Insolvency Law Reform in Australia and Singapore: Directors’ Liability for Insolvent Trading and Wrongful Trading

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Abstract
This article compares reforms to directors’ liability for insolvent trading in Singapore and in Australia. The authors analyse the law in these two countries because they are important Asia-Pacific trading partners and their laws were originally largely the same – Singapore’s law on insolvent trading reflected the law in Australia from the 1960s. However, the law in the two countries has now diverged substantially. The comparison of these two countries therefore represents an interesting case study in how countries differ in their approaches to balancing the competing interests evident in laws that impose personal liability on company directors for insolvent trading. Reform of the prohibition against insolvent trading was a focus of Australia’s insolvency law reforms in 2017 which led to the introduction of a safe harbour for directors from liability. Singapore’s omnibus insolvency law reforms of 2018-19 include amendments to update Singapore’s fraudulent and insolvent trading provisions by introducing a concept of ‘wrongful trading’. The article finds that there are some areas of convergence between these two jurisdictions when it comes to debates about such provisions, but concludes that the different contemporary legislative histories in Australia and Singapore have affected their approaches to reform. Reformers in both jurisdictions have attempted to find an appropriate balance between protecting creditors, discouraging director misconduct and encouraging entrepreneurship and innovation; however, this comparison suggests that the weight that reformers place on creditor protection compared to the concern that excessive personal liability can make directors unduly risk-averse is influenced by their existing legislative framework and experience of those laws. Although Australia has shifted away from a strict focus on creditor protection, to give directors more opportunities to engage in restructuring, Singapore’s amendments may provide a more creditor-friendly regime.

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I. Introduction

This article compares reforms to director liability for misconduct in an insolvency context by analysing the policy considerations and content of reforms to the laws imposing liability for insolvent trading in Australia and Singapore. The terminology used to describe a director’s liability depends on the scope of the applicable provisions and is known, for example, as ‘insolvent trading’ in Australia and, when the reforms set out in the Insolvency, Restructuring and Dissolution Act 2018 (Singapore) (“IRDA”) become effective, ‘wrongful trading’ in Singapore. This type of personal liability is a statutory exception to the general principle that corporate debts are owed by the company as a separate legal entity.

The liability of directors and other company officers for the debts of companies is a relatively recent phenomenon. Fraudulent trading provisions were introduced in the UK Companies Act 1929, following recommendations by the Company Law Amendment Committee led by Mr Wilfrid Greene KC (known as the Greene Committee). The fraudulent trading laws, which still exist in certain jurisdictions such as Singapore, provided for liability if, in the course of winding up the company, it appeared that a person was ‘knowingly a party to’ the carrying on of the business of the company with intent to defraud creditors or for any fraudulent purpose. By contrast, insolvent trading does not require fraudulent conduct or dishonesty — the focus of insolvent trading provisions is the timing of the incurrence of a debt when the company is insolvent and the prospects of repayment.

The Australian framework under s 588G of the Corporations Act 2001 (Cth) provides that a company director may be liable to pay compensation if (a) a company of which the person is a director incurs a debt (which is wholly or partly unsecured) when it is insolvent, or becomes insolvent by incurring that debt, (b) there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent, and (c) the director is aware when the debt is incurred that there are reasonable grounds for so suspecting or a reasonable person in a like position in a company in the company’s circumstances would be so aware. Defences to s 588G civil liability include reasonable grounds to expect solvency, reasonable reliance on information of solvency provided by another person who is competent and reliable, absence from management for good reason, and taking all reasonable steps to prevent the company

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1 In this article, ‘insolvent trading’ is used as the generic term to describe the conduct that these kinds of legislative provisions target, and ‘wrongful trading’ is used when specifically referring to the legislative provisions that use that term such as the new Singaporean provisions or United Kingdom law. Other variations include ‘reckless trading’ and ‘fraudulent trading’, depending on the elements which make up the liability.

2 The IRDA was passed by Parliament in October 2018 and is expected to become effective in 2019.


4 Companies Act 1929, 19 & 20 Geo 5, c 23, s 275.


6 See, eg, Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 238; Insolvency Act 1986 (UK) s 213.

7 Corporations Act 2001 (Cth) ss 588G(1), (2) and 588J(1).

8 Corporations Act 2001 (Cth) s 588H(2).

9 Corporations Act 2001 (Cth) s 588H(3).

10 Corporations Act 2001 (Cth) s 588H(4).
incurring the debt.\textsuperscript{11} Those defences have had limited operation.\textsuperscript{12} Also, where a director has acted ‘honestly’ or ought to be fairly excused from the contravention, the director may be provided relief from civil liability.\textsuperscript{13}

Singapore’s original insolvent trading regime reflected Australia’s historical legislative framework as it existed in the early 1960s, but the laws in the two countries began to diverge from the mid-1960s onwards due to amendments to the Australian laws — particularly the reforms which introduced s 588G in the early 1990s.\textsuperscript{14} This divergence in legislative approaches still remains following 2017-19 reforms in both jurisdictions. Australia introduced a carve-out for directors from liability (described as a ‘safe harbour’) in 2017 and Singapore re-designed its insolvency laws and added provisions setting out liability for ‘wrongful trading’, as part of wide-ranging insolvency law reforms in the IRDA. In future, a director will be liable in Singapore where the company traded ‘wrongfully’ and the director either (a) knew that the company was trading wrongfully or (b) as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.\textsuperscript{15} A company trades wrongfully if the company incurs debt or liabilities when insolvent without reasonable prospect of meeting them in full, or the company becomes insolvent as a result of the incurrence of such debt or liability.\textsuperscript{16}

Singapore considered Australia’s insolvent trading laws as part of its 2013 review of its own laws and explicitly rejected Australia’s approach. Australia did not look specifically to Singapore as part of its 2016 reform consultation process.\textsuperscript{17} There are similarities, however, in the final reform provisions in each jurisdiction, driven by a similar reform agenda which focused on making the provisions work as a deterrent to director misconduct without


\textsuperscript{12} Ian Ramsay and Stacey Steele, ‘Insolvent Trading in Australia: A Study of Court Judgments from 2004 to 2017’ (2019) 27 Insolvency Law Journal (forthcoming). A study of 39 judgments of Australian courts which considered insolvent trading by directors under s 588G of the Corporations Act 2001 (Cth) found that defences were argued in 13 of the judgments, but there was no case in which a defendant succeeded in arguing a defence. In an earlier study that examined 103 judgments from the 1970s to 2004, directors were successful in arguing a defence in only 11 percent of the judgments: James, Ramsay and Siva, above n 11, 234. The limited operation of the defences may have therefore encouraged directors to put companies into voluntary administration, with limited opportunity for restructuring. Also, as Harris has noted, there is no specific defence for directors from insolvent trading liability where they are engaging in good faith restructuring efforts: Jason Harris, ‘Reforming insolvent trading to encourage restructuring: Safe harbour or sleepy hollows?’ (2016) 27 Journal of Banking and Finance Law and Practice 294, 299. Anderson highlighted that the insolvent trading duty and its defences ‘were not intended to allow scope for directors to engage in workouts prior to liquidation’: Helen Anderson, ‘Shelter from the Storm: Phoenix Activity and the Safe Harbour’ (2018) 41 Melbourne University Law Review 999, 1006.

\textsuperscript{13} Corporations Act 2001 (Cth) ss 1317S, 1318. However, it should be noted that the courts have only granted relief from liability in a small number of cases in which reasonable restructuring efforts were made in an attempt to save the business: Harris, above n 12, 299.

\textsuperscript{14} See Part 2.

\textsuperscript{15} Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239.

\textsuperscript{16} Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239(12).

\textsuperscript{17} One notable, belated exception was Herbert Smith Freehills’s submission to the Australian Treasury’s 2016 consultation which quoted the 2013 Singapore report’s criticisms of s 588G: Herbert Smith Freehills, ‘Improving Bankruptcy and Insolvency Laws Proposals Paper – Submission to Treasury from Herbert Smith Freehills’ (30 May 2016) 4-5 <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-017_Herbert_Smith_Freehills.pdf>.
dampening innovation and entrepreneurship. A comparison of the final provisions demonstrates some key remaining differences and provides insights for possible future reforms in this area.18

Reform proposals over the last decade in Australia have created a deep and varied literature on insolvent trading in Australia, but comparative work has tended to consider jurisdictions such as England and New Zealand.19 This article looks beyond these traditional comparators, to provide a comparison of directors’ liability in Australia and Singapore.20 Singapore and Australia are important regional allies and trading partners, but they are also competitors for insolvency work and talent.21 Both jurisdictions have a profession of insolvency practitioners and are ranked by the World Bank in the top 30 countries for resolving insolvency (with Australia at 20 and Singapore at 27).22 Both have made a concentrated policy effort to develop legislation in this area, with Singapore publicly stating that it wants to become the restructuring hub of Asia.23

The structure of the article is as follows. In Part II we document the origins of fraudulent and insolvent trading laws in both Australia and Singapore. We observe that the laws were originally the same but had largely diverged in content by the early 1990s when Australia introduced major reforms to its laws. In Part III we discuss the 2017-19 reforms – the background to, and introduction of, the safe harbour reforms in Australia and the IRDA in Singapore. In Part IV we compare the two frameworks after the reforms, focusing in particular on the prohibited conduct, when an action may be brought and by whom, who is a potential defendant to an action, and the consequences of a finding of liability. We conclude by observing how each country has balanced the competing policy considerations that apply to the laws that impose personal liability on directors in the context of insolvency.

