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**An Act providing for temporary measures to ameliorate the effects of the outbreak of COVID-19 on the business community of the Cook Islands, including provision for Government business loan facilities, guarantees, and indemnities.**

**The Parliament of the Cook Islands enacts as follows—**

**(6 July 2020)**

**1 Title**

This Act is the COVID-19 (Economic Response) Act 2020.

**2 Commencement**

- (1) This Act comes into force on the day after the date it is assented to by the Queen’s Representative.
- (2) This Act is automatically repealed on the expiry of 5 years after its commencement unless—
  - (a) it is earlier repealed by Order in Executive Council; or
  - (b) it is extended by an amendment to this subsection.

**Part 1**  
**Preliminary matters**

**3 Purpose**

The purpose of this Act is—

- (a) to relieve, subject to conditions, directors of stressed companies from liability for certain decisions taken during the outbreak of COVID-19; and
- (b) to provide, subject to conditions, a moratorium for a limited period on enforcement of debts owed by businesses; and

- (c) to protect persons dealing with companies from having transactions during the outbreak of COVID-19 unwound under voidable transaction provisions; and
- (d) to provide for loan, guarantee, and indemnity support by the Crown to businesses.

#### 4 **Interpretation**

In this Act, unless the context otherwise requires,—

**board**, in relation to an entity, means the board of directors, the partners, or the governing body or committee of an entity, as the case may be

**business** includes any profession, trade, or undertaking carried on with the intention of making a pecuniary profit

**business debt hibernation** or **BDH** means the scheme for imposing a moratorium on the debts of a trader under Part 3

**Companies Act** means the Companies Act 2017

**company** means a company registered or re-registered under the Companies Act

**Court** means the High Court

**director**, in relation to a company, has the same meaning as in the Companies Act

**document** includes any of the following:

- (a) any form of writing on material:
- (b) information recorded, transmitted or stored digitally or electronically, and any material subsequently derived from that information:
- (c) any label or mark:
- (d) any book, map, plan, graph or drawing:
- (e) any photograph, film, negative or device in, on or from which 1 or more visual images are capable of being stored or reproduced

**entity** means a company, a partnership, or any other body, whether incorporated or not

**file** means to apply, give, submit, send, or lodge, and includes to file by electronic means

**form** includes—

- (a) format; and
- (b) an electronic form or format

**MFEM Act** means the Ministry of Finance and Economic Management Act 1995-1996

**Minister** means the Minister of Finance

**prescribed** means prescribed by regulations made under this Act

**protection period** has the meaning given in section 5

**Registrar** means the Registrar of Companies

**trader** means an entity or person, including a sole trader, who carries on business in the Cook Islands

**trading insolvent**, in relation to a trader, means that the trader is unable to pay its debts as they become due in the ordinary course of business

**trading solvent**, in relation to a trader, means that the trader is able to pay its debts as they become due in the ordinary course of business

**writing** includes writing sent or communicated in electronic form or by electronic means.

## **5 Protection period**

- (1) The protection period is the period beginning on 1 March 2020 and ending on the close of 28 February 2021, unless extended under subsection (2).
- (2) The Minister by notice in the Gazette may extend the protection period by up to 6 months on 2 occasions.
- (3) The protection period expires at the latest on the close of 28 February 2022.

## **6 Act binds the Crown**

This Act binds the Crown.

# **Part 2**

## **Directors of stressed companies**

### **7 Decisions by directors of stressed company protected**

- (1) A director of a stressed company is not liable under section 88 (reckless trading) or 89 (duty in relation to obligations) of the Companies Act for a decision that is taken in relation to the company during the protection period.
- (2) Nothing in subsection (1) affects the liability of a director for a decision that is made—
  - (a) in bad faith; or
  - (b) with the intention, or for the purpose, of defrauding or otherwise disadvantaging the creditors of the company.
- (3) For the purposes of section 92 of the Companies Act, a decision by the director of a stressed company that is taken in relation to the company during the protection period must be judged in the light of the circumstances affecting the company that arise out of the outbreak of COVID-19.

