Directors' duties to prevent insolvent trading in a crisis: Responses to COVID-19 in Australia and lessons from Germany

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Abstract

This article considers relief from directors’ duties to avoid trading whilst insolvent during the COVID-19 pandemic in Australia and Germany. Comparative insolvency law literature traditionally compares Australia to jurisdictions such as the United Kingdom and New Zealand. However, Germany has a track record of using insolvency law to manage social and economic crises. The German approach suggests solutions to critical issues not dealt with in the Australian safe harbour legislation, such as the failure to suspend other statutory duties to provide clear guidance to directors on the balancing of various interests, and the treatment of potential voidable transactions and new monies (i.e., new funding or credit). The responses in both jurisdictions suggest a change in priorities away from creditor protection, a key raison d’être for these types of duties, during a crisis. Similar to the German approach of turning the obligation to file for formal insolvency proceedings off and on, the further safe harbour adopted in Australia as part of a new restructuring procedure for small businesses, which commenced on January 1, 2021, suggests that the use of
safe harbours could become a permanent crisis-management tool in Australia too, with potential consequences for the balance between debtor and creditor interests.

1 | INTRODUCTION: DIRECTORS’ DUTIES IN A CRISIS

Relief from directors’ duties to avoid trading whilst insolvent has been a common global response to the economic crisis precipitated by the COVID-19 pandemic.¹ These duties are configured in legislation in different ways, depending on the jurisdiction, including as a prohibition on insolvent, wrongful or fraudulent trading, or an obligation to file for insolvency.² These responses raise questions about the role of insolvency law in a crisis and the ultimate goal of protecting creditors as the explicit driver for these duties. COVID-19 has killed almost 2 million people globally at the time of writing.³ This extraordinary situation led governments worldwide to prevent businesses operating as usual, causing unprecedented harm to economies. Australia was not immune. The Australian Treasury forecasted that unemployment would reach 9.25% in December 2020 and two successive quarters of GDP contraction confirmed in September 2020, means Australia entered a recession.⁴

This article examines Australia’s introduction of a new safe harbour for conduct, which would otherwise fall foul of s 588G of the Corporations Act 2001 (Cth), drawing on insights from the response of the German Government to relax requirements for directors to file for insolvency. When the pandemic took hold, Australia was one of the first jurisdictions to legislate to introduce a safe harbour for directors, which essentially suspended the controversial duty to prevent insolvent trading (“COVID-19 Safe Harbour”).⁵ In Germany, according to the INSOL International and World Bank Group’s survey of COVID-19 insolvency law responses (“INSOL Report”), the obligation to file for insolvency “is usually the first insolvency law provision modified in times of crisis”.⁶ The obligation was suspended in 2013 and 2016 as a result of severe flooding in Germany.⁷ In Australia, the COVID-19 Safe Harbour followed the introduction of a new safe harbour in 2017 (“2017 Safe Harbour”). The formulation of Australia’s insolvent trading regime is unique and has been described as “draconian”.⁸ However, the regime has similarities to provisions in other jurisdictions, which prohibit what is known as wrongful trading (where the test for liability focuses less on the timing of “insolvency” than Australia’s provisions), fraudulent trading (where the trading involves an element of dishonesty), and positive duties to file for external administration where a company is in financial difficulties such as Germany’s.⁹

The article begins by outlining the current Australian legislative provisions. For comparative purposes, the article then sets out the approach taken in Germany. Based on a review of the debates and legislative processes, which led to the Australian measures, the article then identifies issues, which were left unresolved in the rush to introduce the COVID-19 Safe Harbour, and considers what Australia can learn from Germany’s approach to the extent that a safe harbour is used again in response to any future crisis. When it comes to comparative insolvency law, the literature in Australia traditionally tends to consider jurisdictions such as the United Kingdom and New Zealand.¹⁰ This comparison with Germany provides fresh insights. As an advanced insolvency law jurisdiction in Europe that has been at the forefront of using
insolvency law reforms as part of its response to crises, Germany serves as a useful touchpoint for Australia. This international comparison also underscores the global nature of these types of directors’ duties, which “pierce the corporate veil”. As such, whilst the wording of the provisions differ markedly, they serve as a functional equivalent. This article concludes by considering what these suspensions say about the raison d’être for these types of provisions.

2 | DUTIES TO PREVENT INSOLVENT TRADING IN AUSTRALIA

2.1 | S 588G: Duty to prevent insolvency trading

S 588G of the Corporations Act 2001 (Cth) applies if:

“(a) a person is a director of a company at the time when the company incurs a debt; and
(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be.”

By “failing to prevent the company from incurring the debt”, the director contravenes the duty if:

the director is “aware at that time that there are such grounds for so suspecting”; or
“a reasonable person in a like position in a company in the company’s circumstances would be so aware”.

The director may seek to rely on defences based on reasonable grounds, illness, or reasonable steps, but these defences are rarely made out in practice.

Contravention of the duty may lead to civil penalties. Moreover, the director will commit an offence if the failure to prevent the company incurring the debt was dishonest and an order to compensate the company for losses or damage incurred by creditors by the breach may be made. A director may also be disqualified from managing corporations. In practice, it is most likely that a director who is found to have contravened the duty will become personally liable for the debts incurred whilst the company was insolvent. There is a statutory cause of action for liquidators (on behalf of the company) and creditors to sue for compensation for loss or damage incurred due to a breach of the civil penalty provision. As such, the timing at which the company became insolvent is a key focus of litigation in this area, because it helps to determine whether the director will be liable, and which debts are included in any compensation claim. The compensation is determined by the Court and will be equal to the amount of the loss or damage suffered by the person to whom the debt is owed because of the company’s insolvency where the debt was wholly or partly unsecured. A company’s holding company may also be liable for that company’s insolvent trading and ordered to pay compensation.

2.2 | Safe harbour reforms of 2017

In 2017, the Corporations Act 2001 (Cth) was amended to provide a safe harbour so that sub-s 588G(2) does not apply in relation “to a person and a debt” if a director is undertaking an informal restructure of the company. The 2017 Safe Harbour applies where:
• at a particular time after a person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and
• the debt is incurred directly or indirectly in connection with any such course of action during the relevant “period”.

The period starts when the person begins to develop the course of action and ends at the earliest of:

(a) “if the person fails to take any such course of action within a reasonable period after that time – the end of that reasonable period”;
(b) “when the person ceases to take any such course of action”;
(c) “when any such course of action ceases to be reasonably likely to lead to a better outcome for the company”;
(d) “the appointment of an administrator, or liquidator, of the company”.

Importantly from a practical perspective, the 2017 Safe Harbour does not apply if the company is failing to substantially comply with its obligations to pay the entitlements of its employees by the time they fall due, or give returns, notices, statements, applications, or other documents as required by taxation laws. The Court may order that a failure to meet these conditions will not preclude the 2017 Safe Harbour’s application if the Court is satisfied that the failures were due to exceptional circumstances or that it is otherwise in the interests of justice to make the order. A review of the 2017 Safe Harbour reform was scheduled to commence by September 2019; however, this review was not initiated until August 2021.

2.3 COVID-19 safe harbour

The duty to prevent insolvent trading was further impacted as part of the Government’s response to COVID-19, effectively suspending the duty. The Coronavirus Economic Response Package Omnibus Act 2020 (Cth) (“Omnibus Act”) included a series of schedules amending various legislation. Pt 3 of Sch 12 is titled “Temporary relief for directors from duty to prevent insolvent trading”. Other measures in the Omnibus Act relating to companies in financial difficulty included temporarily increasing the threshold at which creditors may issue a statutory demand on a company from AUD 2,000 to AUD 20,000 and extending the deadline by which companies have to respond to any statutory demands from 21 days to 6 months.

