

# DEBT HIBERNATION



  
**waterstone**  
INSOLVENCY

# DEBT HIBERNATION

## Preamble

Parliament has made some significant changes to the Companies Act and have added a new insolvency regime. This booklet addresses this new regime.

The scheme allows for companies that were solvent on the 31st of December 2019, but which will fall into insolvency as a result of Covid19, to place their creditors on hold for six months. This new regime freezes all legal and other enforcement measures against the company and is designed to allow firms to seek protection from their creditors for a period of six months.

A least half of all creditors must agree to the proposal and at the end of the six months the debts becomes due. It applies to all creditors, including most of those with a security, and all IRD debt with

the exception of outstanding PAYE obligations. New debts will need to be paid on time.

This scheme places pressure on directors, who are required to sign an undertaking as to the solvency of the business at the end of 2019 and to the fact that the solvency of the business will be affected by Covid19.

This regime can work in conjunction with other regimes, such as the Part XIV Compromise, Voluntary Administration and the Phoenix Company Hive Down.

This regime will only be suitable for a limited number of firms and it is a public process. It isn't without risks.



*The Debt Hibernation regime puts your creditors on hold. You can obtain as much as seven months before you have to pay existing creditors; but the regime comes with many conditions.*

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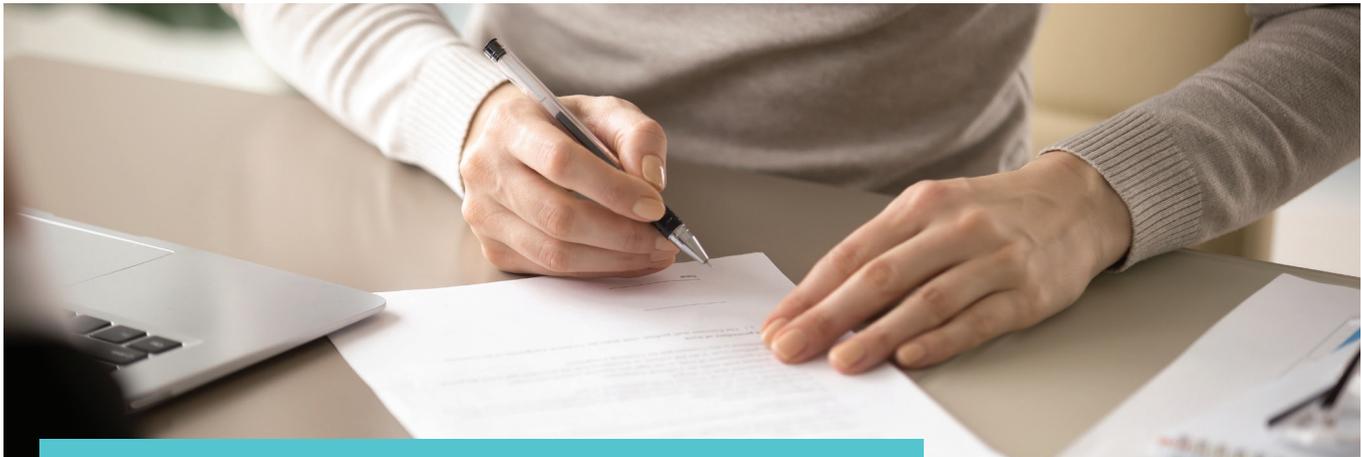
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# The Directors' Resolution

Before a company can enter into a debt hibernation scheme each director who votes for the resolution must sign a statutory declaration that declares:

- A. At the 31st of December 2019 the company was able to pay its debts as they fall due
- B. The business will suffer significant liquidity problems as a result of Covid19
- C. The company will be able to pay its debts on and after September 2021
- D. Sets out the grounds for their belief for B and C.

Let's look at these in more detail.



*Before invoking the Debt Hibernation regime, directors must sign a statutory declaration regarding the solvency of their business. This places significant legal obligations on directors and should not be done lightly.*

## A) Paying debts as they fall due

This is a reference to the solvency test; Section 4 of the Companies Act 1993.

