Sample Law Thesis from Australia on Corporations Law: 27,000 Words

THE UNI TUTOR
Custom Essays

Table of Contents

Acknowledgments

I sincerely thank David Franzi for his supervision throughout the year. Over the past 12 months David's work commitments were demanding, yet this did not detract from the quality of supervision which I received. This is testament to David's professionalism and dedication to assist me. David has made my honours experience an enjoyable one, a feat, I suspect, not too often attained by others. I also thank Jessica Delaney for her guidance and support throughout the honours process.

I particularly thank Todd Simpson and Evans Ellis for treating me like family – I will always be indebted to you for the kindness and support you have given me.

Finally, I thank my family for their love and support over the last five years, my final year culminates with this thesis and you have been there for me through it all. I deeply appreciate all that you have done for me.

Introduction

"When there's an elephant in the room introduce him"[1]

It is suggested that '[p]references have, for many years, been the type of pre-liquidation transaction which liquidators have most frequently sought to avoid',[2] with the ability to avoid such transactions usually regarded as the primary weapon in the arsenal of a liquidator in recovering property for the creditors of the company.[3] Therefore, the approach that a court takes to the application of preference provisions has a tangible impact on the assets that are available to share amongst the unsecured creditors on a winding of a company.

Section 588FA(3) in Division 2 of Part 5.7B[4] of the *Corporations Act 2001* (Cth) deals with unfair preferences.[5] This thesis maintains that the current judicial approach to s588FA(3) is at odds with the function of the terms of the section itself.

Section 588FA came into effect on 23 June 1993. Prior to that date unfair preferences were regulated by s122 of the *Bankruptcy Act 1966* (Cth),[6] the provision into which the courts read the common law 'running account doctrine'.[7] Under that doctrine, where a company and creditor engage in a business relationship such that payments by the company to the creditor are made on the mutual assumption of the parties that the business relationship will continue, then the payments forming part of the business

---

1 Randy Pausch and Jeffrey Zaslow, *The Last Lecture* (2008). 'The elephant in the room and variants: a big problem or controversial issue which is obviously present but ignored or avoided as a subject for discussion, usually because it is more comfortable to do so': Oxford University Press, *Oxford English Dictionary* (2nd ed, 1989).

2 Andrew Keay, 'An Analysis of Unfair Preferences under the New Avoidance Regime' (1996) 24 *ABLR* 39, 39.

3 Andrew Keay, 'An Analysis of Unfair Preferences under the New Avoidance Regime' (1996) 24 *ABLR* 39, 39; James O'Donovan, *McPherson's: The Law of Company Liquidation* (3rd ed, 1987), 135; D Robertson and D Lovall, *Australian Corporation Law - Principles and Practice* (1991), 241.

4 Part 5.7B: '*Recovering property or compensation for the benefit of creditors of an insolvent company*'.

5 The emphasis of Division 2 is to identify the pre-liquidation transactions of companies that are voidable and may be challenged by a liquidator: Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1033]. Further, an insolvent transaction under s588FE(2) is one kind of voidable transaction, and the definition of insolvent transaction under s588FC may include an *unfair preference* under s588FA.

6 Which received importation into state law by virtue of s565 of the *Corporations Law*.

7 It is also known as the 'running account defence'.

relationship cannot be impugned by the liquidator as unfair preferences.[8] Accordingly, for the purpose of determining both whether the creditor has received an unfair preference and the extent of that unfair preference, the transactions which form part of the running account are to be treated as constituting a single transaction.[9] Further, the courts appeared to recognise two conflicting approaches to determining the effect of the 'single transaction'; the 'doctrine of ultimate effect' and the 'peak indebtedness rule'.[10]

In enacting s588FA the legislature inserted a version of the running account defence into what is now s588FA(3) of the *Corporations Act 2001* (Cth).[11] The Explanatory Memorandum indicates that the enactment of s588FA(3) was intended to codify the running account defence.[12] Post-codification, the courts have accepted and applied the former common law version of the running account defence to s588FA(3).

The High Court has asserted, in the context of insolvency litigation, that 'it is essential to begin from the elementary proposition that insolvency law is statutory and primacy must be given to the relevant statutory text'.[13] Therefore, to the extent that s588FA(3) reflects the pre-codified position it is appropriate to continue to apply the former common law approach to the new section. By marked contrast, however, where the statute conflicts with the common law approach, the plain operation of the statute must be given primacy.

---

8 For example, see *Richardson v Commercial Banking Co of Sydney Ltd* (1951) 85 CLR 110; *Rees v Bank of New South Wales* (1964) 111 CLR 210; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; *Re Weiss* [1970] ALR 654; *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547; *Spedley Securities Ltd v Western United Ltd* (1992) 7 ACSR 271; *CSR Ltd v Starkey* (1994) 13 ACSR 321; *Airservices Australia v Ferrier* (1996) 185 CLR 483; *Sutherland v Lofthouse* (2007) 64 ACSR 655.

9 See *Airservices Australia v Ferrier* (1996) 185 CLR 483; Damien McAloon, '"Ultimate Effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?' (2006) 14 *ILJ* 90, 91.

10 For example, see *Rees v Bank of New South Wales* (1964) 111 CLR 210 which recognised the peak indebtedness rule and *Airservices Australia v Ferrier* (1996) 185 CLR 483 which recognised the doctrine of ultimate effect.

11 When s588FA(3) came into effect on 23 June 1993, it was s588FA(2) of the then *Corporations Law*, which later became s588FA(3) of the *Corporations Act 2001* (Cth).

12 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1042].

13 *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 182 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

This thesis argues that the operation of s588FA(3) is patently inconsistent with some aspects of the previous running account defence. Under the former law only those transactions that occurred within the six-month relation-back period[14] could comprise the running account. Section 588FA(3) does not impose a similar restriction. Further, the peak indebtedness rule, which is currently applied to s588FA(3), is inconsistent with the operation of the statute rendering its continued application wrong at law.

Commentary does not adequately address the inconsistency between the former common law approach and the operation of the current section,[15] nor do the cases account for this when determining preferences under s588FA(3).

Structurally, this thesis is comprised of three chapters. Chapter I provides an assessment of the status of the pre-codified law, explaining the operation of the running account defence, the doctrine of ultimate effect and the peak indebtedness rule. It primarily focuses on the disunity between the doctrine of ultimate effect and the peak indebtedness rule, and concludes that under the pre-codified law the High

---

[14] This is the six-month period preceding the *relation-back day*. Section 9 of the *Corporations Act 2001* (Cth) states that '*relation-back day*, in relation to a winding up of a company or Part 5.7 Body, means: (a) if, because of Division 1A of Part 5.6, the winding up is taken to have begun on the day when an order that the company or body be wound up was made – the day on which the application for the order was filed; or (b) otherwise – the day on which the winding up is taken because of Division 1A of Part 5.6 to have begun'.

[15] It is accepted that s588FA(3) was intended to embody the principles relevant to s122 and therefore it appears to operate, with some minor differences, in a similar manner to the former common law approach: see Damien McAloon, '"Ultimate Effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?' (2006) 14 *ILJ* 90; Shirley Quo, 'Legal practitioners and persons acting for those at risk of insolvency: In what circumstances will professional fees constitute unfair preferences?' (2005) 13 *ILJ* 7, 18; Ken Barlow, 'Voidable Preferences – The High Court Reconsiders' (1998) 26 *ABLR* 82, 92; Andrew Keay, 'The Avoidance of Pre-Liquidation Transactions: An Angelo-Australian Comparison' [1998] *JBL* 515, 519-520; Jeffrey Lawrence, 'Are Directors Running Accounts in Breach of Their Duties' (1997) 8 *AJCL* 1, 3; Andrew Keay, 'An Analysis of Unfair Preferences under the New Avoidance Regime' (1996) 24 *ABLR* 39, 42, 45, 48 and 50; Justin King, 'Running accounts and Interest in relation to Preference Actions: *The Compass Case*' (1996) 10(4) *CLQ* 5; Jeffrey Lawrence, 'Keeping a Running Account on the Preference Laws' (1996) 4 *ILJ* 171, 174. Further, other commentaries recognise the legislative difficulties involved in codifying the running account doctrine, but they do not address the issue of the inconsistency between the operation of s588FA(3) and the former common law approach: see Legal Online, *McPhersons Law of Company Liquidation*, (at 23 September 2009) Assets available for division and distribution, 'Continuing business relationship or "running account"', [11.800]; Hal Bolitho, 'Continuing Business Relationships – Eight Questions in Search of an Answer' (1998) 16 *CSLJ* 584, 604; Andrew Keay, 'An Analysis of Unfair Preferences under the New Avoidance Regime' (1996) 24 *ABLR* 39, 42.

Court decision of *Airservices Australia v Ferrier*[16] severely limits the potential application of the peak indebtedness rule.

Chapter II provides an analysis of the codification of the running account defence into s588FA(3) and, with reference to applicable High Court authority, argues that because insolvency law is statutory the relevant approach to the section must be consistent with the clear meaning expressed by its terms. Moreover, if the former running account defence is inconsistent with the terms of s588FA(3) it is the meaning evident from the terms of s588FA(3) that must be regarded as paramount and given full effect.

Chapter III assesses and determines the operation of s588FA. It argues that there is a clear divergence between the operation of s588FA and the current approach taken with respect to the section. Further, it claims that the operation of the section would be improved by redrafting specific parts of s588FA. The thesis concludes by offering suggestions as to how the subsections in need of redrafting could appear.

The inconsistency between the current judicial approach to s588FA(3) and the clear operation of that section as evident from its terms has become an uncomfortable issue in insolvency jurisprudence. In as much as this thesis brings the spotlight to bear on this inconsistency, it attempts to provide 'the elephant in the room' with an appropriate introduction.

[16] (1996) 185 CLR 483 ('*Airservices*').

Chapter I – The Pre-codified Law

Introduction to the pre-codified law

Prior to the enactment of what is now s588FA(3)[17] case law governed the treatment of unfair preferences in relation to running accounts (the 'Pre-codified Law'). The relevant provision that regulated unfair preferences was s122 of the *Bankruptcy Act 1966* (Cth),[18] and the courts applied the *common law running account defence*[19] in conjunction with this provision:

122 Avoidance of preferences

(1) A Transfer of property by a person who is insolvent (the **debtor***) in favour of a creditor is void against the trustee in the debtor's bankruptcy if the transfer:*

(a) had the effect of giving the creditor a preference, priority or advantage over other creditors; and

---

[17] When this provision came into effect on 23 June 1993, it was s588FA(2) of the then *Corporations Law*, which became s588FA(3) of the *Corporations Act 2001* (Cth). For an overview of the evolution of Australian company law: see RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (13th ed, 2007), 43-46.

[18] Section 122 received importation into state law by s565 of the *Corporations Law*. Section 122 mirrored its predecessor, s95 of the *Bankruptcy Act 1924-1960* (Cth). For an overview of the history and development of insolvency law: see Michael Murray, *Keay's Insolvency: Personal and Corporate Law and Practice* (6th revised ed, 2008), 6-10.

[19] For a summary explanation of the common law running account defence: see Legal Online, *McPhersons Law of Company Liquidation*, (at 23 September 2009) Assets available for division and distribution, 'Continuing business relationship or "running account"', [11.800] '[a]t common law, if a creditor could establish the fact that the transaction sought to be impugned was not an isolated transaction, but part of a series of transactions that involved the creditor dealing with the debtor pursuant to a running account in which the amount owing fluctuated as monies were paid and further good and services provided, then any payments will not be regarded as preferential save to the extent that the net effect of the series of transactions, taken as a whole, constituted a preference (citing *Richardson v Commercial Banking Co of Sydney Ltd* (1951) 85 CLR 110; *Rees v Bank of New South Wales* (1964) 111 CLR 210; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; *Re Weiss* [1970] ALR 654; *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547; *Spedley Securities Ltd v Western United Ltd* (1992) 7 ACSR 271; *CSR Ltd v Starkey* (1994) 13 ACSR 321; *Airservices* (1996) 185 CLR 483; *Sutherland v Lofthouse* (2007) 64 ACSR 655). Thus the creditor could have the benefit of only being liable to repay the net amount (if any) by which it was preferred as a result of the running account transactions as a whole rather than each amount it might have been paid in each transaction in the series, and will only have to pay the amount by which the net indebtedness to it was reduced by payments over the preference period'.

(b) was made in the period that relates to the debtor, as indicated in the following table.[20]

Further, this section provided for defences[21] which also affected the applicability of the running account defence.

An examination of the Pre-codified Law assists in determining the operation of s588FA(3) in two ways. Firstly, it illustrates the subject matter from which the legislature codified the law with respect to running accounts. Knowledge of the state of the Pre-codified Law assists in evaluating the extent to which the peak indebtedness rule and the doctrine of ultimate effect were incorporation into the statute upon the enactment of s588FA(3). Secondly, an appreciation of the Pre-codified Law is required to effectively assess current judicial interpretations of s588FA(3).

The High Court decision of *Airservices*

Airservices[22] is the seminal High Court authority concerning unfair preferences, in relation to running accounts. It was decided after the enactment of s588FA(3) but on the basis of the Pre-codified Law.[23] The principles elucidated in the decision comprise

[20] The table indicated that for a creditor's petition it was the 'period beginning 6 months before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor' (see table in s122 for other periods during which transfers of property may be void).

[21] See s588FAs(1A)-(8), particularly s588FA(2)(a): 'Nothing in this section affects the rights of a purchaser, payee or encumbrancer in the ordinary course of business who acted in good faith and who gave consideration as least as valuable as the market value of the property'. See also s588FA(4)(c): 'For the purposes of this section a creditor shall be deemed not to be a purchaser, payee or encumbrancer in good faith if the transfer of property was made under such circumstances as to lead to the inference that the creditor knew, or had reason to suspect: (i) that the debtor was unable to pay his or her debts as they became due from his or her own money; and (ii) that the effect of the transfer would be to give him or her a preference, priority or advantage over other creditors'.

[22] This case concerned the collapse of Compass Airlines in 1992. In the six-month relation-back period, Airservices (creditor) provided services to the value of A$17.8 million (Australian dollars) and received nine payments from Compass (debtor) totalling A$10.3 million (Australian dollars).

[23] For example, cases which have applied *Airservices* on the basis of the Pre-codified Law: see *Yarra Capital Group Pty Ltd v Sklash Pty Ltd* [2006] VSCA 109, [26] (Chernov JA, with Ashley JA and Warren CJ agreeing) applied *Airservices* for the definition of a running account in the context of the appropriation of payments to interest and principle under contract; *Beachquest Pty Ltd v Interstate Mortgage and Investments Pty Ltd* [2003] 2 Qd R 586, 596 (White J) cited *Airservices* for definition of running account in relation to mortgages and charges; *Opal Maritime Agencies Pty Ltd v Skulptor Konenkov* (2000) 98 FCR 519, 527 (Black CJ, Cooper and Finkelstein JJ) applied *Airservices* for the definition of a running account in relation to a right to set-off founded on the basis of a running account; *Patrick Stevedores No 2 Pty Ltd v MV Skulptor Konenkov (No 4)* (1998) 81 FCR 16, 20

the law which was the subject of codification, and thus it serves as a declaratory judgment by the High Court on the state of the Pre-codified Law.[24] It follows that the High Court's comments in *Airservices* about the operation of the running account defence, and the use of the doctrine of ultimate effect and the peak indebtedness rule, are arguably relevant to an analysis of how the statute regulates these common law concepts.[25]

The doctrine of ultimate effect

The judgement of the majority in *Airservices*, Dawson, Gaudron and McHugh JJ spoke to and expanded upon previous common law jurisprudence about running

(Tamberlin J) cited *Airservices* for the definition of a running account in the context of the *Admiralty Act 1988* (Cth); *Opal Maritime Agencies Pty Ltd v Baltic Shipping Co* (1998) 158 ALR 416, 421 (Tamberlin J) applied *Airservices* for the definition of a running account in relation to a right to set-off founded on the basis of a running account; *Horsburgh v Strongman & Crouch* [1998] 3 VR 896, 903 (Phillips JA, with Tadgell and Batt JJA agreeing) *Airservices* was considered with respect to the submission put to the Court that by virtue of 451(1) of the *Companies Code 1981* (Cth), s 127(5) of the *Bankruptcy Act 1966* (Cth) applied to the winding up in question. See also, in relation to the preference determination of impugned transactions: *Walsh v Salzer Constructions Pty Ltd* (2000) 3 VR 305, 313 (Winneke P, with Tadgell and Chernov JJA agreeing) applied *Airservices* for the definition of a running account and concluded that the impugned transactions were not preferences; *Guthrie v Radio Frequency Systems Pty Ltd* (2000) 34 ACSR 572, 589 (Commissioner Pringle QC) *Airservices* was cited in relation to the determination of individual payments as preferences; *Wily v St George Partnership Banking Ltd* (1999) 84 FCR 423, 434-435 (Finkelstein J, with Wilcox and Sackville JJ agreeing) applied *Airservices* as authority for the time to assess impugned payments, in the context of a charge being a preference under s122; *Panasonic Australia Pty Ltd v Wily* (1997) 23 ACSR 266, 267-269 (Sheller JA, with Mason P and Powell JA agreeing) applied and followed *Airservices* and the doctrine of ultimate effect for the assessment of the impugned running account; *Prospect Electricity v Advanced Glass Technologies of Australia Pty Ltd* (1996) 22 ACSR 1, 13-14 (Priestly JA, with Cole JA and Aradee AJA) *Airserivces* was applied in relation to the operation of the defence in s 122(2) of the *Bankruptcy Act 1966* (Cth); *Emwest Products Pty Ltd v Olifent* (1996) 22 ACSR 202, 211 (Perry J, with Cox and Prior JJ agreeing) *Airservices* was distinguished as there was no running account on the facts; *Olifent v Work Cover Corporation (SA)* (1996) 135 FLR 423, 433 (Debelle J) *Airservices* was distinguished as there was no running account on the facts.

