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Corporate Insolvency and Governance Act 2020

A Coronavirus Guide

Corporate Insolvency and Governance Act 2020

Is your company or charity holding an AGM over the coming months or facing serious financial difficulty as a result of the crisis? New legislation has been introduced to relax corporate governance and insolvency law requirements.

The Corporate Insolvency and Governance Act 2020 has recently come into force. The new Act is intended to provide organisations with breathing space to continue to trade – and potentially avoid insolvency due to the unprecedented financial pressures caused by the coronavirus crisis. These provisions could be a great help to organisations which are facing serious financial hardship in the midst of this crisis. The Act also introduces measures which benefit a much wider range of organisations by relaxing governance provisions for many organisations that are grappling with legal requirements relating to members' meetings in the midst of social distancing practices.

The measures include a more flexible framework for the holding of members' meetings, such as an ability to hold meetings electronically even if not currently authorised under an organisation's governing document. Whilst these measures will be particularly helpful for organisations with upcoming AGMs or which need to pass members' resolutions in the coming months, they also provide a helpful opportunity for other organisations to amend their governing documents so that members' meetings can be held more flexibly in the future, particularly as the flexibility offered by the Act will only last until 30 September 2020 (unless extended by secondary legislation).

The Act received Royal Assent on 25 June 2020 and most provisions came into force from 26 June 2020.

What key changes have been made by the Act?

Corporate governance and members' meetings

After much uncertainty for organisations which need to hold members' meetings during the lockdown, the Act creates a more flexible framework in which meetings can be held, notwithstanding the organisations' constitutional requirements. These measures aim to allow AGMs and other general meetings to be validly held, while the current restrictions on public gatherings remain in place and in the context of the potential for social distancing measures to continue in some form indefinitely in the future.

These flexibilities are available to companies, CIOs and a range of mutual organisations – including building societies, credit unions, friendly societies, co-operative societies, community benefit societies and other registered societies. The flexibilities are not available to organisations established by an Act of Parliament or Royal Charter.

They include the following flexibilities:

a) Extended period to hold AGMs: where an organisation is currently required to hold an AGM (under

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statute or under its governing rules) on a date falling between 26 March 2020 and 30 September 2020 (the "Relevant Period"), it will be able to hold that AGM validly at any point in that extended period.

This means that companies (including charitable companies), CIOs and mutuals which have postponed their AGMs since 26 March 2020, or would like to postpone an upcoming AGM, will be given until the end of September 2020 to validly hold those meetings and, in doing so, they can take advantage of the additional flexibilities provided by the Act as to the manner in which meetings can be held.

b) Virtual meetings: where a members' meeting is held during the Relevant Period (either because it has to be held or simply because an organisation chooses to hold a members' meeting in that period), companies (including charitable companies), CIOs and mutuals will be afforded the following flexibilities, even if their governing document does not currently permit them:

- the meeting does not need to be held in a particular place, for example if the governing document states that it must be held in a particular physical location.
- the meeting may be held and any votes may be permitted to be cast by electronic means or any other means.
- the meeting may be held without any number of those participating in the meeting being together at the same place.
- a member does not have a right to attend the meeting in person, participate in the meeting other than by voting, or to vote by any particular means.

Organisations will be afforded the flexibility they need to decide how best to run these general meetings, in line with the measures above. However, the Government can expand on the detail of these flexibilities and make further provision in relation to notice requirements and transmission of documents ahead of meetings in secondary legislation.

The measures will not prevent a shareholder or member from exercising their right to vote on resolutions or other matters brought before the meeting and companies are expected to make reasonable efforts to provide the usual degree of engagement and challenge.

The Government has noted in a Q&A, issued in early June (before the Act was published or came into effect), some guidance on what it would consider to be best practice here. For example, Government advice is that as a minimum, organisations should consider exemplary member communication as the key element of good practice.

This should include:

- issuing communications in a timely fashion to ensure members can consider the matters to be voted on;
- ensuring that clarity is given on proxy voting;
- explaining the procedure for both the meeting and any communications prior to the meeting;
- giving all members the opportunity to both ask questions and receive responses to those questions prior to voting either at a real time on-line meeting or via proxy;
- making answers to any questions raised available to all both in the meeting and in written form following the meeting. This could be in real-time in the case of virtual meetings; and
- offering a physical meeting to all shareholders once government restrictions are lifted.