### 4 **Meaning of solvency test**

(1) For the purposes of this Act, a company satisfies the solvency test if—

- (a) the company is able to pay its debts as they become due in the normal course of business; and
- (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

The solvency test has two limbs; the cash flow test, (a) and the balance sheet test (b).

Under the debt hibernation rules the company isn't required to pass the balance sheet test, merely the cash flow one.

The directors are only required to declare that the company is able to "...pay its debts as they fall due." A company can have substantial debts to its bank, shareholders or other stakeholders that would mean that the company does not have assets "... greater than the value of its liabilities..." as in the above section.

On a practical level, a board should look at their available current assets against their current liabilities. In a typical balance sheet;

#### CURRENT ASSETS:

Cash	\$ A
Inventory	\$ B
Prepaid expenses	\$ C
Accounts receivables	\$ D
TOTAL	$\$A+B+C+D$

#### CURRENT LIABILITIES:

Accounts payable	\$ F
Accrued expenses (including payroll)	\$ G
Accrued Taxes	\$ H
Bank Overdraft*	\$ I
TOTAL	$\$F+G+H+I$

The company will pass the test if the current assets ( $\$A+B+C+D+E$ ) are greater than the current liabilities ( $\$F+G+H+I$ ).

\* The bank overdraft is technically a due debt, as it is usually an on-demand loan. This is separate from a long-term bank loan, such as a mortgage or a business loan that is to be repaid over several years. However, as bank overdrafts are usually never re-called, you are unlikely to be challenged if the board elected not to consider this as a current liability. It would be wise to take independent accounting and legal advice, however, if the solvency of the company hinged on this point.

*Before entering the Debt Hibernation regime, directors must certify that the company was solvent, but only on one of the two limbs of the solvency test; the ability to pay debts as they fall due.*



## B) Significant liquidity problems as a result of Covid19

This is a subjective assessment and it is made by the directors acting in good faith. It isn't clear how firms are meant to measure the impact of the pandemic on their individual business but a liberal interpretation can be assumed.

We are entering a period of deep economic instability and a recession, if not a depression, on a scale not seen since the 1930s. If the business is going to suffer a downturn in revenue as a result it can be assumed that Parliament intended that the company should be covered by this legislation.

It would be more useful to think of examples that might not be covered rather than those that are. A company that lost a major supplier due to quality issues, faced increased costs due to litigation, or shareholder dispute these are going to be negative shocks that are unrelated to the current economic crisis. Such a firm would not be able to rely on the business hibernation regime.

However, a firm was supplying the airline industry and saw their revenue collapse as a result, would certainly qualify, as would a construction firm that was losing orders as a result of the current economic uncertainty.

## C) Able to pay its due debts on and after 30 september 2021

The key issue here is that the company is moving from a position of solvency, in terms of paying its debts as they fall due, to one of insolvency, and back to solvency.

The director's must declare that they will be able to get the company back to solvency by September 2021 and they must outline their reasons for this belief. This means a period of insolvency that corrects itself by September 2021.

It is also important to look at the legislation in totality;

The director must declare that, in good faith, the director is of the opinion that,—

- (a) the entity has, or in the next 6 months is likely to have, significant liquidity problems;  
**and**
- (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 the date in.

This is a three stage test; the board must undertake that the company meets all three elements;

- that the company was solvent in December 2019
- it will face liquidity problems as a result of Covid19
- it will be solvent come September 2021

All three must be present before the Debt Hibernation regime can be activated.

## D) Grounds for belief about pending insolvency

The statutory declaration must include commentary around why the director believes that the company is going to fall into insolvency and why this is related to Covid19 and that it will come right by September 2021.

This raises the level of detail substantially. This isn't the same as passing a simple resolution. Directors are required, under oath, to outline why their company is likely to fall into insolvency and why this is going to be caused by either Covid19 directly or the economic consequences that have accompanied this pandemic.