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18 A review of Australia’s safe harbour reforms is already scheduled to commence by September 2019. Section 588HA of the Corporations Act provides that the Minister must cause an independent review of the impact of the availability of the safe harbour to be undertaken, as soon as practicable, after the last day of the two-year period from the commencement of this section (which came into effect on 19 September 2017): Corporations Act 2001 (Cth) s 588HA(1); Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017 (Cth) s 2.


20 See also, eg, Stacey Steele, Meng Seng Wee and Ian Ramsay, ‘Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia, and Singapore: The Roles of Courts’ (2018) 13 Asian Journal of Comparative Law 141. Steele, Wee and Ramsay highlight the cross-pollination of ideas by the courts in the UK, Australia and Singapore.


23 See Steele and Latcham, above n 21. Singapore’s new Commercial Court has also been successful in attracting litigants, helping Singapore to become a leading forum for commercial dispute resolution and an Asian financial and business hub. On the experience of the Court, see Andrew Godwin, Ian Ramsay and Miranda Webster, ‘International Commercial Courts: The Singapore Experience’ (2017) 18 Melbourne Journal of International Law 219. Note also that IMF Bentham, a Sydney-based litigation funder has set up an office in Singapore with a view to funding Singapore cases, which could include insolvency work: IMF Bentham, ‘IMF Bentham Asia’ <https://www.imf.com.au/about/asia>.
II. A common yet divergent history

Until the IRDA reforms, Singapore’s fraudulent and insolvent trading laws reflected the provisions existing in Australia in the early 1960s. By 1959, all Australian states imposed civil and criminal responsibility for ‘fraudulent trading’ where it appeared, in the course of the winding up of a company, that a person was knowingly a party to the carrying on of the business of a company with intent to defraud creditors or for any fraudulent purpose.24 New Companies Acts were introduced by each of the Australian states in 1961–1962; section 304 of this uniform companies legislation was titled ‘Responsibility for fraudulent trading’. A criminal offence for insolvent trading was also introduced in Australia in 1961 under s 303 of the uniform companies legislation which was entitled ‘Liability where proper accounts not kept’.25 Unlike s 304, s 303(3) did not require any fraudulent intent.26 Section 303(3) provided that an officer of a company committed an offence if, in the course of the winding up of the company, it appeared the officer was knowingly a party to the contracting of a debt provable in the winding up, and at the time the debt was contracted, the officer had no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time, of the company being able to pay the debt. Civil liability for insolvent trading was also introduced in the 1960s in Australia.27 This civil liability provision was inserted into the fraudulent trading provision of the Companies Act 1961 (Vic), and the other Australian states followed.28 The important feature of this civil liability was that it was only consequent upon a conviction for the associated criminal offence for insolvent trading under s 303(3).29 These criminal and civil liability provisions for insolvent trading formed the basis of the insolvent trading, under s 303(3) of the 1961 uniform companies legislation: Phillip R Adams, The Law and Practice Relating to Company Directors in Australia (Butterworths, 2nd ed, 1970) 165.

24 Fraudulent trading provisions (based on Companies Act 1929, 19 & 20 Geo 5, c 23, s 275) were first introduced in Queensland in 1931, with the other Australian states adopting similar provisions in later years: Companies Act 1931 (Qld) s 284; Companies Act 1934 (SA) s 290; Companies Act 1936 (NSW) s 307; Companies Act 1938 (Vic) s 275; Companies Act 1943 (WA) s 281; Companies Act 1959 (Tas) s 237. The provisions included civil and criminal liability and were essentially identical in each state except for some very minor differences in wording.


26 In Re Patrick and Lyon Ltd [1933] Ch 786, 790, Maugham J held that the terms ‘defraud’ and ‘fraudulent purpose’ in the fraudulent trading provisions connote ‘actual dishonesty’ involving ‘real moral blame’. In that case, his Honour did not believe that the director was ‘deliberately intending to carry out any fraudulent purpose or to defraud creditors’: 792. The Australian High Court first considered a fraudulent trading provision in 1960, in Hardie v Hanson (1960) 105 CLR 451. This decision is said to have demonstrated that the fraudulent trading provisions ‘had ceased to be the potent weapon in the hands of the creditors which [they were] thought to be’: Phillip R Adams, The Law and Practice Relating to Company Directors in Australia (Butterworths, 1965) 152. The decision prompted the introduction of a separate offence, for what has been described as reckless or insolvent trading, under s 303(3) of the 1961 uniform companies legislation: Phillip R Adams, The Law and Practice Relating to Company Directors in Australia (Butterworths, 2nd ed, 1970) 165.

27 Companies Act 1961 (Vic) s 304(1A), as inserted by Companies (Public Borrowings Act 1963 (Vic) s 7 (came into effect 1 February 1964). See also New South Wales, Hansard, Legislative Assembly, 8 April 1964, 8357 (R R Downing, Attorney-General). The Harmer Report erroneously indicated that this amendment first occurred in NSW under the Companies (Amendment) Act 1964 (NSW): Law Reform Commission (Australia), Harmer Report, above n 25, 123 [278].

28 See eg Companies Act 1961 (NSW) s 304(1A), as inserted by Companies (Amendment) Act 1964 (NSW) s 5; Companies Act 1962 (Tas) s 304(1A), as inserted by Companies Act 1966 (Tas) s 39.

29 Law Reform Commission (Australia), Harmer Report, above n 25, 123 [278]. See eg Companies Act 1961 (NSW) s 304(1A), as inserted by Companies (Amendment) Act 1964 (NSW) s 5.
trading provisions in Singapore’s Companies Act 1967 via a substantial transplant from the Malaysian Companies Act 1965.\(^{30}\)

Similarly to the old Australian provision s 303(3), s 339 of the Singapore Companies Act 1967 (cap 50, 2006 rev ed) is entitled ‘Liability where proper accounts not kept’. Section 339(3) imposes an offence and criminal liability regarding knowingly being a party to the contracting of a debt, in other words, insolvent trading:

If, in the course of the winding up of a company or in any proceedings against a company, it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time of the company being able to pay the debt[.]

Section 340 of the Singapore Companies Act provides for civil liability for both fraudulent and insolvent trading, although it is entitled ‘Responsibility for fraudulent trading’.\(^{31}\) Section 340(2) provides that where a person has been convicted of an offence of insolvent trading under s 339(3), the Court, on the application of the liquidator or any creditor or contributory of the company, ‘may, if it thinks proper to do so, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.’\(^{32}\) Similarly to the historical Australian provisions, a director’s personal liability for a debt under s 340(2) is consequent on that director’s criminal liability under s 339(3). These provisions remained largely intact in Singapore from 1967 until the IRDA reforms.\(^{33}\) When it becomes effective, the IRDA will repeal ss 339 and 340 of the Companies Act and replace them with a new regime which incorporates some elements of these older provisions as well as a new offence of wrongful trading, as discussed further in the next section.\(^{34}\)

In Australia, however, this historical approach of conflating liability for improper accounts and fraudulent trading to form the basis of insolvent trading liability, was abandoned well before the 2017 safe harbour reforms. The Australian provisions began to change from the mid-1960s.\(^{35}\) First, the Companies (Defaulting Officers) Act 1966 (Vic) repealed ss 300–305 of the


\(^{31}\) The heading of this provision is the same as the heading for the Australian s 304.

\(^{32}\) Companies Act 1967 (Singapore, cap 50, 2006 rev ed) s 340(2).

\(^{33}\) There were minor amendments to the provisions under the Companies (Amendment) Act 1984 (No 15, 1984) (Singapore), including to increase the fine for an offence of insolvent trading (from $500 to $2,000).

\(^{34}\) Insolvency, Restructuring and Dissolution Act s 451(29) repeals subds (1)-(4) of Div 4 of Pt X (ss 313-342) of the Companies Act (cap 50, 2006 rev ed).

Companies Act 1961 (Vic) and replaced them with new provisions. There were other amendments across the 1970s and 1980s, but the most significant changes were made based on recommendations by the Australian Law Reform Commission’s seminal report on insolvency, known as the ‘Harmer Report’. Following the Harmer Report, new insolvent trading laws were introduced in Australia in 1992 and came into effect in June 1993. The amendments to the Corporations Law imposed a duty on directors (and not other company officers) under s 588G to prevent the company from engaging in insolvent trading and implemented new statutory defences, introduced civil penalty orders for a contravention of s 588G with no dishonest intent, provided a restricted offence (for breaching the duty in circumstances involving dishonesty), gave liquidators standing to initiate proceedings, and allowed for compensation orders to be made in favour of liquidators and creditors. There were only minor amendments to these Australian provisions until the reforms in 2017.

