

# THE NEW BANKRUPTCY AVOIDANCE PROVISIONS: NEW WINE IN OLD BOTTLES?

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[The Bankruptcy Legislation Amendment Act 1996 (Cth) introduced a new regime for the recovery of property which has been disposed of by a bankrupt before bankruptcy. With the 1992 reforms to the counterpart provisions of the Corporations Law, there are now, unfortunately, two quite distinct regimes governing this area of the law and it can be expected that discrete case law will develop around each. The bankruptcy reforms rely heavily on three concepts: 'transfer of property', 'market value' and 'insolvency'. All three concepts have established meanings, the first two in non-insolvency contexts however. This article outlines and examines these new avoidance provisions and explores the meaning and implications of these 'new' concepts.]

## I INTRODUCTION

Both personal and corporate insolvency law have long had provisions which empower a trustee in bankruptcy or a liquidator to recover certain transfers of property made by an insolvent debtor prior to bankruptcy or liquidation ('avoidance provisions').<sup>1</sup> Two classes of transfers are of particular interest. One concerns transfers made by a debtor to one or more creditors in preference to other creditors ('preferences'). The other concerns transfers made to other parties, commonly friendly with or related to the debtor, for inadequate consideration. The rationale for retrospectively avoiding such transactions differs. In the case of preferences, the objection is that the preferred creditors receive an unfair advantage over the other (non-preferred) creditors. Equal treatment of creditors is seen as a desirable legislative objective.<sup>2</sup> The other class of transfers is seen as unfair to the body of creditors as a whole in that it removes property which would otherwise have been available to the creditors. In both cases, other policy issues may come into play, particularly the need for certainty in commercial transactions.

Reforming the avoidance provisions of the *Bankruptcy Act* 1966 (Cth), which deals with the insolvency of personal as opposed to corporate debtors, was one of the key tasks of the *Bankruptcy Legislation Amendment Act* 1996 (Cth) ('the Act'). The Explanatory Memorandum describes the amendments as designed to

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<sup>1</sup> *Bankruptcy Act* 1966 (Cth) ss 120–2 and *Corporations Law* pt 5.7B, div 2. Prior to the *Corporate Law Reform Act* 1992 (Cth), companies legislation did not have its own equivalents of ss 120–2 of the *Bankruptcy Act*, but expressly incorporated those provisions into the legislation: *Corporations Law* s 565.

<sup>2</sup> Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) vol 1 [33]. For an economic justification of this objective, see Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (1986) 'Introduction' and ch 1.

'simplify' the law and 'to change the focus of the provisions away from the intention of the parties to particular transactions, to the nature of the transactions and the likely effect on creditors'.<sup>3</sup> The new provisions came into effect on 16 December 1996.<sup>4</sup>

The reforms introduce three new concepts into the avoidance provisions, namely 'transfer of property', 'market value' and 'insolvency'. All three concepts have established meanings, the first two however, in non-insolvency contexts. It is the aim of this article to outline and examine the reformed avoidance provisions now in the Act and in particular, to explore the meaning and implications of these 'new' concepts. With the 1992 reforms to the counterpart provisions of the *Corporations Law*, there are now two quite distinct regimes governing this area of the law and it can be expected that discrete case law will develop around each. Given the essentially common rationale for the provisions, this divergence in approach is unfortunate.

## II UNDERVALUED TRANSACTIONS: THE NEW SECTION 120

Section 120(1) of the Act now avoids transactions against the trustee in bankruptcy where the following requirements are met:

- there was a 'transfer of property' from the bankrupt to another person;
- the transfer occurred between the date of bankruptcy and five years before the commencement of bankruptcy; and
- the transfer was for less than 'market value'.

A transfer of property which satisfies these conditions is stated to be 'void against the trustee in the transferor's bankruptcy'.<sup>5</sup> 'Void' in this context will doubtless mean 'voidable', as it did under the old s 120.<sup>6</sup> Section 120(4) provides that the trustee, on avoiding the transfer, must repay any consideration paid by the transferee.

### A *Transfer of Property*

It can be seen that s 120(1) now avoids a 'transfer of property'.<sup>7</sup> This contrasts with the previous provision which avoided a 'settlement of property'. The previous s 120(8) defined 'settlement of property' to include 'any disposition of property'. Despite some judicial support for a broad reading of 'settlement' in the

<sup>3</sup> Commonwealth, House of Representatives, *Bankruptcy Legislation Amendment Bill 1996*, Explanatory Memorandum [23] ('Explanatory Memorandum').