It is at this point that directors may want to take a moment to consider the significance of their actions. Parliament clearly intends that creditors can have some certainty that, if they are going to vote for a proposal under the Debt Hibernation scheme, that the company affected is experiencing a financial impact directly related to the pandemic.

### **E) The directors are acting in good faith**

Good faith is an inexact phrase. There isn't a strict legal test for it. However, we can distil it down to three broad ideas.

- Parties must honour their commitments
- No party should take advantage of another
- A party to an agreement do whatever could be expected of an honest person given the nature of the transaction

In insolvency law there has been a further requirement that those involved in a transaction are not engaged in self-dealing.

Within the context of a resolution on the matters facing a board considering the undertaking required for the Debt Hibernation regime directors need to consider;

*Does the accounting information before them accurately reflect the true situation of the company?*

*Are there off-balance sheet items or transactions that materially alter the true financial status of the business?*

*Are there any related-party dealings that are material and undisclosed, or partly disclosed?*

*Is there any information that, were they brought to the attention of the creditors, affect how they would vote on any proposal?*

From a practical perspective, it is unlikely that this is an issue that will be tested in court if a proposed debt hibernation arrangement is passed by the creditors, especially by a small company. However, directors who are signing such resolutions still need to satisfy themselves that they are adhering to the letter of the law as they will be signing a statutory declaration, and there are severe consequences for making a false statutory declaration.

### **F) At least eighty percent of the board consents to this resolution**

This is self-explanatory. Most boards only have a few directors. For this element of the resolution to matter there must be at least six directors with two dissenting.

A company with five directors, with one opposing or abstaining, will reach the eighty percent threshold. Importantly, the law requires eighty percent of the directors to vote for the resolution. This means that, if there are directors who do not vote, these need to be effectively counted as 'no' votes.

This will mean, if the company wants to pass the resolution, dissenting directors will need to either resign or the shareholders will need to replace the directors before this process can begin.

A version of what we believe that the statutory declaration should look like is attached in the example.

# The Entry Notice

Once the board has passed the resolution with the required eighty percent of directors voting for and signing the required statutory declaration, a notice shall be sent to the Registrar of Companies.

This will entail uploading the document to the Companies' Office on their website. The person doing this will need to have the required access and permission to modify the company's affairs.

This notice will have the effect of notifying anyone who searches your company that you have triggered this regime. It will be a permanent notice on your company and it will, in all likelihood, have implications for your credit rating and your ability to obtain goods and services on credit.

It will also trigger a number of legal barriers to firms seeking to enforce against the company; including the right to liquidate the company, the right to remove some secured assets and the right to begin some legal claims. More on that on page 12.

In addition, the company must send to all of its creditors a copy of;

- The statutory declaration as signed by all directors
- The total number of creditors
- The amount that the company estimates is owed by the company to that specific creditor
- The total number of creditors
- The date that the notice was sent to the Companies Office
- A high level proposal as to how the Company is going to address its solvency issues
- The address, phone and email to where inquiries are to be addressed

This notice must be sent as soon as practicable after notice has been sent to the Registrar of Companies.

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# The Proposal

The Company must make a proposal to its creditors. The most that they can ask for is that all of the debts owing to the company at the date of the Entry Notice is frozen for six months, but there is some flexibility.

It is possible to propose that all creditors shall receive a portion of the amount owing during the six months or preventing a secured creditor exercising their rights during the Protection Period.

The Proposal cannot cause a creditor's debt to be permanently forgiven or that other aspects of a creditor's rights, such as personal guarantees or securities are waived.

It might even be possible, the legislation is silent on

this aspect, to allow for some creditors to be paid during the Protection Period whilst others are paid.

However, the High Court order that a creditor is not bound by the agreement if the proposal is 'unfairly prejudicial' to that creditor and that creditor voted against the proposal.