### **8 What is stressed company**

For the purposes of section 7, a stressed company is a company—

- (a) that, as at 29 February 2020, was trading solvent; and
- (b) that in the protection period is or becomes trading insolvent; and
- (c) the board of which considers in good faith and on reasonable grounds that the company's trading insolvency is substantially the result of the effects of the outbreak of COVID-19 on 1 or more of the following:
  - (i) the company's level of trading;
  - (ii) the company's ability to operate;
  - (iii) the company's ability to raise finance;
  - (iv) the company's ability to recover debts due and owing by its debtors;
  - (v) any other factor that materially contributes to the company's normal cashflow.

**Part 3**  
**Business debt hibernation**

Subpart 1—General

**9 Purpose of business debt hibernation**

The purpose of a trader entering business debt hibernation (**BDH**) is to allow the trader to enjoy a temporary moratorium on enforcement by the trader's creditors of the trader's debts in light of the exceptional circumstances of economic hardship arising out of the outbreak of COVID-19.

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

For the purposes of this Part,—

**BDH notice** means a notice that is filed under section 14(a)

**creditor**—

(a) includes—

- (i) a secured creditor; and
- (ii) the Collector of Inland Revenue; but

(b) does not include—

- (i) an employee of the trader in relation to salary, wages, or other amounts that the trader owes the employee as an employee; or
- (ii) a person to the extent that the debt is an excluded debt

**excluded debt** means a debt that is excluded under section 11.

**11 Debts that are excluded from BDH**

The following debts do not qualify for protection under BDH:

- (a) a debt incurred on or after the date on which the trader files a BDH notice with the Registrar; or
- (b) any amount that has been deducted or withheld from the salary or wages of an employee and that has not been paid to the Collector of Inland Revenue as required by tax or child support legislation; or
- (c) any other debt or claim of a kind prescribed by regulations under this Act.

**12 Requirements for entering BDH**

(1) A trader may enter BDH if—

- (a) as at 29 February 2020, the trader was able to pay its debts as they became due in the normal course of business; and
- (b) the trader has taken the verification steps set out in section 13; and
- (c) within the protection period, the trader files a BDH notice with the Registrar.

(2) A trader enters BDH when the BDH notice is filed.

**13 Trader verification steps**

(1) In the case of a trader that is an entity, the board must resolve that the entity enter BDH but may only do so after certifying in writing—

- (a) that as at 29 February 2020, the entity was trading solvent; and

- (b) that the entity is, or in the next 6 months, is likely to be trading insolvent; and
  - (c) that the board considers in good faith and on reasonable grounds that the entity's actual or likely trading insolvency is or will be substantially the result of the effects of the outbreak of COVID-19 on 1 or more of the following:
    - (i) the entity's level of trading;
    - (ii) the entity's ability to operate;
    - (iii) the entity's ability to raise finance;
    - (iv) the entity's ability to recover debts due and owing by its debtors;
    - (v) any other factor that materially contributes to the entity's normal cashflow.
- (2) In the case of a person who is a sole trader, the trader must certify in writing that—
- (a) that as at 29 February 2020, the trader was trading solvent; and
  - (b) that the trader is, or in the next 6 months, is likely to be trading insolvent; and
  - (c) that the trader believes in good faith and on reasonable grounds that the trader's actual or likely trading insolvency is or will be substantially the result of the effects of the outbreak of COVID-19 on 1 or more of the following:
    - (i) the trader's level of trading;
    - (ii) the trader's ability to operate;
    - (iii) the trader's ability to raise finance;
    - (iv) the trader's ability to recover debts due and owing by his or her debtors;
    - (v) any other factor that materially contributes to the trader's normal cashflow.

**14 BDH notice**

A BDH notice must be—

- (a) filed with the Registrar in accordance with section 37; and
- (b) accompanied by a copy of—
  - (i) the board resolution and certification under section 13(1); or
  - (ii) the sole trader certification under section 13(2); and
- (c) accompanied by the prescribed fee, if any.