[24] Section 588FA(3) sought to embody the principles established by the High Court in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 and *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547: Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1042]. Further, the High Court in *Airservices* drew upon the principles contained in these cases.

[25] See *Woodgate v Scansoft Belgium Bvba* [2006] NSWDC 204, [14] (Rein DCJ) '[i]f it be correct that s 588FA is intended to embody the principles established by the High Court in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, then the law's further exposition in *Airservices* would also be relevant to s588FA, although there is open an argument that s588FA is more expansive (and favourable to creditors) than *Airservices* and ought not be constrained by it'. See also Legal Online, *McPhersons Law of Company Liquidation*, (at 23 September 2009) Assets available for division and distribution, 'Continuing business relationship or "running account"', [11.800] '*Airservices* can still be regarded as a good guide to the operation of the relevant principles even though it was decided under the previous legislation' (citing *Sydney Appliances Pty Ltd v Eurolinx Pty Ltd* (2001) 37 ACSR 477).

accounts and is authority for the application of the doctrine of ultimate effect to a running account to determine if there was an unfair preference.[26]

Their Honours began by highlighting that the effect of a payment on other creditors must be determined objectively[27] and 'that it did not matter that neither the creditor nor the debtor intended to give the creditor preferential treatment'.[28] Significantly, their Honours went on to fashion four propositions. Firstly, that consideration must be given to the business purpose and context of the impugned payment, and that to have the effect of giving the creditor preference over other creditors, the payment must ultimately result in a decrease in the net value of the assets that are available to meet the competing demands of the other creditors.[29]

Secondly, where a payment is a step in a wider transaction, its actual business character must be considered and when it forms part of an entire transaction which if carried out to its intended conclusion will leave the creditor without any preference, priority or advantage over other creditors the payment cannot be isolated and construed as a preference.[30]

Thirdly, in the context of explaining the application of the doctrine of ultimate effect, their Honours also explained how the purpose of a transaction might determine the existence of a preference:[31]

> If a payment is part of a wider transaction[32] or a "running account"[33] between the debtor and the creditor, the purpose for which the payment was made and received will usually determine whether the payment has the effect of giving the creditor a preference, priority or advantage over other creditors. If the sole purpose of the payment is to discharge an existing debt, the effect of the payment is to give the

---

26 *Airservices* (1996) 185 CLR 483, 507-508 (Dawson, Gaudron and McHugh JJ).
27 *Airservices* (1996) 185 CLR 483, 501 (Dawson, Gaudron and McHugh JJ) (citing *S Richards & Co Ltd v Lloyd* (1933) 49 CLR 49, 59-60, 62 and 64; *Matthews v Geraghty* (1986) 4 ACLR 727, 733).
28 *Airservices* (1996) 185 CLR 483, 501 (Dawson, Gaudron and McHugh JJ) (following *S Richards & Co Ltd v Lloyd* (1933) 49 CLR 49, 62).
29 *Airservices* (1996) 185 CLR 483, 502 (Dawson, Gaudron and McHugh JJ) (citing *Re Discovery Books Pty Ltd* (1973) 20 FLR 470, 475).
30 *Airservices* (1996) 185 CLR 483, 502 (Dawson, Gaudron and McHugh JJ) (citing *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, 132).
31 *Airservices* (1996) 185 CLR 483, 501-502 (Dawson, Gaudron and McHugh JJ).
32 Citing *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, 129 and 132; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 283-284; *Re Weiss* [1970] ALR 654, 657).
33 Citing *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110,133; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 283-284; *Re Weiss* [1970] ALR 654, 658.

> creditor a preference over the other creditors unless the debtor is able to pay all of his or her debts as they fall due. But if the purpose of the payment is to induce the creditor to provide further goods or services as well as to discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the value of the goods or services acquired. In such a case a court, exercising jurisdiction under s122 of the *Bankruptcy Act*, looks to the ultimate effect of the transaction. Whether a payment is or is not a preference has to be "decided not by considering its immediate effect only but by considering what effect it ultimately produced in fact".[34]

Accordingly they emphasised that the entire dealings between the debtor (company) and the creditor must be considered before, during and after the six-month relation-back period, along with the business purpose and context of the impugned payment to determine if a preference had been given.[35]

Finally, the majority expanded upon the doctrine of ultimate effect in an economic regard: 'a court, exercising jurisdiction under s122 of the *Bankruptcy Act*, does not allow itself to be unsighted by the shadow of the legal form when it can see that the economic effect of the transaction does not give the creditor any preference, priority or advantage over the general body of creditors'.[36] Hence, if at the end of a series of dealings, the creditor has supplied goods to a greater value than the payments made to it during that period, the general body of creditors are not disadvantaged by the transaction – they may even be better off.[37] Therefore, there is no preference.

Application of principles of law

These propositions make clear that the doctrine of ultimate effect requires a court to consider the entire effect of payments made by the company and goods or services received to determine whether a preference was granted. The method the Court used to quantify the ultimate effect involved making a comparison of the debit value in the account at the beginning of the running account and that at the end of the six-month

[34] Citing *Rees v Bank of New South Wales* (1964) 111 CLR 210, 221-222.
[35] *Airservices* (1996) 185 CLR 483, 502 (Dawson, Gaudron and McHugh JJ).
[36] *Airservices* (1996) 185 CLR 483, 503 (Dawson, Gaudron and McHugh JJ).
[37] *Airservices* (1996) 185 CLR 483, 503 (Dawson, Gaudron and McHugh JJ).

relation-back period[38] to assess the difference between any payments made and services received, which determined the amount of any net reduction in the initial indebtedness of Compass (creditor). This amount constituted the preference granted.[39]

Applying the doctrine of ultimate effect, if the value of any goods or services received by a company exceeds or equals the amount of any payments made by the company, the initial amount of indebtedness of the company is not reduced, resulting in no preference. Hence, after emphasising the business context of the payments, the majority found that 'throughout the six-month period, Airservices provided Compass with services whose value far exceeded the value of the payments that Compass made during that period. At the end of the six-month period, Airservices was more than \$8 million worse off than it had been at the commencement of the period'.[40]

On the facts of *Airservices*, the six-month relation-back period spanned from 20 June 1991 to 20 December 1991.[41] However, the court found that a running account began on 1 July 1991 and concluded on 18 December 1991. This meant that the entire running account occurred within the six-month relation-back period. However, if the running account had commenced before the relation-back period the court would have then utilised the balance on the account at the date of the beginning of the relation-back period as the opening balance of the running account. This is because under the common law running account defence, as it was read into s122, only those transactions which occurred within the relation-back period could comprise the running account.[42] As Chapter III explains, this is a major difference in comparison to the operation of s588FA(3), which does not impose a similar restriction.

---

[38] See above (footnote reference) at 20 for the definition of the six-month period as it applied to s122 of the *Bankruptcy Act 1966* (Cth); see above (footnote reference) at 14 for the definition of relation-back date under the *Corporations Act 2001* (Cth).

[39] *Airservices* (1996) 185 CLR 483, 504 (Dawson, Gaudron and McHugh JJ).

[40] *Airservices* (1996) 185 CLR 483, 507 (Dawson, Gaudron and McHugh JJ). As a consequence, there was no preference. However, the final payment of A\$1.7 million (Australian dollars) amounted to a preference because at the time of the payment the authority (creditor) strongly suspected that the company was about to cease operations. Thus, the payment was a partial payment of an existing debt (the authority did in fact provide some services to the company with respect to the payment) and was not made to secure future services: *Airservices* (1996) 185 CLR 483, 509-510 (Dawson, Gaudron and McHugh JJ).

[41] This was the period six-months prior to Compass (company) going into provisional liquidation on 20 December 1991.

[42] Section 122(1)(b) of the *Bankruptcy Act 1966* (Cth), in relation to a creditor's petition, required that the impugned payment was made in the 'period beginning six months before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor'. Therefore, the

Rationale for the doctrine of ultimate effect

The rationale and justification for the doctrine of ultimate effect, and the restriction it imposes on the practice of singling out individual payments credited into a running account to impugn as preferences, is founded upon the majority equating the existence of a running account with a continuing business relationship.

The majority reasoned that the significance of a running account lies in the inferences that can be drawn from the facts that answer the description of a running account, and the essential feature of a running account is that it predicates a continuing relationship of debtor and creditor with an expectation that further debits and credits will be recorded, and therefore each particular payment is connected with the subsequent provision of goods or services in that account.

The rationale follows, that where payments into an account are *connected* with the future supply of goods or services indicating a *continuing business relationship*, the effect of which can only be assessed by examining the *ultimate effect* of the relationship not the immediate effect of individual payments. In support of this proposition, the comments of Barwick CJ in *Queensland Bacon Pty Ltd v Rees*[43] were applied:

> In my opinion, it is enough if, on the facts of any case, the court can feel confident that implicit in the circumstances in which the payment is made is a mutual assumption by the parties that there will be a continuance of the relationship of buyer and seller with resultant continuance of the relation of debtor and creditor in the running account, so that, to use the expressions employed in *Richardson's Case*,[44] "it is impossible" – I interpolate, in a business sense – "to pause at any payment into the

---

running account defence, which was read into s122, had a limitation on the composition of the running account only being made up of transactions that occurred within the six-month relation-back period. This limitation is manifest in the comments made by the majority in *Airservices* (1996) 185 CLR 483, 503-504 (Dawson, Gaudron and McHugh JJ) where their Honours stated with regards to whether a series of dealings constituted a preference that it must have 'the effect of reducing the amount of indebtedness of the debtor at the *beginning of the six month period* [italics added]'. Other comments made by the majority also reflect this position. see below (in-text discussion) at about 61-63. Moreover, see *Panasonic Australia Pty Ltd v Wily* (1997) 23 ACSR 266, 267-269 (Sheller JA, with Mason P and Powell JA agreeing) where the running account was assessed from the beginning of the six-month relation-back period but the running account actually began before this point.

43 (1966) 115 CLR 266, 286 (Barwick CJ).

44 Referring to *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110.

> account and treat it as having produced an immediate effect to be considered independently of what followed…".[45]

Therefore, because of the existence of a continuing business relationship,[46] individual payments cannot be singled out as preferences. Applying this principle, the majority found that:

> The facts recorded in the running account indicate that Compass and Airservices had a continuing relationship which contemplated further debits and credits and that the individual payments were intended to continue and not determine that relationship. The various payments must therefore be regarded as so connected with the continuing provision of services, that it is the ultimate and not the immediate effect of each payment on the relationship of Compass and Airservices that is relevant.[47]

Rees: The peak indebtedness rule

The peak indebtedness rule has its genesis in the decision of Barwick CJ in *Rees v Bank of New South Wales*,[48] where his Honour stated that:

> In my opinion the liquidator can choose any point during the statutory period in his endeavour to show that from that point on there was a preferential payment and I see no reason why he should not choose, as he did here, the point of the peak indebtedness of the account during the six month period.[49]

The Chief Justice's justification for this rule is rather dubious. His Honour did not cite any authority, legal or non-legal, to justify the application of this rule and its presence is not felt in the common law which operated before *Rees*. However, perhaps His Honour's opposition to comparing the debit in the account at the beginning of the six-month relation-back period to the debit in the account at the commencement of the

---

[45] *Airservices* (1996) 185 CLR 483, 505-506 (Dawson, Gaudron and McHugh JJ).
[46] Which is the essential feature of a running account.
[47] *Airservices* (1996) 185 CLR 483, 507 (Dawson, Gaudron and McHugh JJ).
[48] (1964) 111 CLR 210 ('*Rees*').
[49] *Rees v Bank of New South Wales* (1964) 111 CLR 210, 221 (Barwick CJ) (the peak indebtedness rule was subsequently approved of or applied in: *Re Weiss* [1970] ALR 654; *Re Toowong Trading Pty Ltd* [1989] Qd R 207; *Rothmans Exports Pty Ltd v Mistmorn Pty Ltd* (1994) 15 ACSR 139; *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285; *Sutherland v Eurolinx Pty Ltd* (2001) 37 ACSR 477; *Rennie v Printbase Pty Ltd* [2002] NSWSC 78; *Whitton v Konemann Australia Pty Ltd* (2002) 43 ACSR 436; *Tectron Industries Pty Ltd v Taylor* [2006] SASA 175; *Sutherland v Lofthouse* (2007) 64 ACSR 655; *All Type Timber Pty Ltd v BGC Fibre Cement* [2007] NSWDC 90).

liquidation to calculate the preference[50] can be explained by his comment that 'in this case [it] would result in a materially lesser figure than that reached by taking the liquidator's comparison [the point of peak indebtedness]'.[51] It seems that enabling liquidators to obtain maximum recovery is the only explanation given to vindicate the existence of this rule.[52]

There is justification for the peak indebtedness rule if each impugned transaction is assessed individually. Under such an approach only from the peak point of indebtedness could a liquidator assert that a preference exists, because from that point on payment (from the company) is less than supply (from the creditor) resulting in a reduction in existing indebtedness. Therefore, it could be argued that payments made by the company following the peak point of indebtedness constitute unfair preferences. However, this rationale is inconsistent with the running account doctrine and the doctrine of ultimate effect because it disregards the concept of assessing the entire effect of the relationship between the company and the creditor.

However, the paramount issue is whether its continued application is consistent with the judgment of the High Court in *Airservices*, and thus with the doctrine of ultimate effect.

Ultimate effect versus peak point of indebtedness

Airservices: Express treatment of Rees

Unlike *Rees*, the running account in *Airservices* did not contain a point of peak indebtedness as the level of indebtedness throughout the period of the account increased from a debit value of around A$4.3 million (Australian dollars) to approximately A$10.4 million (Australian dollars).[53] One consequence of this is that

---

[50] This was submitted by the respondent creditor as the appropriate method: *Rees* (1964) 111 CLR 210, 214.
[51] *Rees* (1964) 111 CLR 210, 221 (Barwick CJ).
[52] This has also been suggested in the relevant commentary: see Damien McAloon, '"Ultimate Effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?' (2006) 14 *ILJ* 90.
[53] *Airservices* (1996) 185 CLR 483, 500-501 (Dawson, Gaudron and McHugh JJ).

the *ratio decidendi*[54] of *Airservices*, from a technical, precedential point of view, does not explicitly overrule Barwick CJ's decision in *Rees*.

However, in light of *Airservices*, it is submitted that the operation of the peak indebtedness rule is significantly attenuated so that it only has utility when its application is consistent with the doctrine of ultimate effect and the High Court in *Airservices*.

The majority, in *obiter dicta*,[55] read the doctrine of ultimate effect into the rationale of *Rees*, the effect of which reconciles the use of the peak indebtedness rule in *Rees* with the rationale of the doctrine of ultimate effect. Thus, in the context of appropriating payments to earlier debts, the majority stated:

> Where the relationship of debtor and creditor contemplates further debits and credits, it is difficult to see how the appropriation of a payment to an earlier debt has any significance at all unless, as in *Rees v Bank of New South Wales*, the parties expressly agree that one of purposes of the payment is to permanently reduce the level of indebtedness below the level existing at the time of the agreement. Even then, as *Rees* assumes, where the relationship is a continuing one, the preference will be no more than the amount that constitutes the difference between the indebtedness at the commencement of the agreement and the indebtedness at the end of the six-month period.[56]

This interpretation affirms *Rees* as a case where there was a running account and the parties made an express agreement that one of the purposes of future payments was to reduce existing indebtedness. That agreement distinguishes the account in *Rees* from the usual running account which contemplates a continuing business relationship of indefinite duration and value. Therefore, in that case, the amount of any preference

---

[54] Reason for deciding. Any indispensable factor in the process of reasoning lending to a judicial decision. *Rationes decidendi* (plural) of higher courts are binding on lower courts by virtue of the common law doctrine of precedent: Peter Butt (ed), *Butterworths Australian Legal Dictionary* (3rd ed, 2004), 364 (citing *Deakin v Webb* (1904) 1 CLR 585).

[55] *Obiter dictum* (singular) is a remark in passing. Judicial observations that do not form part of the reasoning of the case. Unlike *rationes decindendi*, *obiter dicta* (plural) are not binding on lower courts nor subsequently on the court that makes them: Peter Butt (ed), *Butterworths Australian Legal Dictionary* (3rd ed, 2004), 364 (citing *Enever v R* (1906) 3 CLR 969, 973; *Deakin v Webb* (1904) 1 CLR 585 at 605; *Magrath v Commonwealth* (1944) 69 CLR 156, 177).

[56] *Airservices* (1996) 185 CLR 483, 508 (Dawson, Gaudron and McHugh JJ).

was the *ultimate effect* of the impugned transactions in the period from the commencement of the agreement to the commencement of the winding up.