The range of options under a Debt Hibernation regime are considerably less than what is available under a Part XIV or Voluntary Compromise. However, the requirement of only getting fifty percent of creditors is substantially lower than under those regimes, that require seventy five percent approval and covers a wider class of creditor.

## Voting on the Proposal

Creditors will have one month to respond to the Company to indicate if they approve of the Company accessing the Debt Hibernation regime and the Proposal must be sent to them at least five working days before that deadline expires.

The Proposal must contain a voting form for creditors to vote for or against the Proposal and contain the following information;

- The resolution creditors are voting on
- The last date by which votes can be submitted

- How votes may be submitted
- If there is a physical meeting, the time and place of that meeting.
- Explain that, if the resolution passes, it will be binding on all creditors
- Detail who is responsible for counting and declaring the results of the vote
- Explaining that related party votes are to be discounted

The Company can hold an actual meeting, but this isn't required. If a meeting is to be held, it can be in person or electronically.

*Creditors get to vote on the Company's Proposal. They will need to consider if the proposal gives them a better chance of recovery than allowing the business to fail.*



## Passing the Proposal

The Proposal passes if a majority in the total number of creditors vote, representing a majority of the total debt, vote yes. Only creditors who vote are counted. Related creditors are to be excluded. The mechanics are important. In the Proposal sent to all creditors, the Company must nominate a person to count the votes. This person, who the legislation helpfully refers to as **A**, has a number of key roles.

In addition to collecting the votes and declaring the results, **A** must also determine who is a creditor and in the event that there is some dispute or ambiguity, make a determination. At the end of this process **A** must also sign a declaration as to the results. Further, if **A** has made any determination as to the validity of any uncertain creditors they must describe how they made their determination.

This also applies to related creditors if **A** has had to make a determination as to whether a creditor has voted is a related creditor and has been excluded, or if there is some uncertainty, the process by which **A** made the determination that the creditor did not meet the standards of being a related creditor.

So; if a company has ten creditors, nine are owed \$1,000 each, and one is owed \$15,000. If the nine \$1,000 creditors vote yes, but the one \$15,000 creditor votes no, then the resolution will fail.

Once **A** has completed the declaration declaring the vote, this is given to the board who must prepare a certificate outlining the outcome and a statement on the effects of the proposal if it passed.

This statement is the evidence that the vote passed.



*Related party creditors cannot vote and the definition of what is a related party is very broad.*



## What is a Related Creditor?

A creditor is considered to be a related party if they fall into the related categories;

### A Related Party

- Promoter, (person behind the company but not holding any formal office)
- A director or shareholder
- A relative, or spouse, or someone in a trust relationship with the above

A relative means; grandparent, parent, child, brother, sister, nephew, niece, uncle, aunt or first cousin, including a in a step relationship in any of the relationships.

A spouse includes a civil union or defacto partner.

A trust relationship is one where the related party is a beneficiary, or a trustee, of a trust, or is a joint beneficiary with a related party.

### A Related Company

- Is a subsidiary
- More than half of their shares are held by the Company or related parties
- Is conducted in such a way as to be indistinguishable to the Company
- One in which the shares are connected to the shareholders, directors or promoters in a trust relationship and these are over fifty percent.

Related party creditors cannot vote.

If a creditor wishes to vote and **A** believes that they are related to the Company, then **A** must make a determination and, as above, give their reasons.

# The Protection Period

From the time that a notice is sent to the Registrar of Companies a series of protections kick in. These will remain in place for one month, or for a further six months if the resolution is passed.

## Landlords

Landlords may not exercise their rights to evict the Company if they are behind in their rent at the time that the Entry Notice was sent to the Registrar of Companies. This only applies to outstanding rent. If the Company fails to remain current during the period the Protection Period, the normal rules apply.

## Debt Enforcement

The usual legal tools of debt enforcement are stayed. This includes issuing a statutory demand or commencing litigation. However, a creditor can seek the permission of the court to commence proceedings. Ongoing litigation is also suspended.

