 751 at [25]; *Cooper v Debut Homes Ltd (in liq)* [2019] NZCA 39 at [26]. [↑](#footnote-ref-35)
36. *Companies Act 1993* (NZ), s 137. [↑](#footnote-ref-36)
37. *Companies Act 1993* (NZ), s 301. [↑](#footnote-ref-37)
38. *Goatlands Ltd (in liq) v Borrell* (2007) 23 NZTC 21,107 at [114]. [↑](#footnote-ref-38)
39. *Companies Act 1993* (NZ), sch 12, cl 7(3). [↑](#footnote-ref-39)
40. *Companies Act 1993* (NZ), sch 12, cl 7(1). [↑](#footnote-ref-40)
41. *Companies Act 1993* (NZ), sch 12 cl 7(1). [↑](#footnote-ref-41)
42. *Companies Act 1993*, sch 12, cl 6(3). [↑](#footnote-ref-42)
43. *Companies Act 1993*, s 395A. [↑](#footnote-ref-43)
44. *Companies Act 1993* (NZ), Pt 15A. [↑](#footnote-ref-44)
45. *Companies Act 1993* (NZ), Pt 14. [↑](#footnote-ref-45)
46. *Companies Act 1993* (NZ), sch 13, cls 3(2), 5(5). [↑](#footnote-ref-46)
47. *Companies Act 1993* (NZ), sch 13, cls 3(1), 4(1). [↑](#footnote-ref-47)
48. *Companies Act 1993* (NZ), sch 13, cl 3(3). [↑](#footnote-ref-48)
49. *Companies Act 1993* (NZ), sch 13, cl 3(4). [↑](#footnote-ref-49)
50. *Companies Act 1993* (NZ), sch 13, cl 1(a),(b). [↑](#footnote-ref-50)
51. *Companies Act 1993* (NZ), sch 13, cl 1(2). [↑](#footnote-ref-51)
52. *Companies Act 1993* (NZ), sch 13, cl 1(3)(b), (c). [↑](#footnote-ref-52)
53. *Companies Act 1993* (NZ), sch 13, cl 1(3)(a). [↑](#footnote-ref-53)
54. See [www.business.govt.nz/covid-19/business-debt-hibernation/](http://www.business.govt.nz/covid-19/business-debt-hibernation/). [↑](#footnote-ref-54)
55. “Board” is defined to include the board of a company, the general partners of a limited partnership, the partners of a partnership, and the committee or other governing body of a body corporate or unincorporated association: *Companies Act 1993* (NZ), sch 13, cl 4(1). [↑](#footnote-ref-55)
56. *Companies Act 1993* (NZ), sch 13, cl 5(1)(a)-(c). [↑](#footnote-ref-56)
57. See the definition in Companies Act 1993, sch 13, cl 4(1). [↑](#footnote-ref-57)
58. *Companies Act 1993* (NZ), sch 13, cl 5(2). [↑](#footnote-ref-58)
59. *Companies Act 1993* (NZ), sch 13, cl 5(3), (4). [↑](#footnote-ref-59)
60. *Companies Act 1993*, (NZ), sch 13, cl 6(1), (2). [↑](#footnote-ref-60)
61. *Companies Act 1993* (NZ), sch 13, cl 7(1). [↑](#footnote-ref-61)
62. *Companies Act 1993* (NZ), sch 13, cl 7(2). [↑](#footnote-ref-62)
63. *Companies Act 1993* (NZ), sch 13, cl 14. [↑](#footnote-ref-63)
64. *Companies Act 1993* (NZ), sch 13, cl 15. [↑](#footnote-ref-64)
65. *Companies Act 1993* (NZ), sch 13, cl 18. [↑](#footnote-ref-65)
66. *Companies Act 1993* (NZ), sch 13, cls 16, 17. [↑](#footnote-ref-66)
67. *Companies Act 1993* (NZ), sch 13, cl 21(1), (4). [↑](#footnote-ref-67)
68. The definition of “enforce” in sch 13, cl 4(1) adopts the definition of this term for the purposes of the voluntary administration regime in the Companies Act: see *Companies Act 1993* (NZ), s 239ABK. [↑](#footnote-ref-68)
69. *Companies Act 1993* (NZ), sch 13, cl 21(2). [↑](#footnote-ref-69)
70. *Companies Act 1993* (NZ), sch 13, cl 22. Excluded debt is defined to include debts incurred after the entity’s entry into BDH, to wages, salaries or other amounts owed to an employee in connection with an employment relationship, and amounts owed to the Commissioner of Inland Revenue (including PAYE, student loan repayments, kiwisaver contributions and amounts payable under an instalment arrangement entered into with the Commissioner): *Companies Act 1993* (NZ), cl 4. [↑](#footnote-ref-70)
71. *Companies Act 1993* (NZ), sch 13, cls 45, 46. Note, also, that the rights of secured creditors pursuant to these exceptions may be limited by the Court: *Companies Act 1993* (NZ), cl 47. [↑](#footnote-ref-71)
72. *Companies Act 1993* (NZ), sch 13, cl 38. [↑](#footnote-ref-72)
73. *Companies Act 1993* (NZ), sch 13, cls 49, 50. Note, also, that the rights of owners or lessors pursuant to these exceptions may be limited by the Court: *Companies Act 1993* (NZ), cl 51. [↑](#footnote-ref-73)
74. *Companies Act 1993* (NZ), sch 13, cl 39. [↑](#footnote-ref-74)