In justifying the doctrine of ultimate effect the majority made clear that if the purpose of payment is to reduce indebtedness and induce further supply, only the amount of the reduction in indebtedness amounts to a preference.[57] Hence the presence of the express agreement serves to unequivocally show that the purpose of future payments is to reduce indebtedness. Therefore, theoretically, it is consistent with the rationale of the doctrine of ultimate effect for the point at which an express agreement is made to reduce the level of indebtedness to be the point from which the preference is assessed. Moreover, the words 'no more' indicate that in the context of facts analogous to *Rees*,[58] if the peak point of indebtedness occurs at any other time, save for the commencement of the agreement, it must not be used to calculate a preference.[59]

Considering these comments, it is submitted that the peak indebtedness rule may only have an application that it consistent with *Airservices* and the doctrine of ultimate effect if the peak point of indebtedness occurs at the same time as the commencement of an express agreement between the parties to appropriate payments to reduce existing indebtedness.[60]

Airservices: Implied treatment of Rees

The majority in the *Airserivces* decision made other germane comments by way of *obiter dicta* which make it clear that to calculate a preference in conformity with the doctrine of ultimate effect, the peak point of indebtedness is not the value to use as the commencement of the account.

---

[57] *Airservices* (1996) 185 CLR 483, 503-504 (Dawson, Gaudron and McHugh JJ).

[58] That is, where there is in existence a continuing business relationship (i.e. running account) and the parties expressly agree that one of the purposes of future payments is to reduce the existing level of indebtedness in the account.

[59] A use of this kind is repugnant to the doctrine of ultimate effect as it results in an inaccurate reflection of the entire business relationship.

[60] One issue remains as to why the majority did not expressly overrule the use of the peak indebtedness rule in *Rees*. However, it is unnecessary to explore this issue as the validity of the current use of each method is to be determined by the operation of s588FA(3) (as explained in Chapter II).

Firstly, their Honours emphasised that:

> The court does not regard the individual payments as preferences even though they were unrelated to any specific delivery of goods or services and may ultimately have had the effect of reducing the amount of indebtedness of the debtor at the *beginning of the six-month period*. If the net effect of the payments is to *reduce the initial indebtedness*, only the amount of the reduction will be regarded as a preferential payment [italics added].[61]

Later, they stated that:

> Even where payments are expressly made for the purpose of reducing a debt earlier incurred as well as for the purpose of obtaining further goods or services, only the amount representing the *reduction of the opening debt for the period* will be regarded as a preference [italics added].[62]

Finally, they concluded that 'at the end of the six-month period, Airservices was more than $8 million worse off than it had been at *the commencement of the period* [italics added]'.[63] The collective force of these comments, from a precedential point of view, serve to impliedly overrule the use of the peak indebtedness rule save for the previously mentioned *obiter dicta* in relation to an express agreement between the parties.[64]

Doctrinal inconsistency

Theoretically, the doctrine of ultimate effect and the peak indebtedness rule are inconsistent. One operates by taking the opening balance[65] of the running account and comparing it with the balance at the end of the running account, while the other takes the highest debit value on the account and compares it with the balance at the end of the account.

---

[61] *Airservices* (1996) 185 CLR 483, 503-504 (Dawson, Gaudron and McHugh JJ).
[62] *Airservices* (1996) 185 CLR 483, 504 (Dawson, Gaudron and McHugh JJ).
[63] *Airservices* (1996) 185 CLR 483, 508 (Dawson, Gaudron and McHugh JJ).
[64] These comments place significant emphasis on assessing the reduction in indebtedness from the commencement of the six-month relation-back period.
[65] On the facts of *Airservices*, because the running account commenced within the six-month relation-back period the actual balance on the running account at the beginning of the account was used to assess whether a preference has been granted. This is to be contrasted with the use of the balance at the commencement of the six-month relation-back period, when the running account commenced before the six-month period, as the opening balance of the running account to assess whether a preference had been granted: see above (in-text discussion) at about 41-42.

The only means of reconciling the two approaches is to argue that there is some kind of a separation between the doctrine of ultimate effect and the method used to quantify a preference. Such an argument holds that the doctrine of ultimate effect is applied to the impugned 'transactions'[66] to determine if there has been a reduction in indebtedness, and therefore a preference. If there has been a reduction, another calculation is then performed to quantify the value of that preference. It follows that the doctrine of ultimate effect could be used to determine whether a preference exists, and the peak indebtedness rule applied to quantify its value. Thus, a two-stage inquiry is conducted.

Some traction in support of this argument exists in Barwick CJ's approach to applying the peak indebtedness rule in *Rees*. Arguably, His Honour employed a two-stage approach. Firstly, the doctrine of ultimate effect was applied:

> But at the time of the receipt of each deposit during the relevant period, the bank was able to retain at least some portion of it in a permanent reduction of its account. What part it did retain can be determined by taking the total intake into the account during the period and deducting the outgo [sic]… It is sufficient in the circumstances of this case to take the overall effect of the deposits and withdrawals in the period.[67]

Further, after finding that there was a reduction in indebtedness, his Honour stated that 'the liquidator can choose any point during the statutory period in his endeavour to show that from that point on there was a preferential payment'.[68] Hence, the doctrine of ultimate effect determined that a preference existed (*unfair* reduction in indebtedness) and the peak indebtedness rule quantified its value.[69]

---

66 These transactions include individual payments by the company and supply by the creditor.

67 *Rees* (1964) 111 CLR 210, 220 (Barwick CJ).

68 *Rees* (1964) 111 CLR 210, 221 (Barwick CJ).

69 For example, in *Re Toowong Trading Pty Ltd* [1989] Qd R 207, 221 (Ryan J) in following *Rees v Bank of New South Wales* (1964) 111 CLR 210, and applying the peak indebtedness rule, Ryan J appeared to also employ a two-stage approach to the determination of the preference: 'In these circumstances it seems to me proper to apply the remarks of Barwick CJ in *Rees v Bank of New South Wales* (1964) 111 CLR 210, 220. It can be said in this case that at the time of each receipt of each payment during the period after 22 January 1986 [beginning of six-month relation-back period] Abel Lemon was able to retain at least some portion of it in permanent reduction of its account. What part it did retain could be determined by taking the total intake into the account during the period and deducting the outgo. It was sufficient in the circumstances of this case to take the overall effect of the payments and withdrawals in the period'. This appears to be consistent with the ultimate effect principle, however Ryan J went on to state that 'I accept his [the liquidator] evidence as showing that the amount of the preference was $42,940.20'. This amount was the result of applying the peak indebtedness rule to the facts.

Notwithstanding the lure of this argument, it cannot successfully be applied. In *Airservices* the doctrine of ultimate effect and the method used to quantify the preference were not separate concepts. The High Court did not indicate that there is a two-stage process to determining and quantifying unfair preferences.[70] Furthermore, Barwick CJ's remarks[71] suggest that, of itself, choosing the point of peak indebtedness determines that there is a preference, apart from the operation of the running account doctrine and the doctrine of ultimate effect.[72]

Summary

Firstly, it is clear that one distinct feature of the common law running account defence is that it operated so that only those transactions which occurred within the six-month relation-back period could form part of the running account.

Secondly, from a precedential, technical perspective, it is arguable that, on the state of the Pre-codified Law, the peak indebtedness rule has a continuing application given that the majority in *Airservices* did not expressly overrule its application. However, its use, in light of *Airservices*, is confined to a manner which is both consistent with the doctrine of ultimate effect and the majority's comments regarding *Rees*.

Following this analysis, it is evident that both the peak indebtedness rule and the doctrine of ultimate effect were manifest in the operation of the Pre-codified Law, from which the legislature codified s588FA(3). Accordingly, Chapters II and III explore the interpretation of s588FA(3) in an attempt to determine the correct operation of the statute and whether the doctrine of ultimate effect and the peak indebtedness rule were indeed codified.

[70] The *obiter dicta* of the majority deflates any argument which asserts that there is a two-stage approach to quantifying the value of any preference where there is a running account: see above (in-text discussion) at about 61-63.

[71] See above (in-text discussion) at about 49.

[72] As earlier discussed, the peak indebtedness rule appears to only focus on the effect of each impugned transaction individually in preference to examining the effect of the entire relationship: see above (in-text discussion) at about 52.

Chapter II – s588FA(3): Codification and Interpretation

Introduction

The intention of the legislature in enacting s588FA(3),[73] the policy behind its enactment, and its background including the Pre-codified Law are relevant factors ('Contextual Factors') which provide a context within which s588FA(3) is interpreted. Nevertheless, because Australian insolvency law is statutory,[74] it is the clear meaning derived from its terms which is to determine the operation of s588FA(3) and therefore the extent to which the peak indebtedness rule and the doctrine of ultimate effect were incorporated into the statute.

Contextual factors relevant to interpretation

Apart from industry lobbying, the initial impetus for statutory recognition of the running account defence came in 1988 when the Australian Law Reform Commission, *General Insolvency Inquiry*,[75] recommended that the judicial approach adopted by the courts, with respect to running accounts, 'be reinforced with a statutory provision which would allow the court to have regard to the relationship between the parties and, if appropriate, the history of transactions between them'.[76] In his second reading speech the Commonwealth Attorney General[77] recognised that the origin of the insolvency reforms contained in the Bill came from this Report.[78]

The *Corporate Law Reform Act 1992* (Cth) followed through with the Harmer Report recommendation and, in relation to s588FA(3),[79] its Explanatory Memorandum states:

> Subsection 588FA(2) provides that where a transaction is, for a commercial purpose, an

[73] The original provision was s588FA(2).
[74] *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52.
[75] Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) ('Harmer Report').
[76] Harmer Report at 274, [655].
[77] The Honourable Mr Michael Duffy (Commonwealth AG 1990-1993).
[78] Corporate Law Reform Bill 1992, Second Reading, House of Representatives, 3 November 1992 (Hansard ID: chamber/hansardr/1992-11-03/0068).
[79] The original provision was s588FA(2): see above (footnote reference) at 11.

> integral part of a continuing business relationship such as a running account between a creditor and the company (including such a relationship to which other persons are parties), it should not be attacked as a preference, but rather the effect of all the transactions which form the relationship between that creditor and the company should be taken into account as though they constituted a single transaction. This provision is aimed at embodying in legislation the principles reflected in the cases of *Queensland Bacon Pty Ltd v Rees* (1967) 115 CLR 266 and *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547. The effect of these principles is that it is implicit in the circumstances in which payments are made to reduce the outstanding balance in a running account between purchaser and supplier that there is a mutual assumption that the relationship of purchaser and supplier would continue as would the relationship of debtor and creditor. The net effect, therefore, is such that payments 'in' are so integrally connected with payments 'out' that *the ultimate effect of the course of dealings should be considered to determine whether the payments are preferences* [italics added].[80]

In addition to its description of the running account defence, the Explanatory Memorandum makes it clear that Parliament intended to codify the running account defence as expressed in the two referenced cases (*Queensland Bacon v Rees* and *Petagna Nominees Pty Ltd v AE Ledger*).[81] In light of these cases, the language of the Explanatory Memorandum and judicial interpretation of the peak indebtedness rule, it remains unclear whether the legislature intended to codify the peak indebtedness rule.

Notable aspects of both *Queensland Bacon v Rees* and *Petagna Nominees Pty Ltd v AE Ledger* do not appear to support the peak indebtedness rule,[82] and the Explanatory

---

[80] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1042].

[81] The general principle emerging from *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 286 is contained in the seminal comments of Barwick CJ: see above (in-text discussion) at about 45. These comments were followed in *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547, 565 (Franklyn J). Further, Franklyn J, at 563, summarised the effect of the relevant authorities by citing McPherson *The Law of Company Liquidation* (3rd ed 1986), 319: 'Genuine payments made by the company to reduce a general debit as it stands from day to day and in order to maintain a genuine business relationship that promises advantages to both the company and its creditor are not preferences. This is because there is a mutual assumption by the parties that the business relationship of buyer and seller will continue with the result that the relationship of debtor and creditor will continue in the running account between the parties. There is no attempt to terminate this relationship but rather to ensure its continuance to the mutual benefit of the parties. In these circumstances payments made by the company to its supplier should not be viewed in isolation and attacked as preferences'.

[82] In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 290-291 and 300 (Barwick CJ), at both instances when Barwick CJ assessed the value of any preference, his Honour assessed the ultimate effect of the account and made no mention of the liquidator having the freedom to choose any point

Memorandum's emphasis on considering the 'ultimate effect of the course of dealings'[83] also lends support to the argument that there was no intention to incorporate the rule into the section.

Conversely, there are other factors which suggest that the legislature did intend to codify the rule. There is authority which concludes that Parliament did not intend to remove it from s588FA(3),[84] and it has continued to receive judicial application.[85] Moreover, it has been suggested that in *Queensland Bacon v Rees* Barwick CJ gave tacit approval for the rule's continued application,[86] yet the Explanatory Memorandum is equivocal about which aspects of *Queensland Bacon v Rees* were intended to be codified.

Approach to s588FA(3)

Although Parliament's intention behind the codification is nebulous, there is no uncertainty about the role of the Contextual Factors[87] in the interpretation of

in the account from which to show that a preference had been granted. However, there was no peak point of indebtedness in those accounts and, therefore, it did not arise on the facts and the parties did not make submissions concerning it. In *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547, 553 and 554, on the facts, there was a peak point of indebtedness in the running account, but the court chose to assess the account based on the payments paid in and out from a point taken before the peak. However, the appellants did not submit that the peak indebtedness rule should be applied. Therefore, once again, the position of the court is unclear.

83 To determine whether any payments are preferences.

84 *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285, 292 (Burley SCM).

85 *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285; *Sutherland v Eurolinx Pty Ltd* (2001) 37 ACSR 477; *Rennie v Printbase Pty Ltd* [2002] NSWSC 78; *Whitton v Konemann Australia Pty Ltd* (2002) 43 ACSR 436; *Tectron Industries Pty Ltd v Taylor* [2006] SASA 175; *Sutherland v Lofthouse* (2007) 64 ACSR 655; *All Type Timber Pty Ltd v BGC Fibre Cement* [2007] NSWDC 90.

86 See Damien McAloon, '"Ultimate Effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?' (2006) 14 *ILJ* 90, 93 McAloon makes this point in relation to the following remarks of Barwick CJ in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 282 'no fact or event existed or occurred between such limiting dates to warrant any different conclusion being drawn between one such payment and the other. But there will be occasions when there will be such facts or events intervening between the first payment which is impugned and the commencement of the liquidation as will require the limiting dates to be different, the terminal date for consideration of the state of the running account being for that reason earlier than the date of the commencement of the liquidation'. However, this appears simply to be a reference to a change in the status of the 'running account', that is, no further expectation between the parties that future payments will reduce existing debt and ensure future supply.

87 The intention of the legislature in enacting s588FA(3), the policy behind its enactment, and its background including the Pre-codified Law.

s588FA(3).[88] Although they assist in the interpretative process, it is unequivocally clear that they must not detract from giving s588FA(3) a plain interpretation based on Part 5.7B and the section itself.[89]

In *Sons of Gwalia Ltd v Margaretic*[90] the High Court emphasised the importance of the statute itself to the interpretation of ss553(1) and 563A of Part 5.6 of the *Corporations Act 2001* (Cth), in the matter before the court.[91] The Court did not allow previously entrenched common law principles[92] to change the effect and meaning of s563A, as its meaning was clear from its terms and the Part to which it belonged.[93]

---

88 In *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273, [11] (McHugh ACJ, Gummow and Hayne JJ) the following relevant principles of statutory interpretation were stated: 'In *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112, McHugh J observed: "[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context." His Honour went on to refer to what had been said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408. There, Brennan CJ, Dawson, Toohey and Gummow JJ said: "It is well settled that at common law, apart from any reliance upon s15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* [1986] 6 NSWLR 363, 388, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent"'.

89 In *Rugs-A-Million (WA) Pty Ltd v Walker* [2007] WASCA 23, [34] (Pullin JA, with Buss and Wheeler JJA agreeing) 'The proper principles of construction are not in dispute. The court must begin by looking at the language of the statute rather than secondary sources or materials: *Weiss v The Queen* (2005) 80 ALJR 444, [31]. The primary object of all statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The duty of the court is to give the words of a statute the meaning that the legislature is taken to have intended them to have. The grammatical meaning of a statute may on occasions be ambiguous, but ordinarily the legal meaning will correspond with the grammatical meaning of the provision. In determining the grammatical meaning, due consideration must be given to the context, the general purpose and the policy of the provision: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69] and [78]; *Commissioners for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397'.

90 (2007) 231 CLR 160.

91 The case involved the determination of whether a shareholder's claim against a company for misleading or deceptive conduct, and breaches of other specific statutory requirements, amounted to a claim against the company 'in the person's capacity as a member of the company' under s563A of the *Corporations Act 2001* (Cth).

92 The common law principle in issue was 'the *Houldsworth* principle': see Gleeson CJ, 181 and Hayne J, 227 [183] for an explanation of its entrenchment.

93 The Court emphasised the meaning of the statute: see Gleeson CJ, 183 [28], Kirby, 209 [115], Hayne J, 233 [200]-[206] (Gummow, Heydon and Crennan JJ agreeing).