The new sub-s 588GAAA(1) of the Corporations Act 2001 (Cth) provides that:

“Subsection 588G(2) does not apply in relation to a person and a debt incurred by a company if the debt is incurred:

• in the ordinary course of the company’s business; and
• during:
  ○ the 6-month period starting on the day this section commences; or
  ○ any longer period that starts on the day this section commences and that is prescribed by the regulations for the purposes of this subparagraph; and
• before any appointment during that period of an administrator, or liquidator, of the company.”
A person who wishes to rely on the COVID-19 Safe Harbour in a proceeding for, or relating to, a contravention of sub-s 588G(2), bears an evidential burden in relation to that matter. The COVID-19 Safe Harbour provisions anticipate that it will not apply in certain circumstances, which are to be prescribed by regulations. At the time of writing, there were no regulations specifying when the COVID-19 Safe Harbour does not apply.

The temporary relief was to apply for a 6-month period starting on March 25, 2020. The measures operate alongside the existing 2017 Safe Harbour regime and do not have retrospective application. Any debts incurred prior to March 25, 2020, when a company was trading whilst insolvent could still be subject to a claim against a director. The Omnibus Act provided that the period of 6 months may be extended, which occurred on September 7, 2020, when the Government extended the period to December 31, 2020. The company itself is still liable for any debts incurred during the period.

The third limb qualifying a debt for the COVID-19 Safe Harbour under para 588GAAA(1)(c), namely that the debt be incurred “before any appointment during that period of an administrator, or liquidator, of the company”, caused controversy. Some commentators read the requirement as having the effect of requiring an administrator or liquidator to be appointed before December 31, 2020 (the end of the COVID-19 Safe Harbour period) in order for the directors to avail themselves of the COVID-19 Safe Harbour. An opposing view is that such an interpretation would be inconsistent with the meaning of the section and the purpose of the provisions. The interpretation of this provision has been left to the courts.

2.4 Another new safe harbour: Small business reforms

After the experience of the COVID-19 Safe Harbour, the Government relied on the safe harbour concept again when reforming Australian insolvency law at the end of 2020. On September 24, 2020, the Australian Government announced the introduction of new procedures for restructuring and liquidation for small businesses. A bill to amend the Corporations Act was passed by Parliament on December 15, 2020, and the reforms came into effect on January 1, 2021. The new debtor-in-possession restructuring process is central to the reforms, with directors receiving assistance from a new category of registered liquidators known as small business restructuring practitioners (“SBRP”). The object of the new restructuring procedure is to provide for a restructuring process for eligible companies that allows the companies:

- “to retain control of the business, property and affairs while developing a plan to restructure with the assistance of a small business restructuring practitioner”; and
- “to enter into a restructuring plan with creditors”.

The reforms aim to reduce the costs of external administration and the compliance burden borne by insolvency practitioners to help viable businesses stay afloat, and improve returns to creditors and employees of nonviable businesses. Companies with liabilities of less than $1 million will be eligible to access the new restructuring process.

Practitioners had little time to prepare for the reforms and the Government was concerned that companies would not be able to appoint an SBRP as soon as the reforms became effective. The COVID-19 Safe Harbour was due to end on December 31, 2020, however, and the Government wanted to continue to provide relief to directors whilst facilitating the commencement of the new procedure. Accordingly, the new law provided directors of eligible companies looking
for restructuring practitioner whilst waiting to access the new debt restructuring procedure with temporary relief from the civil penalty in sub-s 588G(2) of the Corporations Act 2001 (Cth) ("Small Business Safe Harbour"). Moreover, entry into the new small business restructuring procedure itself provides immediate relief from sub-s 588G(2) if a debt is incurred during the restructuring phase and in the ordinary course of the company’s business or with approval of the SBRP or the court in accordance with the new sub-s 588GAAB(1) of the Corporations Act 2021 (Cth).

The new section 588GAAC(1) sets out the temporary Small Business Safe Harbour and provides that:

“Subsection 588G(2) does not apply in relation to a person and a debt incurred by a company if:

- the company is “eligible for temporary restructuring relief” when the debt is incurred; and
- the debt is incurred in the ordinary course of the company’s business; and
- the company has taken all reasonable steps to appoint a restructuring practitioner before the debt was incurred.”

S 458E of the Corporations Act 2001 (Cth) sets out the criteria for companies to be “eligible for temporary restructuring relief”, namely:

- before the end of the “restructuring relief period”, the directors of the company make and publish a declaration that there are reasonable grounds to believe the company is insolvent or is likely to become insolvent before the expiry of the declaration, and the declaration has not yet expired;
- there are reasonable grounds to believe the company is insolvent, or is likely to become insolvent before the declaration expires and the eligibility criteria for restructuring would be met if a restructuring practitioner were appointed on the day the declaration is published or any day the declaration has not expired;
- the board has resolved that a restructuring practitioner should be appointed;
- there is no (i) restructuring practitioner for either the company or restructuring plan made by the company; (ii) administrator of either the company or a deed of company arrangement executed by the company; or (iii) liquidator or provisional liquidator of the company;
- the company has not ceased to be eligible for temporary restructuring for any reason; and
- the company has not previously been eligible for temporary restructuring relief that has ceased because a previous declaration expired or any other reason.

The “restructuring relief period” is defined as the period beginning on January 1, 2021, and ending on March 31, 2021. Directors who make and publish a declaration will be entitled to an initial relief period of 3 months from the publication of the declaration plus a possible 1-month extension. The declaration must be lodged with the Australian Securities and Investment Commission ("ASIC"), Australia’s key corporate regulator, no later than five business days after publication.

Harris, a leading academic commentator on the new legislation, argued that the Small Business Safe Harbour should not be promoted as a way for directors to avoid their duty to prevent insolvent trading, particularly given that the 2017 Safe Harbour is separately available. He also recommended that the eligibility criteria for accessing the new procedure:

“allow for employee entitlements to be brought up to date through a restructuring plan rather than needing to be fully paid at the time of appointing an SBRP.”
This was because, otherwise, “the vast majority of small businesses will be unable to use the new procedure.”

Under the final legislative framework, access to the Small Business Safe Harbour is not predicated on the company being able to meet employee entitlements. However, directors must still find a way to meet unpaid employee entitlements, because before the company can propose a restructuring plan to its creditors, a company under restructuring “must do certain things”, which includes having “paid the entitlements of its employees that are payable” and “given returns, notices, statements, applications or other documents as required by taxation laws”, or be “substantially compliant” with those matters. As such, the issue of employee entitlements still looms large for directors seeking to rely on the Small Business Safe Harbour.

2.5 Other statutory and general law duties

The safe harbour provisions do not relieve directors from other statutory and general law duties, which apply to directors and other company officers. Directors and other officers are also under a statutory duty to act with the degree of care and diligence of a reasonable person in the circumstances and in good faith in the best interests of the corporation and for proper purposes. Furthermore, reforms to the Corporations Act 2001 (Cth), which became effective just before the COVID-19 crisis, introduced a new criminal offence and civil penalty provision for company officers (including directors) who are found to have failed to prevent a company from making certain “creditor defeating dispositions” unless an exception applies. Courts have also found that directors owe a duty to take into account the interests of creditors based on general law principles where a company is insolvent or nearing insolvency. These general law duties are not well defined; despite the expectation that directors should take the interests of creditors into account, those interests are not paramount.

The statutory duties of directors and other officers are in large part a codification of their duties under common law and equity. A breach of the duty to act with due care and diligence, or in good faith, gives rise to civil penalty provisions under the Corporations Act 2001 (Cth). On finding that a director or other officer has breached either duty, a court must issue a declaration of contravention, which allows ASIC to apply for a pecuniary penalty order. A court may also order that the contravening director or other officer compensate the corporation for the damage suffered, and be disqualified from managing corporations. A director or company officer may also be criminally prosecuted for a breach of their duty to act in good faith if it is found that they acted recklessly or dishonestly and failed to exercise their powers or discharge their duties in good faith in the best interests of the corporation or for a proper purpose.

