



COVERSHEET

Ministers	Hon Grant Robertson Hon Kris Faafoi	Portfolio	Finance Commerce and Consumer Affairs
Title of Cabinet paper	Extending COVID-19 related regulatory relief for businesses	Date to be published	No later than 3 November 2020

List of documents that have been proactively released

Date	Title	Author
29 July 2020	<i>Extending COVID-19 related regulatory relief for businesses</i>	Offices of the Minister of Finance and of the Minister of Commerce and Consumer Affairs
29 July 2020	CAB-20-MIN-0444 – <i>Extending COVID-19 related regulatory relief for businesses: Orders in Council</i>	Cabinet Office

Information redacted

NO

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In Confidence

Office of the Minister of Finance
Office of the Minister of Commerce and Consumer Affairs
Chair, Cabinet

EXTENDING COVID-19 RELATED REGULATORY RELIEF FOR BUSINESSES

Proposal

- 1 This paper seeks authorisation for submission to the Executive Council of:
 - 1.1 the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) (Extension) Order 2020 (M+E Regulations); and
 - 1.2 the Contract and Commercial Law (COVID-19—Extension of Modification Relating to Powers of Attorney) Order 2020 (CCLA Regulations).

Executive Summary

Background

- 2 On 15 May 2020, the *COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020* received Royal Assent (M+E Act). That Act enabled entities to use electronic communications, hold electronic meetings, and make temporary exceptions to their own rules. It also enabled certain decision-makers to grant relief to entities from compliance with certain statutory or other obligations.
- 3 On 15 May 2020, the *COVID-19 Response (Further Management Measures) Legislation Act 2020* also received Royal Assent (FMM Act). That Act amended the Contract and Commercial Law Act 2017 (CCLA) to allow businesses to electronically sign the documents necessary to access secured finance from commercial lenders. This was needed because of restrictions on people’s movement (as required under Alert Levels 3 and 4).

Issue A: Extending the powers under the M+E Act

- 4 The powers granted by the M+E Act will expire at the close of 30 November 2020. However, the original harm the M+E Act was designed to manage (the impact of lockdowns on the ability of entities to conduct their business) has not yet disappeared. An extension would enable entities to continue to govern themselves during lockdowns with full confidence that their decisions will not be tainted by any procedural adjustments made necessary by the pandemic.
- 5 In this context, we are seeking agreement to extend the powers granted under the M+E Act by 4 months.

Issue B: Extending the ability for businesses to enter into lending documents by electronic means

- 6 Prior to these amendments being made, it was not possible for businesses to rely on the electronic transaction provisions in the CCLA to enter into documents giving commercial lenders (i.e. banks) the ability to take enforcement action against their property (security deeds). Entry into these documents is often a condition to banks being willing to lend money to businesses. Without the ability to sign documents electronically there is a risk that businesses would be unable to access financial support from their banks when they need it the most.
- 7 The ability to use electronic signatures to enter into security deeds will expire from 15 November 2020. We are seeking agreement to extend the ability to use electronic signatures to enter into security deeds by 6 months.

Policy

Issue A: Extending the exemption and modification powers

- 8 The M+E Act enables:
 - 8.1 entities to use electronic communications, hold electronic meetings, and make temporary exceptions to their own rules (Part 2 of the M+E Act); and
 - 8.2 relevant Registrars or Ministers to grant exemptions from compliance with statutory provisions in any of 12 Acts of Parliament set out in Appendix One of this paper, and the Chief Judge of the Māori Land Court to grant relief from compliance with certain other obligations (Part 3 of the M+E Act).

Threshold for extending the Part 2 and Part 3 powers

- 9 The powers granted under Parts 2 and 3 are due to expire at the close of 30 November 2020. However, under section 42 of the M+E Act, these powers can be extended up to 31 March 2020 by Order in Council made on the recommendation of the Minister of Finance and the Minister of Commerce and Consumer Affairs (Joint Ministers). A recommendation for extension is possible only if the Joint Ministers are satisfied that:
 - 9.1 the order is necessary and desirable to address the effects of COVID-19; and
 - 9.2 the period of the extension is no longer than is reasonably necessary to address the matters that gave rise to it.

Extending the powers in Part 2 is necessary and desirable

- 10 We consider that an order extending the powers in Part 2 of the M+E Act is necessary and desirable. This is because the original harm that the M+E Act was designed to manage (the impact of lockdowns on the ability of entities to conduct their business) has not yet disappeared. An extension would enable entities to continue to govern themselves during lockdowns with full confidence that their

decisions will not be tainted by any procedural adjustments made necessary by the pandemic.

Extending the powers in Part 3 is necessary and desirable

- 11 We also consider that an order extending the powers in Part 3 of the M+E Act is necessary and desirable. Te Puni Kōkiri is currently progressing statutory exemptions in relation to certain Māori trust boards under the Māori Trust Boards Act 1955. Furthermore, we know from the Companies Office and Charities Services that a number of entities have been requesting extensions to the filing of annual returns, as a result of the initial lockdown earlier this year. While such requests have been able to be accommodated so far using registrars' discretion, officials anticipate that any further lockdowns will greatly increase the need for a formal exemption under Part 3 of the M+E Act.