<sup>4</sup> *Bankruptcy Legislation Amendment Act 1996* (Cth) items 427 and 428 of pt 2, div 1, sch 1. The new preference provisions apply to bankruptcies which were current on that date but do not affect any distributions made before that date. The other provisions apply to bankruptcies where the date of bankruptcy occurs after 16 December 1996.

<sup>5</sup> *Bankruptcy Legislation Amendment Act 1996* (Cth) s 120(1).

<sup>6</sup> *Re Brall; Ex parte Norton* [1893] 2 QB 381; *Re Vansittart; Ex parte Brown* [1893] 2 QB 377; *Douglas v M'Intyre* (1884) 6 ALT 900.

<sup>7</sup> 'Property' is defined in the broadest terms in s 5(1) of the Act as 'real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real and personal property'.

light of this subsection,<sup>8</sup> it was well established that for a transfer of property to constitute a 'settlement' it was necessary that there be an intention on behalf of the bankrupt that the property be retained by the transferee, as opposed to being immediately dissipated or consumed.<sup>9</sup>

The new provision represents a significant broadening of the reach of the section. The term 'transfer of property' is an all-embracing one.<sup>10</sup> While there were legitimate concerns over the arbitrariness of the old 'settlement' requirement, it may be that the new terminology will create difficulties of a different kind. The combination of the broader reach of s 120(1) and the more restricted defences now available, which are discussed below, may have unintended consequences. In widening the restricted scope of the previous provisions, the rationale for the courts reading down the meaning of 'settlement' appears to have been overlooked. In *Re La Rosa*, the court noted that the old s 120(8), which, as noted, provided that a settlement included any disposition of property,

was read down by reference to the criterion of contemplated retention implicit in the notion of settlement. That reading down may not have had the virtue of strict logic. It was, however, the invention of necessity, for without some such limitation, all manner of intra familial payments for maintenance and house-keeping and other purposes of a day to day character would have been caught.<sup>11</sup>

In light of the clear intention to broaden the reach of s 120, it is inconceivable that the new s 120 will be read down in a similar manner. The concerns expressed in *Re La Rosa* thus resurface. To take just one example, will 'housekeeping money' provided by a bankrupt to his or her spouse<sup>12</sup> be a transfer of property? It may be that some anomalies can be picked up in the new exemption provisions, which allow the regulations to exempt certain transfers (discussed below), but concerns over the width of the provision remain.

The 'transfer of property' concept is elaborated in s 120(7). Section 120(7)(a) defines a transfer of property to include a payment of money. This overcomes doubts on this question raised by the High Court decision in *Robert Reid Pty Ltd v Cassidy*.<sup>13</sup> More intriguingly, s 120(7)(b) provides that a transfer of property also occurs where 'a person ... does something that results in another person becoming the owner of property that did not previously exist'. Examples of what might fall within paragraph (b) are suggested in the Explanatory Memorandum to

<sup>8</sup> *Re Ward; Ex parte Official Trustee v Dabnas Pty Ltd* (1984) 3 FCR 112. See also *Barton v Official Receiver* (1984) 4 FCR 380, 380–89 (Sweeney and Fisher JJ); cf *Re La Rosa; Ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 270, 286 ('*Re La Rosa*'), which was approved by the Full Court in sub nom *Norgard as Trustee in Bankruptcy of the Estate of La Rosa v Rocom Pty Ltd* (Federal Court of Australia, Northrop, Davies and Lee JJ, 16 August 1990).

<sup>9</sup> *Re Kastropil; Ex parte Official Trustee in Bankruptcy v Kastrophil* (1991) 33 FCR 135; *Re La Rosa* (1990) 21 FCR 270 sub nom *Norgard as Trustee in Bankruptcy of the Estate of La Rosa v Rocom Pty Ltd* (Federal Court of Australia, Northrop, Davies and Lee JJ, 16 August 1990).

<sup>10</sup> See, eg, *Re Hardman* (1932) 4 ABC 207, 210; *Re Docker* (1938) 10 ABC 198. The width of the term was referred to in the Explanatory Memorandum [84.8].

<sup>11</sup> *Re La Rosa* (1990) 21 FCR 270, 284.

<sup>12</sup> See, eg, *Jack v Smail* (1905) 2 CLR 684.