**15 Notice to creditors of entering BDH**

A trader that enters BDH must, without delay after filing a BDH notice, send a copy of the notice to each known creditor.

**16 Initial protection**

- (1) This section applies for 3 months after the date on which the trader files a BDH notice.
- (2) Subject to subsection (3), during the 3-month period,—
  - (a) a charge over the trader's property is unenforceable; and

- (b) the owner or lessor of property that is leased or occupied by the trader must not take possession of the property or otherwise recover it; and
  - (c) there must not be commenced or continued any proceeding in a court or other tribunal against the trader in connection with a debt (other than an excluded debt) or in relation to the trader's property; and
  - (d) there must not be commenced or continued any enforcement proceeding in relation to the trader's property.
- (3) Subsection (2) does not apply to the extent that—
- (a) the Court orders; or
  - (b) the trader gives its written consent.
- (4) In this section, **property** includes land or an interest in land.

### **17 Subsequent protection**

- (1) Subject to subsection (2), the protection conferred on a trader under section 16 continues for a further 6 months after the end of the 3-month period if the trader has by the end of the 3-month period entered into a binding arrangement with its creditors under subpart 2.
- (2) The protection conferred on a trader under subsection (1) does not apply to a secured creditor who has a charge on or over the whole, or substantially the whole, of the property of the trader.

## Subpart 2—Arrangement with creditors

### **18 Arrangement with creditors**

- (1) A trader may enter into an arrangement with creditors for the purposes of section 17 by—
- (a) preparing a proposed arrangement; and
  - (b) sending to each known creditor a notice that complies with section 19.
- (2) The notice must be received by creditors no less than 7 days before—
- (a) the last day for voting, if voting is by email or post; or
  - (b) the date of the meeting, if a meeting of creditors is to be held to approve the arrangement.
- (3) The procedure for a meeting of creditors to approve an arrangement must comply with any prescribed requirements.

### **19 Notice of proposed arrangement**

- (1) A notice of proposed arrangement must—
- (a) describe the proposed arrangement in sufficient detail to enable a creditor to form a reasoned judgement in relation to it (including the terms of the arrangement and the reasons for it); and
  - (b) set out the text of the resolution to be voted on; and
  - (c) explain how and when a creditor may vote on the resolution, including the last date for voting and the manner of voting (for example, the notice may specify an email address for receiving votes by email); and
  - (d) explain that the proposed arrangement will be binding on all creditors if approved in accordance with section 20; and

- (e) contain any other prescribed information.
- (2) If the trader proposes to hold a meeting of creditors to approve the arrangement, the notice must also state the date, time, and place of the meeting.

## **20 Approval of arrangement**

- (1) An arrangement is approved by creditors of a trader if a majority in number and value of the creditors who are entitled to vote and who vote on the proposal, vote in favour of the resolution.
- (2) The board of the trader or the sole trader, as the case may be, must without delay—
  - (a) certify the result of the vote in writing; and
  - (b) certify the terms of the arrangement, if approved; and
  - (c) file the certificate with the Registrar; and
  - (d) send a copy of the certificate to each creditor.

## **21 Effect of approval of arrangement**

An arrangement approved under section 20—

- (a) binds the trader; and
- (b) binds all creditors of the trader to whom a notice of the proposed arrangement was sent under section 18; and
- (c) continues the protection of the trader under section 17 until the end of the subsequent protection period.

### Subpart 3—Voidable transactions provisions disapplied

## **22 Interpretation for this subpart**

In this subpart,—

**transaction** includes giving a security

**voidable transactions provisions** means section 279 (insolvent transaction voidable) and 282 (voidable security) of the Companies Act.

## **23 Voidable transactions provisions disapplied**

The voidable transactions provisions do not apply to a transaction by a company that is in BDH if the requirements set out in section 24 are met.

## **24 Requirements for disapplying voidable transactions provisions**

- (1) The voidable transactions provisions do not apply to a transaction by a company that is in BDH if—
  - (a) the transaction is—
    - (i) entered into by the company during the protection period under section 5; or
    - (ii) specifically authorised under an arrangement that has been approved under section 20; and
  - (b) the transaction is entered into by all the parties—
    - (i) in good faith; and
    - (ii) on arm's-length terms.



