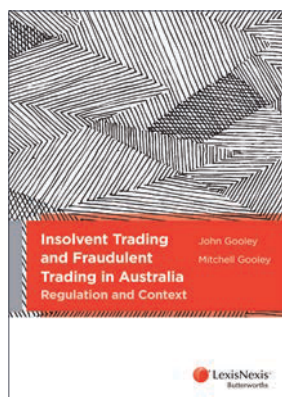


## Insolvent Trading and Fraudulent Trading in Australia: Regulation and Context

By John Gooley and Mitchell Gooley | Lexis Nexis Butterworths | 2016



Ever since the House of Lords' decision in *Salomon v A Salomon & Co* [1897] AC 22, the metes and bounds of a separate corporate personality has been the subject of successive legislative and judicial incursions. This is rightly so. The concept of limited liability promoted the entrepreneurialism upon which the material and economic success of the United Kingdom and much of the Western world has been based. It also had the potential to promote fraudulent conduct as was foreseen by Lord Halsbury in *Salomon's* case. Legislators and the judiciary have, since that time, answered with varying degrees of success the vexed question of where to draw the line between enabling corporate risk taking and protecting the public. That is, to what extent should one interfere in the allocation of responsibility and liability between a limited liability entity and its owners, managers and creditors operating in what remains an essentially capitalist system?

The current and historical approach of the law to answering this question occupies much of the focus of the authors of *Insolvent Trading and Fraudulent Trading in Australia: Regulation and Context*. It is this focus which sets this text apart from other practical guides to insolvency, such as the well-known and much used *Keay's Insolvency* and which makes this text a valuable and welcome contribution to the field.

Commonly, guides to insolvent trading legislation helpfully, although rather prosaically, state the relevant legislative provisions and their practical application by illustrative excerpts from the authorities. Messrs Gooley and Gooley take this approach one step further by, in addition, examining the historical context and objectives of such provisions, providing international comparison and discussing future reform. Fraudulent trading provisions, although less favoured, receive a similar treatment and this juxtaposition also gives context to the objectives behind regulating the behaviour of those controlling the trading activities of corporations. In this way, the text admirably fulfils its stated aim which is to explore the historical and current provisions which have regulated and which regulate both fraudulent trading and insolvent trading in Australia'.

The text is divided into three parts. In Part 1, the authors provide an overview of the regulatory context and then examine, in some depth, the concepts of separate legal personality and limited liability. There is then an historical overview of the developments in the law relating to directors' duties. It is not until 126 pages into the text that the authors address insolvent trading regulation. This comprises Part 2.

Having addressed the legal context of insolvent trading regulation in the form of Part 1, Part 2 commences with its historical context. The predictable review of the first enactments and their genesis in bankruptcy legislation is followed by a surprisingly detailed analysis of their application in various decisions. The analysis is a welcome reminder that the authorities, often cited faithfully in present times, are largely a product of distinct and, in some ways, remarkably different legislative regimes.

Chapters 5 to 8, in Part 2, comprise the main analysis of the current insolvent

trading provisions as they relate to corporations. Given the emphasis on context, it is not surprising that the analysis commences with a review of the objectives of the current provisions as enunciated in parliamentary debates, the authorities and the Harmer Report, to which the current provisions owe much of their form and content. The discussion of the current provisions is structured to assist legal advisers and, in particular, advocates. The text specifically addresses

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the onus and standard of proof required, each of the elements of the claim and the defences available to directors. The consequences (whether in terms of damages or penalty) are also addressed. The treatment is detailed, comprehensive and nuanced so as to be of assistance even to the most seasoned and knowledgeable practitioner in the field.

Chapter 9 addresses regulation of insolvent trading of entities other than companies, a topic often neglected in other texts.

Chapter 10 addresses current calls for reform of insolvent trading provisions. Included in the discussion are the potential introduction of a business judgment rule as well as safe harbour options, such as the temporary appointment of registered restructuring advisers without the need for formal

## BOOK REVIEWS

'Insolvent Trading and Fraudulent Trading in Australia: Regulation and Context'

external administration.

Chapter 11 provides an analysis of the regulation of insolvent trading in overseas jurisdictions, in particular, the 'wrongful trading' provisions in the United Kingdom.

Part 3 is devoted to regulation of fraudulent trading, comprising sections 592(6) and 593(2) *Corporations Act*

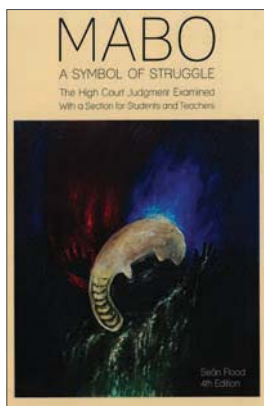
2001 (Cth). Although the regulation of fraudulent trading of companies has enjoyed a much longer legislative history than the regulation of insolvent trading of companies, there is not the range or depth of judicial analysis. This is no doubt due to the requirement to prove dishonest intent resulting in it being a less attractive avenue of recovery. Consequently, the authors' analysis of this claim is limited.

While fraudulent trading regulation is relevant to the questions posed in the book and at the outset of this review, the real value of this publication is in its contextual analysis of insolvent trading. As such, the text will be a welcome and useful addition to the library of any legal practitioner specialising in the area of insolvency.

**Reviewed by Jo Shepard**

## Mabo

Sean Flood | E Fink | 2017



You would be hard pressed finding a person in Australia who hasn't heard of the High Court decision of *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (*Mabo*). You would have an even harder time trying to find a person who understands what *Mabo* actually means or has actually read it.

In the fourth edition of this book, the author celebrates the landmark decision of *Mabo*, 25 years after it was handed down, by educating its readers about what *Mabo* really means for modern day Australia. When the book was first published Mr Flood felt that it was incredibly important to dispel some of the myths that were being whipped up about the potential

impact of *Mabo*. As an Aboriginal lawyer, I hope that this book will continue to be used to educate the community about the true meaning of *Mabo*.

The first half of the book provides an updated discussion on the *Mabo* decision, the *Native Title Act 1993* (Cth) and judicial approaches to native title since 1992. The chapter 'Native title in the courts since *Mabo*', which was written

*This is a new edition to the book, which explores the impact of colonisation, equality, self-determination and constitutional recognition.*

with assistance from barrister Lee Corbert, is particularly relevant to those who practise in the area of native title. Other sections will also appeal to those who have an interest in historical jurisprudence and thankfully the book is written in a way which is not overdone with legal jargon.

The second half of this book shifts its focus slightly to look more broadly

at the struggle faced by Indigenous Australians today. This is a new edition to the book, which explores the impact of colonisation, equality, self-determination and constitutional recognition. Drawing from his experience working within Aboriginal communities, Mr Flood brings these issues to the surface in a way which will hopefully provoke readers into exploring these issues further.

Readers will also be treated to images of artwork which symbolise the position that many Indigenous people find themselves in. For those studying legal studies, studies of religion and history in their HSC, this edition also includes useful discussion questions which will act as great study tool.

This book provides us all with a useful reminder that *Mabo* 'represented neither the beginning nor the end of [the] struggle' faced by Indigenous Australians and that there is a great deal of this struggle yet to unfold. *Mabo: A Symbol of Struggle* is published independently by E Fink at PO Box 4004, Castlecrag NSW 2068.

**Reviewed by Damian Beauflis**