3 DUTY TO INITIATE INSOLVENCY PROCEEDINGS: GERMANY’S APPROACH

3.1 Director liability when a company is in or near the insolvency zone

Until the Companies Law Reform Act (“MoMiG7”) came into force on November 1, 2008, the insolvency filing requirements for commercial companies were set out in German company law. The MoMiG7 shifted the filing requirements to the Insolvency Statute (“InsO”) and
established a general standard, which largely reflected the filing obligation set out in the company law. After the MoMiG7 reforms, s 15a(1) of InsO provided that:

“Where a legal person becomes illiquid or overindebted, the members of the board of directors or the liquidators shall file a request for the opening of proceedings without culpable delay, at the latest, however, three weeks after the commencement of insolvency or overindebtedness.”

The period for filing was extended from three to 6 weeks after the occurrence of overindebtedness by reforms to InsO in late December 2020 discussed below, which also introduced a new s 15(b) that prima facie prohibits persons required to file an application for insolvency from allowing a debtor to make payments after the debtor becomes insolvent or overindebted, unless the payments are consistent with the due diligence of a prudent and conscientious manager, and introduces a compensation provision where such payments are made in contravention of this prohibition. S 15(a)(1) places a duty on all of the legal representatives of the company, typically the managing director and members of the management board. Failure to file in these circumstances may lead to personal civil liability for representatives or criminal penalties.

Under s 17(2) of InsO, a debtor is deemed illiquid (Zahlungsunfähigkeit) if it is unable to meet its obligations to pay as they fall due and insolvency is presumed if the debtor has stopped making payments. Under s 19(2) of InsO, over-indebtedness (Überschuldung) exists when a debtor’s assets no longer cover the debtor’s existing obligations to pay, unless it is highly likely, considering the circumstances that the debtor, in the next 12 months, will continue to exist. The previous position under German insolvency law was that, if the valuation of a company’s assets on a going-concern basis resulted in a negative net asset value, the company was obliged to file for insolvency. The Global Financial Crisis of 2008 prompted a change to InsO so that where it is more likely than not that a business will be able to continue, the company is not obliged to file for insolvency.

3.2 COVID-19 relaxation of filing obligations

On March 27, 2020, the German Parliament passed the Act to Mitigate the Consequences of the Covid-19 Pandemic in the Fields of Civil Law, Insolvency Law, and Criminal Procedure (“German Omnibus Act”). The German Omnibus Act included a suite of legislation designed to combat the negative economic consequences of COVID-19. Article 1 of the German Omnibus Act enacted the Act to Temporarily Suspend the Obligation to File for Insolvency and to Limit Directors’ Liability in the Case of Insolvency Caused by the COVID-19 Pandemic (“COVInsAG March 2020”), which temporarily suspended a debtor’s obligation to file for insolvency. Specifically, it suspended the obligation to file an insolvency request under s 15a of InsO and sub-s 42 (2) of the Civil Code (Bürgerliches Gesetzbuch) until September 30, 2020, with possible extensions of that time period. The suspension did not apply if the insolvency was not a consequence of the COVID-19 pandemic or if there were no prospects of remedying the insolvency. For the purposes of the suspension, it was assumed that if the debtor was not illiquid on December 31, 2019, and subsequently became insolvent, the insolvency was a consequence of the COVID-19 pandemic and there was the possibility it could be remedied.

S 2 of the COVInsAG March 2020 further provided that where the filing obligation had been suspended:
payments, which were made in the ordinary course of business, in particular those payments, which served to maintain or resume business operations or to implement a restructuring concept, were deemed to be consistent with the due care of a prudent director;

- repayment, up until September 30, 2023, of a new credit, which was granted during the period of the suspension and the provision of collateral to secure such a credit during the period of the suspension was deemed not to constitute prejudice to creditors (this also applied to repayment of shareholder loans and payments based on claims resulting from legal acts, which are equal, in economic terms, to such loans, but not to their collateralisation);

- credit granted and collateral provided during the period of the suspension were not deemed to be contributing, contra bonos mores, to the delayed filing of a request for insolvency;

- legal acts, which granted or enabled the other party to obtain collateral or satisfaction to which such party was entitled in that manner and at that time could not be avoided in subsequent insolvency proceedings (this did not apply where the other party was aware that the debtor's efforts to restructure and finance the company were not suited to remedying the insolvency, which occurred).

Art 6(1) of the German Omnibus Act made the COVInsAG March 2020 applicable retrospectively from March 1, 2020. The legislation also made it clear that the legal consequences of the suspension were intended to continue to apply even after the suspension period came to an end on September 30, 2020, or some later date if the suspension was extended.

The Federal Ministry of Justice and Consumer Protection was authorised to extend the suspension of the filing obligation and associated rules until no later than March 31, 2021: “if this appears necessary due to the continuing demand for available public aid, ongoing financing difficulties or other circumstances.”

In September 2020, the German legislature adopted the Act to Amend the German COVID-19 Insolvency Suspension Act, approving a partial extension of the modified insolvency regime. The suspension of filing obligations was extended until December 31, 2020, only in relation to companies, which are overindebted (Überschuldung) but not illiquid (Zahlungsunfähigkeit). Accordingly, preliminary relief for illiquid companies, regardless of whether that illiquidity was a consequence of the COVID-19 pandemic, ended on September 30, 2020.

The rationale for extending the relief for overindebted, but not illiquid, companies was explained by one law firm as:

“a continued blanket derogation from the mandatory filing requirement for companies facing severe cash-flow problems to the point of illiquidity (i) would often only delay the inevitable and (ii) create an unwanted cluster of many insolvency proceedings which are ultimately all filed for at the same time when the suspension comes to an end, rather than a steady and progressive cleansing of the market by gradually removing companies that have failed to recover from the pandemic in a reasonably short period of time.”

However, the exception from the filing obligation under COVInsAG March 2020 was extended again from January 1, 2021, until January 31, 2021, after the German Parliament adopted the Act on the Further Development of Restructuring and Insolvency Law (“SanInsFoG”) in December 2020, which amended COVInsAG March 2020 again. This further suspension applied to both over-indebted and illiquid companies that applied for government aid between November 1, 2020, and December 31, 2020 (or were prevented from applying for legal or technical reasons). The SansInsFoG extension would not apply if the funds would
be insufficient to overcome the reason for insolvency or the application obviously lacked the prospect of success.  

4 | COMPARISON OF SUSPENSION PROVISIONS: LESSONS FOR AUSTRALIA

Like Sch 12 of the Australian Omnibus Act, the German COVInsAG March 2020 was part of a larger suite of legislation responding to COVID-19, but the relevant provisions themselves are brief. Both responses were criticised for being “rushed”. However, the COVInsAG March 2020 provided more details than the Australian provisions thus avoiding the key criticisms of the Australian COVID-19 Safe Harbour, which include the failure to suspend other statutory duties to provide clear guidance to directors on the balancing of various interests, and the treatment of potential voidable transactions and thus new monies. This section compares differences and similarities between the approaches adopted by Australia and Germany to these issues.

4.1 | Suspension of other statutory duties and clarity on balancing the rights of creditors

A key issue highlighted by the Law Council of Australia in a submission to the Australian Treasury on March 31, 2020, was the continuing operation of statutory obligations of directors and other officers to act with the degree of care and diligence of a reasonable person in the circumstances and in good faith in the best interests of the corporation and for proper purposes set out in ss 180 and 181 of the Corporations Act. The Council argued that without this further relief from ss 180 and 181, the “effectiveness” of the COVID-19 Safe Harbour would be undermined. The Council acknowledged that this additional relief was not a “perfect solution” either, because a director’s general law duties would still apply. However, “as Parliament considered it fit to enact [section] 588GAAA”, it was logical that this additional protection in respect of the other statutory duties is afforded to directors. The Law Council’s recommendation was not taken up, however.