III. Insolvency law reform in Australia and Singapore

A. Background and legislative reform in Australia

Australia’s insolvent trading provisions were initially generally positively received by regulators and commentators, although there were critics who questioned the efficacy of the provisions. By the time of the Global Financial Crisis (‘GFC’) in 2008, however, commentators were questioning whether the insolvent trading laws were appropriate for the current economic climate. A coalition started to emerge in Australia amongst academics, practitioners and politicians in favour of reforming the insolvent trading provisions to give company directors what they deemed as more certainty. The GFC made it harder for companies to obtain credit, putting them under financial stress and increasing uncertainty for...
Building on this momentum for reform, the Australian Treasury published a discussion paper in 2010 outlining possible options for reform to the insolvent trading laws in relation to business rescue outside of external administration. The paper noted that concerns regarding the practical effects of Australia’s insolvent trading law had shifted post-GFC — from a focus on ‘the possible unwillingness of directors to make business decisions as their company approaches insolvency’ (and the appropriate balance between discouraging undesirable conduct and prompting responsible risk-taking), to ‘how the law impacts on informal work-outs outside of external administration’. Concerns appeared to be ‘more targeted to circumstances where the company is unable to maintain solvency while a work-out is attempted, particularly where the business is a large enterprise and/or a public company.’ Some stakeholders argued that the insolvent trading laws could cause companies to be placed into external administration prematurely by directors who feared personal liability where the company engaged in insolvent trading while attempting a work-out. This discussion paper suggested that a ‘safe harbour’ from insolvent trading laws that applies to informal work-outs ‘could assist directors (concerned about personal liability for insolvent trading) to avoid placing their companies into external administration, when a corporate rescue could be more appropriately achieved through an informal work-out.’ In contrast to formal insolvency procedures, ‘contractual workouts allow directors to continue to manage the business, do not do the damage to good will and business reputation as the appointment of an administrator, avoid triggering ipso facto clauses and provide greater flexibility in negotiating and implementing a restructuring plan.’ While Australia’s insolvent trading law was designed on the assumption that the early transfer of control of a company to an external administrator would best protect the interests of creditors, the 2010 Treasury paper acknowledged that ‘placing a company into external administration may not always be the most appropriate way to affect a business rescue or to otherwise realise value for the benefit of the company’s creditors and members.’ Two options were identified to provide a ‘safe harbour’ for directors from the duty: a modified business judgment rule in respect of a director’s duty to avoid

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46 Ibid 8. Note MacFarlane’s view that this premise was inaccurate, as evidence suggests that directors do not appoint administrators in a timely fashion and risk of insolvent trading liability is low – the real risk for Australian directors is personal liability for the company’s unremitted tax. See Anna MacFarlane, ‘Safe Harbour Reforms – Should Insolvent Trading Provisions be Reformed?’ (2010) 18 Insolvency Law Journal 138.


48 Ibid 8.


50 Ibid 2.

51 Ibid 2.
insolvent trading, or a moratorium from the duty not to trade whilst insolvent (for the purpose of attempting a reorganisation of the company outside of external administration).  

The momentum for reform culminated in an influential report by the Productivity Commission called  *Business Set-up, Transfer and Closure*, which was published on 7 December 2015. In response to the Productivity Commission’s 2015 report, the Australian Government issued its suggestions for insolvency law reform in a proposals paper titled,  *National Innovation and Science Agenda – Improving Bankruptcy and Insolvency Laws* in April 2016. The Government argued that the insolvent trading provisions inhibited innovation and entrepreneurial activity, by placing too much focus on ‘penalising and stigmatising’ business failures, and the provisions therefore hurt the economy. Concerns that the insolvent trading regime drove directors into formal insolvency proceedings even where a company may have a chance of longer-term viability — including because of the ‘uncertainty over the precise moment a company becomes insolvent’ — were cited by the Government as reasons for the reforms. Further, concerns that the insolvent trading provisions often discouraged early stage (angel) investors and professional directors from becoming involved in a start-up were also seen as detrimental to creating a culture of ‘innovation and entrepreneurship’.

The Proposals Paper noted that a ‘safe harbour’ to the insolvent trading provisions would facilitate ‘the restructure of businesses, striking a better balance between encouraging entrepreneurship and protecting creditors’. Accordingly, the Paper suggested two models for reform of the insolvent trading regime: Model A and Model B. Model A would have made it a defence to s 588G ‘if, at the time when the debt was incurred, a reasonable director would have an expectation, based on advice provided by an appropriately experienced, qualified and informed restructuring adviser, that the company can be returned to solvency within a reasonable period of time, and the director is taking reasonable steps to ensure it does so’. The restructuring adviser would be required to ‘remain of the opinion that the company can avoid insolvent liquidation and is likely to be able to be returned to solvency within a reasonable period of time’. Furthermore, the adviser ‘would be required to exercise their powers and discharge their duties in good faith in the best interests of the company and to

55 Ibid 3.
56 Ibid 10 [2.1].
57 Ibid.
58 Ibid 10 [2.1].
59 Ibid 10-16.
60 Ibid 11. The Proposals Paper noted that the Productivity Commission recommended in its 2015 report that a safe harbour, framed around the appointment by the directors of a professional restructuring adviser, would ‘allow directors to make decisions relating to the possible restructuring of the company, free from fear of liability’: 11. Model A was developed in line with this recommendation.
61 Ibid.
inform [the Australian Securities and Investments Commission] of any misconduct they identify’.62

By contrast, Model B did not involve a defence, but would have restricted the application of s 588G:

(a) if the debt was incurred as part of reasonable steps to maintain or return the company to solvency within a reasonable period of time; and

(b) the person held the honest and reasonable belief that incurring the debt was in the best interests of the company and its creditors as a whole; and

(c) incurring the debt does not materially increase the risk of serious loss to creditors.63

Unlike Model A, Model B did not emphasise the role of a restructuring adviser, but the Proposals Paper noted that any appointment of an adviser, engagement with shareholders, and ‘creditors (including employees)’ would be taken into account as part of the consideration of ‘reasonable steps’.64 Accordingly, advisers would still have an important role to play in the assessment of the availability of this proposed carve out to s 588G liability. Moreover, a liquidator bringing any claim would have had the burden of demonstrating that the director breached one of the three limbs set out above.65 Model B was more akin to the English approach under wrongful trading.66

Submissions to the Treasury’s consultation on the proposals for reform closed on 27 May 2016. Seventy-two submissions were received and five were confidential.67 The role of any restructuring adviser was the key divisive issue amongst the submissions to Treasury from legal and accounting professionals and other groups such as representatives of directors and business. The majority of submissions stated no particular position in relation to either Model. To the extent a position could be identified from the submissions, however, the authors categorised 15 submissions as supporting Model A, and 20 submissions as supporting Model B. The submissions in support of each Model sometimes also suggested amendments. The key reason for objecting to Model A was the requirement to have a restructuring advisor (10

62 Ibid.
63 Ibid 15.
64 Ibid 16.
65 Ibid 15.
66 Harris, above n 12, 308–309. Under s 214 of the Insolvency Act 1986 (UK), a person may be liable to contribute to the company’s assets if: (a) the company has gone into insolvent liquidation, (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and (c) that person was a director (or shadow director) of the company at that time. If, once the director knew there was no reasonable prospect that the company would avoid going into insolvent liquidation, the director ‘took every step with a view to minimising the potential loss to the company’s creditors’ as he or she ought to have taken, the director will not be liable: s 214(3). Harris has highlighted that the English wrongful trading provision is based on the culpability of the director in unreasonably continuing to trade at a time when they should have known that the company would not avoid liquidation; it respects the director’s ability to decide whether it is in the best interests of the company and its creditors to continue trading and therefore provides greater flexibility to engage in restructuring attempts: 303. In contrast to the Australian s 588G approach, the focus of director liability under the English model is ‘not on the mere fact of insolvency and a reasonable suspicion of insolvency, but on the failure to have a reasonable plan to avoid insolvent liquidation’: Harris, above n 12, 305.
submissions). Alternatively, supporters of Model A felt that advisors would be helpful and were one of the positive aspects of the reform (6 submissions). Submissions from groups likely to receive work as restructuring advisers were more likely to support Model A.68 The Treasury released an exposure draft of legislation on 28 March 2017.69 The exposure draft consultation received a further 45 submissions, including seven confidential submissions.70 Most of these further submissions related to technical drafting issues.

Following these consultations, the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017 (Cth) was passed by Parliament and assented to on 18 September 2017. The reforms introduced a safe harbour for directors in relation to insolvent trading liability in a new provision of the Corporations Act, namely s 588GA. The safe harbour reforms came into effect on 19 September 2017.71 The detailed Explanatory Memorandum accompanying the Australian reforms gives guidance to market participants.72 The Explanatory Memorandum noted that the Government hoped the reforms would ‘drive cultural change amongst company directors’ and encourage directors ‘to keep control of their company, engage early with possible insolvency and take reasonable risks to facilitate the company’s recovery instead of simply placing the company prematurely into voluntary administration or liquidation’.73 According to the Explanatory Memorandum, the reforms would ‘create a safe harbour for company directors from personal liability for insolvent trading if the company is undertaking a restructure outside formal insolvency’.74 The reforms are intended to offer protection to ‘honest, diligent and competent’ directors during any informal restructuring process that ‘would achieve a better outcome for the company than immediately appointing an administrator or liquidator’.75 Directors are expected to continuously assess whether the course of action is ‘reasonably likely to lead to a better outcome for the company’.76 The new safe harbour in Australia repositions the policy balance between the competing interests of creditors and ‘competent’ directors in s

71 Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Cth) s 2.
72 Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (Cth).
73 Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (Cth) 3.
74 Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (Cth) 3.
75 Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (Cth) 6–7.
76 One of the events that will cause the safe harbour to discontinue is ‘when any such course of action ceases to be reasonably likely to lead to a better outcome for the company’: Corporations Act 2001 (Cth) s 588GA(1)(b)(iii). As discussed below, the Explanatory Memorandum notes (at 15) that pursuing a course of action ‘will necessarily require ongoing assessment of whether the course of action remains reasonably likely to lead to a better outcome for the company’.
588G of the Corporations Act. It has been noted that the protection was primarily aimed at directors of large companies rather than small companies, as directors of a small company might be willing to risk trading while insolvent ‘in a last-ditch attempt to save their investment and livelihood’ – in comparison, directors of large companies are likely to act cautiously so as to avoid insolvent trading liability and to try to save their reputations.