It is reasonably necessary to extend Part 2 and Part 3 powers by four months

- 12 Because of the uncertainty about if, and when, a re-escalation in Alert Levels might be required we consider that it is reasonably necessary to extend the powers under Parts 2 and 3 of the M+E Act for as long as possible – i.e. four months.

Issue B: Extending the ability for businesses to enter into lending documents by electronic means

- 13 The CCLA states that a legal requirement for a signature is met by an electronic signature subject to certain conditions. However, those provisions did not originally apply to powers of attorney.
- 14 During the initial escalation to Alert Levels 3 and 4, this created a practical barrier to businesses entering into the documents necessary to access secured finance from lenders. This was because security deeds routinely contain a power of attorney – which is a key requirement for lenders to be able to take enforcement action. Entry into these kinds of documents is often a condition of lenders being willing to lend money to a business. This created a practical barrier to some businesses being able to access finance. Allowing businesses to sign security documents electronically was a pragmatic and efficient solution to this problem.
- 15 The provisions providing for this regulatory relief are currently due to expire at the close of 15 November 2020.

Criteria for extending the ability to use electronic signatures

- 16 Under section 218B of the CCLA, we are able to recommend to the Governor-General that the ability for security deeds to be signed electronically be extended by up to six months (to 15 May 2021).
- 17 In making any such recommendation we are required, under section 218C of the CCLA, to be satisfied that an extension is:
- 17.1 necessary or desirable to address the effects of COVID-19; and
 - 17.2 no longer than is reasonably necessary to address those effects.

Extending the ability to use electronic signatures is desirable

- 18 The main argument for extending the amendments is that doing so guards against the effects of re-escalation to Alert Levels 3 or 4. A sudden change in Alert Levels, as has happened in Auckland, would cause businesses to once again find themselves with a barrier to getting financial support from lenders when they most need that support. This support could be vital to businesses remaining viable during any re-escalation in Alert Levels.
- 19 The existing protections in the CCLA relating to the reliability of electronic signatures will continue to apply to the use of electronic signatures, so we consider that the risk of these provisions being abused is low.

It is reasonably necessary to extend the ability for security deeds to be signed electronically by six months

- 20 Because of the uncertainty about if, and when, a re-escalation in Alert Levels might be required we consider that it is reasonably necessary to extend the ability for security deeds to be entered into electronically for as long as possible – i.e. six months.

Timing and 28-day rule

- 21 Subject to Cabinet's agreement, the amendment regulations will be submitted to the Executive Council on 5 October 2020, be notified in the Gazette on 8 October 2019, and come into effect:
- 21.1 for the M+ E Regulations, on 30 November 2020;
 - 21.2 for the CCLA Regulations, on 15 November 2020.
- 22 It will not be necessary to exempt either set of regulations from compliance with the 28 day rule.

Compliance

- 23 The draft M+ E Regulations and the draft CCLA Regulations each comply with the following:
- 23.1 the principles of the Treaty of Waitangi;
 - 23.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 23.3 the principles and guidelines set out in the Privacy Act 1993;
 - 23.4 relevant international standards and obligations;
 - 23.5 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 24 There are no anticipated grounds for the Regulations Review Committee to draw the Orders in Council to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

- 25 The draft M+ E Regulations and the CCLA Regulations have each been certified by the Parliamentary Counsel Office (PCO) as being in order for submission to Cabinet.

Impact Analysis

- 26 The Treasury has determined that the proposals in this Cabinet paper are exempt from providing a Regulatory Impact Statement (RIS) on the grounds that they temporarily allow alternative methods of legislative compliance in situations where a declared emergency of COVID-19 has made compliance with existing legislative requirements impossible, impractical or unreasonably burdensome.
- 27 The two corporate governance proposals (related to Part 2 of the M+E Act), and the proposal extending the ability for business to enter into lending documents by electronic means (related to the CCLA), would also be exempt from the requirement to provide a RIS on the basis that they have minor impacts on businesses, individuals or not for profit entities.

Publicity

- 28 The Ministry of Business, Innovation and Employment will release a media statement following the finalisation of the relevant Cabinet minutes. We also note that under section 42(9) of the M+E Act, and section 218C(2) of the CCLA, our reasons for making our recommendations (including why the regulations are necessary and/or desirable) must be published together with the regulations.

Proactive release

- 29 This paper will be proactively released within 30 business days of decisions being confirmed by Cabinet, subject to any redactions as appropriate under the Official Information Act 1982.

Consultation

Ministerial consultation on Issue A

- 30 Section 42(8) of the M+E Act provides that, before making a decision on an extension recommendation, the Joint Ministers must consult the Ministers responsible for the Acts the extension would concern.
- 31 In this regard, we have consulted with the Minister for Māori-Crown Relations: Te Arawhiti, the Minister for Māori Development and the Minister of Fisheries. Their feedback is reflected in the proposals in this Cabinet paper.

