The Section 1323 Injunctive Power of the Australian Securities Commission: Its Operation and Shortcomings

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INTRODUCTION

A significant feature of the Australian system for corporate regulation which replaced the cooperative scheme in 1991 was the establishment[1] of a federal administrator, the Australian Securities Commission (the 'ASC'), with broad powers of investigation and enforcement. The *Australian Securities Commission Act* 1989 (Cth) (the '*ASC Act*') and the *Corporations Law* not only established one administrative agency to replace the various state commissions, but also provided significant judicial power to assist the ASC in its functions of investigation and enforcement. As with its predecessor under the *Companies Code* (s 573), s 1323 of the *Corporations Law* provides a mechanism whereby the ASC can obtain orders to protect the interests of the creditors or other possible civil claimants, against a person who is under investigation or subject to criminal or civil proceedings under the *Corporations Law*. Like the Mareva injunction[2] in civil litigation, s 1323 provides a statutory method by which a suspected wrongdoer may be prevented from dissipating assets or continuing the wrongdoing prior to final judicial consideration of the matters in dispute.

While an order under s 1323 may appear to be an effective tool to safeguard the interests of the victims of corporate wrongdoing, its utilisation by the ASC may only occur in certain specified circumstances. Unfortunately, the preconditions to the use of s 1323 normally mean that any party against whom such a remedy will be sought has sufficient notice of the impending action by the ASC to place their own property or the property of their companies beyond reach. The simple transfer of property[3] to an associate prevents the application of s 1323, which has no provision for dealing with such possibility.

In this article the mechanics of an ASC investigation will be considered with particular emphasis on the commencement and scope of ASC investigations as one of the grounds for obtaining s 1323 orders. The provisions of *Corporations Law*, s 1323 will be contrasted with the *Bankruptcy Act*,[4] the new

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[1] *Australian Securities Commission Act* 1989 (Cth).

[2] From the case *Mareva Compania Naviera SA* v *International Bulkcarriers SA* [1975] 2 *Lloyd's Law Rep* 509.

[3] Of course, if the wrongdoer retains a beneficial interest through application of trust principles, that beneficial interest would be covered by a s 1323 order.

[4] *Bankruptcy Act* 1966 (Cth).

insolvency provisions of the *Corporations Law*,[5] the *Proceeds of Crimes Act*,[6] and the United States' *Racketeer Influenced and Corrupt Organizations*[7] ('*RICO*') law all of which enable property to be recovered even though it has been transferred prior to the entering of an order. It is proposed that these might provide one model for 'claw-back' provisions which should be introduced to enable the court, at its discretion, to unwind certain transactions that have been made prior to the invocation of an order under s 1323.[8] The public and academic debate that greeted similar changes to the *Proceeds of Crime Act* indicates that any such proposal to change the *Corporations Law* may be regarded as contentious, and any extension of ASC powers would be subject to parliamentary scrutiny.[9] Nevertheless, the strengthening of s 1323 to overcome this deficiency would add substantially to the armoury of the ASC in combating the activities of dishonest company directors and officers.

SECTION 1323

The ASC, like many governmental agencies, faces a difficult task in providing effective administration and prevention of wrongful activity without subjecting individuals to the exercise of excessive administrative powers. The difficulty of achieving a proper balance is exhibited in a number of the ASC's investigatory powers,[10] but is never more obvious than in the application of s 1323. On the one hand, the ASC is able to interfere with an individual's ability to dispose of or enjoy property, but on the other hand such extensive intervention is often essential to prevent a wrongdoer from frustrating efforts to recover wrongfully acquired property.

Section 1323, like the Mareva injunction, is intended as a means of preserving the assets of an individual or company so that they are not dissipated or removed until the claims of creditors or potential creditors can be dealt with.[11] Similar powers were originally granted to the National Companies and Securities Commission ('NCSC') by s 573 of the *Companies Code*, s 147 of

[5] *Corporations Law*, Part 5.7B, Division 2.

[6] *Proceeds of Crimes Act* (1987) (Cth).

[7] *Organized Crime Control Act of 1970*, Pub L No 91-452, 84 Stat 922 (1970) (codified as 18 USC ss 1961-8.

[8] The idea that all assets available to corporate officers at the time of a wrong to a company should be available to meet the company's claim has also been suggested by Mr Justice Andrew Rogers. See The Hon Mr Justice Rogers, 'A Vision of Corporate Australia' (1991) 1 AJCL 1, 8.

[9] In fact, the administrative practices of the ASC (including its use of s 1323) have already been scrutinised by the Standing Committee on Legal and Constitutional Affairs. In relation to s 1323, this Committee recommended that the ASC should be subject to recovery for its use of s 1323 where no successful civil or criminal action results. See Canberra, *The Investigatory Powers of the Australian Securities Commission* (1995), Recommendation 4. The specific proposal is mentioned in fn 65.

[10] J Kluver, 'ASC Investigations and enforcement: Issues and Initiatives' (1992) 15 UNSWLJ 31.

[11] *ASC* v *Farmer Johnson Ltd* (1991) 6 ACSR 219, 222; *Beach Petroleum & Anor* v *Johnson & Ors* (1992) 9 ACSR 404; *CAC* v *Smithson & Anor* [1984] 3 NSWLR 547, 553; *CAC* v *United International Technologies Pty Ltd* (1987) 6 ACLC 637; and *CAC* v *Lombard Nash International Pty Ltd* (1987) 5 ACLC 1 020.

the *Securities Industry Act*, and s 155 of the *Futures Industry Act*.[12] Section 1323 is unlike the Mareva injunction, however, in that it is not a remedy of general application but applies only in circumstances where liability arises or may arise for activities in relation to corporate and securities fraud:

> The legislature clearly intended that drastic remedies should be available to protect the interests of persons who might have a claim in respect of such activity by freezing the assets of those responsible.[13]

Both the extent of the orders available under s 1323 and the basis on which orders under the section will be granted reflect the legislative desire to provide adequate protection for the victims of corporate and securities fraud.

Section 1323 is designed to facilitate the protection of persons with claims arising from corporate and securities fraud. The section is not expressly limited in its application other than by reference to the type of liability owed. Protective orders under s 1323 may be obtained upon application of the ASC or any person (referred to within the section as 'an aggrieved party') who is or may become entitled to payment of money[14] or to an accounting for any securities, futures contracts or other property from another person (referred to within the section as the 'relevant person') if the relevant person is:

> One whose acts or omissions (which are or may be a contravention of the *Corporations Law*) are being investigated under the *ASC Law*;
> One whose prosecution under the *Corporations Law* has begun; or
> One against whom civil proceedings under the *Corporations Law* have begun.[15]

Where a court considers it necessary or desirable for the purposes of protecting the interests of the aggrieved party, it may enter either interim[16] or final orders.[17] These orders, though effective once entered, do not have any retrospective effect. Nevertheless, the possible orders allowed for in s 1323 are extensive, and would effectively inhibit the actions of those subject to them:

> The prohibition of a person indebted to the relevant person or any associated person from making a payment in partial or total discharge of the debt, or from paying the debt to anyone else at the request of the relevant person;[18]
> The prohibition of a person who holds money or securities or futures contracts or other property on behalf of the relevant person, or any associate of the relevant person, from paying all or any of the money, or in any

[12] *Companies Act* 1981 (Cth) (the '*Companies Code*'); *Securities Industry Act* 1980 (Cth); *Futures Industry Act* 1986 (Cth); see also the Corporations and Securities Industry Bill cl 273.

[13] *CAC* v *Walker* (1987) 5 ACLC 991, 996 per Waddell CJ in Equity in discussing s 147 of the *Securities Industry (New South Wales) Code* 1980, a predecessor of s 1323.

[14] Liability for money owed is expressly stated to be in respect of a debt, by way of damages or compensation or otherwise: *Corporations Law*, s 1323(1).

[15] *Corporations Law*, s 1323(1).

[16] *Corporations Law*, s 1323(3).

[17] *Corporations Law*, s 1323(6) indicates that such orders may operate for a specified time or until discharged by further order.

[18] *Corporations Law*, s 1323(1)(d).

way parting with the possession of the securities or futures contracts or other property;[19]
Orders prohibiting anyone taking or sending the money of the relevant person or any associate of the relevant person out of the State or Territory, or out of Australia;[20]
Prohibition on the taking or sending or transfer of the securities, futures contracts or property of the relevant person or any associate of that person from the place inside the State or Territory to a place outside the State or Territory;[21]
The appointment of a receiver or trustee of the property of the relevant person or, if the person is a body corporate, appoint a receiver or receiver and manager;[22]
Orders requiring the relevant person, if a natural person, to surrender their passport and other documents to the court;[23] and
Prohibition of the relevant person, if a natural person, from leaving Australia without the court's consent.[24]

Because the possible orders under s 1323 have the effect of interfering with property and other rights prior to final determination of the substance of the underlying allegations, these orders may be granted only where the court, having regard to all the circumstances of the case, is of the view that the orders are necessary and desirable to protect the interests of the aggrieved party.[25]

A review of the way in which s 1323 operates may commence by reference to the specific requirements of the section and the related issues which each raises:

(1) The aggrieved party;
(2) The relevant party; and
(3) The necessity or desirability of the order.