Commissioner John Price of ASIC outlined the regulator’s approach in April 2020. He acknowledged that:

“the economic circumstances surrounding COVID-19 present many challenges to companies, boards and management.”

He went on to say, however, that:

directors and officers need to carefully reflect on their fundamental duties to act with due care, skill and diligence, and to act in the best interests of the company”,

and reminded them that:

“the recently passed insolvency safe harbour provisions do not relieve directors from their other statutory and common law duties.”

As such, ASIC still expected directors to reflect:

“on which stakeholders’ interests need to be factored into decisions – including employees, investors and creditors.”

Moreover, the Government also emphasised that the temporary Small Business Safe Harbour should not apply where debts have been incurred as part of illegal phoenixing or other dishonest behaviour. To successfully rely on the COVID-19 Safe Harbour or the Small Business
Safe Harbour, a director must prove that the relevant debt was incurred in the “ordinary course of business”, which means it must have been necessary to facilitate the continuation of the business during the relevant period. The Explanatory Memorandum to the Omnibus Act gave examples of such debts in the case of the COVID-19 Safe Harbour: taking out a loan to move some business operations online; or debts incurred through continuing to pay employees during the COVID-19 pandemic.

The inconsistency as between the approach to the duties in ss 588G and 180 and 181 and statements such as those by ASIC reminding directors of their various obligations placed directors in a difficult position and highlights the tension between balancing creditors’ interests and encouraging directors to trade on. The joint media release by the Treasurer and Prime Minister on March 22, 2020, did not refer to protecting unsecured creditors during this time of crisis. In practice, the measures are likely to have the contrary effect. A large commercial law firm predicted that the measures:

“make it more difficult for suppliers and other creditors to recover overdue payments, which could have the ultimate effect of increasing credit risk and shifting liquidity pressure from debtors to suppliers and creditors.”

This firm recommended that:

“[S]uppliers will need to be more vigilant with their trading counterparties and consider adjusting their trading terms to address this risk.”

Unlike the complex Australian law position, COVInsAG March 2020 made it clear that “payments which are made in the ordinary course of business” are “deemed to be consistent with the due care of a prudent director”. The relief also addressed the balancing of creditors’ interests by imposing additional conditions. COVInsAG March 2020 provided that the suspension of the filing obligation “does not apply where the insolvency is not a consequence of the spread of the SARS-CoV-2 virus (COVID-19 pandemic) or where there are no prospects of remedying the insolvency”. Accordingly, for COVInsAG March 2020 relief to apply, the insolvency must be related to COVID-19 and the company must have a chance of trading beyond the resolution of the COVID-19 crisis. This approach was emphasised again with the changes to the scope of the suspension to limit it to over-indebted companies during the period from October 1, 2020, to December 31, 2021.

The types of issues, which the German Government anticipates forming a basis for the suspension because the insolvency relates to COVID-19 included: accruing a high level of sick leave; costs incurred to protect workers; collapse in demand or financing; delays in receiving deliveries of supplies or services; governmental restrictions, which may impact on operations such as ordering infected people to self-isolate; discontinuation of business in the manufacturing sector; bans on major events; border closures; and the compulsory closure of some businesses in sectors such as catering, retail, schools, and childcare facilities. Unlike Australia where the director has the burden of proof, the person alleging that the obligation should continue to apply in Germany bears the burden of proof. Moreover, the suspension provisions in COVInsAG March 2020 provided a rebuttable presumption that:

“[W]here the debtor was not illiquid on 31 December 2019, it is assumed that the insolvency is a consequence of the COVID-19 pandemic and that there are prospects of remedying the insolvency.”

If this rebuttable presumption only protects directors in obvious cases, the aim of COVInsAG March 2020 would not be met and thus a broad interpretation is likely to be applied to the benefit of directors.
However, the additional condition set out in COVInsAG March 2020 meant that directors of insolvent companies may not rely on the protection “where there are no prospects of remedying the insolvency”. The legislation and the explanatory materials do not indicate whether the prospects of overcoming insolvency have to be foreseeable in a certain period of time or the extent to which there must be a chance of remedying the insolvency.\textsuperscript{97} It is clear that companies need to take concrete steps, implement plans, and make reasonable applications for state aid for the suspension to apply.\textsuperscript{98} One law firm suggested that the application of the suspension requires that:

“[T]here are prospects for restructuring of the company due to pending procedures for granting public aid to the company and/or pending negotiations with (potential) creditors of the company about additional financing or reorganization of debt.”\textsuperscript{99}

In practice, it may not be difficult for directors to establish that any insolvency is a consequence of the COVID-19 pandemic, but these additional conditions and the context of the further extensions to the suspension for only over-indebted companies make it clear that the relief is aimed at the consequences of COVID-19. There are concerns in Australia that the COVID-19 Safe Harbour and related insolvency law measures have encouraged directors to continue trading when it is clear that there are no prospects of recovery.\textsuperscript{100}

### 4.2 Voidable transactions and new monies

Voidable transaction risk and the treatment of new monies were not explicitly dealt with in the Australian Omnibus Act; however, these issues were dealt with in COVInsAG March 2020. The relationship between the COVID-19 Safe Harbour and the timing for making voidable transaction claims was recognised by the Law Council of Australia.\textsuperscript{101} Given that the COVID-19 Safe Harbour and other measures have resulted in delays in companies entering into formal insolvency proceedings, the periods during which transactions may be attacked as voidable have been affected. Transactions, which occur during the relevant period—for example, 6 months before the company’s winding up—may be voidable where the company was insolvent.

There are likely to be many transactions during the period where the company was insolvent but the delay in filing for formal insolvency proceedings will place them beyond the review of a liquidator. Conversely, there is also a risk to creditors that liquidators may seek to claw back payments made to creditors whilst the company was trading under the COVID-19 Safe Harbour as voidable transactions where the company is eventually placed into formal proceedings and the transaction coincidentally occurred within the relevant period. Either way, the position is extremely difficult for directors and creditors to navigate and could lead to creditors refusing to supply goods and services required for a company’s continued operations, or at least requiring payment on delivery. There is also a risk of domino insolvencies of suppliers who are required to repay amounts as voidable transactions once the COVID-19 Safe Harbour and Small Business Safe Harbour transition measures expire if the company eventually ends up in liquidation.\textsuperscript{102}

In practice, the risk of payments being set aside as unfair preferences (one type of voidable transaction) will be particularly relevant to payments made to the Australian Tax Office (“ATO”) during the period in which a director relies on the COVID-19 Safe Harbour or Small Business Safe Harbour. The ATO is a large creditor to small businesses in Australia and a study of court judgements dealing with insolvent trading between 2004 and 2017 found that debts
were owed to the ATO in almost half of the judgements reviewed.\textsuperscript{103} The ATO may also be subject to preference claims, particularly in the context of COVID-19, where it may agree to a payment plan for taxes in light of financial difficulties experienced by the company if the company eventually enters into liquidation. A director may also be personally liable for tax debts unless a voluntary administrator or SBRP is appointed or the company begins to be wound up if the director fails to respond to a director penalty notice (“DPN”) issued by the ATO.\textsuperscript{104}

The DPN system is designed to ensure that a company either meets its obligations or goes into voluntary administration, small business restructuring, or liquidation.\textsuperscript{105} In practice, the system may incentivise directors to pay the ATO at the expense of other creditors. At around the same time as the COVID-19 Safe Harbour was announced, the ATO also announced that it would “tailor a support plan” for a company’s needs and circumstances and:

“[S]upport measures could include deferral of some payments, quicker access to GST refunds, and options to enter low interest payment plans for existing or future tax debts.”\textsuperscript{106}

The ATO warned, however, that:

“[E]mployers will still need to meet their ongoing super guarantee obligations for their employees.”\textsuperscript{107}

Unlike the COVID-19 Safe Harbour, COVInsAG March 2020 was designed to encourage creditors to continue to trade with the company. First, if the debtor was not illiquid on December 31, 2019, a rebuttable presumption is established that the insolvency occurred due to the Covid-19 pandemic and that there are prospects of resolving an existing illiquidity.\textsuperscript{108} Accordingly, the directors will prima facie be entitled to rely on the suspension of the obligation to file. Furthermore, sub-s 2(4) of the COVInsAG March 2020 provided that transactions, which might otherwise have been avoided in subsequent insolvency proceedings may not be avoided; this provision does not apply, however, in circumstances where the creditor was aware that the debtor’s efforts to restructure and finance the company were not suited to remedying the actual illiquidity.