<sup>13</sup> (1966) 114 CLR 558, 561, 573.

the Bill.<sup>14</sup> These are: the creation of a mortgage or charge; the construction of a residence on another person's land; and creation of intellectual property rights. This provision, which is intended to extend the reach of the 'transfer of property' concept, may however, also introduce limitations. An interesting parallel can be drawn with the contentious s 160M of the *Income Tax Assessment Act* prior to its amendment. In its original form, s 160M(6) provided that 'a disposal of an asset that did not exist (either by itself or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset for the purposes of [Part IIIA]'.<sup>15</sup> This section appears to have been designed to ensure that transactions such as an allotment of shares or the creation of contractual rights (in particular, restrictive covenants) would be caught as a 'disposal of an asset' for capital gains tax purposes.<sup>16</sup>

Section 120(7)(b) of the Act has evident similarities with the old s 160M(6). It is noteworthy therefore, that the High Court in *Hepples v Federal Commissioner of Taxation*,<sup>17</sup> read down s 160M(6). *Hepples* was a majority decision and subsequent decisions<sup>18</sup> have had some difficulty in discerning its *ratio*. Nevertheless, such decisions have indicated that s 160M(6) was to be read down by confining it to transactions which carved out a lesser interest from a greater, such as where an easement is granted by an owner of land. It will be interesting to see whether the courts read a similar limitation into the bankruptcy provisions. Will, for example, a release of a debt by a debtor be a 'transfer of property'?

### B Time Zones

In most cases, the relevant time zones during which transfers are vulnerable to attack from the trustee in bankruptcy remain the same as under the old provisions. There are thus two relevant time zones. In practice, the most common is likely to be that the transfer must have taken place between the date of bankruptcy and the period beginning two years before the commencement of bankruptcy (s 120(3)). The relevant period extends to five years before the commencement of bankruptcy if the transferee is unable to show that the transferor was 'solvent' at the time of the transfer (see s 120(1) and (3)). The requirement of solvency differs from the requirements of the old s 120(2), which required that the debtor be 'able to pay all his debts without the aid of the property comprised in the settlement'. Despite this change in terminology, the new definition is

<sup>14</sup> Explanatory Memorandum [84.9]–[84.10].

<sup>15</sup> *Income Tax Assessment Act* 1936 (Cth) s 160M (6) (prior to amendment).

<sup>16</sup> See Robin Woellner *et al*, *Australian Taxation Law* (6<sup>th</sup> ed, 1996) [10-472].

<sup>17</sup> (1992) 173 CLR 492 ('*Hepples*').

<sup>18</sup> See *Reuter v Federal Commissioner of Taxation* (1993) 93 ATC 4037; *Naval, Military & Airforce Club of SA (Inc) v Federal Commissioner of Taxation* (1994) 51 FCR 154.

unlikely to have any practical impact.<sup>19</sup> Insolvency is discussed below in Part IV.<sup>20</sup>

### C Exemptions

Exemptions from transfers of property which would otherwise be within subsection (1) are provided by s 120(2). These are:

- (a) a payment of tax (necessitated presumably by the change from 'settlements' to 'transfers', referred to above);
- (b) a transfer under a maintenance agreement or order;<sup>21</sup>
- (c) a transfer under the new debt agreement provisions of Part IX of the Act; and
- (d) a transfer exempted by the regulations.

### D Protected Transfers

There have been important changes to the transactions which are given protection by s 120. In some significant respects, the range of protected transactions under s 120 has been reduced. First, and perhaps less significantly, some settlements protected under the old s 120 have not been maintained in the new scheme. These are settlements made in consideration of marriage<sup>22</sup> and settlements made of property which accrued to the settlor in right of spouse. Another noteworthy change is that, with respect to the transfer between the bankrupt and transferee, there is no longer a requirement that the transferee show that he or she acted in 'good faith'. This is because, apart from the exemptions noted above and the solvency defence where the transfer occurred between two and five years, the only transfers now entitled to protection are those for which the transferee gave consideration amounting to at least 'the market value' of the property.<sup>23</sup> Subsequent transferees of the property, that is, those whose title derives from the transferee under the original transfer, are protected where it can be shown that the transferee from the bankrupt took in good faith and gave at least market value for the property. 'Good faith' for this purpose will no doubt carry the same meaning as under the old s 120.<sup>24</sup>

<sup>19</sup> That is, while the new definition introduces a 'cash flow' test of insolvency, compared with the prior 'balance sheet' test, the case law on s 120 has attached no significance to this difference. See generally Andrew Keay, 'The Insolvency Factor in the Avoidance of Antecedent Transactions in Corporate Liquidations' (1995) 21 *Monash University Law Review* 305.