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Given the present uncertainties, the Government is making the flexibilities available throughout "AGM season" – the period within which the majority of companies and other bodies plan to hold their AGMs. The framework for both postponement of AGMs and the flexible holding of members' meetings could also be extended through secondary legislation so that it could continue to be available for any period up to 5 April 2021.

AGMs or other general meetings for unincorporated charities are not covered by the new law but the Charity Commission has noted that an alternative approach for trustees of these charities may be to change the requirements in the governing document about their timing (provided it is possible to do so in compliance with the existing requirements of the charity's constitution).

You may also wish to refer to our guidance note on Charity Members Meetings, which can be found here.

Companies House filings

Companies are required by law to submit accounts and various other documents annually to Companies House. From 25 March 2020, businesses were able to apply for a 3-month extension at Companies House for filing their accounts.

The Act introduces further relaxations, including extended deadlines for certain filings, including (but not limited to) filing accounts, registering charges and filing notices of changes in directors and secretaries.

Changes to insolvency law

The Act introduces certain temporary and permanent changes to UK insolvency law to enable companies (including charitable companies and CICs), CIOs (in all cases except with regards to the new restructuring scheme) and mutuals (in some cases) in financial difficulty to continue trading, which are intended to provide breathing space for these organisations to explore options for turnaround and/or rescue. These latest measures do not apply to entities incorporated by an Act of Parliament or by Royal Charter.

These measures could be a considerable help (but are not necessarily a silver bullet) for organisations which are facing serious financial hardship in the midst of this crisis. The Act introduces new insolvency measures, split into two categories:

1. Temporary measures:

Some of the measures will only apply for an initial temporary period and are introduced specifically to cater for the current coronavirus crisis.

a) Suspension of directors' liability for wrongful trading:

The Act temporarily suspends wrongful trading provisions for a period of seven months with retrospective effect from 1 March 2020 to 30 September 2020 (the period in which companies are thought to be suffering most acutely from the impact of the coronavirus pandemic).

Liquidators and administrators will therefore be unable to bring claims for wrongful trading against an insolvent company's directors for any losses caused by trading during the period of the suspension of the rules.

The Act will therefore temporarily remove the threat of personal liability for wrongful trading from company directors while they make their best efforts to continue to trade. However, it is important to note that other insolvency law requirements – such as directors' duties to give paramount consideration to the interests of creditors when a company is insolvent or close to insolvency – will continue to impact how directors are able to trade during this period.

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b) Prohibition on presentation of winding-up petitions:

The new Act also temporarily suspends the use of statutory demands (written demands from creditors) and winding up petitions, in each case where coronavirus has prevented a company paying its debts. Any petitions which are made will need to be reviewed by the court.

This suspension will apply to:

- statutory demands made from 1 March 2020 to 30 September 2020; and
- statutory demands used as the basis of a winding-up petition at any point on or after 27 April 2020. In other words, no petition for the winding up of a company can be presented on or after 27 April 2020 on the grounds that the company has failed to satisfy a statutory demand, if the relevant statutory demand was served during the period beginning with 1 March 2020 and ending with 30 September 2020.

Creditors can object if they have reasonable grounds for believing that coronavirus has not had a financial effect on the debtor, or the debtor would have been unable to pay its debts even if coronavirus had not had a financial effect on the debtor. However, these grounds for objection are likely to be challenging to prove given the severe financial impact of the pandemic on so many organisations.

The expiry dates for these temporary measures (initially being 30 September 2020) are capable of being extended in six-month increments by secondary legislation.

2. Permanent measures:

Some of the measures contained in the Act have been under development for a number of years and are permanent measures aimed to assist with company rescue processes generally.

- **A new "company moratorium":**

Companies can pursue a rescue plan (such as a company voluntary arrangement ("CVA")) without creditors being able to take legal action for a period of 20 business days (extendable to 40 business days, and beyond that with creditor or court approval).