A creditor with an ongoing relationship with a debtor may also qualify for the new (or “fresh”) monies exemption set out in sub-s 2(2) of the COVInsAG March 2020, which essentially gave lenders of fresh money from March 1, 2020, to September 30, 2020 (extendable until March 31, 2021) exemptions from voidable transaction proceedings in any future insolvency proceeding provided that repayment is made on or before September 30, 2023.\textsuperscript{109} According to the INSOL Report, the exemption:

“applies regardless of intentions, knowledge, prognosis, and proximity of the repayments to the subsequent insolvency and bars any and all grounds for transaction avoidance including the German equivalent of fraudulent conveyance ... and the special avoidability of the repayment of shareholder loans... The legislator, thus, did not accord priority to fresh money claims ... but effectively ensured that any repayments received in time are safe and collateral can be realized.”\textsuperscript{110}

These provisions go well beyond the support offered under Australia’s COVID-19 Safe Harbour and help to clarify the legislative position for all parties.

5 | REFLECTIONS: WHAT DOES THE RELIEF FROM DIRECTOR’S DUTIES IN A CRISIS TELL US?

Providing protection for creditors was a key rationale for the introduction of s 588G in 1993 after the devastating effects of Australia’s early-1980s recession.\textsuperscript{111} It was designed to discourage
corporate behaviour, which was perceived as reckless, encourage directors to take measures to deal with financial problems early, and better protect creditors, including by increasing the pool of money available to unsecured creditors. The rationale underpinning the German obligation to file for insolvency proceedings is also one of creditor protection.\textsuperscript{112} Whether these duties achieve these goals in practice has long been questioned in Australia.\textsuperscript{113}

Whilst the German relaxation of the obligation to file for insolvency pursuant to COVinsAG March 2020 was modelled on similar responses to floods in 2013 and 2016, the effect of those floods was regionally limited and the measures were not designed as a national “blanket” response.\textsuperscript{114} It is, therefore, difficult to extrapolate the outcome of these measures to predict what the effect may be of broader COVID-19 measures on the rates of insolvency in Germany, but the approach suggests that a debtor's interests will be preferred during a crisis. The COVID-19 Safe Harbour and Small Business Safe Harbour also suggest that in a future crisis the Australian legislature may place less priority on creditor protection than it will in ordinary economic circumstances.

In Australia, the introduction of the 2017 Safe Harbour already reflected a shift in perceptions about section 588G’s role in protecting creditors. There was increasing support for the argument that the duty distracts directors from their responsibilities to seek an appropriate workout for a company in financial distress, because they are too focused on the potential of being personally liable. The argument that personal liability has a chilling effect on directors’ decision-making is empirically unproven, although a leading law firm’s survey of Australian company directors supports earlier surveys that suggest that the issue of personal liability is front of mind for many directors—at least of large companies.\textsuperscript{115} The situation in small-medium enterprises, where directors often already have personal exposure due to personal guarantees and security pledged to banks, is less clear.

Despite the seeming shift in perception, the 2017 Safe Harbour reform was still controversial with critics warning of deteriorating director standards.\textsuperscript{116} Furthermore, the 2017 Safe Harbour was criticised for failing to achieve its goals in any event, with few documented instances of the 2017 Safe Harbour having been relied on by August 2019.\textsuperscript{117} The lack of reliance on the 2017 Safe Harbour could be attributed to a number of reasons, including the good health of the economy. However, another key reason appears to have been the employee entitlements’ obligations and tax reporting threshold requirements under the 2017 Safe Harbour. A survey of insolvency practitioners in August 2019 suggested that a “failure/inability to meet the threshold requirement of payment of employee entitlements” was the most frequent reason for companies not implementing a safe harbour proposal.\textsuperscript{118}

Furthermore, respondents to the survey suggested that directors of small businesses are usually so indebted based on personal guarantees that the thought of an insolvent trading claim is the least of their concerns. Moreover, smaller companies are more likely than large companies to have outstanding superannuation obligations.\textsuperscript{119} Thus, the 2017 Safe Harbour would not have been available to those directors during the COVID-19 pandemic. Similarly, the temporary Small Business Safe Harbour may also not be particularly useful to the directors whose companies owe large amounts of employee entitlements.

According to the Australian Treasurer and Prime Minister, the Omnibus Act measures were designed to help “cushion the economic impact of the coronavirus and help build a bridge to recovery”.\textsuperscript{120} Indeed, across the world, the priorities driving the establishment of these duties have been put aside by governments in response to COVID-19. COVinsAG March 2020 was also aimed at keeping businesses going to secure employment and prevent mass job losses.\textsuperscript{121} Arguing in favour of reliance on general directors’ duties over specific duties such as the duty to
prevent insolvent trading, lawyers from King and Wood Mallesons captured the current
dilemma well:

“[T]he distress caused by the COVID-19 pandemic and the commencement of the new
temporary regime create a unique opportunity for the utility of the ‘insolvent trading’ laws to be
tested, by their absence.”122

However, the effect of the COVID-19 Safe Harbour will be difficult to disaggregate from the
other Omnibus Act measures such as the increase in amount and time for statutory demands,
which were introduced at the same time.

Moreover, the rush to legislate in early 2020 meant that there was no significant debate
about the efficacy or drivers of the existing section 588G prohibition on insolvent trading. Just
24 hours after the first announcement of the COVID-19 Safe Harbour via the joint media
release from the Treasurer and Prime Minister, the Omnibus Act passed both Houses of Parlia-
ment. It received Royal Assent on March 24, 2020.123 The COVID-19 Safe Harbour amendments
received no particular attention in the Parliamentary debates. The House of Representative
debates on March 23, 2020, recorded in Hansard reflect the urgency of the circumstances and
make for breathless reading. Of the 90 pages generated in Hansard for that day, almost 70 pages
were dedicated to debate of the Coronavirus Economic Response Package Omnibus Bill 2020
(Cth), but “insolvency” is only mentioned three times and “trading while insolvent” once.124
The Treasurer, Mr Frydenberg noted that the measures are:

“targeted, they are temporary, they are scalable and they are based on our existing tax and
transfer system.”125

The discussion of the COVID-19 Safe Harbour in Mr Frydenberg’s Second Reading Speech
was brief:

“There will also be temporary relief for directors from any personal liability for trading
while insolvent. For owners or directors of a business that are currently struggling due to the
coronavirus, the Australian Taxation Office will tailor solutions for their circumstances, includ-
ing temporary reduction of payments or deferrals or withholding enforcement actions,
including director penalty notices and wind-ups. This will provide directors with additional
confidence to continue to trade through this difficult period.”126

Mr Bandt, leader of the Greens, summed up the prevailing feeling of the Opposition parties:

“the government have thrown out the economic rule book to deal with this crisis, and I
applaud them for that.”127

The rush to legislate in Australia and lack of experience with adjusting directors’ duties in
times of crisis when compared to Germany does not mean that perceived problems associated
with section 588G were not considered seriously or previously, however.128