<sup>20</sup> It should also be noted that s 115(2), which establishes the 'commencement of bankruptcy', has been repealed and replaced with a table and that the date of the commencement of bankruptcy may, in some circumstances, differ from that under the old provisions. This is also considered below in Part IV.

<sup>21</sup> The definition of 'maintenance order' in s 5, has been amended to include assessments of maintenance made by the Child Support Registrar under the *Child Support (Assessment) Act* 1989 (Cth).

<sup>22</sup> See generally *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364.

<sup>23</sup> *Bankruptcy Legislation Amendment Act* 1996 (Cth) s 120(1)(b).

<sup>24</sup> See generally *Re Hyams* (1970) 19 FLR 232; *Official Trustee v Mitchell* (1992) 38 FCR 364; *Re Barton*; *Ex parte Official Receiver* (1984) 4 FCR 380; *Wansley v Edwards* (1996) 148 ALR 420.

### E Market Value

The basket into which all the defence eggs have now been placed is 'market value', the second of the new concepts introduced into the avoidance provisions. 'Market value' replaces the previous 'valuable consideration' test. Valuable consideration had been interpreted to mean that the consideration was 'real and substantial' rather than 'nominal, trivial or colourable'. The consideration need not have been adequate.<sup>25</sup>

The new section itself says little about the meaning of 'market value'. Section 120(7)(c) states that the relevant 'market value' is that at the time of the transfer. Section 120(5) provides that the following have no value as consideration:

- (a) the fact that the transferee is related to the transferor;
- (b) a deed in favour of the transferor made by a transferee spouse or de facto spouse;
- (c) a promise to marry or become a de facto spouse;<sup>26</sup> and
- (d) love and affection of the transferee.

'Market value' is a term used in a number of other contexts, particularly compulsory land acquisition and taxation, and it can be expected that the courts will draw on the substantial case law which has developed in these contexts when interpreting the term in the new s 120. 'Market value' has usually been taken to mean the price obtainable by a 'willing but not anxious seller to a willing but not anxious buyer'.<sup>27</sup> The Explanatory Memorandum refers to the concept in similar terms when it states that:

[T]he expression 'market value' is intended to refer to the value of the property concerned if it were disposed of to an unrelated purchaser bidding in a market on an ordinary commercial basis for property of the kind disposed of, without any sort of discount or incentive for purchase being offered. The expression is not intended to include a situation where the property was being disposed of at a 'fire sale', at discounted prices because of some immediate need on the part of the owner to liquidate his or her assets.<sup>28</sup>

It can reasonably be expected that this term will give rise to both problems of application and proof.<sup>29</sup> This is acknowledged in the Explanatory Memorandum.<sup>30</sup> Property may not have a 'market value', and particular difficulties may arise in proving 'market value' in respect of property transferred a number of years ago. Further, as Goode notes, a financially distressed debtor may reasonably wish to sell property below its 'market value'.<sup>31</sup> Such a transfer will now be subject to avoidance under s 120.

<sup>25</sup> *Barton v Official Receiver* (1986) 161 CLR 75.

<sup>26</sup> Cf *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364.

<sup>27</sup> See generally *Spencer v Commonwealth* (1907) 5 CLR 418. For a statutory example, see *Lands Acquisition Act 1989* (Cth) s 56.

<sup>28</sup> Explanatory Memorandum [84.13]. See also *Cannane v Official Trustee in Bankruptcy* (1996) 136 ALR 406, 420-2.

<sup>29</sup> See generally *Housing Commission of NSW v Falconer* [1981] 1 NSWLR 547.

<sup>30</sup> Explanatory Memorandum [84.13].

<sup>31</sup> Royston Goode, *Principles of Corporate Insolvency Law* (1990) 39-41.

### III TRANSFERS TO DEFEAT CREDITORS: THE NEW SECTION 121

The power of a trustee in bankruptcy to avoid a 'fraudulent' transfer of property has a long history.<sup>32</sup> The requirement that the transfer be 'fraudulent', even though that term has not been interpreted as requiring an intent to deceive,<sup>33</sup> has resulted in relatively little use being made of s 121. The new provisions are couched in more modern language but, as explained below, have not introduced fundamental reforms and are unlikely to lead to significantly greater use of the section.