This is not to say that other factors were not relevant to the interpretive process[94] but, above all, the High Court emphasised the paramountcy of the statute:

> These questions are to be answered by reference to the applicable statutory regime: in particular, the provisions of Pt 5.6 of the 2001 Act…The answer to the questions that arise in this case do not depend upon any principle of judge-made law. In particular, they do not depend upon the application, or the identification of the content, of what is sometimes called "the rule in *Houldsworth's Case*".[95]

There is utility in considering other *obiter dicta* of the Court regarding the interpretive process:

> The ultimate duty of a court in a case of this kind is to give effect to the meaning of the law as expressed by the Parliament.[96]
>
> …In repeated decisions of the Court in recent years, where a statutory problem is proffered for resolution, the Court has insisted, with a very high degree of uniformity, that analysis must commence and finish with the text of the legislation.[97] The analysis must proceed, not only by reference to words of the statutory provision but also by reference to the object and purpose of those words[98] … In this instance, that involves unpacking the meaning of s563A of the Act and, in the end, nothing else. If any general presumptions do not accord with the legislation, properly construed, it is the legislation that must prevail for it expresses parliamentary command.[99]

Furthermore, in *International Air Transport Association v Ansett Australia Holdings Ltd*,[100] the High Court, in following *Sons of Gwalia Ltd v Margaretic*,[101] stated that 'it is essential to begin from the elementary proposition that insolvency law is statutory

[94] Contextual Factors were extensively considered: history of preceding case law; legislative history; the Harmer Report; the Explanatory Memorandum; differing legislative schemes; the influence of interpretive methods.
[95] (2007) 231 CLR 160, 214 (Hayne J with Gummow, Heydon and Crennan JJ agreeing).
[96] (2007) 231 CLR 160, 207 (Kirby J).
[97] *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168, 197-198 [84] where the line of authority is collected.
[98] *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423 (McHugh JA) (approving *Bropho v Western Australia* (1990) 171 CLR 1, 20). See also *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321; *Act Interpretation Act 1901* (Cth) s15AA.
[99] (2007) 231 CLR 160, 209-210 (Kirby J).
[100] (2008) 234 CLR 151.
[101] (2007) 231 CLR 160.

and primacy must be given to the relevant statutory text'.[102] This indicates that the source of insolvency law is the statute and therefore it is the statute that is to dictate how a provision such as s588FA operates.

Summary

The Pre-codified Law, the policy behind codification, along with the background to and intention of the legislature in enacting s588FA(3), are valuable to the interpretive process. However, these factors must not divert attention away from giving s588FA an interpretation and application that is consistent with its clearly expressed meaning, and that meaning must be paramount to any other factor.

[102] (2008) 234 CLR 151, 182 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) (citing *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52).

Chapter III – The operation of s588FA(3)

Operation of the statute

It is important to appreciate the function s588FA performs in Part 5.7B, Division 2 of the *Corporations Act 2001* (Cth). An insolvent transaction under s588FC is voidable under s588FE(2), and the definition of insolvent transaction in s588FC may include an *unfair preference under s588FA*. Hence, an unfair preference under s588FA is voidable if the requirements of ss588FC and 588FE and fulfilled.

The section states:

DIVISION 2 – VOIDABLE TRANSACTIONS

588FA Unfair Preferences

(1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:

(a) the company and the creditor are parties to the transaction (even if someone else is also a party); and

(b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction of an agency.

(2) For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security.

(3) Where:

(a) *a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and*

(b) *in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;*

then:

(c) *subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and*

(d) *the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.*

On an initial viewing, it is apparent that s588FA(1) defines the circumstances when a transaction constitutes an unfair preference, and s588FA(3) operates to exempt those transactions from amounting to a preference under s588FA(1). Therefore, both subsections must be considered in determining whether a transaction amounts to an unfair preference.

The apparent operation of s588FA begins by a liquidator (representing a debtor company) submitting that individual payments received by a creditor from the company constitute unfair preferences under s588FA(1).[103] But if the creditor has a defence under s588FG those transactions cannot be impugned. However, in the absence of a defence, s588FA(3) may still operate to exempt the impugned transactions from s588FA(1). Accordingly, if the transactions fall within the meaning

[103] The liquidator would also contend that the individual payments are insolvent transactions, under s588FC, because they occurred at a time when the debtor was insolvent, and that they are voidable transactions, under s588FE, because they took place within six months of the relation-back day.

of s588FA(3)(a)-(b), that is they form an integral part of a continuing business relationship, then s588FA(3)(c) has the effect of applying s588FA(1) to all the transactions forming part of the relationship as if they together constituted a 'single transaction'. And s588FA(3)(d) provides that the transactions can only be taken to be an unfair preference if the 'single transaction' can be taken to be an unfair preference under s588FA(1). If there is an unfair preference then, subject to ss588FC (insolvent transaction) and 588FE (voidable transaction), an order can be made under s588FF.

Unlike the operation of the pre-codified running account defence,[104] which was read into s122 of the *Bankruptcy Act 1966* (Cth), s588FA(3) places the onus on the liquidator to establish that a preference exists. Santow J aptly described the position under the statute in *Sutherland v Eurolinx Pty Ltd*:

> [T]he codification of the so-called running account has become definitional of what is an "unfair preference". That means that, in terms of onus, what was once merely a defence is now an ingredient or element of that which the plaintiff liquidator must prove in establishing whether it is a preference (and its dimension). The onus in that sense has shifted to the party attaching the payments.[105]

On a practical basis, the liquidator must seek to establish that either the transactions impugned under s588FA(1) do not fall within s588FA(3)[106] or, alternatively, if they do fall within s588FA(3), they constitute a preference.[107] Notwithstanding this position, the statute does not indicate that the creditor is prevented from establishing the application of s588FA(3) by satisfying the court that the impugned transactions under s588FA(1) fall within the meaning of s588FA(3)(a)-(b).

The Application of the pre-codified law principles to s588FA

[104] Where, as a defence, the creditor had the onus of proving that the impugned transactions formed a running account and did not constitute a preference.

[105] (2001) 37 ACSR 477, 508 (Santow J) (approved and followed in *Whitton v Konemann Australia Pty Ltd* (2002) 43 ACSR 436, 448 (Austin J)). See also *Modern Master Pty Ltd v Canon Australia Pty Ltd* [2007] NSWDC 245, [30-32] (Hungerford ADCJ) (following the comments made by Santow J) '[i]n terms, I think plain from s588FA(3)(d) that a transaction may only be taken to be an unfair preference if certain conditions are satisfied. It is, it seems to me, in that sense Santow J held the codification of a running account to be definitional of what is an unfair preference. To succeed, the plaintiff must show the transaction to be an unfair preference so that, in my view, it necessarily follows that the plaintiff has the onus to establish it'.

[106] For example, they do not form an integral part of a continuing business relationship.

[107] See s588FA(3)(c): When s588FA(1) is applied to the single transaction.

The cases presented with the task of interpreting s588FA predominantly take the view that the former principles in relation to determining unfair preferences with respect to individual transactions and running accounts, under s122 of the *Bankruptcy Act 1966* (Cth), are equally applicable to s588FA.[108] Ormiston JA articulated this view in *V R Dye & Co v Peninsula Hotels Pty Ltd*:

> The provisions of the *Corporations Law* now…are differently expressed from those previously incorporated from the *Bankruptcy Act*. However, so far as one can gather, they were not intended to make any significantly different provision for identifying what is an unfair preference, except in a few minor respects and except insofar as the sections now appear in the *Corporations Law* itself…It should be noted, however, that s588FA now contains subs(3) what appears to be a codification of the implied exception as to running accounts read into earlier legislation and examined in such detail, albeit after the earlier provision had been replaced, in *Airservices* and (at least to a degree) in *Sheahan v Carrier Air Conditioning Pty Ltd*[109]. These exercises, which might otherwise seem exercises in futility while the companies legislation continues to undergo constant and piecemeal revamping, would appear to have continuing application…Fortunately, it appears that the presently relevant provisions are intended to have no different effect, other than in minor respects, from those which made preferences voidable when the *Companies Act* of this state was no more than 253 pages long.[110]

Ormiston JA, went on to caution against indiscriminately applying the former principles to s588FA, but nevertheless thought they equally applied:

> The qualification [referring to the running account defence] applying to running account payments must be considered as being accepted by Parliament in as much as subs(3) of s588FA explicitly recognises it…I would conclude that the new provision

[108] The operation of the approach under s122 will be explained when its consistency with the operation of s588FA is examined under the next heading. For now, it is worth considering the justification for the application of the previous principles to s588FA.

[109] (1997) 189 CLR 407.

[110] (1999) 32 ACSR 27, 36-37 ("*V R Dye*") (Ormiston JA, with Tadgell JA and Winneke P agreeing) Ormiston JA reasoned that the amendments were intended to have such a limited effect (citing the Explanatory Memorandum, [1033-43]; the Harmer Report, [629-38]; *Re Emanuel (No 14) Pty Ltd; Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281, 283; *Re Lanpac International Pty Ltd; Jonas v Automation House Pty Ltd* [1998] VSC BC9803587 (Unreported, Chernov J, 30 July 1998), [40] where Chernov J held that the nature of an unfair preference under s122 is the same as under s588FA)), Ormiston JA went on to find that in relation to s588FA(3) only the newly introduced definition of 'transaction' seemed to have produced any effective change (citing the Explanatory Memorandum, [1042]; *Re Emanuel (No 14) Pty Ltd; Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281, 283).

> should be construed in the same way as the former provision, except to the extent that the language of s588FA clearly points to a contrary conclusion…In my opinion it is clear that no change was intended to be made to the nature of a preference under the new legislation, whatever other alterations were made to the law.[111]

The cases broadly utilise the rationale of Ormiston JA to justify the application of the principles applicable under s122 of the *Bankruptcy Act 1966* (Cth) to s588FA.[112] Moreover, the practice of applying the pre-codified principles to the determination of a preference under s588FA is so deeply entrenched that the majority of cases apply them without reference to authority.[113]

To determine whether it is appropriate to apply the pre-codified principles, in relation to individual transactions and running accounts, to the operation of s588FA, an analysis of the operation of the statute must be undertaken to assess the compatibility between the former principles and the operation of the section. Further, where there is disparity between the former principles and the operation of s588FA(3), primacy must be given to the statute.

---

[111] *V R Dye* (1999) 32 ACSR 27, 39 (Ormiston JA, with Tadgell JA and Winneke P agreeing) (citing *Re Emanuel (No 14) Pty Ltd; Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281, 283) Ormiston JA stated that: '[C]ases on the earlier provisions "will often provide useful guidance on the interpretation of aspects of Part 5.7B", though care will need to be taken to ensure that "proper account is taken of the significant textual differences between the old and new regimes"'. Ormiston JA also stated in relation to *Sands & McDougall Wholesale Pty Ltd v Commissioner of Taxation* [1999] 1 VR 489 that 'although it might be said that the issue as to whether there was any difference for present purposes between the provision in s122 and s588FA was not explicitly addressed, the reasoning of the court appears to have accepted that there was no difference to the limited extent that the general question arose (Charles JA, [35-37] and [49] and Kenny JA, [75-76])'.

[112] For cases which follow *V R Dye* (1999) 32 ACSR 27: see *Sutherland v Lofthouse* (2007) 64 ACSR 655, [34] (Nettle JA, with Neave and Redlich JJA agreeing); *Re Centaur Mining and Exploration Ltd* (2008) 221 FLR 217, 221 (Robson J); *Jetaway Logistics Pty Ltd v Deputy Commissioner of Taxation* (2008) 68 ACSR 226, 230 (Robson J); *Sheahan Pty Ltd v Murdock & Gediz Pty Ltd* [2008] SADC 5 (Tilmouth DCJ); *Mann v Sangria Pty Ltd* (2001) 38 ACSR 307, [34-42] (Bryson J). See also *Woodgate v Scansoft Belgium BVBA* [2006] NSWDC 204, [12-14] (Rein SC DCJ) where Rein SC DCJ held that the former common law principles apply to s588FA. See also *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285, 292 (Burley SCM) (applying the pre-codified principles to s588FA): 'In my opinion, the nature and ambit of the running account defence under the former provisions is essentially the same as the defence provided for under the current provisions. The absence of any provision in s588FA(2) to alter or vary the situation which pertained under the former provisions indicates that the legislature did not intend to alter that provision. I therefore consider that what was said by Barwick CJ in *Rees v Bank of New South Wales*…applies with equal force to the current provisions of the Law' (followed by *Julzer Pty Ltd v Rodgers* [1999] NSWSC 199, [32] (Young J); *Cashflow Finance Pty Ltd v Westpac Banking Corp* [1999] NSWSC 671, [513] (Einstein J); *Woodgate v Scansoft Belgium BVBA* [2006] NSWDC 204, [17] (Rein SC DCJ)).

[113] For example, see *Rothmans Exports Pty Ltd v Mistmorn Pty Ltd* (1994) 15 ACSR 139 (Santow J).

The ensuing discussion considers how a preference is determined under s588FA, particularly in relation to running accounts, and whether the statute permits the application of the doctrine of ultimate effect and the peak indebtedness rule.

Interpretation of s588FA

The operation of s588FA(1)

A literal or plain interpretation of s588FA(1)[114] suggests that s588FA(1)(b) is satisfied if the impugned transaction results in the creditor[115] receiving more than the creditor would receive from the company, in respect of a debt, if the impugned transaction were set aside and the creditor were to prove for the debt in a winding up of the company.

However, given the judicial attitude towards s588FA holds that the nature of a preference under the section is much the same as under s122, the courts do not favour a literal interpretation of s588FA(1), instead they read it as consistent with the relevant approach under s122(1):

> The amended provision defines what a preference must involve, that is the creditor receiving more than what it would in a winding up of the company. In my opinion, the provision does not exhaustively define when such a transaction would constitute an unfair preference. In my opinion, that was left to be governed by well established existing principles [under s122]. This view is supported by the fact that the least controversial transaction not considered to be a preference under the ultimate effect principle would be caught by the literal words of s588FA. If, during the relevant period, a creditor, who did not conduct a running account with the debtor, agreed to supply on credit goods to the debtor of equal value to an existing debt owed by the debtor if the debtor paid off the existing debt, this creditor would receive more from an existing unsecured debt than it would if it were to prove for the debt in a winding up…In my view, the principle and rationale is clear. The existing creditors have not

[114] Section 588FA(1): 'a transaction is an unfair preference given by a company to a creditor of the company if, and only if: (a) the company and the creditor are parties to the transactions (even if someone else is also a party; and (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company'.

[115] The word 'creditor' indicates that there must be a debtor creditor relationship.

> been disadvantaged by the transaction. By the transaction, the payee has not obtained a preference, priority or advantage over other creditors…For these reasons, I find…the ultimate effect principle did survive the 1992 amendments and [does] apply under s588FA.[116]

The former approach under s122(1)[117] found that a transfer was a preference if it had the effect of giving the creditor a 'preference, priority or advantage over the other unsecured creditors'.[118] The principles relevant to this determination focused on whether there was, by reason of the transfer of property by the debtor, a reduction in an existing debt owed by the company to the creditor that *unfairly* preferred an existing creditor over the general body of creditors ('Preferential Treatment').[119] This approach, which determines a preference by assessing whether a creditor received an *unfair* reduction of an existing debt (Preferential Treatment), has been incorporated

[116] *Re Centaur Mining and Exploration Ltd* (2008) 221 FLR 217, 226 (Robson J).

[117] Section 122 Avoidance of preferences: '(1) A transfer of property by a person who is insolvent (the debtor) in favour of a creditor is void against the trustee in the debtor's bankruptcy if the transfer: (a) had the effect of giving the creditor a preference, priority or advantage over other creditors; and (b) was made in the period that relates to the debtor, as indicated in the following table' (i.e. For a creditor's petition – it was the period beginning six months before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor).

[118] For the purposes of s122, the section looks to the effect of the transaction and not to the intent, or state of mind, of the debtor: *S Richards & Co Ltd v Lloyd* (1933) 49 CLR 49, 62 (Starke J); *Richardson v The Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, 129 (Dixon, Williams and Fullagar JJ); *Airservices* (1996) 185 CLR 483, 501 (Dawson, Gaudron and McHugh JJ). Further, the effect of the payment on the other creditors of the debtor is determined objectively: *S Richards & Co Ltd v Lloyd* (1933) 49 CLR 49, 59-60, 62 and 64 (Rich, Dixon, Starke and Evatt JJ); *Matthews v Geraghty* (1986) 4 ACLC 727, 733; *Airservices* (1996) 185 CLR 483, 501 (Dawson, Gaudron and McHugh JJ)).

[119] For example, see *Richardson v The Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, 130 (Dixon, Williams and Fullagar JJ) '[i]t is therefore obvious that there was no preferential payment of an existing debt, no preference over other creditors brought about by the transaction'; *Bank of New South Wales v Rees* (1964) 111 CLR 210, 220 (Barwick CJ) '[b]ut at the time of the receipt of each deposit during the relevant period, the bank was able to retain at least some portion of it in permanent reduction of its account'; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 283 (Barwick CJ) '[i]n general to pay one of a number of creditors, and neither paying, securing nor arranging with the others, is to prefer the creditor who is paid. But it seems to me that it is one thing to pay a sum of money in the liquidation of an indebtedness, so as to end the relationship of debtor and creditor and, that it may be quite another to make a payment on account of a "running" indebtedness…'; *Re Discovery Books Pty Ltd* (1973) 20 FLR 470, 475 (Fox J) '[o]ne must ultimately come back to considering whether by reason of the payment, or dealing, there is less money available for the general body of creditors'; *Airservices* (1996) 185 CLR 483, 502 (Dawson, Gaudron and McHugh JJ) '[t]o have the effect of giving the creditor a preference, priority or advantage over other creditors, the payment must ultimately result in a decrease in the net value of the assets that are available to meet the competing demands of the other creditors' and, at 491, (Brennan CJ) '[t]o be a preference a payment must discharge, pro tanto, an existing debt'.

into and is an aspect of the doctrine of ultimate effect – as expressed by the majority in *Airservices*.[120]

Further, this Preferential Treatment aspect of the doctrine of ultimate effect is recognised[121] by the courts as applicable to the determination of a preference under s588FA(1),[122] notwithstanding the literal words of s588FA(1) which do not require that a creditor received Preferential Treatment.[123]

---

120 In *Airservices* (1996) 185 CLR 483, 502-502 and 504 (Dawson, Gaudron and McHugh JJ) in relation to running accounts, the doctrine of ultimate effect was based on two principal propositions: Firstly, where payments into an account are connected with the future supply of goods or services, that connection indicates a continuing business relationship, the effect of which can only be assessed by examining the ultimate effect of the relationship not the immediate effect of individual payments. Secondly, to have the effect of giving the creditor a preference, priority or advantage over other creditors, the payment must ultimately result in a decrease in the net value of the assets that are available to meet the competing demands of the other creditors (Preferential Treatment). Further, if the effect of the payments is to reduce the initial indebtedness, only the amount of the reduction will be regarded as a preferential payment.