75. *Companies Act 1993* (NZ), sch 13, cl 40. [↑](#footnote-ref-75)
76. *Companies Act 1993* (NZ), sch 13, cl 42. Note the duties of court officers in relation to an entity’s property: *Companies Act 1993* (NZ), sch 13, cl 43. [↑](#footnote-ref-76)
77. *Companies Act 1993* (NZ), sch 13, cl 44. [↑](#footnote-ref-77)
78. *Companies Act 1993* (NZ), sch 13, cl 36(1)(b). [↑](#footnote-ref-78)
79. *Companies Act 1993* (NZ), sch 13, cl 36(2). [↑](#footnote-ref-79)
80. See *Companies Act 1993* (NZ), sch 7, cl 53(2). [↑](#footnote-ref-80)
81. The period of one month from the entity’s entry into BDH and for an additional six months if creditors approve an arrangement. [↑](#footnote-ref-81)
82. *Companies Act 1993* (NZ), sch 7, cl 53(1)(a). [↑](#footnote-ref-82)
83. *Companies Act 1993* (NZ), sch 7, cl 53(1)(b). Note the definition of “arms-length terms” in cl 53(3). [↑](#footnote-ref-83)
84. *Companies Act 1993* (NZ), sch 7, cl 7. [↑](#footnote-ref-84)
85. *Companies Act 1993* (NZ), sch 7, cl 9(1). [↑](#footnote-ref-85)
86. “Secured creditor” in relation to an entity is defined to mean a person entitled to a charge on or over property owned by the entity: *Companies Act 1993* (NZ), sch 7, cl 4. [↑](#footnote-ref-86)
87. *Companies Act 1993* (NZ), sch 7, cl 4. [↑](#footnote-ref-87)
88. *Companies Act 1993* (NZ), sch 7, cl 4. [↑](#footnote-ref-88)
89. *Companies Act 1993* (NZ), sch 7, cl 30(2). [↑](#footnote-ref-89)
90. *Companies Act 1993* (NZ), sch 7, cl 30(1)(a). [↑](#footnote-ref-90)
91. Unless this is a variation as a result of a permitted effect of an arrangement, or permitted under regulation: *Companies Act 1993* (NZ), sch 7, cl 31(1)(b), (3). [↑](#footnote-ref-91)
92. *Companies Act 1993* (NZ), sch 7, cl 30(1)(b),(c). [↑](#footnote-ref-92)
93. The applicable rules relating to how a notice or other document may be given are those in s 391 of the *Companies Act 1993* (NZ): Companies Act 1993, sch 13, cl 65(1). [↑](#footnote-ref-93)
94. *Companies Act 1993* (NZ), sch 7, cl 9(2). [↑](#footnote-ref-94)
95. *Companies Act 1993* (NZ), sch 7, cl 9(3). [↑](#footnote-ref-95)
96. *Companies Act 1993* (NZ), sch 7, cl 9(4). [↑](#footnote-ref-96)
97. *Companies Act 1993* (NZ), sch 7, cl 11. If a meeting is held, the specified procedural rules largely mirror those relating to meetings of creditors under sch 5 of *Companies Act 1993* (NZ): *Companies Act 1993* (NZ), sch 7, pt 8. [↑](#footnote-ref-97)
98. *Companies Act 1993* (NZ), sch 7, cl 4(2). [↑](#footnote-ref-98)
99. *Companies Act 1993* (NZ), sch 7, cl 10(1)(c). [↑](#footnote-ref-99)
100. *Companies Act 1993* (NZ), sch 7, cl 24(1)(a). [↑](#footnote-ref-100)
101. *Companies Act 1993* (NZ), sch 7, cl 24(1)(b). [↑](#footnote-ref-101)
102. *Companies Act 1993* (NZ), sch 7, cls 32-35. [↑](#footnote-ref-102)
103. *Companies Act 1993* (NZ), sch 7, cls 24(2), 25(1). [↑](#footnote-ref-103)
104. *Companies Act 1993* (NZ), sch 7, cl 25(1). [↑](#footnote-ref-104)
105. *Companies Act 1993* (NZ), sch 7, cls 25(1)(d), 27. [↑](#footnote-ref-105)
106. *Companies Act 1993* (NZ), sch 7, cl 28. [↑](#footnote-ref-106)
107. *Companies Act 1993* (NZ), sch 7, cl 29. [↑](#footnote-ref-107)
108. *Companies Act 1993* (NZ), sch 7, cl 31. [↑](#footnote-ref-108)
109. *Companies Act 1993* (NZ), sch 7, cl 36(1)(a). [↑](#footnote-ref-109)
110. *Companies Act 1993* (NZ), sch 7, cl 37. See also *Companies Act 1993* (NZ), s 232. [↑](#footnote-ref-110)
111. *Companies Act 1993* (NZ), sch 1AA, cl 6(1); *Insolvency Act 2006* (NZ), sch 1AA, cl 26(1). [↑](#footnote-ref-111)
112. See Cabinet Paper “Insolvency Law Reform” (23 September 2019) at [21]; Regulatory Impact Statement “Voidable Transactions” (23 September2019). [↑](#footnote-ref-112)
113. *Companies Act 1993* (NZ), ss 292(1)(a), 4(C), 293(1), (5A); *Insolvency Act 2006* (NZ), ss 194(1), 198(1). Note the definition of “related party” in *Companies Act 1993* (NZ), s 291A; *Insolvency Act 2006* (NZ), ss 193A. [↑](#footnote-ref-113)
114. *Companies Act 1993* (NZ), ss 292(1A), (5), 293(1AA), (5); *Insolvency Act 2006* (NZ), ss 194(2), 198(2). [↑](#footnote-ref-114)