- (2) A transaction between a company and another party (P) is on arm's-length terms if the terms—
- (a) would be reasonable in the circumstances if the parties were connected or related only by the transaction in question, each acting independently and each acting in its own best interests; or
  - (b) are less favourable to P than the terms referred to in paragraph (a).

## Part 4

### Business loan facilities and guarantees

#### Subpart 1—Preliminary

#### 25 Interpretation for this Part

In this Part, unless the context otherwise requires—

**BCCF loan** means a loan contract entered into by the Crown under the business continuity credit facility

**BGLP guarantee** means a guarantee given by the Crown to secure a BGLP loan

**BGLP indemnity** means an indemnity given by the Crown indemnifying a bank against losses arising from default under a BGLP loan

**BGLP loan** means a loan made under the business growth loan program

**business continuity credit facility** or **BCCF** means the business continuity credit facility established and administered by the Crown under the COVID-19 Economic Response Plan

**business growth loan program** or **BGLP** means the business growth loan program established and administered by the Crown under the COVID-19 Economic Response Plan

**COVID-19 Economic Response Plan** means the official plan put in place by the Ministry to address the economic impacts of COVID-19, as amended from time to time

**Crown** means Her Majesty the Queen in right of the Government of the Cook Islands

**Financial Secretary** means—

- (a) means the Financial Secretary appointed under section 4 of the MFEM Act; and
- (b) includes any person or persons delegated by the Financial Secretary to perform any of his or her power or powers under the MFEM Act or this Act

**Ministry** means the Ministry of Finance and Economic Management established under the MFEM Act.

#### Subpart 2—BCCF loans

#### 26 Financial Secretary may make BCCF loans

- (1) The Financial Secretary may, on behalf of the Crown, enter into a BCCF loan contract with a person if the requirements of this section are met.

- (2) The Financial Secretary must be satisfied that all reasonable and prudent steps have been taken to ensure that—
  - (a) the identity of the loan applicant is established; and
  - (b) the loan applicant is eligible under the BCCF eligibility criteria to receive the loan; and
  - (c) the loan application is received in the period between the date the BCCF loan terms are published and 30 September 2020.
- (3) The loan contract must be on the BCCF loan terms published under section 27(1).

**27 Financial Secretary must publish BCCF eligibility criteria and loan terms**

- (1) The Financial Secretary must publish, on or before 14 July 2020,—
  - (a) an explanation of how the BCCF works; and
  - (b) the criteria for eligibility under the BCCF (the **BCCF eligibility criteria**) to receive a loan; and
  - (c) the loan terms and conditions (the **BCCF loan terms**).
- (2) For the purposes of subsection (1), the Financial Secretary—
  - (a) must publish the information listed in subsection (1)(a) to (c) on a website maintained by or on behalf of the Ministry to which the public has free access; and
  - (b) may publish that information in other media as he or she considers expedient.

**28 Agent to administer BCCF**

- (1) The Financial Secretary may engage the Bank of the Cook Islands (the **BCI**) under an agency agreement to administer the BCCF.
- (2) As agent of the Crown to administer the BCCF, BCI may—
  - (a) receive and assess loan applications for eligibility; and
  - (b) receive funds in bulk from the Crown for disbursement to borrowers; and
  - (c) disburse funds to borrowers in accordance with loan contracts; and
  - (d) take all other steps to administer the BCCF that are required by the agency agreement.

**29 Minister must report to Parliament**

As soon as practicable after 30 September 2020 but in any event no later than 31 October 2020, the Minister must present to Parliament a written report that specifies—

- (a) the number of concluded loan contracts; and
- (b) the total amount of loan money disbursed; and
- (c) the total amount of loan money approved but not disbursed.

**30 Disclosure not required**

The Crown is not required to provide disclosure to an applicant for a BCCF loan despite any provision in an act or regulations to the contrary.