121 It must be appreciated that the doctrine of ultimate effect, as articulated in *Airservices* (1996) 185 CLR 483, 507-508 (Dawson, Gaudron and McHugh JJ) was intended by the High Court to be applicable to circumstances where a continuing business relationship existed between the debtor and the creditor: 'The facts recorded in the "running account" indicate that Compass and Airservices had a continuing relationship which contemplated further debits and credits and that the individual payments were intended to continue and not determine that relationship. The various payments must therefore be regarded as so connected with the continuing provision of services, that it is the ultimate and not the immediate effect of each payment on the relationship of Compass and Airservices that is relevant'. However, conceptually, the operation of the doctrine of ultimate effect is complicated by the fact that one of its components is derived from the former principles relevant to determining whether a creditor received a '*preference, priority or advantage over the unsecured creditors*' (Preferential Treatment) under s122(1): see above (in-text discussion) at about 117-120. It therefore must be understood that where the cases recognise that the doctrine of ultimate effect applies to s588FA(1), it is recognition that the former approach under s122(1) to determine a preference is applicable to the statute. This is separate from the line of authority which recognises that the doctrine of ultimate effect, as the former running account defence, applies to s588FA(3).

122 See *V R Dye* (1999) 32 ACSR 27, [37] (Ormiston JA, with Tadgell JA and Winneke P agreeing) 'I would see the logical consequences of these authorities [referring to the authorities relevant to the effect and meaning of s588FA] as requiring that, for the purposes of characterising any impugned transactions and its effect for the purposes of the preference provisions, in each case the court should look at the "ultimate effect" of the "entire transaction" (*Airservices* at 505 and 509) before determining it has worked an unfair preference within the meaning of s588FA'. Ormiston JA went on, at [39-41], to determine the existence of a preference under s588FA(1) by applying the doctrine of ultimate effect; *Re Centaur Mining and Exploration Ltd* (2008) 221 FLR 217, 221-226 (Robson J) (following *V R Dye* (1999) 32 ACSR 27) Robson J held that the doctrine of ultimate effect applies to s588FA; *Sheahan Pty Ltd v Murdock & Gediz Pty Ltd* [2008] SADC 5, [12] (Tilmouth DCJ) (citing *Airservices* and *V R Dye*) 'An unfair preference arises when a transaction takes place between a company and a creditor resulting in the creditor receiving "more than the creditor would receive … if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company": s588FA(1)(b). As the ultimate effect of the transaction on the creditors is determined objectively, it must "result in a decrease in the net value of the assets that are available to meet the competing demands of the other creditors"'; *Mann v Sangria Pty Ltd* (2001) 38 ACSR 307, [34-42] (Bryson J) (followed the comments of Ormiston JA in *V R Dye* in relation to the operation of s588FA(1) containing the doctrine of ultimate effect and that it connoted a necessary element of 'unfairness'). See also *Re Lanpac International Pty Ltd; Jonas v Automation House Pty Ltd* [1998] VSC BC9803587 (Unreported, Chernov J, 30 July 1998), [40] '…I think, that the

However, there are significant differences in the language and operation of s588FA(1) which suggest an inconsistency with the Preferential Treatment approach taken under s122.[124] Firstly, a minor difference exists in the newly introduced definition of 'transaction' which is broader than and replaces the former concept of 'a transfer of property'.[125] However, given the definition of transaction includes 'a conveyance, transfer or other disposition',[126] it must be accepted without controversy that 'transaction' refers to a payment by the company and does not include supply by the creditor.[127]

Secondly, s122(1) required that the impugned transaction occurred at a time when the debtor was insolvent ('Insolvency Requirement') and that it was within the relation-back period ('Timing Requirement').[128]

Section 588FA(1) does not contain an equivalent Timing Requirement or express Insolvency Requirement contained in s122. The timing of the impugned transaction is

---

circumstances which constitute an "unfair preference" under s588FA(1) are the same as those which constituted a preference under s122 of the *Bankruptcy Act 1966* (Cth). In other words, if the payment of the two sums in question would not give the respondent a preference, priority or advantage over other creditors (for the purposes of s122 of the *Bankruptcy Act 1966* (Cth)) they are unlikely to be "unfair preferences" under s588FA(1)'. Further, at [44], Chernov J cited principles relevant to the doctrine of ultimate effect for the determination of a preference under s588FA(1); *Minister for Transport v Francis* (2000) 35 ACSR 584, [46] (Templeman J, with Kennedy JJ agreeing); *Sands & McDougall Wholesale Pty Ltd v Commissioner of Taxation* [1999] 1 VR 489, [75-76] (Kenny JA) his Honour applied the doctrine of ultimate effect for a determination under s588FA(1).

123 For example, cases which appear to interpret s588FA(1) more literally, without reference to the principles applicable under s122: see *Williams v Peters* (2009) 72 ACSR 365; *Hurricane Formwork Pty Ltd v Commissioner of Taxation* [2009] FCA 133; *Woodgate v Fawcett* (2008) 67 ACSR 611; *Tolcher v John Danks & Son Pty Ltd* [2007] NSWSC 1207; *Morris v Commissioner of Taxation* [2007] QSC 320; *Duncan v Commissioner of Taxation* (2006) 58 ACSR 555; *Walsh v Natra Pty Ltd* (2000) 1 VR 523; *Europacific Handling Systems Pty Ltd; Totterdell v Nicol-Burmeister* [1994] WASC BC9504123 (Unreported, Scott J, 1 September 1995).

124 See *Airservices* (1996) 185 CLR 483, 526 (Toohey J) '[referring to s588FA] It may be that the application of the new provision would lead to a different result in the present case. However the appeal must be determined according to the operation of s122(1) of the *Bankruptcy Act*'.

125 This is recognised as one of the differences between s122 and s588FA: *Re Emanuel (No 14) Pty Ltd; Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281, 283; *V R Dye* (1999) 32 ACSR 27, [26] (Ormiston JA, with Tadgell JA and Winneke P agreeing).

126 Section 9 of the *Corporations Act 2001* (Cth).

127 Section 588FE does not operate to void payment and supply, the reference to 'transaction' refers to a payment made by the company to a creditor.

128 The legislature built the requirements necessary to void a transaction into s122: s122(1) required that the transfer occurred at a time when the debtor was *insolvent* (Insolvency Requirement); and s122(1)(b) required that it was made, for a creditor's or debtor's petition, within the period *beginning six-months* before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor (Timing Requirement).

not relevant to its status as an 'unfair preference' under s588FA(1).[129] However, it is implicit in the language of s588FA(1)(b) that for an impugned transaction to constitute an unfair preference the debtor company must have been insolvent[130] when the transaction occurred. If the company is solvent at the time of the transaction the creditor is unable to receive more from the company than it would if it were to prove for the debt on a winding up of the company. This is because a company which is solvent is able to pay 100 cents per dollar owed to all of its creditors, and it is therefore able to pay all of its existing debts on a winding up. Therefore, under s588FA(1) in order for a creditor to potentially receive more from the company than on a winding up, the impugned transaction must have occurred at a time when the company was insolvent.[131] Thus, the former Insolvency Requirement is nonetheless observed.

Accordingly, s588FA(1), on its face, is broader than s122 as a transaction can still have the status of an 'unfair preference' without having to satisfy the former Timing Requirement. However, in relation to individual impugned transactions under s588FA(1), the former Insolvency and Timing Requirements of s122 are now contained in ss588FC (insolvency) and 588FE (timing), the combined effect of which is that only those unfair preferences that occurred within the six-month relation-back period and at a time when the company was insolvent are voidable. Consequently, the initial wide-reaching nature of s588FA(1) produces no change in the overall nature of an *individual impugned transaction* in comparison to s122, with regard to the Insolvency and Timing Requirements.

However, as explained later, this change in the nature of an 'unfair preference' under s588FA(1), as not requiring the former s122 Timing Requirement, has significant ramifications for the operation of s588FA(3), which produces a change to the assessment of the continuing business relationship in comparison to the former running account defence.

[129] However, for an impugned transaction to be 'voidable' under s588FE(2)(b) it must have been 'entered into, or an act was done for the purpose of giving effect to it during the six months ending on the relation-back date'. Therefore, it must have occurred within the relation-back period in order to be 'voidable', this is distinct from it being classified as an 'unfair preference'.

[130] If a company is solvent it is able to pay all its debts as and when they become due and payable.

[131] A company is generally considered insolvent when there exists an inability to pay all the company's debts as and when they become due and payable.

Thirdly, the language of s588FA(1) is couched in wider terms than s122(1). The words of s588FA(1) focus on the potential 'result' of an impugned transaction, that is the creditor receives 'more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company'. This definition looks only to the consequences, not to the reason for that 'result', and thus it provides no limitation on or indication of which transactions will be set aside and which will not.

In contrast, the language of s122 is more restrictive, providing an indication of the reason why impugned transactions will be set aside, by focusing on whether the transaction had the effect of giving the creditor a 'preference, priority or advantage' over the other creditors. These words connote some *unfair* advantage, priority or preference,[132] and the cases explain that a transaction comes within s122(1) if it had the effect of unfairly reducing an existing debt owed by the debtor company to the creditor (Preferential Treatment).[133]

It follows from the clear differences in the language and effect of the two provisions, that a transaction may result in a creditor receiving more from the company than if it were to prove for the debt on a winding up, which are circumstances constituting a preference under the wording in s588FA(1), yet the effect of the transaction may not have been to grant Preferential Treatment to that creditor over the other creditors, thus the same transaction may not constitute a preference under s122(1).[134]

[132] *V R Dye* (1999) 32 ACSR 27, [27] (Ormiston JA, with Tadgell JA and Winneke P agreeing).
[133] See above (in-text discussion) at about 117-123.
[134] Further, one significant issue, the subject of which is outside the parameters of this thesis, is the timing of the preference determination. Under s122(1) the dominant position is that the preference is assessed at the time the impugned transaction occurred: *Airservices* (1996) 185 CLR 483, 501; *G & M Aldridge Pty Ltd v Walsh* (2001) 203 CLR 662, [16], [26-28], [31-32]; *Burns v Stapleton* (1959) 102 CLR 97; *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, 129. Therefore, the preferential effect of the transaction on the other unsecured creditors is assessed at the time the transaction was entered into. For example, cases which read the approach under s122 into s588FA(1)(b), with the issue focusing on whether there has been some kind of *Preferential Treatment*, the preference is assessed by examining the 'ultimate effect' of the impugned transaction: see *Re Centaur Mining and Exploration Ltd* (2008) 221 FLR 217, 221; *Sheahan Pty Ltd v Murdock & Gediz Pty Ltd* [2008] SADC 5, [12]; *Mann v Sangria Pty Ltd* (2001) 38 ACSR 307, [34-42]; *Minister for Transport v Francis* (2000) 35 ACSR 584, [46]; *Sands & McDougall Wholesale Pty Ltd v Commissioner of Taxation* [1999] 1 VR 489, [75-76]; *V R Dye* (1999) 32 ACSR 27, [37]; *Re Lanpac International Pty Ltd; Jonas v Automation House Pty Ltd* [1998] VSC BC9803587 (Unreported, Chernov J, 30 July 1998). In relation to these cases, it is without controversy to conclude that a finding of Preferential Treatment (i.e. an unfair reduction in an existing debt) amounts to the creditor receiving 'more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the

To reconcile the variation in the language and effect of s122 and s588FA(1), the judicial attitude towards s588FA(1) is that the approach to s122 equivalently applies.[135] Appealing as this approach may be, it is patently inconsistent with the unambiguous language of s588FA(1)(b). To resolve this conflict, either the judicial

---

debt in a winding up of the company': *Sands & McDougall Wholesale Pty Ltd v Commissioner of Taxation* [1999] 1 VR 489. Thus, s588FA(1) is sufficiently satisfied. However, there is a body of authority which determines the unfair preference claim under s588FA(1) by applying a more literal approach to the language of the subsection, without assistance from the principles applicable to a determination under s122(1)(b): *Williams v Peters* (2009) 72 ACSR 365; *Hurricane Formwork Pty Ltd v Commissioner of Taxation* [2009] FCA 133; *Woodgate v Fawcett* (2008) 67 ACSR 611; *Tolcher v John Danks & Son Pty Ltd* [2007] NSWSC 1207; *Morris v Commissioner of Taxation* [2007] QSC 320; *Duncan v Commissioner of Taxation* (2006) 58 ACSR 555; *Walsh v Natra Pty Ltd* (2000) 1 VR 523; and, *Europacific Handling Systems Pty Ltd; Totterdell v Nicol-Burmeister* [1994] WASC BC9504123 (Unreported, Scott J, 1 September 1995). Here the preference determination seeks to establish whether the creditor received 'more than the creditor would receive…if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company'. Therefore, there is an issue as to the timing of the 'winding up'. Should the actual winding up (if one occurred) or a hypothetical winding up, which is estimated at the time of the impugned transaction, be used to determine the preference? In this context, there is a divergence of authority. Cases which assert that the actual winding up is the appropriate time to assess the impugned transaction: see *Walsh v Natra Pty Ltd* (2000) 1 VR 523 (followed by *Williams v Peters* (2009) 72 ACSR 365). Alternatively, for an example of a case which concludes that the transaction must be examined at the date of the impugned transaction: see *Europacific Handling Systems Pty Ltd; Totterdell v Nicol-Burmeister* [1994] WASC BC9504123 (Unreported, Scott J), 1 September 1995. As previously stated, the general approach to s588FA(1) is that the approach under s122 is applicable to the section, and therefore this timing issue is not magnified. However, if the literal words of s588FA(1)(b) are applied, then because s588FA(3)(c) applies s588FA(1) to all the transactions which form part of the continuing business relationship, the timing of the winding up will become relevant to the preference determination under s588FA(3). For completeness, because this thesis recommends (as discussed later) that the s122 Preferential Treatment approach be maintained for the interpretation of s588FA(1)(b), this timing issue is not a major factor with respect to the determination of a preference under s588FA(3)(c) because the focus is on whether by reason of the transaction there has been Preferential Treatment. However, it is appropriate that I make some brief observations about this issue in the event that the literal approach to s588FA(1) is preferred. If a creditor receives 100 cents per dollar owed at a time when the company was insolvent then it is irrelevant as to whether the actual winding up or the hypothetical winding up, which is estimated at the time of the transaction, is used to determine the preference. Because it will always amount to a preference, the fact that the company was insolvent and it provided 100 cents per dollar owed for an existing debt indicates that that creditor received more than it would have on a winding up. The point at which the 'winding up' is assessed becomes an issue if the company is insolvent and it provides less than 100 cents per dollar owed in relation to an existing debt. In that case if the actual winding up is used to assess whether there was a preference it is more likely that this will result in a finding that there was an unfair preference as opposed to assessing the transaction with reference to a hypothetical winding up at the time of the transaction. This is because at the time of the actual winding up, the company will generally be in a worsened financial state than at the time of the impugned transaction, from which the hypothetical winding up is assessed. Furthermore, if the actual winding up is the point at which the impugned transaction is assessed it may lead to some absurd results. For instance, any payment of an existing debt by the company to the creditor which occurs before the eventual winding up of that company, if that transaction is impugned and then assessed using the actual winding up, will generally result in a finding that the creditor received 'more than the creditor would receive…if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company'. Therefore it is recommended that those cases, which assert that the actual winding up may be utilised for the preference determination, be constrained to their specific facts and not applied generally, particularly: *Walsh v Natra Pty Ltd* (2000) 1 VR 523 and *Williams v Peters* (2009) 72 ACSR 365.

[135] See above (in-text discussion) at about 116-120.

approach to the section needs to be modified to reflect the language of s588FA(1)(b), or the section requires a redraft to reflect the s122 approach.

In interpreting s588FA(1), there are meritorious reasons for favouring the s122 Preferential Treatment approach over the literal meaning of s588FA(1)(b).[136] It is consistent with the intention of the legislature as expressed in the Explanatory Memorandum:

> Section 122 refers at present to a transaction which has the effect of giving to the creditor a 'preference, priority or advantage' over other creditors of the company, whereas the new provision specifies quite clearly what that expression means in the context of a corporate winding up.[137]

Therefore, the object sought to be achieved by Parliament in enacting s588FA was not to amend the substantive nature of a preference under s122 but to incorporate into s588FA(1) a definition of the circumstances which constituted a preference under the former provision.