The Aggrieved Party

Section 1323(1) explicitly states that orders may be entered where a court considers it necessary and desirable to protect the interests of a person to whom the relevant party

is liable, or may become liable, to pay money, whether in respect of debt, by way of damages or compensation or otherwise, or to account for securities, futures contracts or other property.

The defining character of the aggrieved party under the section is the liability or potential liability owed by the relevant party. The two major issues concerning the determination that a person is an aggrieved party under the section concentrate upon the liability owed. The first is whether the liability upon which a person may be characterised as an aggrieved party is by

[19] *Corporations Law*, s 1323(1)(e).
[20] *Corporations Law*, s 1323(1)(f).
[21] *Corporations Law*, s 1323(1)(g).
[22] *Corporations Law*, s 1323(1)(h).
[23] *Corporations Law*, s 1323(1)(j).
[24] *Corporations Law*, s 1323(1)(k).
[25] *CAC (SA)* v *Lone Star Exploration NL (No 2)* (1988) 50 SASR 24; 14 ACLR 499.

implication limited by the section. The possible limitations which could be argued to apply could be described as generic (limited to liabilities arising under the *Corporations Law* or its predecessors) or specific (liabilities arising from the relevant party's activities forming the basis for his or her characterisation as a relevant party, ie the matters under investigation by the ASC or the matters which are the subject of criminal or civil litigation).

The second issue in relation to the aggrieved party concerns the likelihood that any potential liability of the relevant party will ultimately be brought to judgment. The standard required by the section strangely neglects any reference to the ultimate likelihood of success of the aggrieved party,[26] a consideration which is critical to a Mareva injunction.[27]

The type of liability which can form the basis for characterising a person as an aggrieved party has now been considered several times. In *Corporate Affairs Commission ('CAC')* v *Walker*[28] Waddell CJ considered the type of liability which could lead to an order under the former *Securities Industry (New South Wales) Code*. He concluded:

> In my opinion, the language of sec 147(1)(c) is comprehensive and indicates that the liability mentioned is not intended to be limited to one arising under the Code and extends to one under the general law. No doubt, in considering whether it was necessary or desirable to make an order under the section a court would bear in mind whether the liability put forward was associated with or a consequence of a breach of the Code.[29]

In the leading judgment in *Lone Star Exploration NL* v *CAC*,[30] von Doussa J of the Full Court of the Supreme Court of South Australia accepted the views of Waddell CJ in this regard:

> Then the question for the Court is whether it is necessary or desirable for the purposes of protecting the interests of any person to whom the relevant person is or may become liable to pay money or to account for any property. It is not necessary that the Commission establish that the actual or potential liability is one that results from a breach of the Code. The liability may arise under the general law. In the exercise of the discretion the Court may have regard to all the known facts and circumstances, although in a particular case the Court may think it appropriate to consider whether the actual or potential liability is connected in some way with a possible contravention of the Code.[31]

In relation to the contention that there should be some connection between the liability to the aggrieved and matters giving rise to the investigation, civil or criminal action involving the relevant party, von Doussa J rejected this

[26] Although this matter has been subject to judicial consideration: *Connell* v *NCSC* (1989) 1 ACSR 193.

[27] The grant of a Mareva injunction requires the applicant to show a prima facie case, or good prospects of success in the principal action: *Patterson* v *BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319.

[28] (1987) 5 ACLC 991.

[29] (1987) 5 ACLC 991, 995.

[30] (1988) 6 ACLC 1108.

[31] Id 1113.

construction of *Companies Code* s 573, finding there was no requirement of a such a nexus:

> To require that a court be satisfied that the potential liability of the relevant person results from an identifiable breach of a particular provision of the Code could make it necessary for the court to pre-judge the outcome of the investigation, prosecution or civil proceeding.... A construction which could have this effect should be avoided....[32]
>
> I would hold that the exercise of power in the subsection is not conditioned by a test of nexus between the relevant activity in para (a), (b), and (c) and the actual or potential liability of the relevant person.[33]

In accordance with this view, orders under section 1323(1)(a) to (c) could arise if an aggrieved party has liabilities or potential liabilities arising either under the *Corporations Law* or the common law, whether such liabilities had any relation to a breach of the *Corporations Law*[34] or to the investigation, prosecution or civil proceeding relied upon as the basis for the application.[35] An alternative view, however, was expressed in the case of *Connell* v *NCSC*.[36] In that case, Malcolm CJ of the Western Australian Supreme Court expressed by way of observation his doubts about the conclusions in the *Lone Star* case rejecting a required nexus between the liability and a breach of the *Corporations Law*.[37]

Given the fact that the grant of orders is subject to the discretionary power of the court, however, it is highly likely that the basis of the liability would be considered in the exercise of the discretion whatever the exact nature of any nexus requirement which may eventually be determined to apply.

Similarly, proof that the aggrieved party can ultimately substantiate the claims against the relevant party are not strictly required. However, it is clear that this will form one of the circumstances relevant to the exercise of the court's discretion. In *Walker's* case[38] Waddell CJ addressed the evidentiary requirements in relation to the required liability, indicating that the standard required might vary upon the circumstances of the application:

> In the case of an application made shortly after investigation has begun, the evidence may be regarded as sufficient if it establishes the general circumstances, the nature of the investigation and the reason why it is thought that there may be some liability on the part of a relevant person.
>
> On a later application, where the question is whether or not orders already made should continue, additional evidence may be thought necessary, such as evidence which describes the progress of and the future steps likely to be taken in the investigation. Evidence might be required which goes some distance towards establishing liability or which establishes a prima facie case. In deciding what evidence is required, the Court might well think it relevant to take into account the detriment which might be

[32] Id 1112.
[33] Id 1114.
[34] *CAC* v *Walker* (1987) 5 ACLC 991, 995.
[35] (1988) 6 ACLC 1108, 1114.
[36] (1989) 1 ACSR 193.
[37] Id 201.
[38] (1987) 5 ACLC 991.

caused to potential claimants against a relevant person if an order is refused and to a relevant person if an order is made.[39]

Significantly, the Full Court of the Supreme Court of South Australia agreed with these observations in the *Lone Star* case,[40] leading to the conclusion that, unlike a Mareva injunction, there is no requirement that a prima facie case of liability be established for the order to apply. Clearly, however, evidence of liability may be required by a court to satisfy it that an order is desirable depending upon the circumstances of the application.[41]

The Relevant Party

The second requirement for the application of s 1323 centres on the party who is liable or may become liable to the aggrieved person (the person whose interests will be protected by the order). Under the section, the person who is or may be liable (the relevant party) is defined as 'the person referred to in paragraph (a), (b) or (c), as the case may be'. These refer to a person in relation to whom:

(a) an investigation is being carried out under the ASC Law or this Law in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this law;
(b) a prosecution has been begun against a person for a contravention of this Law; or
(c) a civil proceeding has been begun against a person under this Law.[42]

That s 1323 can be invoked either where civil proceedings under the *Corporations Law* have been instituted or where a person has been prosecuted for an offence under the *Corporations Law* is not worthy of great attention.[43] Serving to distinguish s 1323 from more conventional protective remedies (such as the Mareva injunction) is the application of s 1323 not only to persons who are parties to litigation, but also to those who are merely under investigation for activities in relation to corporate and securities fraud. The significance of the application of this section to circumstances where there is merely the commencement of an investigation by the ASC becomes apparent

[39] Id 995.
[40] *Lone Star Exploration NL* v *CAC* (1988) 6 ACLC 1108, 1114; *CAC* v *Golden Harvest Investments (Australia) Pty Ltd* (1989) 7 ACLC 14.
[41] *Connell* v *NCSC* (1989) 1 ACSR 193, 205.
[42] *Corporations Law*, s 1323(1)(a), (b) and (c).
[43] Of some note may be the issue of what exactly represents civil proceedings. As indicated in the section itself, the civil proceeding must be one instituted under the *Corporations Law* and not merely, for example, an action for the recovery of a debt (see the judgment of Ormiston J in *Re Guardian Investments Pty Ltd* [1984] VR 1019, 1026. Further, the term civil proceeding would ordinarily require court proceedings to have commenced (though it could be possible that in a very rare case non-curial proceedings could come within the words of the section). See the judgment of Young J of the New South Wales Supreme Court in *CAC* v *Prime Commodities Pty Ltd* (1987) 5 ACLC 787, 789, where His Honour observed that a 'show cause' administrative hearing under s 562A of the *Companies Code* (s 1000 of the *Corporations Law*) should not be classified as a civil proceeding. Finally, civil proceedings must precede the application for an order under s 1323, according to Kearney J of the New South Wales Supreme Court in *CAC* v *United International Technologies Pty Ltd* (1987) 6 ACLC 637, 643.

when grounds upon which a formal ASC investigation can be commenced are considered.