The following three requirements, if met, render a transfer void<sup>34</sup> against the trustee under s 121:

- a transfer of property from the bankrupt to a third party — this is the same requirement as for s 120 and has been discussed above;<sup>35</sup>
- the transferred property 'would probably have become part of the transferor's estate or would probably have been available to creditors';<sup>36</sup>
- the bankrupt's main purpose in making the transfer was to 'prevent ... hinder or delay' the transferred property from becoming available to creditors.

If void, the trustee must repay any consideration given by the transferee for the transfer.<sup>37</sup>

As with the old s 121, there is no time limit on when the transfer must have occurred. The new section avoids a 'transfer' rather than a 'disposition', as in the previous section, but this should make no difference to the interpretation of the section, as both words are of very wide import.

The requirement in s 121(1)(a), that the transferred property be property which would probably otherwise have been available to creditors is a new one, but represents little practical change in the law.

#### *A The Debtor's Purpose*

The relevant purpose is now one of 'preventing ... hindering or delaying' the availability of the property to creditors.<sup>38</sup> This replaces the old test of 'intent to defraud creditors'.<sup>39</sup> This is largely an exercise in clarification as s 6 (which remains in place) in any event defines 'intent to defraud' as including an 'intent to defeat or delay' and as noted, the case law made it clear that 'fraud' in this

<sup>32</sup> Such provisions can be traced back to *An Acte agaynst fraudulent Deedes Gyftes Alienations, &c 1571* (Eng) 13 Eliz 1, c5. They have been substantially reproduced in various State conveyancing statutes. See, eg, *Conveyancing Act 1919* (NSW) s 37A(2); *Property Law Act 1958* (Vic) s 172. See generally *Grellman v PT Garuda Indonesia Ltd* (1991) 29 FCR 26.

<sup>33</sup> *Official Trustee v Marchiori* (1983) 69 FLR 290.

<sup>34</sup> As with s 120, it is well-established that a fraudulent transfer is voidable despite the section stating that it is void: *Brady v Stapleton* (1952) 88 CLR 322, 333–4. This interpretation will no doubt continue to apply to the new provisions.

<sup>35</sup> Section 121(9) is the equivalent of s 120(7), which was discussed above.

<sup>36</sup> *Bankruptcy Legislation Amendment Act 1996* (Cth) s 121(1)(a).

<sup>37</sup> *Ibid* s 121(5).

<sup>38</sup> *Ibid* s 121(1)(b).

<sup>39</sup> *Bankruptcy Act 1966* (Cth) s 121(1).

context did not equate with a common law intent to deceive. The reference to the debtor's 'main' purpose recognises that a transfer may be motivated by more than one purpose.

Section 121(2) provides that the relevant purpose is taken to exist 'if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.' Under s 121(3) however, proof of purpose is not confined to this. Again, this has similarities with the case law on the old section.<sup>40</sup>

### B Protected Transfers

As with the protective provisions of s 120, there has been a considerable tightening of the transactions protected from the reach of s 121. Under s 121(4), the transferee, to obtain protection, must show that he or she gave 'market value' for the transferred property. This contrasts with the old requirement of 'valuable consideration', which in this context, as with s 120, was interpreted to mean consideration that was not necessarily fully adequate.<sup>41</sup> The new 'market value' test has the same meaning as for s 120 (with s 121(9)(a) being the equivalent of s 120(7)(a)) and so the above comments on this apply equally here.

In addition to showing 'market value' for the transfer, the transferee must show that he or she did not know that the transferor had the relevant purpose and 'could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent'.<sup>42</sup> This replaces the old 'good faith' test of the previous s 121(1).<sup>43</sup> Again, there are similarities between the new test and the interpretation by the courts of the old.<sup>44</sup> The meaning of 'insolvent' is considered below in Part IV, in the discussion of preferences.

Subsequent transferees, that is, those who take from the original transferee, are protected where they have provided 'market value' and acted in 'good faith'.<sup>45</sup> 'Good faith' will presumably take on a similar meaning to the interpretation under the old s 121(2) and thus require a lack of knowledge on the part of the transferee of the transferor's insolvency and of his or her purpose in preventing, hindering or delaying the availability of property to creditors.<sup>46</sup>

Under s 121(7), a transfer of property under the new debt agreement provisions of Part IX of the Act are exempt from s 121(1).

<sup>40</sup> See, eg, *Official Trustee v Marchiori* (1983) 69 FLR 290; *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 ('*Garuda*').

<sup>41</sup> *Garuda* (1992) 35 FCR 515.

