Australia needs to follow the lead of Singapore and push ahead with restructuring and insolvency law reform so that greater flexibility can be provided and viable businesses can be rescued, according to Herbert Smith Freehills’ restructuring, turnaround and insolvency experts.

The Singapore Government is moving ahead with changes to its restructuring and insolvency laws and has unveiled draft legislation that includes adopting a number of concepts from the United States’ Chapter 11 process.

Herbert Smith Freehills partner Paul Apáthy said Australia risked being left behind. “Singapore has introduced a forward thinking collection of reforms to strengthen its restructuring laws. This is part of Singapore’s strategy to become a regional ‘debt restructuring hub’ and the ‘go to’ venue for complex cross border restructurings,” Paul said.

“In contrast, Australia’s restructuring laws have not been substantially updated for more than 20 years. With a focus largely on the administration procedure, Australia’s restructuring laws frequently operate like an ‘ambulance at the bottom of the cliff’ and all too often lack effective measures to save companies.”

Herbert Smith Freehills senior associate Emmanuel Chua said Singapore’s reforms included provisions to make schemes of arrangement a much more powerful debt restructuring and corporate rescue tool.
“The changes are timely because the current economic climate in Asia means that defaults are expected to rise over the coming year, particularly in the oil and gas and related service sectors,” Emmanuel said.

“The implications of these proposed amendments will be significant, and have the potential to fundamentally reshape restructuring and insolvency practice in Singapore. For example, the proposed amendments may encourage a market for American style ‘debtor-in-possession’ rescue finance in Singapore restructurings.”

Paul said the reforms would also create opportunities for companies in other countries. “The reforms will make it significantly easier for non-Singaporean companies, including - in the right circumstances - Australian companies, to utilise these new and improved Singaporean procedures to restructure, and achieve better outcomes than may be possible under existing Australian law.

“The trend of the last decade has seen a much more international approach to restructurings, where companies will ‘venue shop’ to find a jurisdiction with laws and procedures that best promote a successful restructuring outcome. England and New York are the two most popular locations for restructurings, but these law reform proposals demonstrate Singapore is keen to compete for restructuring work in the regional Asia-Pacific market by offering an attractive set of procedures unavailable elsewhere,” Paul said.

In June this year the firm provided a submission to the Australian Government’s Improving Bankruptcy and Insolvency Laws Proposals Paper, and welcomed moves to introduce legislation to reform Australia’s strict insolvent trading regime. The Federal Government is still considering submissions.

Herbert Smith Freehills partner Andrew Rich said: “Whilst the Federal Government’s proposed insolvency reforms were a welcome development, it is important that the scope of the reform agenda is now broadened to cover the creditor scheme of arrangement regime.

“The Australian creditor scheme regime was introduced in the late 1800s and has not been materially amended since. This has inevitably resulted in it failing to meet the needs of modern day corporate restructurings in a number of important respects.

“Without such reforms, Australia risks being left behind by jurisdictions like Singapore whose proposed reforms to the creditor scheme of arrangement regime will ideally place it to become a regional hub for large corporate restructures,” Andrew said.

In the firm’s submission to the Federal Government (available here), the best approach to reform was outlined, including how to introduce ‘safe harbour’ provisions for directors so they are not personally liable for insolvent trading. More information on Singapore’s proposed reforms is available here.