The *ASC Act* provides three possible grounds for the ASC to commence a formal investigation. These are found in ss 13 to 15 of the *ASC Act,* which cover investigations arising because of the ASC's suspicion of a contravention of the *Corporations Law*, investigations under Ministerial direction, and investigations pursuant to a report of a receiver or liquidator.

The general investigatory powers of the ASC are to be found in s 13 of the *ASC Act*. Under this section, the ASC may make such an investigation as it thinks expedient for the due administration of the *Corporations Act* 1989, the *Corporations Law* or the *ASC Act* (the 'national scheme laws')[44] where it has reason to suspect that there may have been committed:

(a) a contravention of a national scheme law; or
(b) a contravention of a law of the Commonwealth or of a State or Territory, being a contravention that:
  (i) concerns the management or affairs of a body corporate; or
  (ii) involves fraud or dishonesty and relates to a body corporate, securities or futures contracts.[45]

In addition to the general powers of investigation exercised by the ASC itself under s 13, the ASC may be directed by the Minister to investigate certain matters under s 14 of the *ASC Act*[46] or it may, pursuant to s 15 of the *ASC Act,* investigate a matter arising from a report lodged by a receiver or liquidator under s 422 or s 533 of the *Corporations Law* to ascertain whether a person ought to be prosecuted for an offence against a national scheme law.

While the decision by the ASC to commence an investigation may result in the possible application of s 1323 to the affected person, this decision also has implications in relation to production of books, the conducting of compulsory examinations, and even damage to commercial reputation. For these reasons, including the possible application of s 1323, the processes and justification for the commencement of the investigation by the ASC has been subject to frequent judicial consideration.

[44] *ASC Act*, s 5(1).
[45] *ASC Act*, s 13(1).
[46] All that is required to initiate an investigation under s 14 is for the Minister to hold the opinion that the investigation is in the public interest. Section 14(2) of the *ASC Act*, however, limits the matters which may form the basis of a s 14 investigation to:
(a) An alleged or suspected contravention of a national scheme law or of a relevant previous law of a jurisdiction;
(b) an alleged or suspected contravention of a law of the Commonwealth or of a State or Territory, being a contravention that:
  (i) concerns the management or affairs of a body corporate, or
  (ii) involves fraud or dishonesty in relation to a body corporate, securities or futures contracts;
(c) the affairs, or particular affairs, of a corporation;
(d) dealing in securities;
(e) dealing in futures contracts;
(f) the establishment or conducting of a stock market or futures markets;
(g) the provision of clearing house facilities for a futures market;
(h) the giving of advice, analyses or reports about securities or futures contracts.

In the principal case addressing the requirements for justifying the commencement of a s 13 investigation, *Little River Goldfields NL* v *Moulds*,[47] Davies J of the Federal Court indicated that the section requires only that there must be reason to suspect that a contravention has been committed and a belief that it is expedient to undertake the investigation.[48] Further, it is not necessary that the decision to commence an investigation be made formally in writing[49] or that the ambit of the investigation be specified.[50]

Should the ASC's decision to commence an investigation be challenged, the person challenging such a decision is faced with a difficult task:

> The commission may undertake an investigation ... provided that the investigation is undertaken bona fide for the purpose of ascertaining what were the facts of the matter and whether a prosecution should be commenced. If any challenge is made to the investigation, the commission is not bound to justify its action. The onus lies on the challenger to establish lack of bona fides etc, certainly in a case such as the present where the commission appears to have grounds for inquiry into a possible contravention.[51]

Further impediments to a challenge to any decision to commence an investigation arise because of the conclusion that such a decision does not confer a power to take a decision which is an 'ultimate or operative determination'.[52] As a result of this conclusion, the decision of the ASC to commence an investigation is not a decision under the *Administrative Appeals Tribunal Act* 1975 (Cth) or the *Administrative Decisions (Judicial Review) Act* 1977 (Cth),[53] with the result that the ASC has no obligation to provide reasons for commencing an investigation, or to disclose the reasons for which it has acted.[54]

The inclusion of further qualifying words in s 1323 indicate that a narrowing of the investigation to the actions of particular individuals is required for application of s 1323. While s 13 of the *ASC Act* indicates that an investigation may commence where the ASC has reason to suspect that an offence

[47] (1991) 6 ACSR 299.

[48] Id 305. In a particular case this would require that a duly authorised officer who has responsibility for the investigation has reason to suspect that a specified contravention has been committed and considers it expedient to conduct the investigation. There must be grounds for the decision to commence an investigation, but they need not be stated: *NCSC* v *Sim (No 2)* (1986) 11 ACLR 171, 176.

[49] (1991) 6 ACSR 299, 305. Even if the ASC does pass a formal resolution, it need not state its grounds: id 306. See also the observation of Kearney J in *CAC* v *United Technologies Pty Ltd* (1987) 6 ACLC 637, 641, in which formal procedures are described as highly desirable. In some regional offices of the ASC, formal decisions to investigate are now common.

[50] 6 ACSR 299, 308. The matter under investigation need not refer to any particular person or offence but should indicate the matter for investigation: *NCSC* v *Sim (No 2)* (1986) 11 ACLR 171, 177. The investigation may be broadened if the ASC thinks it expedient for the administration of the *Corporations Law*: *Little River Goldfields NL* v *Moulds* (1991) 6 ACSR 299, 308.

[51] *Little River Goldfields NL* v *Moulds* (1991) 6 ACSR 299, 309.

[52] Id 305, referring to *Australian Broadcasting Tribunal* v *Bond* (1990) 170 CLR 321, 338.

[53] (1991) 6 ACSR 299, 308.

[54] *News Corporation Ltd* v *NCSC* (1983) 8 ACLR 338, 351.

'may have been committed', s 1323(1)(a) requires an investigation 'in relation to an *act or omission by a person* ... that constitutes or may constitute an offence'(emphasis added). This relationship between the requirements for an investigation and the prerequisites for a protective order were addressed by Kearney J of the New South Wales Supreme Court in *CAC* v *United International Technologies Pty Ltd*[55] and by the Western Australian Full Court in *Connell* v *NCSC*.[56] Both cases dealt with applications for an order under the *Companies Code* s 573 (the predecessor to s 1323), and both indicate that s 1323(1)(a) requires greater particularity than is necessary to support a s 13 investigation.

In *Connell* v *NCSC,* Malcolm CJ indicated that the section could be invoked before proceedings had been commenced, but qualified this statement by indicating that this would be likely only where

> matters have reached the stage where a particular person may be shown to have done an act or made an admission that constituted or may constitute an offence under the *Code.*

He then further indicated:

> Until the investigations have reached that stage, there is no justification for invoking the wide power in s 573(1) [1323(1)] to ensure that the status quo is preserved.[57]

Notwithstanding that a person may be characterised as a relevant person under s 1323 (with the attendant difficulties which would result), any attempt to review that determination would face similar difficulties to those challenging the commencement of investigations generally. In *CAC* v *United International Technologies Pty Ltd,* Kearney J indicated that impediments recognised in cases concerning such challenges (eg *NCSC* v *Sim (No. 2)*[58]) applied as well in a s 1323 application. It would thus be questionable how far the court may question the basis of the ASC's suspicion in a s 1323 application.[59]

As a result of the problems in mounting a successful challenge to an ASC decision to commence an investigation (either in general or with the greater specificity required in a s 1323 action), the commencement of an investigation may have significant consequences for what is merely an administrative determination. Clearly, any expansion of the ambit of s 1323 will exaggerate these implications. It is fortunate then that the ultimate responsibility for the entering of an order under s 1323 resides with the court required to consider the implication of such an order through a balancing of the interests of the parties involved.

[55] *CAC* v *United International Technologies Pty Ltd* (1988) 6 ACLC 637.
[56] (1990) 8 ACLC 70.
[57] (1989) 1 ACSR 193, 201.
[58] (1986) 4 ACLC 719, 726; 11 ACLR 171, 177–8.
[59] *CAC* v *United International Technologies Pty Ltd* (1988) 6 ACLC 637, 641. This, however, was an application for an interim order and, despite this observation, Kearney J did conclude that the Commission did have reason to suspect that an offence under the Code may have been committed.