## Personal Guarantees

These cannot be enforced during the Protection Period.

## Secured Creditors

A secured creditor may not enforce their charge, or collect their asset, for a debt that existed at the

beginning of the Protection period. This means those who have lent money to the Company for the purpose of purchasing a car, photocopier etc, and used that asset as security, will be unable to collect it.

This is subject to some exceptions. If the security is over perishable items (food, magazines, goods with an expiring use by date) then the secured creditor can recover them.

If the secured creditor has a General Security Agreement, (GSA) over the entire company, they can still appoint a receiver. This would include a bank that has lent the company money and taken a GSA over the company.

## The Ten-Day Rule

If a secured creditor seeks to enforce against the Company ten days before the Company gives the Entry Notice to the Registrar, then this enforcement is halted. This means that if a secured creditor seeks to recover an asset, and within ten days the Company gives notice to the Registrar that they are activating the Debt Hibernation procedure, then this enforcement must cease.

Potentially, this may mean that assets recovered must be returned, although practically it isn't clear how this would be enforced.



# The Creditors

In other business recovery regimes in the Companies Act, specifically the Part XIV Compromise and Voluntary Administration, there are different classes of creditors. A scheme of arrangement can only be done within specific classes of creditors.

There are four classes of creditors;

- Unsecured Creditors
- Preferential Creditors (PAYE and GST taxes, unpaid holiday entitlements)
- Secured Creditors
- Related Party Creditors

In a Hibernation there are only two classes of creditors; Included and Excluded creditors.

An excluded creditor is;

- One whose obligation occurred after the date the Entry Notice was delivered to the Companies Office
- Owing to the IRD for PAYE taxes, including Kiwisaver, Child Support and Student Loan deductions
- Unpaid wages and other payments due to employees that is connected to their employment

The vote to pass the resolution must carry the majority in total number, as well as the total dollar value.

## A) Binding on all Creditors

This is the crunch. The Debt Hibernation Regime is binding on all creditors, whether they voted for the proposal or not. This also applies to secured creditors, who will be unable to enforce their security during the seven months that the Protection Period is in place.

This also applies to creditors who had begun their enforcement in the ten working days before the Entry Notice was sent to the Registrar of Companies. It also applies to landlords, which is a significant issue, as a landlord may have had several months of unpaid rent, and is unable to force the tenant out and, if the Company fails to pay the rent once the Debt Hibernation regime starts, will need to begin the process from scratch.

However, debts that accrue during the Protection Period are not covered, and secured creditors can collect their assets if, during the Protection Period, the Company fails to meet their financial obligations.

## B) Secured Creditors

A feature of the Protection Period is that secured creditors are unable to enforce their rights during the entire duration of the Debt Hibernation. This applies to creditors who have taken a security over a specific asset, such as vehicles, debtors, even the photocopier.

Therefore, if at the time that the Entry Notice has been issued the company is behind in their payments on a vehicle, the finance company is unable to re-possess the car. The debt that they are owed will remain in 'hibernation' until the full seven months has passed.

However, if the company defaults on the repayments during the hibernation period, then the asset can be taken back. This does not apply to secured creditors who have taken a General Security Agreement, where the entire company has been put up as collateral, see below.

## C) Receivership

The Debt Hibernation Regime does not prevent a creditor with a GSA from appointing a receiver over the company. However, the GSA holder cannot appoint a receiver during the first month after the Entry Notice has been sent to the Registrar.

If the Proposal passes, or fails, before this one month period expires, then the GSA holder can appoint a receiver.

This is an important point; if a Company invokes the Debt Hibernation Regime, the GSA holder cannot appoint a receiver until the first month has passed, or the Proposal has been voted on. Once that vote has occurred, regardless if it passes or not, the GSA holder can appoint a receiver.

## Periodic Review

During the Protection Period any creditor can demand that the board of the company make new statutory declarations, repeating the undertakings given at the start of the process.