The perception that directors file too quickly was a key driver for the introduction of the
2017 Safe Harbour.129 Even before the 2017 Safe Harbour was introduced, it was also argued
that the prohibition on insolvent trading was bad for the Australian economy because of the
obligations, which it placed on directors, especially of small businesses.130 However, in 2020,
politicians were keen to draw a distinction between difficult economic circumstances and
COVID-19. Mr. Tony Burke131 noted during the debate on the Omnibus Act, for example, that:

“[N]ormally you’ve got a broad economic downturn and you can try to keep people in jobs.
But if the company is not going to make it, it’s not going to make it. Here we have a downturn
caused by deliberate conscious decisions of government...”132

Normative positions about directors behaving badly versus simply being caught up in world
events beyond their control have played out in the positions taken by governments in their
responses to COVID-19 and the relief afforded directors. The introduction of the COVID-19 Safe
Harbour and the relief offered by COVInsAG March 2020, suggest a shift away from the goal of creditor protection when mass insolvencies and job losses are at stake. In Australia, the long-term usefulness of any safe havens to directors is likely to depend on the conditions for eligibility, including the payment of employee entitlements. Moreover, the benefits of safe havens to creditors, such as a company trading out of difficulties and continuing to need supplies, are unclear. As the economic climate worsens and insolvent companies are wound up in future, there is an increasing risk that directors will be even more indebted as a result of their personal liability because they were encouraged to trade through the COVID-19 crisis by the relief afforded by the COVID-19 Safe Harbour and COVInsAG March 2020.

6 | CONCLUSION: USE OF SAFE HARBOURS IN FUTURE

After more than a quarter of a century, the prohibition on insolvent trading was essentially abandoned in Australia during the COVID-19 crisis after having already been reformed in a director’s favour in 2017. However, the rush to legislate the COVID-19 Safe Harbour left a number of unanswered questions, which the German experience suggests could have been more clearly dealt with in the Omnibus Act. Prior to the COVID-19 pandemic, the 2017 Safe Harbour reforms were perceived to be unworkable for small-medium enterprises in light of the conditions associated with eligibility, particularly the payment of employee entitlements. The COVID-19 Safe Harbour and the Small Business Safe Harbour reflect a recognition of those difficulties. Whilst the temporary relief measures emerged in extraordinary social, political, and economic circumstances, the experiment might signal a new willingness for the Australian Government to use safe havens in future, similarly to the German approach over the last decade. In such a case, the more detailed approach evidenced in Germany’s COVInsAG March 2020 suggests lessons for Australia in dealing with the potential consequences of safe havens for directors’ duties.

ENDNOTES

1 INSOL International and World Bank Group, ‘Global Guide: Measures Adopted to Support Distressed Businesses through the COVID-19 Crisis’ (June 5, 2020), 2. https://www.supersociedades.gov.co/Noticias/SiteAssets/Paginas/2020/El-Banco-Mundial-destaca-medidas-adoptadas-por-Colombia-en-materia-de-insolvencia-Decreto-Ley-560-/Insol.pdf?ID=4.

2 On nomenclature, see Stacey Steele, Ian Ramsay, and Miranda Webster, ‘Insolvency Law Reform in Australia and Singapore: Directors’ Liability for Insolvent Trading and Wrongful Trading’ (2019) Int Insolvency Rev 28 363.

3 World Health Organization, ‘WHO Coronavirus Disease (COVID-19) Dashboard’ (January 15, 2021) <https://covid19.who.int/>.

4 Josh Frydenberg and Mathias Cormann, “Economic and Fiscal Update July 2020” (July 23, 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/economic-and-fiscal-update>; Australian Bureau of Statistics, “Economic Activity Fell 7.0 Per Cent in June Quarter” (September 2, 2020) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/C9973AC780DDFD3FCA257F690011045C?OpenDocument>.

5 Joss Hargrave et al., “COVID-19: International Restructuring and Insolvency Update” (Bird & Bird, March 2020) <https://www.twobirds.com/en/news/articles/2020/global/covid-19-international-r-and-i-briefing> Linklaters, “Covid-19: Restrictions on Creditor Rights, Relaxation of Obligations to File, and Other Insolvency-Related Reforms/Proposals” <https://www.linklaters.com/en/insights/publications/2020/march/covid-19-relaxation-of-obligations-to-file-and-other-insolvency-related-reforms-proposals>.
6 INSOL International and World Bank Group, “Global Guide: Measures Adopted to Support Distressed Businesses through the COVID-19 Crisis – Germany” (June 5, 2020), para 3.1, <http://insol-techlibrary.s3.amazonaws.com/296331bf-a7e3-4e19-97ec-56a78b1ceace.pdf?AWSAccessKeyId=AKIAJA2C21GD2CIW7K1A&Expires=1602464616&Signature=03FkaOdX6d7flQHTfZ9WsNmt3m0%3D>.

7 ibid.

8 See comments by Matt Woods (KPMG) cited in John Kehoe, “Bankruptcy lawyers clash on suspending insolvent trading laws” (Aust Financ Rev, March 18, 2020) <https://www.afr.com/policy/economy/bankruptcy-lawyers-clash-on-suspending-insolvent-trading-laws-20200318-p54bd6>.

9 Steele, Ramsay, and Webster (above note 2).

10 ibid.

11 s 588G(1), Corporations Act 2001 (Cth).

12 ibid., s 588G(2).

13 ibid, s 588H. See Stacey Steele and Ian Ramsay, “Insolvent Trading in Australia: A Study of Court Judgments from 2004 to 2017” (2019) 27 Insolvency Law J 27 156, 176.

14 ibid., ss 588G(2) and 1317E.

15 ibid., s 588G(3) and Schedule 3.

16 ibid., s 588K.

17 ibid., s 206C.

18 Steele and Ramsay (above note 13).

19 s 588M, Corporations Act 2001 (Cth).

20 ibid., s 588R.

21 ibid, ss 588J, 588K and 588M.

22 ibid, ss 588V and 588W.

23 ibid., s 588GA(1). On the reforms, see Firew Tiba, ‘Safe Harbour Carve-out for Directors for Insolvent Trading Liability in Australia and Its Implications’ (2019) Univ San Francisco Law Rev 53 43, 74-76; Craig Edwards, ‘Australia’s Safe Harbour Law – A Better Outcome for Restructuring and Entrepreneurship?’ (2019) Insolvency Law J 27 66, 80; Emma Norton, ‘Risky Business and the Safe Harbour: Evaluating the Insolvent Trading Reform from a Creditor Perspective’ (2018) Company Secur Law J 36 353, 369; Helen Anderson, ‘Shelter from the Storm: Phoenix Activity and the Safe Harbour’ (2018) Melbourne Univ Law Rev 41 999, 1033–34; David Morison, ‘Company Directors in the Spotlight: A Safe Harbour or Plugging Another Imaginary Leak?’ (2017) Insolvency Law J 25 147; Ian Ramsay and Stacey Steele, ‘The “Safe Harbour” Reform of Directors’ Insolvent Trading Liability in Australia: Insolvency Professionals’ Views’ (2020) Aust Bus Law Rev 48(1) 7.

24 s 588GA(1), Corporations Act 2001 (Cth). This subsection was amended in February 2020 to also provide a safe harbour from the duty to prevent creditor-defeating dispositions introduced at that time.

25 ibid, s 588GA(1)(b).

26 Employee entitlements are defined in subsection 596AA(2), Corporations Act 2001 (Cth), and include superannuation contributions.

27 S 588GA(4)(b), Corporations Act 2001 (Cth), provides an exception where the failure: (1) amounts to less than substantial compliance with these matters; or (2) is one of two or more failures by the company to do any or all of those matters during the 12-month period ending when the debt is incurred. Under s 588GA(5), Corporations Act 2001 (Cth), the 2017 Safe Harbour will also not apply if after the debt is incurred the person fails to comply with requirements to assist the relevant insolvency practitioner, and the failure amounts to less than substantial compliance.