**31 Section 58 of MFEM Act disappplied**

Nothing in section 58 of the MFEM Act applies to or affects the capacity or authority of the Financial Secretary to make a BCCF loan under this subpart.

Subpart 3—BGLP guarantees and BGLP indemnities

**32 Financial Secretary may give BGLP guarantee or BGLP indemnity**

- (1) The Financial Secretary may, on behalf of the Crown, give a BGLP guarantee or a BGLP indemnity to a commercial bank carrying on business in the Cook Islands if the requirements of this section are met.
- (2) The Financial Secretary must be satisfied that all reasonable and prudent steps have been taken to ensure that—
  - (a) the guarantee secures, or the indemnity is given in respect of, a BGLP loan by the bank; and
  - (b) the identity of the borrower under the BGLP loan is established; and
  - (c) the borrower is eligible under the BGLP to receive a BGLP loan; and
  - (d) the funds borrowed under the BGLP loan are drawn down in the period between the date the BGLP loan terms are published and 30 June 2021.

**33 Financial secretary must publish BGLP eligibility criteria and loan terms**

- (1) The Financial Secretary must publish, on or before 31 July 2020,—
  - (a) an explanation of how the BGLP works; and
  - (b) the criteria for eligibility under the BGLP (the **BGLP eligibility criteria**) to receive a loan; and
  - (c) the loan terms required to give effect to the BGLP (the **BGLP loan terms**).
- (2) For the purposes of subsection (1), the Financial Secretary—
  - (a) must publish the information listed in subsection (1)(a) to (c) on a website maintained by or on behalf of the Ministry to which the public has free access; and
  - (b) may publish that information in other media as he or she considers expedient.

**34 Minister must report to Parliament**

As soon as practicable after 30 September 2020 and then quarterly ending on 30 June 2021, the Minister must present to Parliament a written report that specifies or updates—

- (a) the number of BGLP guarantees; and
- (b) the number of BGLP indemnities; and
- (c) the total amount, to the extent that it can be assessed, of the Crown liability under BGLP guarantees and BGLP indemnities.

**35 Sections 59 and 60 of MFEM Act disappplied**

Nothing in section 59 or 60 of the MFEM Act applies to or affects the capacity or authority of the Financial Secretary under this subpart to—

- (a) give a BGLP guarantee; or
- (b) give a BGLP indemnity.

## Part 5 Miscellaneous

### 36 **MFEM Act does not prevail**

Despite section 68 of the MFEM Act, a provision of that Act does not prevail over a provision of this Act in the event of a conflict between them.

### 37 **Format for filing notice or document**

A notice or document that is filed under this Act must be filed using the format comprising the data field contained in the online registry maintained by the Registrar for that notice or document or, if a form or format is prescribed, in accordance with that form or format.

### 38 **Regulations**

(1) The Queen's Representative, by Order in Executive Council, may make such regulations as are necessary for the purpose of giving full effect to this Act, and for any other purpose which is related or incidental to any provision of this Act.

(2) Without limiting the generality of subsection (1), regulations made under this section may make provision in relation to any of the following:

- (a) prescribing fees payable for the purposes of this Act;
- (b) prescribing circumstances in which fees are payable for the purposes of this Act;
- (c) prescribing grounds for an exemption from fees, in whole or in part;
- (d) prescribing a form or format;
- (e) prescribing a kind of debt or claim for the purposes of section 11;
- (f) prescribing additional information that a notice of arrangement must contain;
- (g) prescribing the procedure for a meeting of creditors to approve an arrangement.

### 39 **Transitional regulations**

The Queen's Representative may, by Order in Executive Council, make regulations for all or any of the following purposes:

- (a) providing transitional provisions relating to entities and other persons affected by this Act;
- (b) facilitating the bringing into force of any regulations under this Act;
- (c) providing for any other matters necessary for facilitating or ensuring an orderly implementation of the provisions of this Act.

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This Act is jointly administered by the Ministry of Finance and Economic Management and  
the Ministry of Justice.

Printed under the authority of the Cook Islands Parliament—2020.

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