Further, in so far as s588FA(1) relates to s588FA(3),[138] the application of the s122 Preferential Treatment approach to s588FA(1) is consistent with the intention of the legislature to embody the common law running account principles in s588FA(3). As the Explanatory Memorandum states that 'this provision is aimed at embodying in legislation the principles reflected in the cases of *Queensland Bacon Pty Ltd v Rees* (1967) 115 CLR 266 and *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547', both of which assessed whether the creditor had received Preferential Treatment in relation to assessing the impugned running account.[139]

The s122 Preferential Treatment approach aids in the fulfilment of the well established principles of insolvency law. One of the fundamental precepts of corporate insolvency law is that the available assets of the company are to be shared

[136] Consider the timing issues mentioned above (footnote reference) at 134. If the s122 Preferential Treatment approach is read into s588FA(1) then the significant controversy surrounding the timing of the assessment of the impugned payment is ameliorated.
[137] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1040].
[138] Section 588FA(3)(c) states: 'subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction'.
[139] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1042].

rateably among its creditors.[140] Moreover, the practical effect of this principle has meant that:

> …it has been accepted for many years that, as long as the company does not pay out existing creditors without obtaining an effective corresponding advantage, then it should be allowed to acquire goods and services…The rationale behind the "exception" (more precisely, the non-inclusion within the rule) is that the company gains goods and services to an equivalent value (in broad terms) to that which it pays out to obtain them, so that the existing creditors cannot in theory be prejudiced by the payment…The object sought to be obtained by the legislation over the years, and still by the present legislation [s588FA], has been to prevent existing creditors from being disadvantaged.[141]

Thus, the concept of *unfairness*, which the words of s122 connote, and the principles relevant to it (Preferential Treatment),[142] act as an effective measure against which the courts can assess a transaction to ensure that a creditor or creditors do not obtain an advantage over the general body of creditors. Alternatively, on the contrary, the literal words of s588FA(1)(b) do not directly focus on the effect that the impugned transaction has on the general body of creditors, instead attention is directed to the consequences of the transaction in relation to what the creditor received. Therefore the s122 Preferential Treatment approach is superior to an approach which applies the literal words of s588FA(1)(b).[143]

Finally, there is a strong argument that the s122 approach is what the parties to a litigation would consider fair. It would seem overtly unjust to apply the literal words of s588FA(1)(b) and declare an impugned transaction as an unfair preference when

---

140 *Airservices* (1996) 185 CLR 483, 516 (Toohey J) (citing James O'Donovan, 'Undue Preferences: Some Innocents "Scape Not The Thunderbolt"' *UWALR* 22 (1992) 322).

141 *V R Dye* (1999) 32 ACSR 27, [34-35] (Ormiston JA, with Tadgell JA and Winneke P agreeing) (citing *Robertson v Grigg* (1932) 47 CLR 257, 271 (Dixon J, with Rich and McTiernan JJ agreeing)) 'The relationship of debtor and creditor was for long the very foundation of the provisions of the bankruptcy law affecting preference and, although exceptions have been introduced, the old rule otherwise remains and nothing can amount to a preference unless the person preferred is a creditor'.

142 The approach focuses on whether the creditor has received from the company an unfair reduction of an existing debt (Preferential Treatment).

143 See Andrew Keay, 'An Analysis of Unfair Preferences under the New Avoidance Regime' (1996) 24 *ABLR* 39, 41: 'It is trite law that the essence of a preference is that a creditor has received more from a company before it goes into liquidation than it would have otherwise received in a liquidation. The true test of a preference was indicated in *Robertson v Grigg* (1932) 47 CLR 257, 271 where it was said to be: does the transaction confer a priority or advantage on a creditor in relation to a past indebtedness of the company and is the advantage given at the expense of other creditors?'.

the effect of the transaction was not to reduce the assets of the company available to meet the competing demands of the general body of creditors. As explained by the majority in *Airservices*:

> If the purpose of a payment is to secure an asset or assets of equal of greater value, the payee [creditor] receives no advantage over the other creditors. The other creditors are no worse off and, where the value of the assets have increased, they are actually better off.[144]

In light of the plain inconsistency between the language and effect of s122 and s588FA(1), and given the exemplary reasons for applying the s122 approach to s588FA(1), it is submitted that s588FA(1) be redrafted so that it conforms with the former s122 approach of requiring Preferential Treatment to be given to the creditor in order for there to be a preference.

The operation of s588FA(3)(a)-(c)

Because the predominant view holds that the former s122 principles similarly apply to s588FA, the judicial approach to s588FA(3) is that, for the most part,[145] the former common law running account defence applies to the statute.[146] However, the operation of the statute is inconsistent with this former common law approach.

[144] *Airservices* (1996) 185 CLR 483, 502 (Dawson, Gaudron and McHugh JJ).

[145] One notably difference between s588FA(3) and s122 is that the liquidator bears the onus of proof: see above (in-text discussion) at about 105. Further, Under s122 the running account principle could not apply to transactions which occurred between the date of filing of an application for winding up and the making of a winding-up order: see *Re Rampton Holdings Pty Ltd* (1990) 3 ACSR 594; *Sheahan v Workers Rehabilitation & Compensation Corp* (1991) 6 ACSR 11; *Starkey v APA Transport Pty Ltd* (1993) 12 ACSR 15. However, under s588FA(3) transactions occurring during this period may be subject to the operation of s588FA because of the effect of s588FA(1)(b): Legal Online, *McPhersons Law of Company Liquidation*, (at 23 September 2009) Assets available for division and distribution, 'Continuing business relationship or "running account"', [11.800].

[146] For a summary of this approach: see Legal Online, *McPhersons Law of Company Liquidation*, (at 23 September 2009) Assets available for division and distribution, 'Continuing business relationship or "running account"', [11.800] 'At common law, if a creditor could establish the fact that the transaction sought to be impugned was not an isolated transaction, but part of a series of transactions that involved the creditor dealing with the debtor pursuant to a running account in which the amount owing fluctuated as monies were paid and further good and services provided, then any payments will not be regarded as preferential save to the extent that the net effect of the series of transactions, taken as a whole, constituted a preference (citing *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110; *Rees v Bank of New South Wales* (1964) 111 CLR 210; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; *Re Weiss* [1970] ALR 654; *Petagna Nominees Pty Ltd v AE Ledger* (1989) 1 ACSR 547; *Spedley Securities Ltd v Western United Ltd* (1992) 7 ACSR 271; *CSR Ltd v Starkey* (1994) 13 ACSR 321; *Airservices* (1996) 185 CLR 483; *Sutherland v Lofthouse* (2007) 64 ACSR 655). Thus the creditor could have the benefit of only being liable to repay the net amount (if any) by which it was preferred as a result of the running account transactions as a whole

Section 588FA(3) defines the circumstances which exempt an impugned transaction as an unfair preference under s588FA(1). Therefore, the reference to 'transaction' in s588FA(3)(a) must be a reference to a transaction that, under s588FA(1), is an unfair preference. But this transaction, to be classified as an unfair preference under s588FA(1), does not have to conform to the Timing Requirement in s588FE(2).[147]

Accordingly, there are three important aspects to be cognisant of when conceptualising what constitutes an unfair preference under s588FA(1). Firstly, a 'transaction' is a payment by the company to the creditor. It does not encompass the goods or services received in exchange for the payment.[148] Secondly, it must be a transaction that results in the creditor receiving more from the company than the creditor would receive if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company. Thus, implicit in the operation of s588FA(1) is the requirement that the company was insolvent at the time of the impugned transaction.[149] Thirdly, the relevant test which is predominantly read into s588FA(1) is a utilisation of the former approach under s122 and therefore the issue turns on whether the transaction had the effect of giving the creditor a 'preference, priority or advantage over the other creditors' (Preferential Treatment).[150]

Section 588FA(3)(a) speaks of the circumstances where the 'transaction' 'is, for commercial purposes, an integral part of a continuing business relationship between a company and a creditor of the company', an example of which is a running account.[151]

---

rather than each amount it might have been paid in each transaction in the series, and will only have to pay the amount by which the net indebtedness to it was reduced by payments over the preference period'.

[147] See above (in-text discussion) at about 128-129.

[148] See above (in-text discussion) at about 125-127.

[149] See above (in-text-discussion) at about 129-131.

[150] See above (in-text discussion) at about 116-123.

[151] With respect to the definition of a 'running account' the relevant passages from the relevant authorities are as follows: *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, 133 (Dixon, Williams and Fullagar JJ) '[a] running account of any debtor who has reached insolvency must present difficulties under s. 95. A debtor who pays something off his grocer 's account in order to induce the shopkeeper to give him further supplies of groceries can hardly be held, as it seems to us, to give the grocer a preference, if that was the clear basis of the payment. If the grocer credited the money as a payment for the future deliveries instead of the past deliveries of groceries he would in the end be in exactly the same position and yet he could not be attacked as having received a preference. But without stating any principle with an application beyond the facts of this case, it is enough to decide that the payments into the office account possessed in point of

Therefore, the notion of a continuing business relationship is wider or broader than the concept of a running account.[152] Although there is no such case recorded at this point in time, it must be appreciated that under s588FA(3)(a) there may be transactions which sufficiently constitute a 'continuing business relationship' but do not fulfil the definition of a running account.

Section 588FA(3)(b) further adds to s588FA(3)(a), that 'in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship'. Consequently, there are two significant aspects to this subsection.

Firstly, it explicitly recognises that 'in the course of the relationship',[153] to which s588FA(3) is directed, the company's net indebtedness to the creditor is increased and reduced. This is important because it shows that the statute contemplates or acknowledges that, after it commences, the continuing business relationship may

---

fact a business purpose common to both parties which so connected them with the subsequent debits to the account as to make it impossible to pause at any payment into the account and treat it as having produced an immediate effect to be considered independently of what followed and so to be adjudged a preference'; *Queensland Bacon Pty Ltd v Rees* (1966) 111 CLR 210, 283 (Barwick CJ) '[i]n general, to pay one of a number of creditors, and neither paying, securing nor arranging with the others, is to prefer the creditor who is paid. But it seems to me that it is one thing to pay a sum of money in the liquidation of an indebtedness, so as to end the relationship of debtor and creditor and, that it may be quite another to make a payment on account of a "running" indebtedness, the payment not in anywise intended or understood to end the relationship of the debtor and creditor, but rather to ensure its continuance'; *Airservices* (1996) 185 CLR 483, 504-505 (Dawson, Gaudron and McHugh JJ) '[s]ince the decision of this Court in *Richardson v Commercial Banking Co of Sydney Ltd*, the term "running account" has achieved almost talismanic significance in determining when the ultimate, rather than the immediate and isolated, effect of a payment is to be examined for the purpose of a determination under s122 of the Bankruptcy Act. However, the significance of a running account lies in the inferences that can be drawn from the facts that answer the description of a "running account" rather than the label itself. A running account between traders is merely another name for an active account running from day to day, as opposed to an account where further debits are not contemplated. The essential feature of a running account is that it predicates a continuing relationship of debtor and creditor with an expectation that further debits and credits will be recorded. Ordinarily, a payment, although often matching an earlier debit, is credited against the balance owing in the account. Thus, a running account is contrasted with an account where the expectation is that the next entry will be a credit entry that will close the account by recording the payment of the debt or by transferring the debt to the Bad or Doubtful Debt A/c. If the record of the dealings of the parties fits the description of a "running account", that record will usually provide a solid ground for concluding that they conducted their dealings on the basis that they had a continuing business relationship and that goods and services would be provided and paid for on the credit terms ordinarily applicable in the creditor 's business. When that is so, a court will usually be able to conclude that the parties mutually assumed that from a business point of view each particular payment was connected with the subsequent provision of goods or services in that account'.

[152] Also, the 'continuing business relationship' may include the involvement of third parties: s588FA(3)(a).

[153] That is, the continuing business relationship.

involve a peak point of indebtedness. The words 'in the course' denote that the point to which the language is referring is after the commencement of the 'relationship'. Therefore, the peak point of indebtedness, which is contemplated by the subsection, need not occur at the commencement of the continuing business relationship.

Secondly, the increase and reduction in indebtedness is because of 'the result of a series of transactions forming part of the relationship'. Thus, the words 'forming part' make clear that the relationship is comprised of 'transactions', which must be payments made by the company to the creditor, and something else. That 'something else' is the services or goods received by the company from the creditor.

The effect of s588FA(3)(c) and s588FA(3)(d) are predominantly influential in deciding how a preference is determined under the statute. That determination reveals that the peak indebtedness rule and the operation of the former running account defence are inconsistent with the operation of s588FA(3).

The language of s588FA(3)(c) is directed towards 'all the transactions forming part of the relationship' – that is, all of the payments which constitute an unfair preference under s588FA(1)[154] and satisfy the requirements of s588FA(3)(a) and s588FA(3)(b) ('Assessable Transactions'), and thus form part of the continuing business relationship.[155] Obverse to this, under the running account defence the running account could only be comprised of those transactions which satisfied the s122 Insolvency and Timing Requirements.[156] But the language of s588FA(3) imposes no

---

[154] There are 4 main requirements for a transaction to come under s588FA(1), one of which is that the company was insolvent at the time of the transaction: see above (in-text discussion) at about 147-150.

[155] The continuing business relationship is comprised of Assessable Transactions: only those transactions which constitute an unfair preference under s588FA(1) and satisfy s588FA(3)(a)-(b). It is not a reference to the services or goods received by the company from the creditor which also form part of the relationship.

[156] In accordance with s122 only those transactions which satisfied the Timing and Insolvency Requirements (occurred within the relation-back period and were made by a person who was insolvent) could comprise the running account: see above (in-text discussion) at about 127-128. Transactions which did not fulfil these requirements were unable to form part of the running account: see *Panasonic Australia Pty Ltd v Wily* (1997) 23 ACSR 266, 267-269 (Sheller JA, with Mason P and Powell JA agreeing) where the running account was assessed from the beginning of the relation-back period but it actually began prior to this point; see also, Chapter I above (in-text discussion) at about 41-42 .Further, because the approach under the former running account is currently applied to s588FA(3), this limitation is applied to s588FA(3): *Sutherland v Lofthouse* (2007) 64 ACSR 655; *Rennie v Printbase Pty Ltd* [2002] NSWSC 78; *Whitton v Konemann Australia Pty Ltd* (2002) 43 ACSR 436; and *Sutherland v Eurolinx Pty Ltd* (2001) 37 ACSR 477.

limitation with respect to timing. Consequently, all those payments (Assessable Transactions) which form part of the continuing business relationship,[157] regardless of whether they fall within the relation-back period, are included in the 'single transaction' to which s588FA(1) is applied.

The former Insolvency and Timing requirements,[158] now contained in ss588FC[159] and 588FE(2)(a)-(b),[160] do not prevent those transactions which fall outside of the relation-back period from being Assessable Transactions considered in a court's assessment of the single transaction – as they did under the running account defence. Firstly, the Insolvency Requirement contained in s588FC is satisfied because the single transaction is only comprised of transactions which occurred at a time when the company was insolvent. This is because Assessable Transactions,[161] which make up the single transaction, are unfair preferences under s588FA(1), and to be an unfair preference under s588FA(1) the transaction must have occurred at a time when the company was insolvent.[162]

Secondly, the Timing Requirement contained in s588FE[163] is satisfied because the final Assessable Transaction forming part of the single transaction is always entered into during the six-month relation-back period,[164] satisfying s588FE(2)(b). That final transaction would also be an insolvent transaction under s588FC as it forms part of

[157] Those payments which constitute an unfair preference under s588FA(1) and form part of a continuing business relationship within the meaning of s588FAs(3)(a)-(b).
[158] Under s122(1) it was necessary for the transfer of property to be by a person who was insolvent, and it had to be made within the six-month relation-back period (Timing and Insolvency Requirements).
[159] Section 588FC: 'A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and: (a) any of the following happens at a time when the company is insolvent: (i) the transaction is entered into; or (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction'.
[160] Section 588FE(2): The transaction is voidable if: (a) it is an insolvent transaction of the company; and (b) it was entered into, or an act was done for the purpose of giving effect to it: (i) during the 6 months ending on the relation-back day; or (ii) after that day but on or before the day when the winding up began'.
[161] Assessable Transactions, which form the single transaction, are made up of those transactions which constitute an unfair preference under s588FA(1) (thus they occurred at a time when the company was insolvent, see above (in-text discussion) at 129-131), and satisfy s588FA(3)(a)-(b): see above (in-text discussion) at about 154-155 'Assessable Transactions'.
[162] See above (in-text discussion) at about 129-131.
[163] Section 588FE(2)(b): 'The transaction is voidable if it was entered into, or an act was done for the purpose of giving effect to it during the six months ending on the relation-back day'.
[164] Otherwise it would not have been originally impugned by the liquidator under s588FA(1), and thus would not be the subject of s588FA(3).

the single transaction.[165] Therefore, s588FE(2)(a)-(b) is satisfied and the court can make an order in relation to the preferential effect of the entire continuing business relationship, with respect to that final transaction.[166]

Furthermore, s588FA(3)(c) applies s588FA(1) to *all* of the transactions (Assessable Transactions) as if they together constituted a single transaction. Therefore, the relevant approach under s588FA(1) is applied to the 'single transaction'. As previously discussed, the weight of judicial authority supports the application of the doctrine of ultimate effect to s588FA(1)[167] and it has been explicitly accepted as applicable to the operation of s588FA(3).[168] That being the case, it appears that if the 'single transaction' results in an unfair reduction in the company's existing indebtedness to the creditor (Preferential Treatment) then that transaction would constitute an unfair preference. The issue then becomes how is the single transaction determined?

The process a court must undergo to establish the single transaction must involve a comparison of the net indebtedness at one point in the continuing business

---

[165] See above (footnote reference) at 161.