Inter-departmental consultation

- 32 On the proposal to extend the powers granted under the M+E Act, officials at the Ministry of Business, Innovation and Employment consulted with the Treasury, Te Puni Kōkiri, Te Arawhiti, the Ministry for Primary Industries, the Department of Internal Affairs (Charity Services), the Department of the Prime Minister and Cabinet (PAG) and the Parliamentary Counsel Office.
- 33 On the proposal to extend the powers granted under the CCLA, officials at the Ministry of Business, Innovation and Employment consulted with the Treasury, the Department of the Prime Minister and Cabinet (PAG) and the Parliamentary Counsel Office.

Public consultation

- 34 The proposals contained in this paper have not been publicly consulted on; however targeted consultation was undertaken with a number of Māori organisations, law firms, insolvency practitioners, the Restructuring Insolvency and Turnaround Association of New Zealand and the New Zealand Bankers' Association. All of the parties consulted supported extending the current relief.

Recommendations

We recommend that the Cabinet:

Electronic meetings and exemptions from certain governance requirements

- 1 **note** that the powers granted under Parts 2 and 3 of the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020 are due to expire at the close of 30 November 2020;
- 2 **note** that, under section 42 of the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020, all or any of these powers can be extended up to 31 March 2020 by Order in Council made on the recommendation of the Minister of Finance and the Minister of Commerce and Consumer Affairs, provided the Ministers are satisfied that:
- 2.1 the order is necessary and desirable to address the effects of COVID-19; and
- 2.2 the period of the extension is no longer than is reasonably necessary to address the matters that gave rise to it;
- 3 **note** that section 42 of the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020 also provides that, before making a decision on an extension recommendation, the Minister of Finance and the Minister of Commerce and Consumer Affairs must consult the Ministers responsible for the Acts the extension would concern;
- 4 **note** the advice of the Minister of Finance and the Minister of Commerce and Consumer Affairs that:
- 4.1 the consultation requirement in recommendation 3 has been met; and

4.2 the criteria for extension in recommendation 2 have been met;

- 5 **note** the decision of the Minister of Finance and the Minister of Commerce and Consumer Affairs to extend the powers granted under Part 2 and Part 3 of the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020, until the close of 31 March 2021;

Electronic transactions

- 6 **note** that on 3 April 2020 the COVID-19 Ministerial Group agreed to amend the Contract and Commercial Law Act 2017 so that the provisions in that Act relating to electronic signatures apply to security agreements containing powers of attorney;

- 7 **note** that the provisions providing this relief under the Contract and Commercial Law Act 2017 are due to expire at the close of 15 November 2020;

- 8 **note** that under section 218B of the Contract and Commercial Law Act 2017 the Ministers of Finance and Commerce and Consumer Affairs are, acting jointly, able to extend by six months the ability to use electronic signatures to enter into security agreements;

- 9 **note** that section 218C of the Contract and Commercial Law Act 2017 requires the Ministers to be satisfied that the extension is:

9.1 necessary or desirable to address the effects of COVID-19; and

9.2 no longer than reasonably necessary to address those effects;

- 10 **note** the advice of the Minister of Finance and the Minister of Commerce and Consumer Affairs that these criteria have been met;

- 11 **note** the decision of the Minister of Finance and the Minister of Commerce and Consumer Affairs to extend the ability to use electronic signatures to enter into security agreements until the close of 15 May 2021;

Regulations

- 12 **note** that the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) (Extension) Order 2020 will give effect to our joint decision to extend the powers under the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act 2020;

- 13 **note** that the Contract and Commercial Law (COVID-19—Extension of Modification Relating to Powers of Attorney) Order 2020 will give effect to our joint decision to extend the ability to use electronic signatures to enter into security agreements under the Contract and Commercial Law Act 2017;

IN CONFIDENCE

- 14 **authorise** the submission to the Executive Council of:
- 14.1 the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) (Extension) Order 2020; and
 - 14.2 the Contract and Commercial Law (COVID-19—Extension of Modification Relating to Powers of Attorney) Order 2020;
- 15 **note** that the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) (Extension) Order 2020 comes into force on 30 November 2020;
- 16 **note** that the Contract and Commercial Law (COVID-19—Extension of Modification Relating to Powers of Attorney) Order 2020 comes into force on 15 November 2020.

Authorised for lodgement

Hon Grant Robertson
Minister of Finance

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

Appendix One: Relevant Acts of Parliament

Under the *COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020*, relevant Registrars or Ministers may grant exemptions from compliance with statutory provisions in any of the following 12 Acts of Parliament:

Building Societies Act 1965
Charitable Trusts Act 1957
Companies Act 1993
Friendly Societies and Credit Unions Act 1982
Incorporated Societies Act 1908
Industrial and Provident Societies Act 1908
Limited Partnerships Act 2008
Māori Community Development Act 1962
Māori Fisheries Act 2004
Māori Trust Boards Act 1955
Partnership Law Act 2019
Te Ture Whenua Māori Act 1993