Eighty percent of the board of the Company must,

if requested, sign new declarations. However, if the last statutory declarations were done less than two months previously, the Company can rely on these.

This means that the board can be required to provide these declarations every two months, up to three fresh declarations during the seven months that the Protection Period is in place.

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## Other Insolvency Regimes

The Debt Hibernation Regime can only be invoked once. However, there isn't anything in the legislation that would prevent the Company taking advantage of some of the other insolvency regimes.

Most importantly, the Part XIV Compromise, would be a useful tool for firms that went into the Debt Hibernation Regime but found that they were not going to be able to pay their bills once the Protection Period ended.

However, if the Company proposes a Compromise

with Creditors as per Section XIV of the Companies Act, and this compromise fails, then the Debt Hibernation protection ends and creditors can enforce their rights in the usual way. If the compromise passes, then the protections also fall away.

If the company enters into Voluntary Administration or liquidation, then the Debt Hibernation Protections also end. However, in a Voluntary Administration, there is a moratorium that has a similar effect to the protections of the Debt Hibernation regime.



# StoneWater Airlines; An Example

*Below is an example of how the Debt Hibernation could work; using a mythical airline; StoneWater Airline.*

StoneWater Airline is a small business based in Taihape. They fly to a number of bustling regional hubs Whanganui, New Plymouth, Napier and Dannevirke.

They have been especially hard hit by the lockdowns triggered by Covid19 and the lower passenger numbers as a result of social distancing.

They are confident, however, of a turnaround once restrictions are lifted.

## The Numbers:

Prior to March 2020 StoneWater Airlines was trading well. They had a million dollars of revenue each month, and nine hundred thousand in expenses. A typical month looked like this:

### PROFIT AND LOSS

#### Income

Revenue from passengers	\$900,000	
Revenue from cargo	\$100,000	
Total Revenue:		\$1,000,000

#### Expenses

Fuel	\$300,000	
Interest	\$100,000	
Wages	\$300,000	
Landing Fees	\$100,000	
Rent	\$100,000	
Total Expenses:		\$900,000

### BALANCE SHEET 31/12/2019

#### Current Assets

Accounts Receivable	\$500,000	
Cash	\$900,000	
Total Current Assets:		\$1,400,000

#### Fixed Assets

Planes	\$2,500,000	
Vehicles	\$ 500,000	
Total Current Assets:		\$3,100,000

TOTAL ASSETS: \$4,500,000

#### Current Liabilities

Accounts Payable	\$700,000	
PAYE	\$100,000	
GST	\$300,000	
Wages	\$200,000	
Total Current Liabilities:		\$1,300,000

#### Fixed Liabilities

Planes	\$2,000,000	
Vehicles	\$ 500,000	
Shareholder Advances	\$1,000,000	
Total Fixed Liabilities:		\$3,500,000

TOTAL LIABILITIES \$4,800,000

#### EQUITY

**-\$300,000**

The key issue is that on the 31st of December 2019, StoneWater Airlines had current assets of \$1.4m and current liabilities of \$1.3m. It is therefore able to pay its debts as they fall due. It has negative equity, as a result of a one million dollar shareholder advance, so therefore fails the balance sheet test, but this isn't the test for Debt Hibernation.

## StoneWater Airlines hit by Covid19!

By June 2020 the fall in revenue as a result of the government restricting travel and customer's unwillingness to fly, had resulted in a rapid deterioration in the airlines balance sheet.

## TAIHAPE TIMES

### StoneWater Airline hit by Covid19

The director of StoneWater Airline, Edgar Rogers, announced that the airline had been forced to cut routes and lay off staff as a result of the economic downturn. "Passenger numbers are down. Tourists are just not coming to Taihape in the current market, the Taihape Tavern is empty and the Farmer's Market isn't the draw it used to be."

Taihape Mayor, Susan Wellington expressed her disappointment; "We have a big festival around the annual gumboot tossing competition, but there just isn't the interest. To be fair, the event has been declining for a while, but still, it is a disappointment."

