

## Invalidation of Securities upon Insolvency

By G Hamilton

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This book is part of the *Australian Legal Monographs*, a series of short legal treatises, the stated intention of which is to provide an avenue for publication of scholarly works which might otherwise not be available because of their brevity and narrow subject matter.

The author is a well-known insolvency practitioner. The treatise originally comprised the dissertation component of an SJD (Doctor of Juridical Science) completed by the author at the Queensland University of Technology. The focus of the book is the various legislative provisions which operate to invalidate securities granted in favour of individuals or companies who later become insolvent.

The book provides a good analysis of the relevant legislative provisions under the Corporations Law and the *Bankruptcy Act 1966* (Cth) both current and prior to recent amendments (see the *Corporation Law Reform Act 1992* (Cth), and the *Bankruptcy Legislation Amendment Act 1996* (Cth)). The general layout of the book is good, the table of contents is clear and the subject heading references provide a useful guide throughout the text.

The author examines in detail many of the difficult issues of statutory construction and the practical legal consequences of invalidation provisions. This involves a detailed analysis of the relevant statutory provisions, and highlighting gaps and apparent anomalies in the legislation.

Some of the questions raised by the author in respect of the Corporations Law, might be considered to have been determined by earlier authority. For example, at pages 38 – 39 the author refers to the statement by Burley J in *Olifent v Australian Wine Industries Pty Ltd* (1996) 14 ACLC 510 at 516, that the former case law did not offer any assistance on the question of whether under s588FA(3) of the Corporations Law a liquidator is entitled to choose any point during the six month preference period in his endeavour to show that, from that point on, there was a preference payment.

However, this issue had been settled under the earlier companies legislation by Barwick CJ in *Rees v Bank of New South Wales* (1964) 111 CLR 210 at 221, where it was held that the liquidator can choose any point during the statutory period, including the point of peak indebtedness, as the point from which there was a preferential payment. To the extent that choosing the point of peak indebtedness involves a degree of arbitrariness (particularly where there is a 'running account' between the debtor and creditor), then the connection between the alleged preferential payments and dealings prior to the chosen date are not to be

ignored. It is appropriate to have regard to the substance and reality of the debtor/creditor relationship, to choose a period which is a realistic unity (see *M & R Jones Shopfitting Co Pty Ltd (in liq) v National Bank of Australasia Ltd* (1983) 7 ACLR 445 per Wootten J; and *Hamilton v Commonwealth Bank of Australia* (1992) 9 ACSR 90 at 110 per Hodgson J (as he then was)).

There is a very good analysis of the question whether the various statutory provisions under the law which invalidate securities as against a liquidator, administrator of the company, or the Deed's administrator, have any application where the property the subject of the security is realised by the creditor prior to the appointment of the liquidator or administrator of the company.

The authorities in relation to earlier companies legislation, suggested that avoidance of the security upon insolvency, for example, for non-registration (see now s266 of the Corporations Law), or in respect of a floating charge (see now s566 and s588FJ), had no effect on the secured creditor to the extent that he or she had realised his or her security or otherwise obtained payment before the commencement of the insolvency proceeding which rendered the security vulnerable. This was because the security had already been satisfied and there was nothing for the secured creditor to enforce, and the invalidation of the security interest was not retrospective (see *Re Row Dal Construction Pty Ltd* (1996) VR 249; *Mace Builders (Glasgow) Ltd v Lunn* [1987] Ch 191). The author suggests that some of the current invalidating statutory provisions may now have retrospective effect (namely, ss267, 566 and 588FF of the Corporations Law), whilst noting the introduction of s588FJ(6) to reverse the effect of *Mace Builders* in respect of floating charges. The author provides a very useful and insightful analysis of the question of retrospective invalidity, an issue not often considered by other commentators.

Although the book is a specialised work, it is a useful contribution to the legal analysis of the vulnerability of securities upon insolvency. This will always be a topical area.

Reviewed by Fabian Gleeson