The safe harbour complements the defences to personal liability for certain contraventions of the insolvent trading provisions under s 588G, which are already available to directors in s 588H of the Corporations Act. The safe harbour is not, however, a defence itself and there are a number of conditions which apply before a director will have the benefit of the safe harbour. To be eligible for the safe harbour protection, a director must show, based on an objective test, that: first, after the director starts to suspect that a company may become or be insolvent, the director starts developing one or more ‘courses of action’ that are ‘reasonably likely’ to lead to a ‘better outcome’ for that company; and second, the debt in question was incurred directly or indirectly in connection with such a course of action during a specified period. A leading Australian law firm argues that the better interpretation of ‘in connection with the course of action’ is that the section is intended to include ‘normal ongoing trading debts’ which are ‘incurred in good faith during that period’.

The specified period will depend on what action, if any, the director takes. The specified period commences when the director starts developing the course of action referred to above. The specified period ends when:

- if the director fails to take any course of action within a reasonable period after starting to develop such course of action — at the end of that reasonable period; or
- the director ceases to take any such course of action; or
- such course of action ceases to be reasonably likely to lead to a better outcome for the company; or

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77 As discussed further below in this section, the Explanatory Memorandum notes (at 20-21) that the new safe harbour provisions contain appropriate safeguards to ensure that the safe harbour is only available to ‘directors acting competently and in accordance with their general director’s duties’ and to ensure that ‘during any course of action to restructure or recover the company employee entitlements are properly paid and that the company meets its taxation reporting obligations’. However, the safe harbour reform has been criticised on several bases: it will create a new forensic burden for liquidators, ‘in addition to requiring that they prove the already difficult factual issue of insolvency at the relevant time’; it will interfere with the recovery of preferences, which will have an adverse effect on creditor recovery; ‘honest directors’ risk exposing themselves to other forms of liability such as director penalty notices, while avoiding a ‘reasonably unlikely action for insolvent trading’; and it may also increase the prevalence of illegal phoenix activity by directors of small companies. See Anderson, above n 12, 1033. Similarly, commentators have suggested that further reforms would be necessary to encourage a culture of restructuring and entrepreneurship, as the benefit of the safe harbour law may be curtailed by the operation of laws such as the tax law imposing personal liability, under the director penalty notice regime, for company tax obligations, and the continuous disclosure obligations for Australian Securities Exchange listed companies. See Craig Edwards, ‘Australia’s Safe Harbour Law – A Better Outcome for Restructuring and Entrepreneurship?’ (2019) 27 Insolvency Law Journal 66.
78 See Anderson, above n 12, 1007.
79 The defences are noted above at footnotes 8–11.
80 Corporations Act 2001 (Cth) s 588GA(1)(a).
81 Corporations Act 2001 (Cth) s 588GA(1)(b).
83 Corporations Act 2001 (Cth) s 588GA(1)(a).
• an administrator or liquidator is appointed to the company.84

The reform proposals suggested requiring a director to ‘return the company to solvency within a reasonable period of time’.85 This element of the proposed safe harbour reforms was dropped by Treasury after submissions to its consultations pointed out that not all restructuring needs to be aimed at returning a company to solvency and legitimate restructuring could include a sale of assets.

A director will not be entitled to rely on the safe harbour if the company is either consistently failing to pay employee entitlements (including superannuation) on time or comply with reporting obligations under the taxation laws when the debt is incurred.86 Directors will also be required to evidence their diligence in taking a course of action, because directors bear the evidentiary burden that there was a ‘reasonable possibility’ that the matters required to establish a safe harbour exist.87 If directors can provide evidence by, for example, showing that they sought ‘appropriate advice from an appropriately qualified entity’, it will then be up to the plaintiff (typically a liquidator bringing a claim against a director for insolvent trading) to rebut the director’s claims. What is appropriate advice and who is an appropriate advisor will depend on the circumstances and a small company would not be expected to take the same steps as a large listed company, for example.88 By contrast, it has been noted that many directors of small-to-medium enterprises may be excluded from the safe harbour protection due to the requirement to pay employee entitlements, as these kinds of companies often use unpaid superannuation and other employee entitlements as a source of working capital when under financial stress.89

A better outcome for the company is defined as ‘an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company’.90 The new provisions give some examples of the types of matters that a court may take into account ‘in working out whether a course of action is reasonably likely to lead to a better outcome for the company’.91 Regard will be had as to whether a director:

• is properly informing himself or herself of the company’s financial position; or
• is taking appropriate steps to prevent any misconduct by officers or employees of the company that could adversely affect the company’s ability to pay all its debts; or
• is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company; or
• is obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or
• is developing or implementing a plan for restructuring the company to improve its financial position.92

84 Corporations Act 2001 (Cth) s 588GA(1)(b).
86 Corporations Act 2001 (Cth) s 588GA(4).
87 Corporations Act 2001 (Cth) ss 588GA(3),(7).
88 Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (Cth) 14 para 1.54, 16–20 paras 1.66-1.77.
90 Corporations Act 2001 (Cth) s 588GA(7).
91 Corporations Act 2001 (Cth) s 588GA(2).
92 Corporations Act 2001 (Cth) s 588GA(2)(a)–(e).
Notably, these considerations do not focus on the outcome of the course of action per se. Any outcome could possibly be worse for the company. Rather, the focus is on the steps taken by the director as part of a course of action aimed at achieving a better outcome for the company than the appointment of a liquidator or administrator.93

B. Background and legislative reform in Singapore

The insolvency law reforms in Singapore in the IRDA were the product of a much broader remit than the Australian law reforms. In 2010, the Singapore Ministry of Law appointed a committee — the Insolvency Law Review Committee (‘ILRC’) — to review the existing bankruptcy and corporate insolvency regimes, and provide a report setting out recommendations for an omnibus insolvency bill, which would update the Singapore bankruptcy and corporate insolvency laws and unify the regimes in a single Act.94 According to the ILRC, Singapore’s insolvency laws needed to be revised in light of Singapore’s growth as a ‘regional financial and business hub’ as well as the increase in complex credit and financing transactions.95

In October 2013, the ILRC submitted its Final Report to the Ministry of Law, which included a consideration of Singapore’s insolvent trading provisions under ss 339(3) and 340(2) of the Companies Act (Singapore, cap 50, 2006 rev ed). The ILRC stated that it was not aware of any instance in Singapore in which proceedings had been brought to impose civil liability for insolvent trading under s 340(2), and that there had been no reported cases of prosecutions under s 339(3).96 The Committee highlighted that the key problem with Singapore’s insolvent trading provisions was that an officer needed to be convicted under s 339(3) before civil liability could be triggered under s 340(2) to pay the whole or part of the debt incurred by the company.97 This approach raised the following difficulties: insolvent trading needed to be proved according to a criminal standard of proof before civil liability could be triggered — but the insolvency office-holder and creditors had no power to ensure that a criminal prosecution would be brought against the relevant officer; and parties could be deterred from taking civil action due to the time required for consecutive criminal and civil proceedings.98

The ILRC concluded that there was no justification for a criminal conviction being a prerequisite to civil liability, particularly as civil liability could be imposed on an officer under

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93 As noted at footnote 66, in relation the Model B of the 2016 Proposals Paper, this focus on the steps taken by the director brings the Australian position more in line with the UK wrongful trading model (although the UK reasonable steps requirement is a defence under s 214(3) of the Insolvency Act 1986 (UK), rather than a carve out to liability). However, while the UK provision has been criticised for providing no guidance as to what would be required to avoid liability by satisfying the defence that a director had taken ‘every step with a view to minimising the potential loss to the company’s creditors’ as he or she ought to have taken, the Australian safe harbour provision clearly identifies factors that the court may consider in determining whether a course of action ‘is reasonably likely to lead to a better outcome for the company’. See Corporations Act 2001 (Cth) s 588GA(2).

94 ILRC, above n 30, 1.

95 Ibid 5.

96 ILRC, above n 30, 201. Note that since 2013, only one case has been reported on LawNet in which s 339(3) was referred to, and in that case the plaintiff clarified that its intended cause of action was actually fraudulent trading under s 340(1) of the Corporations Act: Aquariva Pte Ltd v Gezel Group Pte Ltd [2017] SGHCR 14 (31 August 2017) [25].

97 ILRC, above n 30, 201.

98 Ibid 200–1.
s 340(1) for fraudulent trading without any associated criminal conviction. The Committee then considered three other frameworks to provide inspiration for reform: the UK regime, the Australian regime and the regime proposed by the UK Insolvency Law Review Committee (chaired by Sir Kenneth Cork) in 1982.