The Necessity or Desirability of the Order

Once the prerequisites to the application of s 1323 have been established a court may grant one of the orders under s 1323 where it considers it *necessary or desirable* to do so, for the purpose of protecting the interests of an aggrieved person. In *CAC* v *Walker*, Waddell CJ in Eq of the New South Wales Supreme Court summarised the process which would be followed:

> The section provides very drastic remedies. In effect, if one of the matters mentioned in para. (a), (b), or (c) is established, it is left to the discretion of the court to determine what other matters should be taken into account in deciding whether or not it is necessary or desirable to exercise a power given by the section for the purpose of protecting the interests of any persons to whom the 'relevant person' may be liable.[60]

In determining whether it is necessary or desirable to grant orders under s 1323, equitable principles, so far as they are relevant in the statutory context, may be invoked.[61] The nature of the discretionary process utilised for protective orders in corporate and securities matters was discussed by Young J of the New South Wales Supreme Court in *CAC* v *Lombard Nash International Pty Ltd*[62] in which he observed that similarities existed between the discretion exercised under the *Trade Practices Act* and in granting protective orders in corporate law:

> It is clear in such cases that the Court, as in cases not involving the public interest, inquires to see whether there is a strongly arguable case and whether damages are an adequate remedy. The Court then proceeds to consider the balance of convenience and has a particularly difficult task in so doing because it has to balance the public interest in protecting consumers against the evils that the Act was passed to guard against, on the one hand, but on the other hand, to make sure that people who are legitimately trading and providing a service to the community are not forced to close down before the case can be properly examined by the Court.[63]

In the context of s 1323, the exercise of this discretion is complicated when, as may often be the case, interim orders are considered to be appropriate pending the determination of the application for orders under s 1323(1).[64] In such circumstances, the applicant is not required to give an undertaking as to damages,[65] the defendant need not be given the opportunity to appear in the

[60] (1987) 5 ACLC 991, 995. These observations are in relation to *Securities Industry Code* s 147, which is the same in this respect as s 1323.

[61] *Connell* v *NCSC* (1989) 1 ACSR 193, 206.

[62] (1986) 5 ACLC 269.

[63] Id 272–3. These observations were in relation to the analogous provision in the *Futures Industry Act* 1986 (Cth), s 157.

[64] *Corporations Law*, s 1323(3).

[65] *Corporations Law*, s 1323(4). While the fact that no undertaking is required may be taken into account by the court when deciding whether to grant an interim order (*CAC* v *Lombard Nash International Pty Ltd* (1987) 5 ACLC 269, 272), the possible prejudicial effect of such orders caused the Senate Legal and Constitutional References Committee to recommend

> that the *Corporations Law* be amended so that in situations where the ASC: obtains ex parte an order freezing personal assets under s 1323 of the *Corporations Law*;

interim order application,[66] and it is not necessary for the purposes of making an interim order under s 1323(3) that the court find the conditions in s 1323(1) to have been fulfilled.[67] While the ease with which such interim orders can be obtained has caused some justifiable disquiet,[68] the only requirement for an order under s 1323 is that the court is of the opinion that such an order is desirable before considering the application.[69]

In exercising its discretion under s 1323 for an interim order under s 1323(3) or for a more lasting order under s 1323(1), the court must balance the interests for protection of the aggrieved party against the possible prejudice to those who may be subject to the order. The processes by which this is done have best been described by Waddell CJ in Eq in *CAC* v *Walker*:

> What evidence is necessary before an order should be made will depend upon the circumstances. In the case of an application made shortly after an investigation has begun, the evidence may be regarded as sufficient if it establishes the general circumstances, the nature of the investigation and the reason why it is thought that there may be some liability on the part of the relevant person.
>
> On later application, where the question is whether or not orders already made should continue, additional evidence may be thought to be necessary, such as evidence which describes the progress of and the future steps likely to be taken in the investigation. Evidence might be required which goes some distance towards establishing liability or establishing a prima facie case. In deciding what evidence is required the court might well think it relevant to take into account the detriment which might be caused to potential claimants against a relevant person if an order is refused and to a relevant person if an order is made.
>
> The order made should, of course, go no further than is necessary for the purpose of protecting likely claimants against the relevant person, for instance, sufficient security may be provided for any liability by making an order in respect of part, as opposed to the whole, of the relevant person's property.[70]

the order is subsequently lifted;
no determinative order is made against the property the subject of the order; and
no successful criminal or civil prosecution results against the respondent,
the respondent should be given a statutory right to recover from the ASC any loss or damage incurred as a result of the original order (Canberra, *The Investigatory Powers of the Australian Securities Commission* (1995), Recommendation 4).

For other than orders under s 1323(3), it is currently customary to require an undertaking as to damages: *Beach Petroleum NL* v *Johnson* (1992) 9 ASCR 404, 412.

66 *CAC* v *Transphere Pty Ltd* (No 2) (1985) 9 ACLR 1005, 1009. See also *ASC* v *Aust-Home Investments Ltd* (1993) 11 ASCR 136.

67 Section 1323(3). Equivalent requirements in *Companies Code*, s 573 were addressed in *CAC* v *Home Buyers Finance Ltd* (1987) 5 ACLC 706, 707; and *CAC* v *United International Technologies Pty Ltd* (1987) 6 ACLC 637, 641.

68 Canberra, *The Investigatory Powers of the Australian Securities Commission* (1995), Recommendation 4. The specific proposal is mentioned in fn 65 supra.

69 Section 1323(3). See also *CAC* v *Lone Star Exploration NL* (1988) 6 ACLC 1108, 1112; *CAC* v *Home Buyers Finance Ltd* (1987) 5 ACLC 706, 707; and *CAC* v *United International Technologies Pty Ltd* (1987) 6 ACLC 637, 641.

70 5 ACLC 991, 995; quoted with approval in *Lone Star Exploration NL* v *CAC* (1988) 6 ACLC 1108, 1114 and *CAC* v *ASC Timber* (1989) 7 ACLC 467, 477.

In consequence of these balancing of interests, the discretion of the court in granting orders under s 1323 may depend to a large extent upon which orders are sought. The orders which may be given under s 1323 reflect the desire to provide effective protection to creditors and other claimants against a person who is under investigation or subject to criminal or civil proceedings under the *Corporations Law*; however they vary significantly in the impact they might have upon the relevant person. The first four orders,[71] like the bankruptcy sequestration order, prevent specified property of the relevant person being dealt with so as to put them beyond the reach of the aggrieved party.

The last two orders listed in s 1323(1), used to prohibit the relevant person from leaving Australia, might have little prejudicial effect upon the commercial interests of the relevant party. Nevertheless, even the exercise of the Court's discretion has an effect upon human rights protected at international law, and was described by Young J in *CAC* v *Prime Commodities Pty Ltd*[72] as 'a very difficult balancing exercise of public and private rights'.[73]

The most significant remedy allowed in s 1323 is the appointment of a receiver or trustee (in the case of an individual) or of a receiver or receiver and manager (in the case of a corporate entity) over the property of the relevant person.[74] This remedy is one of the oldest remedies available in equity, and the inclusion of it within the protective orders available gives the ASC or the aggrieved party a very useful remedy.[75] Passing of control of property to a receiver or manager may assure that no further dissipation will occur or that proper management of the property will be restored. Additionally, however, the remedy might have the incidental effect of assuring that the ASC's investigation can proceed with the assistance of the receiver or manager and, in most cases, the dispossessed party. Unfortunately, however, the appointment of a receiver has severe consequences upon the party whose property is subject to the order including the obvious interference with property rights[76] and often, in the business context, commercial failure.[77] Due to the severity of these consequences, however, the courts have exercised similar caution in the utilisation of the power to appoint a receiver or manager under s 1323 as under general law principles.

[71] *Corporations Law*, s 1323(d)-(g).
[72] (1987) 5 ACLC 787.
[73] Id 789.
[74] *Corporations Law*, s 1323(h). If the relevant person is a natural person, the appointment is of a receiver or trustee. A receiver or receiver and manager may be appointed in the case of a corporation. The property subject to this receivership and the powers of the receiver are determined by the court.
[75] *Bond Brewing Holdings Ltd* v *National Australia Bank Ltd* (1990) 9 ACSR 445, 456.
[76] See *CAC* v *Walker* (1987) 9 ACLC 991, 1001, wherein the detriment caused to an individual by the inability to access money was considered. To lessen this impact, the orders appointing the receiver may include provision for a defendant's reasonable living and legal costs and expenses: *CAC* v *ASC Timber Pty Ltd* (1989) 7 ACLC 467, 479.
[77] It must always be borne in mind that the appointment of a receiver in such a case authorises an irresistible invasion and that even if the army of occupation is withdrawn after only a short time things may never be the same again: *Bond Brewing Holdings Ltd* v *National Australia Bank Ltd* (1990) 9 ACSR 445, 454.