[166] Because that final transaction, which forms part of the single transaction, is voidable in accordance with s588FE(2) (it is an insolvent transaction and it occurred within the six-month relation-back period), the court may make an appropriate order under s588FF(1)(a)-(j) in relation to that transaction. In particular, the court may make an order under s588FF(1)(c) 'requiring a person to pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction'. Hence, if there is a preference this order may include the amount that was preferred. Furthermore, this is not a new concept and under the operation of the former running account defence it was also the last payments which formed part of the running account that were impugned in the event that there was Preferential Treatment: see Legal Online, *McPhersons Law of Company Liquidation*, (at 23 September 2009) Assets available for division and distribution, 'Continuing business relationship or "running account"' [11.800] '…where the effect of the payments made during the relevant period was to reduce the overall level of indebtedness, the last payment or payments will almost always be treated as a preference, because it will in practice be hard to show that that payment or those payments were made and received in the ordinary course of business and for the purpose of securing future goods and services (citing *Sutherland v Lofthouse* (2007) 64 ACSR 655 and *Airservices* (1996) 185 CLR 483)'.

[167] See above (in-text discussion) at about 117-123. However, there is also the line of authority which gives s588FA(1) a more literal reading, yet this approach is not reflective of the attitude of the vast majority of cases: see above (footnote reference) at 123.

[168] For example, see *Jetaway Logistics Pty Ltd v Deputy Commissioner of Taxation* (2008) 68 ACSR 226, 230 (Robson J); *Sims v ABC Tissue Products Pty Ltd* [2008] NSWSC 192, [10-13] (Hammerschlag J); *Woodgate v Scansoft Belgium BVBA* [2006] NSWDC 204, [21-22] (Rein SC DCJ); *Sutherland v Eurolinx Pty Ltd* (2001) 37 ACSR 477, 503 (Santow J) (followed by *All Type Timber Pty Ltd v BGC Fibre Cement* [2007] NSWDC 90, [140] (Johnstone DCJ); *Tectron Industries Pty Ltd v Taylor* [2006] SASC 175, [39] (White J); *Rennie v Printbase Pty Ltd* [2002] NSWSC 78, [33] (Berecry AM); *Whitton v Konemann Australia Pty Ltd* (2002) 43 ACSR 436 (Austin J), [54-55])); *V R Dye* (1999) 32 ACSR 27, [37] (Ormiston JA, with Tadgell JA and Winneke P agreeing); *Sutherland v Liquor Administration Board* (1997) 24 ACSR 176, 181 (Young J).

relationship with the net indebtedness later in the relationship.[169] That process must, therefore, be a comparison of the net level of indebtedness at the beginning of the 'single transaction' with that at the end – the opening balance of the continuing business relationship compared with the closing balance. This is because the language of s588FA(3)(c) irrefutably conveys that the 'single transaction' must be made up of 'all the transactions forming part of the relationship' (Assessable Transactions).

The peak indebtedness rule is clearly inconsistent with this approach because it operates to exclude Assessable Transactions from forming part of the single transaction. As discussed above, the statute recognises that the relationship may include a peak point of indebtedness *after the commencement of the relationship*.[170] It follows that if the peak point of indebtedness is used as the opening balance of the single transaction, Assessable Transactions[171] that occur before it, which also must comprise the single transaction pursuant to s588FA(3)(c), will not be included in the single transaction. Those Assessable Transaction will not have s588FA(1) applied to them as s588FA(3)(c) mandates.[172]

Therefore, the peak indebtedness rule cannot legitimately survive under the statute, as evident from the terms of s588FA(3), and unless the peak point of indebtedness occurs at the commencement of the single transaction, the statute does not permit the liquidator to choose it as the opening balance of the account. Accordingly, it is submitted that the peak indebtedness rule and the authority on which it is founded, *Rees*, is patently inconsistent with the operation of s588FA(3)(c).

---

[169] *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285, 291 (Burley SCM): 'It seems to me that because the section [s588FA(3)] refers to a running account as an example of a transaction forming part of the continuing business relationship, and because s588FA(2)(d) [s588FA(3)(d)] requires a determination as to whether or not the single transaction is to be taken as an unfair preference, the process which must be undertaken by the court in establishing a single transaction involves a comparison of the net indebtedness at one point in the continuing business relationship with the net indebtedness later in the relationship, namely, when the relationship is either determined or an order is made for the winding up of the company'.

[170] Section 588FA(3)(b) 'in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship: See above (in-text discussion) at about 152-154

[171] Assessable Transactions, which form the single transaction, are made up of those transactions which constitute an unfair preference under s588FA(1) and satisfy s588FA(3)(a)-(b): see above (in-text discussion) at about 154-155.

[172] This is the outcome if the peak point of indebtedness is used as the opening balance of the 'single transaction'. It would result in payments that make up the continuing business relationship, which are required by virtue of s588FA(3)(c) to have s588FA(1) applied to them, omitted from the single transaction because they occurred prior to the peak point of indebtedness (opening balance).

The cases which have applied or are supportive of the peak indebtedness rule,[173] following the enactment of s588FA(3), do not read its application into the language or operation of s588FA(3) instead they justify its use by applying *Rees* as part of the pre-codified principles relevant to s588FA.[174] Notwithstanding the operation of the statute, it is also submitted that the use of the peak indebtedness rule, only on the basis of applying the pre-codified principles relevant to continuing business relationships to s588FA(3), is rendered nugatory by the High Court in *Airservices*.[175] Further, the cases which have applied the peak indebtedness rule on this basis, post-

---

[173] See *Sutherland v Lofthouse* (2007) 64 ACSR 655, [50] (Nettle JA, with Neave and Redlich JJA agreeing); *All Type Timber Pty Ltd v BGC Fibre Cement* [2007] NSWDC 90, [31-32] (Johnstone DCJ); *Tectron Industries Pty Ltd v Taylor* [2006] SASA 175, [39] (White J); *Rennie v Printbase Pty Ltd* [2002] NSWSC 78, [40-41] (Berecry AM); *Whitton v Konemann Australia Pty Ltd* (2002) 43 ACSR 436, [59-61] (Austin J); *Sutherland v Eurolinx Pty Ltd* (2001) 37 ACSR 477, 502-503 (Santow J); *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285, 290-292 (Burley SCM); *Rothmans Exports Pty Ltd v Mistmorn Pty Ltd* (1994) 15 ACSR 139, 150 (Santow J).

[174] See *Sutherland v Eurolinx Pty Ltd* (2001) 37 ACSR 477, 502-503 (Santow J) 's588FA(3) codifies, in part, the law on preferences in three High Court decisions: *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110; *Rees v Bank of New South Wales* (1964) 111 CLR 210; and *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266'. However, the Explanatory Memorandum did not seek to codify *Rees*. Further, Santow J went on to adopt the comments of Young J in *Sutherland v Liquor Administration Board* (1997) 24 ACSR 176 '[with regards to s588FA(3)] one does not look at transactions in isolation but looks at the overall effect at the beginning and the end of the relevant period' and, at [140], accepted Kitto J's approach in *Rees* (1966) 115 CLR 266, 221-222: 'Whether there was any preference thereby brought about depended not upon the immediate effect but on the ultimate effect on the balance'. These comments tend to reflect the doctrine of ultimate effect, yet Santow J, at [140], applied the peak indebtedness rule and stated that 'I would measure the preference…by reference to the highest amount owing during the relation-back period, not necessarily "at the beginning", compared to the amount owing on the last day, following *Rees*' (followed by *Tectron Industries Pty Ltd v Taylor* [2006] SASA 175, [39] (White J); *Rennie v Printbase Pty Ltd* [2002] NSWSC 78, [33] (Berecry AM); *All Type Timber Pty Ltd v BGC Fibre Cement* [2007] NSWDC 90, [31-32] (Johnstone DCJ)). See also *Sutherland v Lofthouse* (2007) 64 ACSR 655, [50] (Nettle JA, with Neave and Redlich JJA agreeing); *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285, 290-292 (Burley SCM) (a pre-*Airservices* case which is an example of a decision which attempts to read in the pre-codified approach into the terms of s588FA); *Rothmans Exports Pty Ltd v Mistmorn Pty Ltd* (1994) 15 ACSR 139, 150 (Santow J).

[175] On the basis of the pre-codified law, *Airservices* has the effect of reading down the decision of *Rees v Bank of New South Wales* (1964) 111 CLR 210 as a case which applied the doctrine of ultimate effect to circumstances where the parties made an express agreement to appropriate future payments to reduce existing indebtedness. Thus, the majority stated that 'the preference will be no more than the amount that constitutes the difference between the indebtedness at the commencement of the agreement and the indebtedness at the end of the six-month period'. Therefore, if the peak indebtedness rule is to be applied based on *Rees v Bank of New South Wales* (1964) 111 CLR 210, that application will only be consistent with *Airservices* and the doctrine of ultimate effect if the peak point of indebtedness occurs at the same time as the commencement of an express agreement between the parties to appropriate payments to reduce existing indebtedness: See above (in-text discussion) Chapter I at about 55-60.

codification, do not address the High Court's treatment of *Rees* in *Airservices*,[176] or the rule's incompatibility with the doctrine of ultimate effect.[177]

It appears that the High Court's reading down of *Rees* and its implicit acceptance of the use of the peak indebtedness rule in the circumstances defined in *Airservices* is not permitted under s588FA(3).[178] In *Airservices* the High Court explained that the circumstances of *Rees* were such that the preference would be no more than 'the amount that constitutes the difference between the indebtedness at the commencement of the agreement[179] and the indebtedness at the end of the six-month period'.[180] Thus, transactions which formed part of the continuing business relationship, which occurred prior to the commencement of 'the agreement', were in fact excluded from the unfair preference determination. If this occurred under the statute it would be in clear conflict with s588FA(3)(c) as the single transaction must comprise 'all the transactions' (Assessable Transactions) which form part of the continuing business relationship. Thus, there can be no exclusion of Assessable Transactions from the single transaction.

---

176 *Sutherland v Lofthouse* (2007) 64 ACSR 655 (Nettle JA, with Neave and Redlich JJA agreeing) is the only case which recognises the effect of *Airservices* on *Rees*. But the use of the peak indebtedness rule in this case is still inconsistent with the High Court's treatment of *Rees v Bank of New South Wales* in *Airservices*. Nettle JA, at [47], cited the comments made by the majority in *Airservices* which expressly read down the use of the peak indebtedness rule in that case: see above (in-text discussion) Chapter I at about 56. However, his Honour, at [50], then went on to apply the peak indebtedness rule and stated that 'where the balance of a continuing account fluctuates over the relation-back period, a liquidator faced with the prospect of having to treat the account as a notional single transaction is entitled to pick the peak point of indebtedness during the relation-back period as the beginning of the arrangement, in order to maximise recovery' (citing *Rees v Bank of New South Wales*). On the facts of this case, the arrangement to apportion payments made by the company to reduce existing debt occurred in July, but the liquidator was allowed to treat a date in August as the beginning of the arrangement. If *Airservices* was followed the liquidator would have been required to treat the relevant date in July as the beginning of the arrangement. Hence, the decision turned on the liquidator possessing the ability to choose the peak point of indebtedness (August) as the beginning of the arrangement following the authority of *Rees v Bank of New South Wales*, unaffected by the *Airservices* decision.

177 In the following cases, authority supporting the doctrine of ultimate effect was cited and approved, and then authority justifying the peak indebtedness rule was applied without explanation: *Sutherland v Lofthouse* (2007) 64 ACSR 655, [39-50] (Nettle JA, with Neave and Redlich JJA agreeing); *Sutherland v Eurolinx Pty Ltd* (2001) 37 ACSR 477, 503 (Santow J) (followed by *All Type Timber Pty Ltd v BGC Fibre Cement* [2007] NSWDC 90, [32-41] (Johnstone DCJ); *Tectron Industries Pty Ltd v Taylor* [2006] SASA 175, [39] (White J); *Rennie v Printbase Pty Ltd* [2002] NSWSC 78, [40-41] (Berecry AM)). See also *Whitton v Konemann Australia Pty Ltd* (2002) 43 ACSR 436, [59-61] (Austin J) where the only justification given for the application of the peak indebtedness rule, at [59-61], was that the parties agreed to its use in their submissions.

178 See above (footnote reference) at 175.

179 An express agreement to appropriate future payments to reduce existing indebtedness.

180 *Airservices* (1996) 185 CLR 483, 508 (Dawson, Gaudron and McHugh JJ).

With regard to the operation of s588FA(3)(a)-(c), s588FA(3) is adequately drafted. Firstly, it communicates a clear operation obvious from its terms. That operation declares that s588FA(3) exempts unfair preferences under s588FA(1) by taking all those payments which form part of a continuing business relationship (Assessable Transactions) and then applying the approach under s588FA(1) to those payments as if they form a single transaction.

Secondly, it removes the major deficiency evident in the former common law running account defence,[181] that is, that the continuing business relationship can only be comprised of those transactions which satisfy the Timing Requirement.[182] Criticism of the voidable transactions regime is directed towards the arbitrary effect of the six-month relation-back period,[183] and it is often used to justify the application of the peak indebtedness rule.[184] Yet the operation of s588FA(3) as evident from s588FA(3)(a)-(c) allows transactions which occur outside of the relation-back period to make up the single transaction, provided they satisfy s588FA(1) and s588FA(3)(a)-(b) (Assessable Transactions). In addition, because the single transaction is made up of transactions which satisfy s588FA(1), and implicit in s588FA(1) is that the transaction occurred at a time when the company was insolvent,[185] any transaction which forms part of the single transaction must have occurred at a time when the company was insolvent.

---

[181] Which is the same approach currently given to s588FA(3).

[182] See above (in-text discussion) at about 155-160.

[183] See Andrew Keay, 'Liquidators Avoidance of Preferences: Issues of Concern & Reform Proposals' (1996) 18 *Adel LR* 159, 187: 'It may be argued that the use of fixed time periods has drawbacks. First, it is arbitrary and consequently, a matter of sheer chance whether a transaction occurs within a time zone…Secondly, a creditor dealing with any company cannot ever be really sure, until the elapse of the time zone, that a payment for an outstanding debt will not be attacked as a preference at some time in the future…[therefore] creditors, in fear that they have received a preference, may be moved to keep their receipt of payment secret from other creditors, even assisting the company financially so that it can remain out of liquidation and then abandoning the company summarily once the time period has elapsed'. See also Andrew Keay, *Avoidance Provisions in Insolvency Law* (LBC Information Services, 1997), 136; Damien McAloon, '"Ultimate Effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?' (2006) 14 *ILJ* 90, 95.

[184] A response to the assertion that the peak indebtedness rule should be abolished is that 'the unfair preference provisions would still operate in a somewhat arbitrary fashion by reason of the applicable fixed time period': Damien McAloon, '"Ultimate Effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?' (2006) 14 *ILJ* 90, 96. See also Senator Wong in the Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake*, Subcommittee Hearing: 12 November 2003, 394.

[185] See above (in-text discussion) at about 129-131.

Therefore, the arbitrariness of the former approach is ameliorated and there is a greater emphasis on the insolvency of the company in forming the single transaction rather than a fixed time period, which is a more desirable approach.[186] Moreover, this change also allows the entire relationship to be assessed unaffected by fixed time periods which supports the intention of the legislature as it results in 'the ultimate effect of the course of dealings [being] considered to determine whether the payments are preferences'.[187]

It is further submitted that, with respect to the redraft recommended for s588FA(1), s588FE(2) is also amended to remove the arbitrary element of the relation-back period from the assessment of individual transactions, with a greater focus on the insolvency of the company.

The operation of s588FA(3)(d)?

Section 588FA(3)(d),[188] construed literally, means that the concept of the single transaction is only relevant to determining whether the individual impugned transactions (Assessable Transactions), which make up the continuing business relationship, amount to unfair preferences. If the single transaction is a preference then *all* of the Assessable Transactions also amount to a preference, and the amount of that preference is the total of the Assessable Transactions unaffected by a netting off as a single transaction.[189]

---

[186] See Andrew Keay, 'Liquidators Avoidance of Preferences: Issues of Concern & Reform Proposals' (1996) 18 *Adel LR* 159, 187: 'Instead of fixed time applying, it has been suggested that transactions entered into after the company becomes insolvent (on a cash flow basis) are those that should be set aside. It has been argued that this approach produces greater certainty as creditors can ascertain informally or through trade publications whether a company is insolvent. Therefore, creditors are on notice that it is not going to be profitable to seek payment from a debtor which is insolvent'.

[187] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1042].

[188] Section 588FA(3)(d): 'the transactions referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference'.

[189] This is an absurd result. Under the literal operation of s588FA(3)(d) a creditor who receives payments from a company totalling millions of dollars and provides services to the company totalling millions of dollars may have the total of the payments it received from the company declared void, but the effect of the single transaction may have only preferred the creditor by an insignificant amount.

Principles of statutory construction support an argument that s588FA(3)(d) should not be read literally.[190] Firstly, the literal operation of s588FA(3)(d) contradicts the doctrine of ultimate effect, which is what s588FA(3) arguably aimed at envisaging,[191] because it fails to take account of the goods or services received by the company in the context of the continuing business relationship. Secondly, a literal approach also conflicts with the legislative intent of s588FA(3)(c), which is to have s588FA(1) apply to all the transactions referred to in s588FA(3)(a)-(b) as if they together constitute a single transaction. Accordingly, it appears that the legislative intent was for the single transaction as it applied to s588FA(1) to determine the extent of any unfair preference.