The ILRC formed the view that the current UK provision that imposes personal liability on directors for ‘wrongful trading’, s 214 of the Insolvency Act 1986 (UK), should not be adopted in Singapore. The Committee noted that the provision — which only applies when the company has gone into ‘insolvent liquidation’ — had been criticised as being a ‘paper tiger’ and had not been used against directors as much as should be expected. Also, the provision failed to provide guidance as to what types of conduct could lead to liability, and provided no guidance as to what would be required to avoid liability by satisfying the defence that a director had taken ‘every step with a view to minimising the potential loss to the company’s creditors’ as he or she ought to have taken.

The ILRC believed that the pre-2017 Australian provisions on insolvent trading should also not be adopted for Singapore, because they encouraged an early invocation of insolvency processes and did not ‘strike the best balance’ between the interest in protecting creditors against ‘the reckless or unreasonable incurring of debts by an insolvent company’, and the interest ‘in allowing the directors of a distressed company a fair opportunity to take reasonable steps to avoid the company’s financial ruin’. They noted that the pre-reform Australian provisions were ‘considered to be some of the strictest provisions amongst the major jurisdictions, in the sense that they effectively prohibit trading once there are “reasonable grounds for suspecting” that a company is insolvent’.

The Committee is of the view that [the Australian provisions] are not appropriate for Singapore. … There should be more latitude afforded to a director to continue to trade in the reasonable expectation that, although the company is insolvent, it is most likely to be able to trade out of its present difficulties.

The Singaporean Government did not publicly revisit the Australian position after the safe harbour reforms which occurred between the publication of the ILRC’s 2013 report and the introduction of Singapore’s Insolvency, Restructuring and Dissolution Bill in 2018.

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99 Ibid 201.
100 Insolvency Law Review Committee (Great Britain), Insolvency Law and Practice: Report of the Review Committee (Cmd 8558, 1982) (‘Cork Report’).
101 ILRC, above n 30, 202. Under s 214 of the Insolvency Act 1986 (UK), a person may be liable to contribute to the company’s assets if: (a) the company has gone into insolvent liquidation, (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and (c) that person was a director (or shadow director) of the company at that time. If, once the director knew there was no reasonable prospect that the company would avoid going into insolvent liquidation, the director ‘took every step with a view to minimising the potential loss to the company’s creditors’ as he or she ought to have taken, the director will not be liable: s 214(3).
102 For the purposes of s 214, a company goes into ‘insolvent liquidation’ if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up: Insolvency Act 1986 (UK), s 214(6).
103 ILRC, above n 30, 202-3.
105 Ibid.
106 Ibid 204.
107 Ibid.
108 Ibid.
Despite rejecting the UK and Australian frameworks, the ILRC did, however, find that the draft civil liability provision on ‘wrongful trading’ in paragraph 1806 of the 1982 UK Cork Report contained some valuable concepts for Singapore.\(^{109}\) The ILRC recommended that Singapore’s insolvent trading regime should be amended to provide that the High Court may declare that any person party to the carrying on of the business of the company shall be personally responsible for all or any of the debts or other liabilities of the company if it appears that such person knew, or as an officer of the company, ought, in all the circumstances, to have known, that the company’s trading was ‘wrongful’.\(^{110}\) A company would be trading wrongfully if, at a time when the company is insolvent or unable to pay its debts as they fall due, it incurs further debts or other liabilities to other persons without a reasonable prospect of meeting them in full.\(^{111}\) The provision would be broader in scope than the civil liability provision in s 340(2) of the Companies Act, by applying to the ‘incuring of debts or other liabilities’ rather than only to the ‘contracting of a debt’.\(^{112}\) The Court would also have wider, flexible remedial powers, including to direct that the proceeds of recovery be applied in a particular manner and for the benefit of certain parties.\(^{113}\)

However, if the person had ‘acted honestly and, having regard to all the circumstances of the case, he or she ought fairly to be excused’, the Court would be able to relieve the person from personal liability.\(^{114}\) This relief would recognise that directors of a company may genuinely incur debts or other liabilities in the interests of the creditors and members.\(^{115}\) Additionally, the company (and with the company’s consent any relevant person) would be able to apply to the Court to determine whether ‘all or any of the trading of the company … would be wrongful’.\(^{116}\) The ILRC argued that the ability to obtain advance rulings from the Court in relation to whether certain conduct or transactions would constitute wrongful trading could facilitate the carrying out of transactions and could persuade parties to continue to trade with a company experiencing financial distress.\(^{117}\) The ILRC believed that this framework would strike the best balance ‘between promoting responsible entrepreneurship and preventing abuse of the corporate form by those who manage companies’.\(^{118}\)

The Ministry of Law held public consultations from October to December 2013 in response to the ILRC’s Final Report, and in May 2014 published its response to the feedback received.\(^{119}\) Drafting of an omnibus insolvency law bill commenced in early 2014.\(^{120}\) However, in 2015 the Singapore Government appointed a new committee, the Committee to Strengthen Singapore as

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\(^{109}\) Ibid 205-207. This ‘wrongful trading’ provision was very different to the modern UK ‘wrongful trading’ law under s 214 of the *Insolvency Act 1986* (UK). In particular, under the Cork Report formulation, liability did not require the company to have gone into insolvent liquidation; and there was no defence to personal liability – but the court could grant relief where the person acted honestly, and the company could apply to the court for a determination regarding whether specific conduct would constitute wrongful trading.

\(^{110}\) Ibid 206.

\(^{111}\) Ibid 205-6.

\(^{112}\) Ibid 207.

\(^{113}\) Ibid 207.

\(^{114}\) Ibid 206. The Committee described this as ‘an express defence’: at 211.

\(^{115}\) Ibid 207.

\(^{116}\) Ibid 207.

\(^{117}\) Ibid 208.

\(^{118}\) Ibid 207.


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an International Centre for Debt Restructuring (‘Debt Restructuring Committee’). The Committee’s focus on enhancing Singapore’s effectiveness as a centre for international debt restructuring reflected a much narrower remit than the ILRC’s goal of updating and unifying Singapore’s insolvency laws. The development and formulation of legislative reforms that would strengthen the debt restructuring framework in Singapore became the Government’s top legislative priority, overtaking the larger project of reforming Singapore’s personal bankruptcy and corporate insolvency laws. A phased approach was taken to the implementation of the reforms proposed by both the ILRC and the Debt Restructuring Committee (which published a report in 2016), with amendments to the Bankruptcy Act in 2015 and to the Companies Act in 2017.

In September 2018, the Insolvency, Restructuring and Dissolution Bill 2018 was introduced into Parliament as the final phase of the insolvency and debt restructuring reforms — it included the new ‘wrongful trading’ provision. In his Second Reading Speech for the Insolvency, Restructuring and Dissolution Bill 2018, Mr Edwin Tong noted that the current regime under ss 339(3) and 340(2) of the Companies Act was ‘unsatisfactory as criminal liability must first be found as a prerequisite before the making of an application to impose civil liability against the officer of the company, and has not, as far as we are aware, been used in any reported case in Singapore.’ No other member of Parliament who spoke during the Second Reading Debate addressed the new wrongful trading provision. The Bill received unanimous support and was passed without amendment on 1 October 2018. The IRDA is expected to come into force in 2019.

The IRDA does not completely abandon the approach set out in Companies Act ss 339 and 340. These provisions have been carried over in the IRDA as s 237 ‘Liability where proper accounts not kept’ and IRDA s 238 ‘Responsibility for fraudulent trading’. There are two key differences between the Companies Act and IRDA provisions, however. The first difference relates to the provisions under the Companies Act which are limited to circumstances of winding up or proceedings against the company (as in the case for insolvent trading (criminal and civil) and fraudulent trading (civil only) under ss 339 and 340). The IRDA extends the equivalent provisions in ss 237 and 238 to also apply to judicial management in the equivalent IRDA provisions. This expansion widens the application of the provisions as discussed further in the next section of this article. A second difference is that s 339(3) and the related provision of s 340(2) have not been carried over to the equivalent provisions of the IRDA. The

122 Wee, above n 120.
123 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Report of the Committee (2016).
124 Ministry of Law, ‘New Omnibus Bill’, above n 121; Singapore Parliamentary Debates, Insolvency, Restructuring and Dissolution Bill, 1 October 2018 (Mr Edwin Tong Chun Fai, Senior Minister of State for Law).
125 Ministry of Law, ‘New Omnibus Bill’, above n 121.
126 Insolvency, Restructuring and Dissolution Act s 239.
127 Singapore Parliamentary Debates, Insolvency, Restructuring and Dissolution Bill, 1 October 2018 (Mr Edwin Tong Chun Fai, Senior Minister of State for Law).
129 Likewise, while s 340(6) of the Companies Act made it clear that criminal liability for fraudulent trading shall apply whether or not the company ‘has been, or is in the course of being, wound up’, s 238(5) of the IRDA clarifies that criminal liability applies whether or not the company has been, or is in the course of being, wound up, and whether or not it has been, or is, in judicial management.
new IRDA provisions therefore do not include a concept of ‘insolvent trading’ and criminal liability is no longer a prerequisite to the making of an application to impose civil liability on an officer of the company. These concepts have been replaced with civil and criminal liability for ‘wrongful trading’. Also, while insolvent trading under the Companies Act arose in the context of winding up or proceedings against the company, the offence for wrongful trading (like the fraudulent trading offence) applies whether or not the company has been, or is in the course of being, wound up, and whether or not it has been, or is, in judicial management.130

Section 239 of the IRDA is titled ‘Responsibility for wrongful trading’ and provides, in part:

(1) If, in the course of the judicial management or winding up of a company or in any proceedings against a company, it appears that the company has traded wrongfully, the Court, on the application of any person mentioned in subsection (5), may, if it thinks proper to do so, declare that any person who was a party to the company trading in that manner is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs, if that person —

(a) knew that the company was trading wrongfully; or

(b) as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

…

(6) Where a company has traded wrongfully, every person who was a party to the wrongful trading and who —

(a) knew that the company was trading wrongfully; or

(b) as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years or to both.