<sup>42</sup> *Bankruptcy Legislation Amendment Act 1996* (Cth) s 121(4)(c).

<sup>43</sup> Payment of 'market value' does not necessarily equate with 'good faith': *Cannane v Official Trustee* (1996) 136 ALR 406, 415-9.

<sup>44</sup> See, eg, *Re Barton*; *Ex parte Official Receiver v Barton* (1983) 76 FLR 223.

<sup>45</sup> See s 121(8) and compare it with s 120(6), which was discussed above.

<sup>46</sup> See, eg, *Official Trustee v Marchiori* (1983) 69 FLR 290; *Garuda* (1992) 35 FCR 515.



## IV PREFERENCES

Unlike ss 120 and 121, the earlier versions of which have been repealed, the preference provisions of s 122 have been retained but amended. The main changes to s 122 are as follows. Firstly, throughout the section, the term 'transfer of property' replaces the old references to 'conveyance, transfer, charge, payment or obligation'. This term is defined in s 122(8) in the same terms as for ss 120 and 121. The comments made in relation to those sections therefore also apply to the new preference provisions. Secondly, as with ss 120 and 121, 'market value' replaces references to 'valuable consideration' in s 122. Thirdly, there may be differences in the relevant time zone during which transfers are vulnerable to avoidance in the case of some debtor's petitions, as a result of the amendments to s 115(2). Finally, the new definition of 'insolvency', introduced in s 5(2) and s 5(3) of the Act, will apply to preferences.

## A 'Insolvency'

In the previous s 122(1), the transaction was voidable only if entered into by 'a person who is unable to pay his debts as they become due from his own money'. This requirement has now been replaced with a reference to 'a person who is insolvent'. 'Insolvent' is defined in the new s 5(3) in the same terms as in s 95A of the *Corporations Law*. That is, a person is 'insolvent' if they are not 'solvent'. Under s 5(2) 'a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.' This new definition of insolvency introduces, for the most part, no significant change to the preference provisions. There are two differences which should be noted however. The first is that 'from his own money' is no longer a requirement of insolvency. Some case law suggests that this requirement had meant that unsecured borrowings could not be taken into account in determining a person's solvency.<sup>47</sup> As a result of the new definition it may be that unsecured borrowings should be taken into account, although this awaits judicial determination. Secondly, 'as they [ie debts] become due' has been replaced with 'as and when they become due and payable'. This may mean that creditors' forbearance in collecting debts should be taken into account in determining whether a debtor is insolvent, an issue which has received conflicting responses from the courts.<sup>48</sup> Again, this is far from clear however, and requires judicial clarification.

B *Time Zone*

Section 122(1) now has a table setting out the relevant time zones during which the transfers must occur in order to constitute a preference. With one exception, this table restates the previous law. The exception relates to where a debtor's petition is presented at a time when one or more creditors' petitions were pending, either against the debtor or the debtor's partner. This amendment

<sup>47</sup> See generally Keay, above n 19, 325-9.

<sup>48</sup> *Ibid* 316-9.

follows an amendment to s 115(2) (which in turn follows from amendments to ss 55, 56C and 57). As was previously the case, the time zone begins at the commencement of the debtor's bankruptcy. However, under s 115(2) this will be the time of the commission of the earliest act of bankruptcy on which any of the creditor's petitions was based or, where relevant, the date ordered by the court to be the commencement date.

### *C Protective Provisions*

There have been two changes of note to the protective provisions. Firstly, 'market value' has replaced 'valuable consideration' in s 122(2)(b). The comments made above in relation to ss 120 and 121, apply equally in this context. This will be of significance where the preference transaction is other than a payment of money. Secondly, under s 122(2)(d), a transfer of property pursuant to a debt agreement under the new Part IX provisions is exempt from the preference provisions.

## V CONCLUSION

To a large extent, the reforms to the antecedent transaction provisions represent a simplification and clarification of the law. However the reforms also introduce new concepts, notably 'transfer of property' and 'market value', as part of an attempt to broaden the range of transactions which are subject to the avoidance provisions and to reduce the number of protected transactions. As has been shown, the effect of these amendments falls most significantly on s 120. It has also been shown that these concepts will require clarification from the courts and, in the case of the term 'market value', will inevitably create problems of proof. When combined with a trustee in bankruptcy's broad and contentious powers of recovery,<sup>49</sup> the new provisions demand careful attention from practitioners.

<sup>49</sup> *Bankruptcy Act 1966* (Cth) pt VI, div 4B, subdivision I.