28 ibid, s 588GA(6).

29 ibid, s 588HA. See Treasury, ‘Review of the insolvent trading safe harbour’ (2021) https://treasury.gov.au/review/review-of-the-insolvent-trading-safe-harbour.
Para 588GAAA(1)(c) was later amended by omitting “administrator, or liquidator,“ and substituting “administrator, restructuring practitioner or liquidator”. See sch 1, pt 2, s 64, Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth).

S 588GAAA(2), Corporations Act 2001 (Cth).

ibid., s 588GAAA(3).

Josh Frydenberg and Scott Morrison, “Supporting Australian Workers and Businesses” (Treasurer.gov.au, Press Release, March 20, 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/supporting-australian-workers-and-business>.

Josh Frydenberg and Christian Porter, ‘Extension of Temporary Relief for Financially Distressed Businesses’ (Treasurer.gov.au, Press Release, September 7, 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/extension-temporary-relief-financially-distressed>.

David O’Farrell, ‘Insolvency Update: Uncertainty about Director COVID-19 Protections from Insolvent Trading’ (Mondaq, October 30, 2020) <https://www.mondaq.com/australia/insolvencybankruptcy/1000816/insolvency-update-uncertainty-about-director-covid-19-protections-from-insolvent-trading>; Stephen Mullette, ‘When Your Safe Harbour Leads to a Waterfall’ (2020) Insolvency Law Bull 20(9) 180.

Michael Hodge, ‘Corporations Act – Section 588GAAA(1)(c) – No, Directors Do not Need to Appoint an Administrator or Liquidator by December 31, 2020’ (Insights, November 23, 2020) <https://newchambers.com.au/insights/corporations-act-section-588gaaa1c-no-directors-dont-need-to-appoint-an-administrator-or-liquidator-by-31-december-2020/>.

Harris, for example, alternatively suggested amending the provision to make the position clear. Jason Harris, ‘Submission to Treasury Consultation on SME Restructuring’ (Aust Insolvency Law October 13, 2020) 7 <https://australianinsolvencylaw.com/2020/10/13/submission-to-treasury-consultation-on-sme-restructuring/>. This option was not adopted in further reforms to the Corporations Act 2001 (Cth) at the end of December 2020 (discussed below).

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth).

ibid., s 2.

S 452A, Corporations Act 2001 (Cth).

Explanatory Memorandum to the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020, 7 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6626>.

S 453C(1)(a), Corporations Act 2001 (Cth); reg 5.3B.03(1), Corporations Regulations 2001 (Cth).

Explanatory Memorandum (above note 42), 48, para 2.5.

S 458D, Corporations Act 2001 (Cth).

A declaration expires 3 months after its publication (known as the “initial relief period”) or a further 1 month after the initial relief period if the company remains eligible for temporary restructuring relief, the directors have taken all reasonable steps to appoint a restructuring practitioner but have been unable to do so and they make and publish a further declaration: s 458E(2), Corporations Act 2001 (Cth). Somewhat perversely, it seems that there is a gap in safe harbour protection where a director may be exposed to insolvent trading liability from January 1, 2021, after the COVID-19 Safe Harbour ended and the date falling before March 31, 2021, on which the declaration is published. See Explanatory Memorandum (above note 42), 53-5, paras 2.30-37.

S 458E(4), Corporations Act 2001 (Cth).

Harris (above note 37), 47.

ibid, 5–6.

Reg 5.3B.24, Corporations Regulations 2001 (Cth), as stipulated in reg 5.3B.14.
Given that entitlements are to be paid before a restructuring plan is proposed and any future employee entitlements are not provable because they are excluded from the definition of “admissible debt or claim”, employees may not be creditors in the procedure: reg 5.3B.01, Corporations Regulations 2001 (Cth).

Ss 180 and 181, Corporations Act 2001 (Cth), respectively.

Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth) became effective on February 18, 2020, and created s 588GAB, Corporations Act 2001 (Cth) “Officer’s duty to prevent creditor-defeating disposition”.

Kinsela v Russell Kinsela Pty Ltd (in liq) (1986) 4 NSWLR 722 (NSWCA).

Bell Group (No 9) (2008) WASC 239, (2008) 39 WAR 1, [20.3.3].

Jason Harris, “Relief from Liability for Company Directors: Recent Developments and Their Implications” (2008) Univ Western Sydney Law Rev 12(1) 152.

S 1317E, Corporations Act 2001 (Cth).

ibid, s 1317H.

ibid, s 206C.

ibid, s 184(1).

Sebastian Hofert and Christian Möller, ‘Reform of the Private Limited Company Act and Codification of the Private International Law of Companies in Germany’ (2008) Law Financial Markets Rev 2(5) 401, 404.

Insolvenzordnung, Insolvency Statute of October 5, 1994 (Federal Law Gazette I, 2866), as last amended by Article 19, Act of December 20, 2011 (Federal Law Gazette I, 2854) <https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html>. This article uses the English translations of German laws where available provided by the German Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz) <https://www.bmjv.de>. At the time of writing, the translation was not updated for reforms to German insolvency law passed in December 2020 (discussed below).

Felix Steffek, ‘Antragspflicht bei juristischen Personen und Gesellschaften ohne Rechtspersönlichkeit’ (s 15a: The Duty to File for the Insolvency of Legal Persons and Associations without Legal Personality) in Bruno Kübler, Hanns Prütting & Reinhard Bork (eds), InsO – Kommentar zur Insolvenzordnung (Annotated Guide to the Insolvency Act RWS Verlag 2020) 7 para 4. The author used DeepL Translator to translate this work <https://www.deepl.com/translator>. The shift from company law to insolvency law meant the filing obligation became applicable to companies established under foreign law and also extended to shareholders where a company has no director; see Hofert and Möller (above note 61) 404.

Ss 15a(4) and 15a(5), InsO. This article’s focus is the suspension of the obligation to file in 2020 and not the changes to InsO introduced later in 2020 such as the new section 15(b).

The words “in the next twelve months” were added to this provision by amendments to InsO in late 2020 as part of the SansInsFoG reform discussed further below.

Andreas Fillmann, “Germany Suspends The Obligation For Companies To File For Insolvency” (March 20, 2020) Natl Law Rev <https://www.natlawreview.com/article/germany-suspends-obligation-companies-to-file-insolvency>.

ibid.

Gesetz zur Abmilderung der Folgen der Covid-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht (Federal Law Gazette I 569) <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/FH_AbmilderungFolgenCovid-19.html>.

INSOL International and World Bank Group (above note 6).

COVID-19-Insolvenzaussetzungsgesetz – COVInsAG (Federal Law Gazette I, 569) <https://www.gesetze-im-internet.de/englisch_covinsag/englisch_covinsag.html>. Unless otherwise noted, the references to COVInsAG in this article are to the original provisions enacted in March 2020 to allow for comparisons with the legislation enacted in Australia at the same time. As discussed below, amendments to COVInsAG March 2020 were enacted later in 2020. For commentary, see Herbert Smith Freehills, “COVID-19: Pressure Points: Suspension of the Insolvency Application Obligation (Germany)” (March 26, 2020) <https://www.
herbertsmithfreehills.com/latest-thinking/covid-19-pressure-points-suspension-of-the-insolvency-application-obligation-germany>.

71 S 1, sentence 1, COVInsAG March 2020.

72 ibid, sentence 2.

73 ibid, sentence 3.

74 ibid, s 4. See also Hargrave et al. (above note 5).

75 Gesetz zur Änderung des COVID-19 Insolvenzaussetzungsgesetzes <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Verlaengerung_Insolvenz_Covid.html> Thomas Ingenhoven, “Germany Trends and Developments” (Chambers and Partners, October 5, 2020) <https://practiceguides.chambers.com/practice-guides/banking-finance-2020/germany/trends-and-developments>.