(7) Subsection (6) applies to a company whether or not it has been, or is in the course of being, wound up, and whether or not it has been, or is, in judicial management.

A person found to be a party to the company trading wrongfully may be subject to both civil and criminal liability, as discussed in the next section of this article.

IV. Comparing the reforms: balancing different policy objectives

This section compares key similarities and differences between Australia’s and Singapore’s approach to director liability after the safe harbour and IRDA reforms. The reforms in both Australia and Singapore reset the policy agendas as reflected in these jurisdictions’ respective laws regarding director liability in an insolvency context. Those who oppose directors’ liability in this context typically argue that it has a chilling effect on economic activity and makes directors unduly risk-averse, which can result in directors too quickly putting companies into formal insolvency proceedings for fear of personal liability — it could also lead to appropriately-qualified people refusing to become directors.131 Those who support directors’ liability for insolvent trading argue that it provides protection for unsecured creditors of

130 Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239(7).
companies and an incentive for directors to deal with a company in financial difficulty early, thus potentially increasing the options for any reorganization or restructure.\textsuperscript{132} It is therefore important that liability provisions are framed in a way that facilitates entrepreneurial risk-taking and corporate rescue attempts (by not unduly encouraging directors to place companies into insolvency proceedings prematurely), but also provide necessary protection for creditors.\textsuperscript{133} As demonstrated by the analysis above of the reform processes over the last decade in Australia and Singapore, the debates in both Australia and Singapore encompassed these arguments to varying degrees, as do the resultant reforms.

A. What is the prohibited conduct?

Prior to the recent safe harbour reforms, Australia’s insolvent trading provisions reflected the policy approach set out in the Harmer Report.\textsuperscript{134} The Harmer Report recommendations were based on a policy understanding that directors should be ‘accountable for irresponsible behaviour, particularly where it affects creditors of the company’.\textsuperscript{135} The Commission proposed that the responsibility of a director in relation to insolvent trading be expressed as a positive duty owed to the company to prevent the company from engaging in that activity.\textsuperscript{136} The 2017 reforms in Australia do not change the content of the duty to prevent insolvent trading, but provide a safe harbour for directors to operate within to the extent that they meet certain criteria. The ‘wrongful trading’ provision in Singapore does not create a positive duty. Rather, similar to the position of ss 339 and 340 under the Companies Act, s 239 is set out in the IRDA under Division 5 (‘Offences’) of Part 9, which is titled ‘Provisions applicable in judicial management and winding up’.

A key similarity between Australia’s and Singapore’s laws is the potential for ongoing uncertainty about the parameters of prohibited conduct despite the reforms. In Australia, deciding whether the director’s course of action provided for ‘a better outcome for the company’ under the safe harbour reforms is likely to become a key contested issue in this new area of law. The Explanatory Memorandum cautions that the ‘benefit of hindsight should not impose unrealistic expectations on the decisions of a director or the board or the actions of the company at the time’.\textsuperscript{137} In deciding this issue of whether the outcome would have been better, however, the key will be deciding whether the course of action was ‘reasonably likely to lead’ to a better outcome for the company. Accordingly, hindsight is still likely to be important in any such determination. The perception that hindsight was required in the application of s 588G was a key criticism of the pre-reform section’s focus on the point at which a company was insolvent.\textsuperscript{138} It is unlikely that the safe harbour provisions will completely move away from this backward looking assessment.

Concerns about the potential for uncertainty regarding the interpretation of the term ‘wrongful’ in the wrongful trading provision were also acknowledged in Singapore. For the purposes of s 239, a company ‘trades wrongfully’ if: (a) the company, when insolvent, incurs debts or other

\textsuperscript{132} Ibid 9.
\textsuperscript{133} Williams, above n 19, 59.
\textsuperscript{134} The Commission’s recommendation regarding the directors’ duty to prevent insolvent trading is summarised at Law Reform Commission (Australia), Harmer Report, above n 25, 126–127 [283].
\textsuperscript{135} Ibid 121 [272].
\textsuperscript{136} Ibid 125 [280].
\textsuperscript{137} Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (Cth) 15 para 1.57.
\textsuperscript{138} Allens Linklaters, above n 82.
liabilities without reasonable prospect of meeting them in full; or (b) the company incurs debts or other liabilities — (i) that it has no reasonable prospect of meeting in full; and (ii) that result in the company becoming insolvent. In determining whether there was a ‘reasonable prospect’ of the company meeting the debts or other liabilities in full as required by IRDA s 239, the Court is likely to consider a broad range of factors similarly to the considerations which were likely to be applied to a case involving s 339(3) of the Companies Act. Section 339(3) referred to the formulation of ‘no reasonable or probable ground of expectation’. Whilst there is no legislative guidance on what those considerations should be and the lack of case law in Singapore in relation to the old provisions makes it difficult to say with certainty, Lee suggested in 2000 that considerations such as the causes of the insolvency, reliance on external advice, and the steps taken to restore the company’s profitability would be relevant in a court’s analysis. If these types of considerations are taken into account in an analysis of wrongful trading under the new s 239, they would bring the new Singapore law somewhat closer to the Australian position in practice, because the considerations reflect the issues to be considered when determining whether the new safe harbour will apply. The difference between the jurisdictions is that this further guidance of what issues should be taken into account is explicitly set out in the Australian safe harbour provisions.

In Singapore, the risk of uncertainty has been mitigated by providing for an avenue to the courts. The IRDA provides that a ‘company or (with the company’s consent) any person interested in becoming party to the carrying on of the business of the company’ may make an application to the Court for a declaration that a particular course of conduct or transaction(s) would not constitute ‘wrongful trading’. The Court may order that the declaration and terms and conditions or any part of the declaration or terms and conditions be kept confidential or published. Such a court-sponsored mechanism may also be useful in Australia to provide directors and purchasers comfort when it comes to deciding what is a ‘better outcome’ for the purposes of the safe harbour. Court involvement in providing such comfort has precedents in Australia based on the use of s 447A of the Corporations Act by administrators to obtain court orders in relation to conduct or activities in a voluntary administration that might otherwise have created uncertainty.

B. When may a civil action be brought and by whom?

Australia’s s 588G and Singapore’s IRDA s 239 reveal key differences in approaches to when a civil action may be brought and by whom. These are important considerations, because they affect the scope and possible application of the provisions. The Harmer Report spent considerable time on this issue in the lead up to the reforms which introduced s 588G, but the debates prior to the safe harbour reforms did not revisit these parts of Australia’s insolvent trading law. In Singapore, the influence of the historical provisions in the Companies Act can be seen in the approach taken in the IRDA. The Singapore approach means that the wrongful trading provision has the potential for much broader application than the Australian duty to prevent insolvent trading.

139 Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239(12).
140 Lee, above n 30, 133.
141 Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239(10).
142 Ibid s 239(11).
143 Section 447A(1) of the Corporations Act states that a Court may make such order as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company.
In Australia, an insolvent trading claim may be brought by a liquidator, creditor or the Australian Securities and Investments Commission ("ASIC"), the corporate regulator. In Singapore, the list of persons who may make an application under s 239(1) is much longer: the judicial manager of the company, the liquidator of the company, the Official Receiver, or any creditor or contributory of the company (with the leave of the judicial manager or the liquidator, or the Court) may make an application. The word ‘contributory’ means a person liable to contribute to the assets of the company in the event of its being wound up, and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory. The list was adopted from s 340(2) of the Companies Act, with the addition of judicial managers, and keeps the new wrongful trading offence consistent with the fraudulent trading offence brought over from the Companies Act to the IRDA.

Due to the way that the provisions in Divisions 3 and 4 of Part 5.7B of the Corporations Act work together, a company must be in liquidation before an application under s 588G may be brought by a liquidator or creditor. Moreover, a creditor may not initiate proceedings against a director if the liquidator has already commenced an action in relation to the incurring of the debt. There is no such limitation placed on ASIC seeking a compensation order for a breach of the duty to prevent insolvent trading, however. In the judgment from ASIC’s case against directors of Water Wheel, the Victorian Court of Appeal found that “the Parliament determined that the director’s duty to prevent insolvent trading should not be limited by the necessity for the company to be subsequently wound up, thus making it possible for the [insolvent trading] sections to apply in circumstances such as the present case, where the company (Water Wheel) had gone into voluntary administration”. The Court found that the plain language of the provisions was clear, despite its finding that the Commission recommended that “the potential liability of directors of a company was limited to circumstances of insolvent trading leading to a winding up”. In Singapore, it appears that a person’s right to bring an action for wrongful trading under s 239(1) is not limited by the company’s liquidation or insolvency. A person may be found liable for wrongful trading “in the course of the judicial management or winding up of a company or in any proceedings against a company”. This wording reflects the influence of s 340 of the Companies Act, which used a similar formulation. The IRDA clarifies, however,

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144 A liquidator may apply for compensation for loss or damage due to the company incurring a debt: Corporations Act 2001 (Cth) s 588M. In certain circumstances a creditor may make an application: Corporations Act 2001 (Cth) ss 588R-U. ASIC may apply for a declaration of contravention, a pecuniary penalty order or a compensation order: s 1317J(1). Section 588J(1) provides that on an application for a civil penalty order against a person in relation to a contravention of subsection 588G(2), the court may order that compensation be paid to the company.