Rogers also announced that StoneWater Airline would be entering the new insolvency regime; Debt Hibernation; "We are confident that we will be back to profitability early next year, but at the moment, we just need to batten down the hatches and ride out the storm."

### BALANCE SHEET 30/06/2020

#### Current Assets

Accounts Receivable	\$600,000	
Cash	\$100,000	
Total Current Assets:		\$700,000

#### Fixed Assets

Planes	\$2,500,000	
Vehicles	\$ 500,000	
Total Current Assets:		\$3,100,000

TOTAL ASSETS \$3,800,000

#### Current Liabilities

Accounts Payable	\$900,000	
PAYE	\$100,000	
GST	\$300,000	
Wages	\$200,000	
Total Current Liabilities:		\$1,500,000

#### Fixed Liabilities

Bank (GSA):	\$2,000,000	
Vehicles (Secured):	\$ 500,000	
Shareholder Advances	\$1,300,000	
Total Fixed Liabilities:		<u>\$3,800,000</u>

TOTAL LIABILITIES \$5,300,000

EQUITY **-\$1,500,000**



**Directors consider Debt Hibernation**

Statutory Declaration of a director pertaining to  
a Debt Hibernation Proposal

I, \_\_\_\_\_, of address \_\_\_\_\_, holding the  
occupation of \_\_\_\_\_, on this date \_\_\_/\_\_\_/ 2020

Do swear or affirm that:

- I. StoneWater Airlines was able to pay its bills as they fell due on the 31st of December 2019.
- II. StoneWater Airlines has and will continue to experience significant liquidity issues as a result of the Covid19 outbreak.
- III. The company will be able to pay its debts as they fall due by September 2021.
- IV. This deterioration has been caused by a fall in the number of customers flying either due to government restrictions or a lack of business and holiday travel due to economic uncertainty.
- V. The company will return to solvency due to a focus on cargo as a revenue source.

Declared at \_\_\_\_\_

This \_\_\_\_ day of \_\_\_\_ 2020

Before me:

\_\_\_\_\_

Zander Bastion  
*Barrister*

A person authorised to make a statutory declaration  
under the Oaths and Declarations Act 1957

There are six board members of StoneWater Airlines. They agree to meet to consider voting for a resolution to invoke the Debt Hibernation regime.

Before the board can pass the resolution all those voting for the resolution must sign a statutory declaration. Making a false statement on a statutory declaration is perjury. Of the six, two are unwilling to sign the resolution, four were.

Four out of six is only 67% and below the threshold. One of the two holdout directors is therefore asked to resign, reducing the board to five directors, with four signing and one not. This reaches the 80% threshold and the resolution is signed.

### The Entry Notice

The accountant for StoneWater Airlines, who holds the login at the Company's Office, uploads the details to the Companies Office and this constitutes as serving the Notice to the Registrar of Companies. This begins the Protection Period.

The screenshot shows the New Zealand Companies Office website. The header includes the logo and navigation links for COVID-19 Information, About us, News and notices, All registers, and Data services. The breadcrumb trail is: COVID-19 Information > COVID-19 Business Debt Hibernation > Send your notice to the Registrar. The main heading is 'Send your notice to the Registrar'. Below this is a brief instruction: 'Use this online form to upload your completed and signed Business Debt Hibernation notices. Once submitted, our team will process the notice within 24 hours. They will email you to confirm whether the notice has been registered or whether there are any issues.' The form itself is titled 'Notice details' and contains the following fields: 'Business name (required)' with a text input box; 'Registration number (if applicable)' with a text input box; 'Entity type (required)' with a dropdown menu showing 'Please select the entity type'; 'Notice being submitted (required)' with a dropdown menu showing 'Please select the notice type'; and 'Upload the completed notice (required)' with a file upload button labeled 'Choose File' and the text 'No file chosen'.