Supreme Court Master Burley in *Olifent v Australian Wine Industries Pty Ltd*[192] recognised the inconsistency between the operation of s588FA and the effect of s588FA(3)(d), and attempted to resolve this problem by reading the words 'and to the extent that' into s588FA(3)(d) so that s588FA(3)(d) should be read subject to s588FA(3)(c) and therefore:

> If the single transaction constitutes an unfair preference then the extent of the unfair preference is determined not by reference to the individual transactions forming part of the continuing business relationship, but rather by reference to the single transaction referred to in parra (c) [sic].[193]

---

[190] In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citing with approval the reasons of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320-321) stated: 'If the judge applies the literal rule it is because it gives emphasis to the factor which in the particular case he thinks is decisive. When he considers that the statute admits of no reasonable alternative construction it is because (a) the language is intractable or (b) although the language is not intractable, the operation of the statute, read literally, is not such as to indicate that it could not have been intended by the legislature. [T]he propriety of departing from the literal interpretation is not confined to situations described by these labels [namely absurd, extraordinary, capricious, irrational or obscure]. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions'.

[191] See Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [1042] '…[t]he net effect, therefore, is such that payments 'in' are so integrally connected with payments 'out' that the ultimate effect of the course of dealings should be considered to determine whether the payments are preferences': see above (in-text discussion) Chapter II at about 80.

[192] (1996) 19 ACSR 285, 291-292. Although this decision does not address the differences between the operation of the section and the pre-codified running account defence, this case is an example of a decision which reads the former running account defence into the terms of s588FA. However, this thesis argues that the operation of s588FA(3) is different to the former running account defence and therefore the approach by the court in *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285 is inconsistent with s588FA(3).

[193] *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285, 292.

This appears to be an adequate resolution to this issue, however it is submitted that s588FA(3)(d) is redrafted so that the language of the subsection is consistent with the operation of s588FA(3)(a)-(c).

Summary

There are meritorious reasons as to why s588FA(1) should be redrafted to reflect the s122 requirement that a creditor received Preferential Treatment to the determine whether there was an unfair preference.

Further, the current approach of applying the former running account defence to s588FA(3) is inconsistent with the clear language of s588FA(3). Similarly, the application of the peak indebtedness rule is patently inconsistent with the operation of the section.

The effect of s588FA(3)(a)-(c) ameliorates the arbitrariness of the relation-back date which impacted on the former running account defence. Finally, Section 588FA(3)(d) requires redrafting as the literal meaning of its language contradicts with the operation of s588FA(3).

Conclusion

This thesis has demonstrated that the operation of s588FA(3), intended or not, is distinct from the formerly operative running account defence, which existed at common law, and which is currently applied to the process of determining unfair preferences under s588FA(3).

The controversy that is apparent in this realisation emerges because in the words of the High Court, 'insolvency law is statutory and primacy must be given to the relevant statutory text'.[194] Therefore, although the enactment of s588FA(3) may have been intended to codify the running account defence, it is the terms of s588FA(3) – not the operation of the former common law approach – that must determine how the section operates. In instances where the section is applied, however, the differences between the running account defence and the operation of s588FA(3) are not currently being addressed and accounted for. Accordingly, the inconsistency between the operation of s588FA(3) and the former running account defence has become something of an 'elephant in the room'; unmistakably present but it is too vexingly awkward to address.

Having sought to determine the correct operation of s588FA(3), in accordance with acceptable principles relevant to insolvency law, this thesis culminates with the following conclusions. Firstly, the prevailing view of the courts is that the former Preferential Treatment requirement under s122(1) of the *Bankruptcy Act 1966* (Cth) is applicable to the determination of an unfair preference under s588FA(1). There are sound policy reasons for this but the language and effect of s588FA(1) is inconsistent with this approach. To resolve this conflict, and to preserve the positive outcomes of applying that approach to s588FA(1), it is submitted that s588FA(1) be redrafted to reflect the former s122 Preferential Treatment approach:

588FA Unfair Preferences

[194] *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 182 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

> (1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
>
> (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
>
> (b) the transaction, in respect of an unsecured debt that the company owes to the creditor, has the effect of giving the creditor a preference, priority or advantage over other creditors;
>
> even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction of an agency.

It is further submitted that s588FE(2) be redrafted so that the relation-back time period limitation of s588FE(2)(b) is removed from the operation of the statute.[195]

Secondly, the literal operation and effect of s588FA(3)(a)-(c) is commendable. That operation clearly expresses how transactions which form part of a continuing business relationship are to be assessed as unfair preferences, and it also effectively removes the issue of the arbitrary effect of the relation-back period from the preference determination. Further, it places greater emphasis on the insolvency of the company rather than a fixed time-period to determining unfair preference claims.

However, the literal effect of s588FA(3)(d) conflicts with the plain operation of s588FA(3)(a)-(c) as it determines the extent of the preference without reference to the goods or services received by the company from the creditor. To resolve this issue it is submitted that s588FA(3)(d) be redrafted along the following lines:

> (d) the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor to the extent that the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

[195] Section 588FE(2)(b): 'The transaction is voidable if it was entered into, or an act was done for the purpose of giving effect to it: (i) during the 6 months ending on the relation-back day; or (ii) after that day but on or before the day when the winding up began'.

Thirdly, the application of the peak indebtedness rule to s588FA(3) is wrong at law. The use of the rule excludes Assessable Transactions from forming part of the continuing business relationship and therefore conflicts with the requirement of s588FA(3)(c) that the single transaction is made up of all the transactions forming part of the continuing business relationship. Further, the use of the rule is in conflict with the definition of continuing business relationship in s588FA(3)(b) which anticipates a possible increase in indebtedness after the commencement of the relationship. Therefore, unless the peak point of indebtedness occurs at the commencement of the single transaction, and therefore its application does not exclude Assessable Transactions from making up the single transaction, the peak indebtedness rule cannot have a continued application consistent with the operation of s588FA(3).

The title of this thesis alludes to the fact that matters fraught with confusion or imprecision are not necessarily best left unclarified. Rather, it intimates that despite the ostensible discomfort that might attend the task of addressing such an issue, there may be substantial value to be realised in laying bare its complexities. In as much as it has sought to draw out the basis for the controversies inherent in s588FA(3), this body of work aims to both stimulate and prepare the ground for further exploration into these issues. In doing so, it is hoped that others may avoid the awkwardness of not being introduced to this 'elephant in the room'.

Table of Cases

Airservices Australia v Ferrier (1996) 185 CLR 483

All Type Timber Pty Ltd v BGC Fibre Cement [2007] NSWDC 90

Beachquest Pty Ltd v Interstate Mortgage and Investments Pty Ltd [2003] 2 Qd R 586

Bropho v Western Australia (1990) 171 CLR 1

Burns v Stapleton (1959) 102 CLR 97

Cashflow Finance Pty Ltd v Westpac Banking Corp [1999] NSWSC 671

Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic) (2006) 228 CLR 168

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

Commissioners for Railways (NSW) v Agalianos (1955) 92 CLR 390

Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297

CSR Ltd v Starkey (1994) 13 ACSR 321

Deakin v Webb (1904) 1 CLR 585

Duncan v Commissioner of Taxation (2006) 58 ACSR 555

Emwest Products Pty Ltd v Olifent (1996) 22 ACSR 202

Enever v R (1906) 3 CLR 969

Europacific Handling Systems Pty Ltd; Totterdell v Nicol-Burmeister [1994] WASC BC9504123 (Unreported, Scott J, 1 September 1995)

Foots v Southern Cross Mine Management Pty Ltd (2007) 234 CLR 52

G & M Aldridge Pty Ltd v Walsh (2001) 203 CLR 662

Guthrie v Radio Frequency Systems Pty Ltd (2000) 34 ACSR 572

Horsburgh v Strongman & Crouch [1998] 3 VR 896

Hurricane Formwork Pty Ltd v Commissioner of Taxation [2009] FCA 133

International Air Transport Association v Ansett Australia Holdings Ltd (2008) 234 CLR 151

Isherwood v Butler Pollnow Pty Ltd [1986] 6 NSWLR 363

Jetaway Logistics Pty Ltd v Deputy Commissioner of Taxation (2008) 68 ACSR 226

Julzer Pty Ltd v Rodgers [1999] NSWSC 199

Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404

Magrath v Commonwealth (1944) 69 CLR 156

Mann v Sangria Pty Ltd (2001) 38 ACSR 307

Matthews v Geraghty (1986) 4 ACLR 727

Minister for Transport v Francis (2000) 35 ACSR 584

Modern Master Pty Ltd v Canon Australia Pty Ltd [2007] NSWDC 245

Morris v Commissioner of Taxation [2007] QSC 320

Network Ten Pty Ltd v TCN Channel Nine Pty Ltd (2004) 218 CLR 273

Newcastle City Council v GIO General Ltd (1997) 191 CLR 85

Olifent v Australian Wine Industries Pty Ltd (1996) 19 ACSR 285

Olifent v Work Cover Corporation (SA) (1996) 135 FLR 423

Opal Maritime Agencies Pty Ltd v Baltic Shipping Co (1998) 158 ALR 416

Opal Maritime Agencies Pty Ltd v Skulptor Konenkov (2000) 98 FCR 519

Panasonic Australia Pty Ltd v Wily (1997) 23 ACSR 266

Patrick Stevedores No 2 Pty Ltd v MV Skulptor Konenkov (No 4) (1998) 81 FCR 16

Petagna Nominees Pty Ltd v AE Ledger (1989) 1 ACSR 547

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Prospect Electricity v Advanced Glass Technologies of Australia Pty Ltd (1996) 22 ACSR 1

Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266

Re Centaur Mining and Exploration Ltd (2008) 221 FLR 217

Re Discovery Books Pty Ltd (1973) 20 FLR 470

Re Emanuel (No 14) Pty Ltd; Macks v Blacklaw & Shadforth Pty Ltd (1997) 147 ALR 281

Rees v Bank of New South Wales (1964) 111 CLR 210

Re Lanpac International Pty Ltd; Jonas v Automation House Pty Ltd [1998] VSC BC9803587 (Unreported, Chernov J, 30 July 1998)

Rennie v Printbase Pty Ltd [2002] NSWSC 78

Re Rampton Holdings Pty Ltd (1990) 3 ACSR 594

Re Toowong Trading Pty Ltd [1989] Qd R 207

Re Weiss [1970] ALR 654

Richardson v Commercial Banking Co of Sydney Ltd (1952) 85 CLR 110

Robertson v Grigg (1932) 47 CLR 257

Rothmans Exports Pty Ltd v Mistmorn Pty Ltd (1994) 15 ACSR 139

Rugs-A-Million (WA) Pty Ltd v Walker [2007] WASCA 23

Sands & McDougall Wholesale Pty Ltd v Commissioner of Taxation [1999] 1 VR 489

Sheahan Pty Ltd v Murdock & Gediz Pty Ltd [2008] SADC 5

Sheahan v Workers Rehabilitation & Compensation Corp (1991) 6 ACSR 11

Sims v ABC Tissue Products Pty Ltd [2008] NSWSC 192

Sons of Gwalia Ltd v Margaretic (2007) 231 CLR 160

Spedley Securities Ltd v Western United Ltd (1992) 7 ACSR 271

S Richards & Co Ltd v Lloyd (1933) 49 CLR 49

Starkey v APA Transport Pty Ltd (1993) 12 ACSR 15

Sutherland v Eurolinx Pty Ltd (2001) 37 ACSR 477

Sutherland v Liquor Administration Board (1997) 24 ACSR 176

Sutherland v Lofthouse (2007) 64 ACSR 655

Sydney Appliances Pty Ltd v Eurolinx Pty Ltd (2001) 37 ACSR 477

Tectron Industries Pty Ltd v Taylor [2006] SASA 175

Tolcher v John Danks & Son Pty Ltd [2007] NSWSC 1207

V R Dye & Co v Peninsula Hotels Pty Ltd (1999) 32 ACSR 27

Walsh v Natra Pty Ltd (2000) 1 VR 523

Walsh v Salzer Constructions Pty Ltd (2000) 3 VR 305

Weiss v The Queen (2005) 80 ALJR 444

Whitton v Konemann Australia Pty Ltd (2002) 43 ACSR 436

Williams v Peters (2009) 72 ACSR 365

Wily v St George Partnership Banking Ltd (1999) 84 FCR 423

Woodgate v Fawcett (2008) 67 ACSR 611

Woodgate v Scansoft Belgium Bvba [2006] NSWDC 204

Yarra Capital Group Pty Ltd v Sklash Pty Ltd [2006] VSCA 109

Legislation

Bankruptcy Act 1924-1960 (Cth)

Bankruptcy Act 1966 (Cth)

Companies Code 1981 (Cth)

Corporations Act 2001 (Cth)

Corporate Law Reform Act 1992 (Cth)

Bibliography

Articles

Barlow, Ken, 'Voidable Preferences – The High Court Reconsiders' (1998) 26 *ABLR* 82

Bayliss, Amy and Paris, George, 'Back to Insolvency Basics: When You Can't Bring a Voidable Transaction Claim' (2009) 9(7) *Insolvency Law Bulletin* 119

Bolitho, Hal, 'Continuing Business Relationships – Eight Questions in Search of an Answer' (1998) 16 *CSLJ* 584

Clarke, Jon, 'The Harmer Recommendations and the Corporate Law Reform Bill 1992 - Is it Time for Further Reform? - Part 2' (2003) 4(2) *INSLB* 22

Hargovan, Anil and Harris, Jason, 'Sons of Gwalia and the High Court: Implications for Shareholders, Creditors and the Insolvency Regime' (2007) 7(7) *ILJ* 80

Keay, Andrew, 'An Analysis of Unfair Preferences Under the New Avoidance Regime' (1996) 24 *ABLR* 39

Keay, Andrew, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 *SLR* 55

Keay, Andrew, 'Liquidators Avoidance of Preferences: Issues of Concern & Reform Proposals' (1996) 18 *Adel LR* 159

Keay, Andrew, 'The Avoidance of Pre-Liquidation Transactions: An Angelo-Australian Comparison' [1998] *JBL* 515

King, Justin, 'Running Accounts and Interest in Relation to Preference Actions: *The Compass Case*' (1996) 10(4) *CLQ* 5

Lawrence, Jeffrey, 'Are Directors Running Accounts in Breach of Their Duties' (1997) 8 *AJCL* 1

Lawrence, Jeffrey, 'Keeping a Running Account on the Preference Laws' (1996) 4 *ILJ* 171

McAloon, Damien, '"Ultimate Effect" or Maximum Recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?' (2006) 14 *ILJ* 90

O'Donovan, James, 'Compromising Preference Claims' (1998) 16 *CSLJ* 323

O'Donovan, James, 'Undue Preferences: Some Innocents "Scape Not The Thunderbolt"' *UWALR* 22 (1992) 322

Purcell, David, 'Banks and the Recovery of Voidable Preferences' (1990) 1(8) *Bond Law Review* 107

Quo, Shirley, 'Current Issues Affecting Secured Creditors: Whether Payments to Secured Creditors Can be Recovered by Liquidators as Unfair Preferences' (2003) 11(2) *ILJ* 117

Quo, Shirley, 'Legal Practitioners and Persons Acting For Those at Risk of Insolvency: In what circumstances will professional fees constitute unfair preferences?' (2005) 13 *ILJ* 7

Shapira, Gary, 'Are a Liquidator's Recoveries Available to the Company's Secured Creditors?' (2002) 20 *CSLJ* 25

Singer, Zolly, 'Invalidation of Antecedent Transactions Under Corporate Law Reform Act 1992' (1994) 2 *ILJ* 36

Taylor, Lynne, 'Reform of Corporate Insolvency Law: The Companies Amendment Act 2006' (2007) 15(2) *ILJ* 136

Thomas, Susan, 'Clayton's case and the Common Pool Exception' (2004) 15 *JBFLP* 177

Warde, John, 'Corporate Insolvency: Preferences and Uncommercial Transactions: An Overview: Part 3' (2005) 20(9) *Australian Banking and Finance Law Bulletin* 154

Books

Armour, John and Bennett, Howard (ed), *Vulnerable Transactions in Corporate Insolvency* (2003)

Austin, RP and Ramsay IM, *Ford's Principles of Corporations Law* (13th ed, 2007)

Butt, Peter (ed), *Butterworths Australian Legal Dictionary* (3rd ed, 2004)

Crystal, Michael, Phillips, Mark and Davis, Glen (ed), *Butterworth's Insolvency Law Handbook* (4th ed, 1997)

Finch, Vanessa, *Corporate Insolvency Law: Perspectives and Principles* (2002)

Fletcher, Ian F, *The Law of Insolvency* (1990)

Goode, Royston Miles, *Principles of Corporate Insolvency Law* (3rd ed, 2005)

Milman, David, *Corporate Insolvency: Law and Practice* (2nd ed, 1994)

Murray, Michael, *Keay's Insolvency: Personal and Corporate Law and Practice* (6th revised ed, 2008)

O'Donovan, James, *McPherson's: The Law of Company Liquidation* (3rd ed, 1987)

Omar, Paul J (ed), *International Insolvency Law: Themes and Perspectives* (2008)

Oxford University Press, *Oxford English Dictionary* (2nd ed, 1989)

Pausch, Randy and Zaslow, Jeffrey, *The Last Lecture* (2008)

Robertson, D and Lovall, D, *Australian Corporation Law - Principles and Practice* (1991)

Townley, Adam, *A practical Guide to Insolvency* (1995)

Reports

Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988)

Other Sources

Commonwealth, *Parliamentary Debates – Second Reading*, House of Representatives, 11 March 1992, 0068 (Michael Duffy, Attorney-General)

Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth)

Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2003)

LBC Information Services, *Avoidance Provisions in Insolvency Law* (1997)

Legal Online, *McPherson's Law of Company Liquidation* (1987)