145 See Insolvency, Restructuring and Dissolution Act 2018 (No 40 2018) s 239(5).

146 The word ‘contributory’ has the meaning given by s 4(1) of the Companies Act: Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 2.

147 A liquidator or creditor must commence civil proceedings within six years after the beginning of winding up: Corporations Act 2001 (Cth) s 588M(4).

148 Corporations Act 2001 (Cth) s 588U(1)(b).

149 See Elliott v Australian Securities and Investments Commission (2004) 10 VR 369, 399 [110]. The Victorian Court of Appeal held that the references to a “liquidator” in s 588J(2)-(3) did not qualify the plain meaning of s 588J(1), and the jurisdiction under s 588J to order the payment of compensation was not confined to circumstances of liquidation. They stated that it was “unnecessary to resort to the preceding, historical provisions, or, indeed the Harmer Report as the meaning is plain and the intent of the legislature is clear”: 417 [184].


151 Insolvency, Restructuring and Dissolution Act 2018 (No 40 2018) s 239(1).
that both wrongful and fraudulent trading civil actions may be brought in the context of judicial management.

Despite these differences, an important similarity between the Australian and Singapore approach is that an action by a creditor (or contributory, in Singapore) is subject to the consent of the applicable external administrator or leave from the court.\textsuperscript{152} This process is designed to reduce the impact on the external administration process of a creditor commencing an action in relation to a particular debt. According to the Harmer Report, such an outcome would compromise the assets that would otherwise be available to be distributed to all unsecured creditors and thus detract from the pari passu rule.\textsuperscript{153} Similarly, the IRLC noted that one of the key concepts of the draft provision set out in paragraph 1806 of the Cork Report on “wrongful trading” that was appropriate to be adopted for Singapore was this limitation on creditors and contributories applying for relief. The ILRC noted that “in insolvent liquidations or other analogous insolvency procedures, the sums recovered are properly the property of the company, to be applied for the benefit of all its creditors as opposed to a single creditor or contributory”.\textsuperscript{154} The ILRC was “also concerned to avoid frivolous actions being brought against directors as a pressure tactic”.\textsuperscript{155}

C. Against whom may an application be brought?

Another important difference between the Australian and Singapore approaches is the scope of people against whom an action may be brought. The Singapore formulation is broader and has been influenced by the fraudulent trading provision set out in the Companies Act and the IRDA. Once again, this issue was debated at length leading up to the introduction of s 588G in Australia, but was not part of the considerations for reformers in 2016.

Section 588G only applies if a person is a director of the company at the time when the company incurs the debt.\textsuperscript{156} This sole focus on directors was new to the insolvent trading regime in Australia in the 1990s, with previous legislation applying to “any person who was a director of the company, or took part in the management of the company, at the time when the debt was incurred”\textsuperscript{157} and prior to that to “an officer of the company” who was “knowingly a party to the contracting of a debt”.\textsuperscript{158} The rationale for focusing on directors was set out in the Harmer Report, which noted that the duty in s 588G is to prevent the company from insolvent trading, not “the incurring of a particular debt”.\textsuperscript{159} Given that directors are responsible for overseeing “the whole management of the company”, it is directors who should owe the duty.\textsuperscript{160} However, the Harmer Report warned that the definition of director does “encompass those who act in a de facto capacity as directors” and thus such people also have a duty to

\begin{itemize}
\item \textsuperscript{152} Corporations Act 2001 (Cth) ss 588R(1), 588T(2); IRDA s 239(5)(d).
\item \textsuperscript{153} The Harmer Report recommended that if a director were to be found liable, the amount of the liability should be measured by reference to ‘the loss or damage sustained by the creditors’ and the sum recovered ‘should be applied for the benefit of all unsecured creditors’: Law Reform Commission (Australia), Harmer Report, above n 25, 127 [283]. Note, however, the ILRC’s further comments on granting courts flexibility to order compensation be payable to a particular creditor as discussed at Part IV, E below.
\item \textsuperscript{154} ILRC, above n 30, 206.
\item \textsuperscript{155} Ibid.
\item \textsuperscript{156} Corporations Act, s 588G(1)(a).
\item \textsuperscript{157} Corporations Act 1981 (Cth) s 556(1).
\item \textsuperscript{158} See, eg, Companies Act 1961 (Vic) s 303(3); Companies Act 1961 (Vic) s 374C, as inserted by Companies (Defaulting Officers) Act 1966 (Vic) s 3.
\item \textsuperscript{159} Law Reform Commission (Australia), Harmer Report, above n 25, 143 [325].
\item \textsuperscript{160} Ibid.
\end{itemize}
Insolvent trading liability was never limited to directors in Singapore, and the IRDA reflects the position adopted in s 339 and 340 of the Companies Act and the fraudulent trading offence found in the IRDA. Under the new law, fraudulent trading will continue to apply to any person who was knowingly a party to the carrying on of the business “with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose”. Similarly, wrongful trading applies to “any person who was a party to the company trading” wrongfully “if that person knew that the company was trading wrongfully”. Accordingly, persons such as banks, lawyers and accountants could be liable if they were a ‘party to’ the wrongful trading. However, similarly to Australia, the Singapore legislation recognises that higher expectations should be placed on officers of the company and thus an officer will be liable if that officer “ought, in all the circumstances, to have known that the company was trading wrongfully”.

The different thresholds in the new legislation conflate aspects of the Companies Act provisions where fraudulent trading laws apply to a person knowingly a party to the carrying on of that business (s 340(1)), but the insolvent trading laws apply to officers (s 339(3)). The new s 239(1)(a) means that for people who are not officers of the company to be liable for wrongful trading, they actually had to have known that the company was trading wrongfully, which corresponds to the knowledge test present in the historical and new fraudulent trading provisions. Officers, however, are held to a different standard under the IRDA for wrongful trading.

D. What are the consequences of a finding of liability?

The consequences of a finding of liability in Australia and Singapore are different, but both retain the concept of civil and criminal liability. In Australia, the safe harbour operates to provide a director with protection from liability in the first place and thus represents a significant change without impacting the consequences of a finding of liability itself. It is not a defence to be applied after a finding of liability. Importantly for Singapore, the new formulation in s 239 of the IRDA does away with the requirement of having to obtain a finding of criminal liability before a person may be found civilly liable. This requirement from the common historical provisions was done away with in Australia by the *Companies Act 1981* (Cth).
The Harmer Report had already made it clear that the duty to prevent insolvent trading was not designed to punish directors for a company’s insolvency. The Commission believed that a breach of the duty should only give rise to a civil liability and not a criminal liability. The final legislative provisions allow for a liquidator, or in certain circumstances a creditor, to apply for compensation for loss or damage due to the company incurring a debt; ASIC may apply for an order that a director pay a pecuniary penalty of up to A$1,050,000 and may seek an order that the director be disqualified for managing companies for a period to be determined by the court. ASIC may also still take criminal action against a director, where the failure to prevent the company incurring the debt was dishonest. The penalty is up to 5 years’ imprisonment, 2,000 penalty units ($420,000) or both, and the court may also order compensation.

The IRDA also makes it clear that a person may be subject to criminal liability under s 239(6) whether or not the company ‘has been, or is in the course of being, wound up, and whether or not it has been, or is, in judicial management’. The ILRC recommended that ‘in line with the current position’ criminal liability be retained — ‘wrongful trading under this new regime should constitute a criminal offence’. However, the ILRC stressed that ‘a criminal conviction should not be a pre-requisite to the making of an application to impose civil liability on the officer’. A person who is found guilty of an offence under s 239 is “liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years or to both”.

The potential consequences for criminal liability in Singapore are, therefore, much less than in

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**Companies Act 1981 (Cth)** were adopted by the states in their respective Companies Codes: see, eg, *Companies (New South Wales) Code* (NSW); *Companies (Application of Laws) Act 1981* (NSW).