This moratorium will be available to both solvent and insolvent companies (who have not been in an insolvency-related process in the previous 12 months), and will be overseen by a third party "monitor", who must be a licensed insolvency practitioner. The monitor will have the power to bring the moratorium to an end if it becomes apparent that the company is unlikely to be rescued as a result of it.

- **A new "restructuring scheme":**

Struggling companies that enter into a restructuring process – in order to reach an agreement with creditors to restructure their debts – will be able to form a "restructuring plan" with the approval of at least one class of members or creditors. A notable feature of this new scheme is that dissenting creditors can be "crammed down" and forced to agree to a restructuring scheme, if the court is of the view that such creditor(s) would be no worse off under the proposed scheme than they would be in the most likely outcome were the restructuring plan not to be agreed.

- **Nullifying of clauses in supply contracts:**

Where supply contracts provide for termination of the contract on insolvency, the Act provides that such termination clauses will be automatically suspended, preventing suppliers from stopping or threatening to stop supplying the company when the company enters into insolvency or restructuring (as long as they are complying with their other obligations under the contract). Furthermore, suppliers will not be able to rely on certain contractual terms such as increasing prices upon acompany's insolvency.

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To prevent undue hardship for small suppliers during the pandemic – as a consequence of this new provision – there will be a temporary exemption for small suppliers from 26 June to 30 September 2020 (as may be extended).

These provisions of the Act will also not apply to certain types of contracts, most notably loan agreements and other financial services.

What are the implications of the new Act for your organisation?

The new flexibilities in relation to members meetings could be helpful whether or not you still need to hold an AGM this year:

- **If you have already held an AGM during lockdown** – given its retrospective effect, the Act validates AGMs and other general meetings which have already taken place, even if not held in line with the governing document (e.g. virtually, despite there being no constitutional provision for virtual meetings) and could also validate any resolutions passed at those meetings. However, your organisation will need to comply with rules governing members' meetings which are not addressed / superseded by the Act.
- **If you need to hold an AGM this year** – it will be possible to take advantage of the greater flexibility offered by the measures outlined above, such as flexibility to postpone or to hold the meeting virtually.
- **If you are not required to hold an AGM** – it may nonetheless be advisable to take advantage of the temporary flexibility provided by the Act – such as if there are resolutions which you will need members to pass in the next few months (e.g. in relation to appointment or reappointment of board members).
- **Importantly, even if your organisation does not have any business that will need to be passed at a general meeting this year** – it will often be advisable to consider using the flexibilities available until 30 September 2020 to amend your governing document to ensure that your organisation has the flexibility to facilitate more remote attendance at general meetings after September 2020. The measures introduced by the Act will not apply after 30 September 2020, unless extended by Government. For that reason, Government advice in the Q&A is that in the longer-term, companies and other bodies should review their governing documents or other rules to determine whether these need to be amended to ensure that AGMs can be run more flexibly in the future.

It would be prudent to seek legal advice as potential solutions will vary based on an organisation's individual circumstances and the wording of its governing document. It is particularly important to consider if authorisations granted at the last AGM are still valid if this year's AGM is postponed.

If your organisation is facing serious financial difficulty as a result of the crisis, the changes to insolvency law introduced by the Act could provide vital breathing space to help your organisation continue trading, explore rescue and restructuring options and perhaps ultimately avoid insolvency. In these circumstances, directors and trustees should still seek appropriate expert advice, as available solutions and the comfort afforded by the Act will vary based on the organisation's legal form and individual circumstances.

Furthermore, it is important to note that all other insolvency law requirements – including but not limited to those in relation to directors' duties, preferences, fraudulent trading and transactions at an undervalue – will continue to apply and will determine how a company can operate if the company is close to insolvency.

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You may also wish to consider our resources below:

- Charity Insolvency and Rescue Mechanisms: A Coronavirus Guide
- Charity Governance and Solvency: A Coronavirus Guide
- Governance and Solvency: A Coronavirus Guide for Public Service Mutuals and Co-operatives
- One Stop: Restructuring for resilience

Get in touch

For further detail on the Act and how it may benefit your company, charity or mutual, get in touch with your usual Bates Wells contact, or:

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