76 Mathias Eisen, Sebastian Hein and Robert Kasti, ‘Update – Partial Extension of the Suspension of Insolvency Filing Obligations until December 31, 2020’ (Milbank, September 15, 2020) <https://www.milbank.com/images/content/1/3/v6/138013/Update-Partial-Extension-of-the-Suspension-of-Insolvency-Fil.pdf>.

77 Gibson Dunn, ‘Temporary German COVID-19 Insolvency Regime Extended in Modified Form’ (September 21, 2020) <https://www.gibsondunn.com/temporary-german-covid-19-insolvency-regime-extended-in-modified-form/>.

78 Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts (Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz – SanInsFoG) (Federal Law Gazette, December 29, 2020) <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Fortentwicklung_Insolvenzrecht.html>. Art 10, SanInsFoG sets out the amendments to COVInsAG. An English language translation was not available at the time of submitting this article for publication. Among other measures in this further omnibus legislation, these reforms also implement the European Union Directive (EU) 2019/1029 of June 23, 2019, on preventive restructuring frameworks, the discharge of debt and measures to increase the efficiency of restructuring and insolvency proceedings (the “Restructuring Framework Directive”). Gibson Dunn, “2020 Year-End German Law Update” (January 14, 2021) <https://www.gibsondunn.com/2020-year-end-german-law-update/>. After this article was submitted for publication, the extension until January 31, 2021 was further extended until April 30, 2021. Clyde&Co, "New legislation in Germany: SanInsFoG follows COVIInsAG - which changes managers and directors and their D&O insurers need to consider" (April 19, 2021) <https://www.clydeco.com/en/insights/2021/04/new-legislation-in-germany-saninsfog-follows-covin>.

79 Gibson Dunn (above note 78); s 1(3), sentence 1, COVInsAG March 2020 (as amended by SanInsFoG).

80 Gibson Dunn (above note 78); s 2(3), sentence 3, COVInsAG March 2020 (as amended by SanInsFoG).

81 INSOL International and World Bank Group (above note 6), para 1.1.

82 See the submission by the Insolvency and Restructuring Committee and the Corporations Committee of the Business Law Section, Law Council of Australia, “Consequential Corporate Insolvency Emergency Measures” (March 31, 2020) <https://www.lawcouncil.asn.au/publicassets/60a186e5-a5a0-ea11-9434-005056be13b5/3803%20-%20Consequential%20corporate%20insolvency%20emergency%20measures.pdf>. The author became a member of the Section in July 2020 and did not participate in this submission.

83 ibid, 12. The COVID-19 Safe Harbour also does not apply to the duty to prevent creditor-defeating dispositions introduced in February 2020.

84 ibid, 13.

85 ibid.

86 ASIC, “Directors’ Duties in the Context of COVID-19” (April 16, 2020) <https://asic.gov.au/about-asic/news-centre/articles/directors-duties-in-the-context-of-covid-19/>.

87 Explanatory Memorandum (above note 42), 49, para 2.8.

88 Explanatory Memorandum to the Coronavirus Economic Response Package Omnibus Bill 2020 and associated bills <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6521_emr_84ea9dda-1a44-44b8-878b-68c376cb65/upload_pdf/734816.pdf;fileType=application%2Fpdf>.
Paul Apáthy, Lisa Filippin and Lauren Wright, “COVID-19: Pressure Points: Temporary Changes to Insolvency Laws - Australian Federal Government Addresses COVID-19 Financial Distress (Australia)” (Herbert Smith Freehills, March 25, 2020) <https://www.herbertsmithfreehills.com/latest-thinking/covid-19-pressure-points-temporary-changes-to-insolvency-laws-australian-federal>.

ibid.

S 2(1), item 1, COVInsAG March 2020.

ibid, s 1, sentence 2.

Steffek (above note 63), 62, para 127.

ibid.

S 1(1), sentence 3, COVInsAG March 2020.

See comments on the legislature’s intention in INSOL International and World Bank Group (above note 6), para 3.1.

Steffek (above note 63), 63, para 129.

ibid, 64, para 132.

Hargrave et al. (above note 5).

See, for example, Jack Derwin, “The Government Will Let Australian Businesses Rack Up Bad Debts with No Repercussions until 2021” (Business Insider Australia, September 8, 2020) <https://www.businessinsider.com.au/australian-businesses-distress-safe-harbour-extension-2020-9>.

Law Council of Australia (above note 82), 17.

The new simplified liquidation procedure may provide some relief for creditors because a transaction or series of related transactions of no more than AUD 30,000 in value entered into within 3 months of the relation-back day are not voidable provided that there is no related entity involved: reg 5.4.04, Corporations Regulations 2001 (Cth).

Steele and Ramsay (above note 13), 182.

S 269-15(2), Taxation Administration Act 1953 (Cth).

ibid, s 269-5.

Australian Tax Office, “Support Measures to Assist Those Affected by COVID-19” (March 20, 2020) <https://www.ato.gov.au/Media-centre/Media-releases/Support-measures-to-assist-those-affected-by-COVID-19/>.

ibid.

S 1(1), sentence 3, COVInsAG March 2020.

INSOL International (above note 6), para 3.3.

ibid.

S 588G became operative in 1993 in accordance with the Corporate Law Reform Act 1992 (Cth) based on recommendations set out in the Australian Law Reform Commission, General Insolvency Inquiry, Report No. 45 (1988) (Harmer Report). For an analysis of the 1990s’ debates, see Ian Ramsay, ‘An Overview of the Insolvent Trading Debate’, in Ian Ramsay (ed), Company Directors’ Liability for Insolvent Trading (CCH Australia and the Centre for Corporate Law and Securities Regulation, 2000).

Manuel Ladiges, ‘Criminal Liability of Directors of a Private Limited Company Seated in Germany’ (2013) 24 Crim Law Forum 24 87, 98.

Steele and Ramsay (above note 13), 162.

Raoul Kreide et al., “The Antidote – Legislator Will Suspend the Obligation to File for Insolvency” (GSK Update, March 17, 2020) <https://www.gsk.de/wp-content/uploads/2020/03/GSK-Update-antidote-legislator-will-suspend-the-obligation-to-file-for-insolvency.pdf>.

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116 Anderson (above note 23), 3.
117 Ramsay and Steele (above note 23), 16–17.
118 ibid, 16. See also Ian Ramsay and Stacey Steele, “What do ARITA Members Think about Safe Harbour Reform?” (2020) Aust Restruct Insolvency Turnaround Assoc J 32(1) 10-14.
119 Ramsay and Steele (above note 118), 13.
120 Frydenberg and Morrison (above note 33).
121 INSOL International (above note 6), para 2.1.
122 Troiani et al. (above note 115).
123 Sch 12, Coronavirus Economic Response Package Omnibus Act 2020 (Cth).
124 House of Representatives Parliamentary Debates March 23, 2020, First session – Second period, 2780, 2833 and 2858 (“insolvency”) and 2781 (“trading while insolvent”) <https://www.aph.gov.au/Parliamentary_Business/Hansard?wc=23/03/2020>.
125 ibid, 2778.
126 ibid, 2781.
127 ibid, 2855.
128 Steele, Ramsay and Webster (above note 2); Ramsay and Steele (above note 23).
129 Treasury, “The National Innovation and Science Agenda” (March 18, 2017) <https://treasury.gov.au/publication/backing-australian-fintech/the-national-innovation-and-science-agenda>.
130 Steele, Ramsay and Webster (above note 2). Treasury supported a general defence to insolvent trading as early as 2007; Treasury, Review of Sanctions in Corporate Law (Treasury 2007), 29–33, paras 3.1-3.15. By 2010, Treasury published a discussion paper; see Treasury, Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration, Discussion Paper (Treasury 2010).
131 Member of the House of Representatives for the Labour Party.
132 House of Representatives Parliamentary Debates (above note 124), 2796.

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