In *Bond Brewing Holdings Ltd* v *National Australia Bank Ltd,*[78] the power of the court to appoint a receiver under both general principles and under s 573 of the *Companies Code* were reviewed. The joint judgment of the Full Court of the Supreme Court of Victoria (Kaye, Murphy and Brooking JJ), stated that the power should only be exercised 'after great scrutiny and in extraordinary circumstances'.[79] Referring to the extensive American authority on point, the Court indicated that the considerations bearing on the point were as follows:

> A court in exercising its discretion to appoint or refuse to appoint a receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies. This discretion is to be exercised with great caution and circumspection, after full consideration of the facts of a particular case and the interests of all parties concerned, for a reason strongly appealing to the judge to whom the application is made.
>
> The appointment of a receiver should be denied where it is likely to do irreparable injury to others or where greater injury will probably result from the appointment than if none were made.[80]

The authorities in Australia which deal with the protective orders under s 1323 and its predecessors are consistent with the views expressed in *Bond Holdings*. In particular, very strong and compelling evidence would be needed to justify the appointment of a receiver on an interim basis.[81] Relevant to such justification would be the existence of an immediate,[82] extraordinary[83] need for which an alternative remedy would not suffice.[84] Nevertheless, the remedy is a discretionary one so that firm, inflexible rules should not be encouraged.[85]

Like the other remedies provided in s 1323, the establishment of a receivership is intended to provide protection for the rights of a potential claimant against the party whose assets are the subject of the receivership. Because an investigation by the receiver into the existence and location of assets would normally seem appropriate and diligent,[86] the appointment of a receiver may have the incidental effect of assisting an ASC investigation. This incidental

[78] (1990) 1 ACSR 445.
[79] (1990) 1 ACSR 445, 458.
[80] Ibid, quoting 65 *Am Jur 2d* Receivers para 20.
[81] *CAC* v *Shintoh Shohin Pty Ltd* (1987) 6 ACLC 8. See also *ASC* v *Farmer Johnson Ltd* (1991) 6 ACSR 219 and *Beach Petroleum NL* v *Johnson* (1992) 9 ACSR 404, 406.
[82] *CAC* v *Lombard Nash International Pty Ltd* (1986) 5 ACLC 269, 273.
[83] *CAC* v *ASC Timber Pty Ltd* (1989) 7 ACLC 467.
[84] *Beach Petroleum NL* v *Johnson* (1992) 9 ACSR 404, 406.
[85] See *CAC* v *ASC Timber Pty Ltd* (1989) 7 ACLC 467, 478, where Powell J of the New South Wales Supreme Court indicates a firm rule requiring disappearance of substantial assets would be an abdication of the court's discretion.
[86] *CAC* v *Lombard Nash International Pty Ltd* (1986) 5 ACLC 1020, 1023. See also *CAC* v *Glauber Co Ltd* (1985) 3 ACLC 492 and *CAC* v *Smithson* (1985) 3 ACLC 230.

assistance to the ASC will not prevent the appointment of a receiver if such a step is otherwise justified.[87]

The powers which may be exercised by the receiver once appointed will be determined by the court,[88] but the court order should go no further than is necessary to protect the interests of likely claimants,[89] limiting the powers and subject property as is necessary. Notwithstanding the judicial controls on the application of s 1323, it is clear that any expansion of such powers should be carefully considered. It is within this context that the possible changes to s 1323 should be considered.

DEFICIENCIES OF SECTION 1323

One of the practical difficulties for the ASC is that in many cases where dishonesty is involved, by the time that the investigation has begun pursuant to s 13 of the *ASC Act*, the dishonest directors or officers of the company, or others, have set about divesting the company or themselves of any assets. The freezing order or appointment of a receiver is a hollow victory when the dishonest principals behind the company have foreseen the possibility of an ASC investigation and taken action to put their assets and the assets of the company beyond the reach of creditors and the ASC.[90]

Further complicating matters is the fact that, even where s 1323 is successfully and properly employed, costs of administration of the estate may ultimately fall upon the party seeking the appointment of an external administrator.[91] While the costs of administration may be taken from the assets subject to administration if so provided by court order, the successful dissipation of assets by a wrongdoer would mean that no costs of administration could be thus recovered. Diligent administrators would normally assure that their fees will ultimately be paid by the party seeking appointment before consenting to serve. This possibility would undoubtedly weigh heavily upon any applicant who suspected that most assets had already been placed beyond reach.

[87] *CAC* v *Shintoh Shohin Pty Ltd* (1988) 6 ACLC 8, 22. The court may order that documents be delivered by the relevant party to the receiver to assist the investigation; however, this may not be permitted where the consequences would be self-incriminating: *CAC* v *Golden Harvest Investments (Australia)* (1989) 7 ACLC 14, 15.

[88] Section 1323(1)(h). *Re Merchant Nurseries Pty Ltd; CAC* v *Rowley* (1985) 10 ACLR 143.

[89] *CAC* v *Walker* (1987) 5 ACLC 991, 996.

[90] The orders may apply to assets within the control of third parties with knowledge of the full circumstances of the transfer. *Barnes* v *Addy* (1874) 9 Ch App 244. The difficulties of this proof and the standard required were recently discussed in *Linter Group Ltd* v *Goldberg* (Unreported, Supreme Court of Victoria, Southwell J, 4 May 1992). This is discussed in the Commercial and Finance Law Comment (1992) 3 JBFLP 202.

[91] In the case of an interim order improperly granted, costs of the receiver may be required to be paid by the applicant: *ASC* v *Aust-Home Investments Ltd* (1993) 11 ACSR 136. Recent proposals by the Senate Legal and Constitutional References Committee could also result in a statutory right for compensation against the ASC where it obtains such an interim order without a succesful criminal or civil action against the respondent. See fn 65 supra.

To overcome these deficiencies and improve the usefulness of *Corporations Law*, s 1323, a mechanism that would allow the recovery of assets which have been transferred in suspect circumstances by any wrongdoer (the 'relevant person' in the section) or by the company prior to the invocation by the court of a s 1323 order would be appropriate. Such mechanisms are found in the *Bankruptcy Act*, the *Corporations Law* itself (Div 2 of Pt 5.7B), the *Proceeds of Crime Act* and the American *RICO* law.[92] With each of these statutes, a general ambit claim to property once owned by an individual is coupled with an exemption provision which reverses the onus of proof as to regularity. Where the circumstances indicate that a suspect transfer has occurred, the onus is placed on the person or company being investigated and the parties dealing with the person or the company to show that the transaction ought not be set aside or (in the case of the *Proceeds of Crime* and *RICO* legislation) that the property should not be subject to forfeiture.

Although any such change to s 1323 would not overcome the problem of asset dissipation in all cases (particularly off-shore or well concealed transactions), the provisions of the *Bankruptcy Act*, Div 2 of Pt 5.7B of the *Corporations Law*, the *Proceeds of Crime Act* and the *RICO* Act do provide specific models upon which a recovery mechanism in s 1323 could be based. The public, parliamentary and academic responses to the introduction of the reverse onus provisions of the *Proceeds of Crime Act* as well as the history of the application of the *RICO* law demonstrate that any such innovation would have to be carefully implemented.

ALTERNATIVE MODELS

The Insolvency Models

On first impression, the *Bankruptcy Act* and the *Corporations Law* provisions relating to transactions antecedent to insolvency appear to provide useful models for any expansion of s 1323, establishing as they do mechanisms for review of transactions which may have occurred prior to the entering of a court order. On the simplest level, the *Bankruptcy Act* indicates that the commencement of bankruptcy[93] is the time of the earliest act of bankruptcy (if any) within six calendar months before the presentation of the petition or the making of the application for the sequestration order.[94] Since all property belonging to the bankrupt at the commencement of the bankruptcy is available for distribution to creditors,[95] the proper administration of the bankrupt's estate necessitates that property disposed of by the bankrupt subsequent to the commencement of bankruptcy but prior to any judicial consideration of bankruptcy proceedings nevertheless be considered as

[92] *Organized Crime Control Act of 1970*, Pub L No 91–452, 84 Stat 922 (1970) (codified as 18 USC ss 1961–8.

[93] *Bankruptcy Act*, s 116(1); *Re Docker* (1938) 10 ABC 198, 245.

[94] *Bankruptcy Act*, s 115(1). See also the new Part 5.7B, Div 2 of the *Corporations Law* which deals with transactions antecedent to the winding up of a company.

[95] *Bankruptcy Act*, s 116(1).

potentially part of the bankrupt's estate. Similarly, *Corporations Law*, s 468 (1) indicates that dispositions after the commencement of a winding up are void.[96]

Unqualified application of these concepts, however, could work injustice upon those dealing with an insolvent with lack of knowledge that a non-corporate insolvent had committed an act of bankruptcy or that a corporate insolvent had commenced winding up. Upon entering of formal bankruptcy orders or winding up orders, the transaction could possibly be set aside.