169 Law Reform Commission (Australia), Harmer Report, above n 25, 142 [323].
170 Ibid 126 [283], 141–142 [322]–[323]. The Commission recommended, however, that criminal liability be retained in relation to conduct which amounted to intent to defraud creditors: 144 [327].
171 Corporations Act 2001 (Cth) s 588M.
172 Corporations Act 2001 (Cth) ss 1317E, 1317G(1). The pecuniary penalty applicable to the contravention of a civil penalty provision by an individual is the greater of: (a) 5,000 penalty units; and (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3: s 1317G(3). A penalty unit is currently $210 under s 4AA(1) of the Crimes Act 1914. See also s 1317GAD (Meaning of benefit derived and detriment avoided because of a contravention of a civil penalty provision). Where, on an application for a civil penalty order against a person in relation to a contravention of s 588G(2), the Court is satisfied that: (a) the person committed the contravention in relation to the incurring of a debt by a company; and (b) the debt is wholly or partly unsecured; and (c) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company’s insolvency; the Court may (whether or not it makes a pecuniary penalty order under s 1317G or an order under s 206C disqualifying a person from managing corporations) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage: Corporations Act 2001 (Cth) s 588J(1).
173 Corporations Act 2001 (Cth) ss 1317E, 206C.
174 Corporations Act 2001 (Cth) s 588G(3).
175 Corporations Act 2001 (Cth) sch 3.
176 Corporations Act 2001 (Cth) s 588K. Section 588K provides: If: (a) a court finds a person guilty of an offence under s 588G(3) in relation to the incurring of a debt by a company; and (b) the court is satisfied that: (i) the debt is wholly or partly unsecured; and (ii) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company’s insolvency; the court may (whether or not it imposes a penalty) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage.
177 Insolvency, Restructuring and Dissolution Act 2018 (No 40 2018) s 239(7).
178 ILRC, above n 30, 208.
179 Ibid.
180 Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239(6).
Australia, although in practice very few directors have been found criminally liable in Australia or imprisoned.  

Another difference between Australia and Singapore, is that there are no defences to an offence of wrongful trading. The feedback from the consultation process conducted by the Ministry of Law was supportive of the ILRC’s recommendation that a criminal conviction should not be a prerequisite to bringing a civil action for insolvent trading. The ILRC’s recommendation that an ‘express defence’ to insolvent trading should be included (where the officer acted honestly) was not adopted, however. The feedback suggested that civil liability should be imposed so long as certain thresholds are proven, ‘such as insolvency of the company, and no evidence to support the reasonableness of incurring the debt’. The Ministry of Law determined that in practice there would not be much difference between the recommendation and the suggested thresholds identified in the feedback, as ‘there would be few if any cases where it would be fair to excuse the officer when there is no evidence to support the reasonableness of incurring the debt’. In Australia, s 588H continues to provide for specific defences for civil liability for insolvent trading, in addition to the new safe harbour regime.

There was some further consideration given to relief for civil liability for wrongful trading in Singapore. If a person is declared responsible under s 239(1), the Court may relieve that person from personal liability ‘in whole or in part and on such terms as the Court thinks fit’ if ‘the person acted honestly’ and ‘having regard to all the circumstances of the case, the person ought fairly to be relieved from the personal liability’. Despite the proposal being described by the ILRC as a ‘defence’, this final section is not drafted as such. This provision is essentially the same as the general relief provided under the Australian Corporations Act for liability in civil proceedings.

E. Who benefits from a finding that compensation is payable?

Although both Australia and Singapore provide for civil liability and the payment by the defendant of compensation, the application of any compensation which is ordered by the court may differ. In Australia, the compensation is payable to the company for distribution to all

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181 ASIC rarely seeks criminal penalties: James, Ramsay and Siva noted that ‘the higher burden of proof in relation to criminal prosecutions, and the greater range of relief available in relation to civil proceedings, may prompt authorities to pursue civil proceedings rather than criminal prosecutions’: James, Ramsay and Siva, above n 11, 223.
182 Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239(6).
183 ILRC, above n 30, 211.
185 Ibid.
186 See above n 114.
187 Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 239(2).
188 See above n 114.
189 Sections 1317S and 1318 of the Corporations Act are purely discretionary and any relief under these sections does not remove the breach, rather it simply excuses the contravention of the duty. Section 1317S applies specifically to the civil penalty provisions. An application to the court for relief can be made prior to proceedings being commenced. In relation to relief for insolvent trading, see Hall v Poolman (2007) NSWSC 1330; McLellan v Carroll (2009) FCA 1415; Smith v Boné, in the matter of ACN 002 864 002 Pty Ltd (in liq) [2015] FCA 319.
unsecured creditors, whereas in Singapore it appears that the court may order that the compensation be payable to one or more creditors.

The Harmer Report rejected the submission of the New South Wales Law Society that the right of individual creditors to bring an action under the then existing law be preserved, as the Commission viewed ‘the principle of equal sharing as crucial’. Moreover, the Harmer Report noted that paying compensation to individual creditors ‘gives any benefit of the civil liability to the creditor taking action and thus is only of advantage to a creditor with the resources to take such action’. At the time, liquidators did not have standing to bring an action for the benefit of all creditors. The Harmer Report recommended that if a director were to be found liable, the amount of the liability should be measured by reference to ‘the loss or damage sustained by the creditors’ and the sum recovered ‘should be applied for the benefit of all unsecured creditors’.

In Singapore, s 239(3)(c) provides that the High Court may direct that sums recovered under s 239 be paid to ‘such persons or classes of persons, for such purposes, in such amounts or proportions, at such times and in such priorities between them as the Court may specify’. This provision means that the proceeds of a successful action by a creditor can be directed solely to that creditor (rather than to the company) as compensation for their particular loss. Section 239(3)(c) represents a change in Singapore law when it comes to civil liability. The Companies Act insolvent trading provision did not make it clear whether the company or a particular creditor would benefit from a successful application by a creditor for a declaration of personal responsibility under s 340(2) for the payment of a debt. It has been argued that if creditors are allowed to retain their recovery, there may be more actions brought against wrongdoers, which may raise the standard of corporate governance. The ILRC noted that the power of the court to apply the proceeds of recovery flexibly is important as it will not always be appropriate that the proceeds of recovery against the director ‘be wholly paid to the company’s general pool of assets’ – for example, where one creditor has successfully brought the proceedings, it may be just that part or all of what is recovered should go first to that creditor rather than increasing the pool of money available to the general body of creditors. This line of thinking was explicitly rejected by the Harmer Report.

One explanation for this difference is the positioning of the provisions from a policy perspective. In Australia, s 588G was positioned as a mechanism for increasing returns to unsecured creditors — as highlighted by the position of s 588G within Part 5.7B of the Corporations Act, which is entitled ‘Recovering property or compensation for the benefit of creditors of insolvent company’ and also includes provisions relating to voidable transactions. Whilst increasing the pool of money to be distributed to creditors may be a practical outcome of the new IRDA wrongful trading provision, the application of the provision is not linked

189 Corporations Act s588Y(1). Section 588Y(1) provides that “An amount paid to the company under section 588J, 588K, 588M or 588W is not available to pay a secured debt of the company unless all the company’s unsecured debts have been paid in full.” We are not concerned in this section of the article with the circumstances in which a creditor or ASIC may apply for compensation for loss or damage due to the company incurring a debt: Corporations Act 2001 (Cth) ss 588R-U, s 1317J(1): see the text accompanying nn 144-145 above.

190 Law Reform Commission (Australia), Harmer Report, above n 25, 139 [315].

191 Ibid 124-125 [279].

192 Ibid 127 [283].

193 Lee, above n 30, 128. The Insolvency Act 1986 (UK) s 214 provides creditors with no direct right to recovery. Only liquidators have rights to make an application under s 214(1) and sums recovered must be available to repay all creditors pari passu. See Williams, above n 19, 67.

194 ILRC at 207-8.
directly to increasing recoveries or compensation for unsecured creditors as a class per se and the provision is found with other offences in Division 5 of the IRDA.

V. Conclusion

The 2017-19 reforms in Australia and Singapore are aimed at shifting the balance between protecting creditors by not having companies continue to trade when insolvent and allowing companies greater freedom to restructure while not imposing excessive liability on directors during the restructure. Because the reforms have only recently been introduced in both countries, it is not yet known to what extent the new legislative provisions will be used and therefore to what extent the balance has actually shifted. However, what is clear is that the Australian safe harbour reforms are premised on a view that the insolvent trading provisions, with their very strong creditor protection focus, can operate to limit company restructures. The reforms therefore restrict the operation of the insolvent trading provisions when a restructure that satisfies the safe harbour requirements is undertaken. The reformulation of Australia’s insolvent trading laws in the 1990s created a distinct approach which moved away from historical formulations of these types of provisions dealing with director liability in the context of insolvency. This dramatic parting with previous frameworks established during the period up to and during the 1960s in Australia substantially shifted the focus of the provisions towards creditor protection. However, a focus on the need to promote innovation resulted in the 2017 safe harbour reforms. The reforms were explicitly designed to shift the balance away from placing excessive liability on directors and give directors breathing space to consider restructuring options.

Singapore’s legislative approach, on the other hand, had not changed substantively since the 1960s until the IRDA reforms. The Companies Act formulation made it difficult for creditors to use the provisions and, indeed, there was no history of civil liability for insolvent trading in Singapore. The IRDA therefore documents a shift in policy to provide easier access to not only creditors, but other stakeholders, to seek compensation from directors, officers and other parties, potentially increasing the risk for directors. Although the IRDA insolvent trading reforms borrow heavily from the existing provisions in the Companies Act, the changes are important. Prior to the IRDA, Singapore’s regime still had a criminal focus — with civil proceedings only being possible if a conviction for insolvent trading had already been secured. The IRDA introduces a new wrongful trading offence and also gives courts flexibility in the allocation of compensation. Further, the breadth of possible application of the Singapore provisions, including the list of people who may sue and be sued, suggests there is potential for the provisions to have a significant effect on corporate and insolvency practice in Singapore and the changes suggest a more creditor-friendly regime than the provisions under the Companies Act.