### The Proposal

The board considers several options in the proposal to send to their creditors. Three are proposed;

#### Full Hibernation

Under this arrangement, all creditors are frozen for the full seven months. At the end of the seven months the debts are to be paid in full.

#### Partial Hibernation

The debts of the company are to be partially paid, with ten percent of all outstanding debts to be paid each month, a total of six payments totalling sixty percent of the debt owing, with a forty percent balloon payment at the end of the hibernation period.

#### Selective Hibernation

The outstanding debt to the Airport for landing fees are to be paid, and all other debts are to be paid in six instalments of ten percent each.

After some discussion, it is decided to go with the Selective Hibernation. There is some concern that the non-Airport creditors will be annoyed at this arrangement and may even mount a legal challenge, as the legislation isn't clear that, under a Debt Hibernation proposal, it is possible to treat different creditors unequally. However, under the circumstances, it is decided that this is the best approach.

The Airline's lawyers advise them that paying the airport and not the other creditors might be considered 'unfairly prejudicial' to the other creditors, but that the court may also conclude that not paying the airport would cause the Airline to close and all creditors would get nothing. The lawyers also advise that there isn't anything in the legislation that prevents selective payments being made. Practically, the board decides that a legal challenge is unlikely and that not paying the airport would mean that the business would fail.

Even if there was a challenge, it will buy StoneWater Airlines time. There have also been some ugly conversations with the bank, who are owed two million, and the board is worried that the bank will appoint a receiver. Now that the Debt Hibernation Notice has been sent, there is a month grace, as the bank is unable to appoint now that the Entry Notice has been sent. However, as soon as the first month has expired, or once the proposal is voted on, then the bank can, if they wish, appoint a receiver.

The board needs to act quickly.

### The Creditors

The creditors are made up as follows:

Bank	\$2,000,000
Finance (Vehicles)	\$ 500,000
Airport:	\$ 350,000
IRD for GST	\$ 300,000
Fuel Company	\$ 100,000
Marketing Firm	\$ 70,000
IT supplier	\$ 50,000
Engineering Firm	\$ 40,000
Lawyer	\$ 40,000
Office Supplier	\$ 20,000
HR Consultant	\$ 10,000
Accountant	\$ 10,000
Cleaning Firm	\$ 10,000
Total	\$3,500,000

Staff wages and the debt to the IRD for outstanding PAYE are excluded debts, and as a result they cannot vote, as they must be paid and the protections under the regime do not apply to them. The bank and the finance company that has a security over the vehicles are secured creditors and are allowed to vote.

An external accounting firm is appointed as the person to administer the votes and a date for the confirmation of the vote is set. The first month's protection is set to expire on the last day of the month, the 30th, and the voting papers are to be returned by the 28th. A board meeting is convened for the following day.

The votes come in as follows:

Bank	\$2,000,000	Yes
Finance (Vehicles)	\$ 500,000	No
Airport	\$ 350,000	Yes
IRD for GST	\$ 300,000	No
Fuel Company	\$ 100,000	No
Marketing Firm	\$ 70,000	Yes
IT supplier	\$ 50,000	No
Engineering Firm	\$ 40,000	No
Lawyer	\$ 40,000	Yes
Office Supplier	\$ 20,000	Yes
HR Consultant	\$ 10,000	Yes
Accountant	\$ 10,000	No
Cleaning Firm	\$ 10,000	Yes
Total	\$3,500,000	

There were seven yes votes, totalling \$2,500,000 and six no votes, totalling \$1,000. One complication was that the HR consultant claimed that they were owed \$30,000. The Administrator, from the external accounting firm, reviewed the documentation from the company and the HR firm and decided that the debt was only \$10,000. Under the provisions of the act, they gave their written reasons, both to the creditor and to the board of the company.

The following day the board ratified, by resolution, the that the proposal was accepted, and this was conveyed to the Registrar of Companies by using the Company's Office website.

This Debt Hibernation Regime was successfully passed.





  
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