To prevent application of the 'relation back' doctrine in circumstances which would be unfair to innocent third parties, ss 123 and 124[97] of the *Bankruptcy Act* provide that certain types of commercial transactions[98] which are made in good faith[99] and in the ordinary course of business[100] are protected from the effects of 'relation back'.[101] Those seeking protection under these *Bankruptcy Act* provisions have the burden of proof in establishing all of the essential elements.[102] The *Corporations Law*, s 468(3), on the other hand, provides a general discretion for the court to validate transactions which are subject to s 468;[103] however, the validation is discretionary and depends primarily upon establishing that the transaction has had no prejudicial effect upon the insolvency estate (rather than the innocence, etc of the parties involved).[104]

While a transaction may not be set aside under the *Bankruptcy Act* by virtue of the doctrine of 'relation back' if the defences provided in ss 123 and 124

[96] The commencement of winding up is determined by reference to ss 513A to 513C. These sections, inserted by Act No 210 of 1992 and effective since 23 June 1993, indicate that commencement of winding up will in most circumstances be the commencement of insolvency administration or the date of the winding up order.

[97] Section 124 of the *Bankruptcy Act* protects those, such as solicitors or banks, who hold the property of the bankrupt. Under this section, a person who pays money or delivers property to the bankrupt or deals with it in accordance with the bankrupt's direction will not be subject to the relation back doctrine where the transaction is done in good faith, and in the ordinary course of business before the date of bankruptcy. Transactions occurring after the date of bankruptcy may also be protected if, in addition to being in good faith and in the ordinary course of business, the person involved acted without negligence. See s124(1)(b) of the *Bankruptcy Act*.

[98] Those transactions which are covered by s 123 of the *Bankruptcy Act* are payments by a debtor to creditors; conveyances, transfers or assignments by a debtor for valuable consideration; and payments in respect of a present advance made by an existing creditor.

[99] In this context, good faith indicates honesty and a lack of suspicion of the debtor's intent to prefer. See *Re Donovan* (1910) SR (NSW) 532.

[100] This refers to a transaction which would be usual for the parties to enter as a matter of business, uninfluenced by any apprehension that the debtor might be insolvent. See *Downs Distributing Co Pty Ltd* v *Assoc Blue Star Stores Pty Ltd* (1948) 76 CLR 463, 480. Merely being aware that a debtor had committed an act of bankruptcy does not necessarily constitute a lack of good faith or show that the transaction was not in the ordinary course of business: *Bankruptcy Act*, s 123(3).

[101] *Bankruptcy Act*, s 123(1)(c).

[102] *Bankruptcy Act*, ss 123(2) and 124(2).

[103] *Corporations Law*, s 468(3).

[104] *Sheahan and Anor* v *Workers Rehabilitation and Compensation Corporation* (1991) 6 ACSR 11. See, however, *Tellsa Furniture (in liq)* v *Glendave Nominees Pty Ltd* (1987) 9 NSWLR 254, where it was observed that a case for an order validating a transaction will be strengthened where a creditor acts bona fide with no knowledge of the winding up.

apply, it may still be set aside as a voidable or fraudulent settlement[105] or as a voidable preference.[106] Similarly, transactions which are not caught by *Corporations Law*, s 468 are still subject to the provisions of the *Corporations Law*, Div 2 of Pt 5.7B, if characterised as unfair preferences, uncommercial transactions, or unfair loans.[107] Although the importance of maximising the insolvency estate provides one unifying feature for all of the mechanisms permitting interference with transactions entered into before a formal adjudication of insolvency, the justification for each differs. Not surprisingly then, both the ease with which transactions can be reversed and the length of time before insolvency in which the suspect transactions must occur[108] varies significantly.

Despite the differing elements found in each of the avoidance mechanisms available to set aside transactions antecedent to insolvency, there are useful common features. Avoidance of a transaction[109] normally necessitates proof by the trustee or liquidator of the essential elements of the avoiding provision.[110] This proof is often aided by statutory presumptions about particular elements of the avoiding provision (for example, that the transaction occurred whilst the debtor was insolvent[111]) which may be rebutted if the contrary is proved.[112] Finally, a defence is usually provided for parties who are not culpable and who have provided value.[113]

[105] *Bankruptcy Act*, ss 118 — 121. See also *Corporations Law*, ss 588FA — 588FD.

[106] *Bankruptcy Act*, s 121. See also *Corporations Law*, s 588FA.

[107] See Z Singer, 'Invalidation of Antecedent Transactions under the Corporate Law Reform Act 1992 (Cth)' (1994) 2 *Insolv LJ* 36, and A Keay, ' "Relation-back Day" and "Related Entity": New Key Terms in Liquidation Law' (1994) 2 *Insolv LJ* 126.

[108] For fraudulent transactions in bankruptcy, for example, the proof may be onerous; however, transactions may be overturned no matter how long they have occurred before insolvency: *Bankruptcy Act*, s 121. Under the *Corporations Law*, s 588FE, the transactions must occur within the ten years before the 'relation-back' date. See A Keay, ' "Relation-back Day" and "Related Entity": New Key Terms in Liquidation Law' (1994) 2 *Insolv LJ* 126.

[109] Under the new *Corporations Law*, Div 2 of Pt 5.7B, transactions are not rendered void by the statute (with the consequent ambiguities this may entail), rather avoidance requires a court order under *Corporations Law*, s 588FF.

[110] For voidable settlements under the *Bankruptcy Act*, see *Official Trustee* v *Mitchell* (1992) 110 ALR 484. For fraudulent settlements see *Official Trustee* v *Marchiori* (1983) 69 FLR 290. Under the *Corporations Law*, avoidance is possible only upon application of the liquidator under s 588FF where the court is 'satisfied that a transaction of the company is voidable ...'

[111] The presumption of insolvency in corporate liquidations follows recommendations of the 'Harmer Report' Australian Law Reform Commission, General Insolvency Inquiry (Report No 45, 1988) about the deficiencies of the voidable preference provision of the *Bankruptcy Act* in this regard. See now *Corporations Law*, ss 588E and 588FE(8), which incorporate a presumption similar to the US preference model. See also A Herzberg and P E von Nessen, 'Voidable Preferences and Guarantor Officers' (1987) 16 MULR 49; P E von Nessen, 'Preferential Transfers Antecedent to Insolvency — the Australian Law Reform Commission's Proposals' (1988) 6 CSLJ 128; and A Herzberg and P E von Nessen, 'Preferring Guarantors: A Comparison of the Australian and United States Provisions Regulating Voidable Preferences' (1989) 6 *UCLA Pac Basin LJ* 1.

[112] *Corporations Law* s 588FE(9).

[113] For example, *Corporations Law*, s 588FG(1) and *Bankruptcy Act*, ss 120(7), 122(2), the latter of which also requires that the transaction be in the ordinary course of business. *Bankruptcy Act*, s 120(1)(a) exempts settlements made in such circumstances from its operative provision. This would appear to place the onus of proof of absence of such

The pervasive theme of most insolvency avoidance provisions (the effect of a transaction upon the general pool of creditors) along with the related requirement of knowledge that the transferor was insolvent at the time of the transfer detract from their usefulness as direct models for a revised s 1323. Similarly, the voidable settlement provision (*Bankruptcy Act*, s 120) and the fraudulent settlement provision (*Bankruptcy Act*, s 121), which do not strictly incorporate such concepts, include elements which are inappropriate for inclusion in a broadened s 1323.[114] 'Good faith' means acting without notice or suspicion that any fraud or preference is intended.[115]

Similar elements, in a context closer to s 1323, are, however, found in the criminal forfeiture provisions of the *Proceeds of Crime Act* and *RICO* Act discussed below.

Proceeds of Crime Act

In response to the profitability of certain major criminal enterprises, the Federal Government introduced the *Proceeds of Crime Act* in 1987. This act, based on the *Drug Trafficking Offences Act 1986* (UK) and the *Money Laundering Control Act 1986* (US), provides the mechanism for the tracing, freezing and confiscation of the proceeds of crime and gives powers to police to assist in following the money trail.[116]

Of particular relevance to this article are sections of the *Proceeds of Crime Act* which reverse the onus of proof as to what property was that of the criminal and whether the property was the proceeds of a crime. The sections of the *Proceeds of Crime Act* which cover these matters are ss 19(6)(c) and 27(6). Section 82 of that Act also provides a presumption that a recipient of property which was the proceeds of crime is knowledgeable of its source.[117] While a

circumstances upon the trustee: *Official Trustee* v *Mitchell* (1992) 110 ALR 484; however, see *Michael* v *Thompson* (1984) 20 VR 548, 552.

[114] The required proof under s 120 that a transaction is not an exempt one could necessitate proof concerning the lack of good faith and valuable consideration. This, or the required proof of intent to defraud under s 121 would, if incorporated into s 1323, render its amendment counterproductive.

[115] *PT Garuda Indonesia Ltd* v *Grellman* (1992) 107 ALR 199; *Shirlaw* v *Mallouf* (1989) 15 ACLR 641.

[116] The history of this Act is more fully described in M Weinberg, 'The Proceeds of Crime Act 1987 — New Despotism or Measured Response?' (1989) 15 *Mon LR* 201, and B Fisse, 'The Proceeds of Crime Act, The Rise of Money Laundering Offences and the Fall of Principle' (1988) 13 *Crim LJ* 5. See also similar State Acts: *Crimes (Confiscation of Profits) Act* 1986 (Vic); *Crimes (Confiscation of Profits) Act* 1986 (SA); *Crimes (Confiscation of Profits) Act* 1988 (WA) and *Crimes (Confiscation of Profits) Act* 1989 (Qld).

[117] Section 82 provides:

(1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence against this section punishable, upon conviction, by:

(a) if the offender is a natural person — a fine not exceeding $ 5 000 or imprisonment for a period not exceeding two years, or both; or

(b) if the offender is a body corporate — a fine not exceeding $ 15 000.

(2) Where a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

similar presumption might assist recovery of assets under s 1323, the criminal context of this presumption makes it only indirectly relevant to this article and, consequently, it is not addressed herein.

Section 19 in particular presents potentially useful models to apply to *Corporations Law*, s 1323, because it raises presumptions about use and ownership of property. Under s 19, the property of a person convicted for 'serious offences' may be forfeited to the Commonwealth if the property was used in, or in conjunction with, the commission of the offence. Where a forfeiture order against particular property is sought and it is established that the property was in the person's possession at the time of, or immediately after, the commission of the offence, s 19(6) provides:

> (c) If no evidence is given that tends to show that the property was not used in, or in conjunction with the commission of the offence-the court shall presume that the property was used in, or in connection with, the commission of the offence; or
> (d) in any other case — the court shall not make a forfeiture order against the property unless it is satisfied that the property was used in or in connection with the commission of the offence.

In a similar vein, but also utilising a 'relation back' concept, is s 27 of the *Proceeds of Crime Act*, which deals with pecuniary penalty orders. Under Div 3 of Pt II of the Act, a pecuniary penalty may be imposed on the offender if that person derived benefits from the commission of an offence. This process requires that the value of the benefits be assessed and the penalty be imposed accordingly.[118] In ascertaining the amount of benefits which an offender has obtained, s 27(6) provides in part:

> (a) all property of the person at the time the application is made;
> (b) all property of the person at any time;
> (i) within the period between the day the offence, or the earliest offence, was committed and the day on which the application is made; or
> (ii) within the period of five years immediately before the day on which the application is made;
> whichever is the shorter;
> *shall be presumed, unless the contrary is proved*, to be property that came into the possession or under the control of the person by reason of the commission of the offence or the offences.(emphasis added)

The sections outlined above came under severe criticism within Parliament during debate over the legislation.[119] The then Attorney-General, Lionel Bowen, stated the justification for the provisions:

[118] *Proceeds of Crime Bill* 1987 — Explanatory Memorandum, 15.

[119] For example, the Honourable Mr Peter Duncan conceded that the clauses reversing the onus of proof left him 'in an uneasy frame of mind' during his second reading speech before the House of Representatives: Commonwealth Hansard — House of Representatives, 28 May 1987, 3571-2.

> If a person can clearly establish that he has acquired his money or assets through lawful activity, he has nothing to fear. We cannot have a person getting the benefit of the unlawful activity and then saying: 'Try to prove it against me.' A complete defence is given to any accusation if that person satisfies the court there are proper grounds for his having the property in his possession.[120]

A number of commentators have been highly critical of the legislation in general and the confiscatory aspects of the legislation in particular.[121] Among other concerns identified[122] is the fact that confiscation of the proceeds of crime can unduly penalise relatives and other third parties, a concern of particular relevance to any change proposed for the *Corporations Law*, s 1323.

Due to the breadth of the forfeiture provision, protection for third parties was essential. Section 21(6) of the Act allows a procedure for third parties to have their interests in property otherwise subject to forfeiture protected. Orders under this subsection will be given where:

(a) the applicant was not, in any way, involved in the commission of the offence, or an offence, in respect of which the forfeiture of the property is sought; and
(b) if the applicant acquired the interest at the time of or after the commission of the offence — the applicant acquired the interest:
    (1) for sufficient consideration; and

[120] Commonwealth Hansard — House of Representatives, 28 May 1987, 3575 — 6.

[121] A Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *ANZJ Crim* 44; M Weinberg, 'The Proceeds of Crime Act 1987 — New Despotism or Measured Response' (1989) 15 *Mon LR* 201; B Fisse, 'The Proceeds of Crime Act, The Rise of Money-Laundering Offences and the Fall of Principle' (1988) 13 *Crim LJ* 5 and B Fisse, 'Confiscation of the Proceeds of Crime: Funny Money, Serious Legislation' (1989) 13 *Crim LJ* 368; B Fisse, 'Confiscation of Proceeds of Crime: Discretionary Forfeiture or Proportionate Punishment?' (1992) 16 *Crim LJ* 138; and Editorial, 'Proceeds of Crime' (1988) 12 *Crim LJ* 61.

[122] See, for example, B Fisse, 'Confiscation of the Proceeds of Crime: Funny Money, Serious Legislation' (1989) 13 *Crim LJ* 368, 369. Matters of concern raised in that article related primarily to general criminal law principles and included:

> Forfeiture and penalty orders bear no relationship to the amount of unjust enrichment;
> punishment may not be proportionate to the offence;
> forfeiture is hard to reconcile with the principle of the least drastic means;
> criminal principles have been compromised to facilitate forfeiture; and
> access to legal assistance is compromised by forfeiture.

Most of these objections have proved to be warranted by reference to the United States experience under the *RICO* Law. They are, unfortunately, beyond the scope of this article. However, see B Winick, 'Forfeiture of Attorney's Fees under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It' (1989) 43 *U Mi LR* 765; R Mass, 'Forfeiture of Attorney's Fees: Should Defendants be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of Crime"' (1987) 39 *Stan LR* 663; C Palm, 'RICO Forfeiture and the Eighth Amendment: When is Everything Too Much?' (1991) 53 *U Pitt LR* 1; W Taylor, 'The Problem of Proportionality in RICO Forfeitures' (1990) 65 *Notre DLR* 885; K Brickey, 'RICO Forfeitures as "Excessive Fines" or "Cruel and Unusual Punishments"' (1990) 35 *Vill LR* 905; T Piety, 'Scorched Earth: How Expansion of the Civil Forfeiture Doctrine Has Laid Waste to Due Process' (1991) 45 *U Mi LR* 911 and A Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *ANZJ Crim* 44.

(2) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property.

While objections to the *Proceeds of Crime Act* continued to be expressed after its passage,[123] most concerned the draconian nature of the forfeiture concept itself and the application of statutory presumptions to criminal penalty provisions. While these objections have much force, the processes by which identification of property which is subject to the forfeiture occurs have much to commend them in terms of efficiency. As with the *Bankruptcy Act*, the provision of certain presumptions in relation to the property places the onus of providing contrary evidence upon the parties best able to provide such evidence. Though there may be reason to broaden the grounds for relief under s 20(6) of the *Proceeds of Crime Act*, the limited application of this section does not significantly detract from positive aspects which statutory presumptions of this kind can provide if properly utilised.

The United States RICO Act

In 1970 the United States Congress enacted forfeiture provisions into the *Racketeer Influenced and Corrupt Organizations Act* and the *Comprehensive Drug Abuse and Prevention Act*[124] in order to provide the government with a powerful tool against organised crime and drug traffickers. These forfeiture provisions, like those of the Australian *Proceeds of Crime Act* which followed them, were intended to eliminate the profitability of criminal activity.[125]

The forfeiture provisions of the *RICO Act*, like those of the *Proceeds of Crime Act*, have generated a lengthy debate about the appropriateness of this remedy on criminal law principles.[126] It is its application of the forfeiture provisions to innocent third parties which here is noteworthy. Both a 'relation back' aspect of forfeiture under this Act as well as its application to property indirectly derived from the property used in the prohibited activity (tracing

[123] I Temby, 'The Proceeds of Crime Act — One Year's Experience' (1989) 13 *Crim LJ* 24; A Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *ANZJ Crim* 44; and B Fisse, 'Confiscation of Proceeds of Crime: Discretionary Forfeiture or Proportionate Punishment?' (1992) 16 *Crim LJ* 138.

[124] 21 USC, s 853.

[125] The Statement of Findings and Purpose accompanying the Act indicated that one of its goals was the provision of enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. *Organized Crime Control Act of 1970*, Pub L No 91 -452, 84 Stat 922, 923 (1970). See also Spaulding, ' "Hit Them Where it Hurts": RICO Criminal Forfeitures and White Collar Crime' (1989) 80 *Crim L & Criminology* 197.

[126] For example, C Palm, 'RICO Forfeiture and the Eighth Amendment: When is Everything Too Much?' (1991) 53 *U Pitt LR* 1; W Taylor, 'The Problem of Proportionality in RICO Forfeitures' (1990) 65 *Notre DLR* 885; K Brickey, 'RICO Forfeitures as "Excessive Fines" or "Cruel and Unusual Punishments"' (1990) 35 *Vill LR* 905; and T Piety, 'Scorched Earth: How Expansion of the Civil Forfeiture Doctrine Has Laid Waste to Due Process' (1991) 45 *U Mi LR* 911. The United States Supreme Court has recently agreed to consider whether such forfeitures violate the Fifth Amendment double jeopardy prohibition: *US* v *$405 089.23 in US Currency* 33 F 3d 1210; reh den 56 F 3d 41 (9th Circuit, 1995); cert granted, No 95–346, 12 January 1996.

provisions) has meant that third party rights are likely to be affected.[127] Despite the fact that the *RICO Act* operates as a criminal forfeiture provision,[128] the United States experience in relation to prevention of asset dissipation and protection of innocent parties provides useful insights concerning expansion of s 1323.

The original *RICO* legislation provided for forfeiture of any interest acquired or maintained through prohibited racketeering activity or any property affording a source of influence over an enterprise which participated in such prohibited activity.[129] To assure the effectiveness of these forfeitures, the legislation provided for restraining orders to prevent dissipation of forfeitable assets.[130] These restraining orders could be obtained upon indictment, with forfeiture to be effective upon conviction.[131]

In 1984, the property which was subject to forfeiture was expanded by the *Comprehensive Crime Control Act of 1984* to include property belonging to the *RICO* defendant at the time of the original criminal activity. Such property was deemed to have passed to the government as of the date of the original criminal activity, with this forfeiture being finalised upon conviction.[132] In 1986, these provisions were extended to property derived from proceeds of prohibited activity.[133]

In order to protect innocent third parties from the broad forfeiture provisions, specific defences and procedures for asserting these defences were introduced. These, now included in 18 USC s 1963(2) — (6), indicate that forfeiture will not apply to property for which it can be established by a preponderance of evidence that a person other than the *RICO* defendant, had right, title or interest in such property or a superior right, title or interest to that of the *RICO* defendant at the time of the acts giving rise to the

[127] G Bush, 'The Impact of RICO on Legitimate Business' (1990) 65 *Notre DLR* 996.

[128] RICO also provides for forfeiture in civil actions: 18 USC, s 1864. This most controversial aspect of RICO is discussed in M Goldsmith, 'Judicial Immunity for White-Collar Crime: the Ironic Demise of Civil RICO' (1993) 30 *Harv J Leg* 1; K Rassmussen, 'Introductory Remarks and a Comment on Civil RICO's Remedial Provisions' (1990) 43 *Vand L R* 623; G Blakey, 'The Civil RICO Fraud Action in Context: Reflections on Bennett v Berg' (1982) 58 *Notre DLR* 237; and M Goldsmith, 'Civil RICO Reform: The Basis for Compromise' (1987) 71 *Minn LR* 827. For a recent noteworthy example of the use of this provision see *The National Organization of Women* v *Scheidler* 114 S Ct 798, 127 L Ed 2d 99 (1994).

[129] Pub L 91 — 452, Title IX, s 901(a), 84 Stat 943; 18 USC, s 1963(a) (1970).

[130] See B Baird and C Vinson, 'RICO Pretrial Restraints and Due Process: the Lessons of *Princeton/Newport*'(1990) 65 *Notre DLR* 1009 and 'Note, RICO Post-Indictment Restraining Orders: The Process Due Defendants'(1985) 60 NYULR 1154.

[131] Pub L 91 — 452, Title IX, s 901(a), 84 Stat 943; 18 USC, s 1963(b) (1970).

[132] Pub L 98 — 473, Title II, 98 Stat 1837 (1984), s 302. 18 USC, s 1963 now provides:

> All right, title and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to the forfeiture under this section.

[133] *Department of Justice Assets Forfeiture Fund Amendments Act* of 1986, Pub L No 99 — 570, Title I, Subtitle D, 100 Stat 3207. See 18 USC, s 1963(a)(3) and (m).

forfeiture.[134] For innocent parties acquiring property from the *RICO* defendant between the commencement of the prohibited activity and the conviction of the *RICO* defendant, the property so acquired can be excluded from forfeiture if that party, upon petition to the appropriate federal court can establish, by a preponderance of evidence, that:

> The petitioner is a bona fide purchaser for value of the right, title or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.[135]

Not surprisingly, the forfeiture scheme operating under *RICO* bears a number of similarities to that used in the *Proceeds of Crime Act*. One difference between the United States legislation and that of Australia, however, is that the *RICO* legislation allows forfeiture not only of the proceeds of crime (including property derived therefrom) but also of any interest in an enterprise over which the wrongdoer has influence[136] which that person 'has established, operated, controlled, conducted, or participated in the conduct of' in violation of the *RICO* prohibitions.[137] For this reason, the forfeiture provisions under *RICO* are much more likely to have adverse effects upon innocent parties than any comparable Australian statutes.[138] The concerns raised in the United States about the intrusion of criminal forfeiture into the world of legitimate business are particularly relevant in the context of possible disruptions to legitimate commerce which an expansion of s 1323 injunctive powers may cause.

CONCLUSION: REFORMS TO SECTION 1323

Circumstances have already been described where ASC investigations have been, or are to be, commenced and dishonest individuals might implement the divestiture of assets, of either the company or themselves.[139]

In some circumstances a company which subsequently undergoes liquidation may be able to have certain transactions impugned by a liquidator. This however, will not always be the case because some transactions which

[134] 18 USC, s 1963(6)(A) (Supp 1993). Repeatedly, however, the United States Supreme Court has indicated that innocent owners who have allowed their property to be used in circumstances for which forfeiture is appropriate may suffer forfeiture despite their innocence. See most recently, *Bennis* v *Michigan* US 116 S Ct 994; 134 L Ed 2d 68 (1996).

[135] 18 USC, s 1963(6)(B) (Supp 1995).

[136] 18 USC, s 1963(a)(2) (Supp 1995).

[137] 18 USC, s 1962. See T O'Neill, 'Note, Functions of the Enterprise Concept' (1989) 64 *Notre DLR* 646.

[138] See *Bennis* v *Michigan* US 116 S Ct 994; 134 L Ed 2d 68 (1996); 'Note, Supreme Court Upholds Forfeiture of Innocent Owner's Property Without Prior Notice and Hearing' (1975) 60 *Corn LR* 467 and B Baird and C Vinson, 'RICO Pretrial Restraints and Due Process: the Lessons of *Princeton/Newport*' (1990) 65 *Notre DLR* 1009. See also *United States* v *Reagan* 766 F Supp 447 (SDNY 1989); 713 F Supp 628 (SDNY 1989); 706 F Supp 1102 (SDNY 1989) and 699 F Supp 36 (SDNY 1988), wherein Princeton Newport partners involved in securities fraud had their interests in the partnership forfeited under *RICO* legislation.

[139] See discussion at p 140 supra.

have occurred around the time of commencement of the investigation will fall outside the time limits of the *Corporations Law* insolvency provisions.

Also limiting the effectiveness of the recovery provisions under the *Corporations Law* is the fact that delinquent officers themselves may not come under bankruptcy administration at the same time as the insolvent company. While claims against the officer are being pursued, the officer may be dissipating assets in an effort to become judgment-proof. Such transfers may be prevented under s 1323; however, if such transactions occur before a s 1323 order can be obtained they may not be undone until and unless the officer is bankrupted. This, of course, is the most serious deficiency in the Australian scheme.

It is probable that the introduction of a 'relation back' concept into the provisions of s 1323 would do much to rectify the deficiencies which currently exist. As with the *Bankruptcy Act* this concept might be applied, at the court's discretion, after a court grants an order for receivership under s 1323(1)(h).

Where the appointment of a receiver or trustee over the property of an individual occurs under s 1323(1)(h)(i) or where the appointment for a body corporate or a receiver or of a receiver and manager occurs pursuant to s 1323(1)(h)(i), the property covered by such receivership should include property transferred by the individual or body corporate with no consideration.

While s 1323 could potentially apply to the proceeds of corporate crime or to assets subject to civil claims, it is often the least drastic of modifications which provides the most appropriate change. Consequently, rather than adapting the automatic 'clawback' provisions of the *Proceeds of Crime Act* or of the *RICO* legislation to s 1323, it is thought that certain features of the insolvency model would be sufficient to assure that s 1323 would be effective without being overly disruptive. All property of the relevant person under s 1323 would be expanded to include property transferred by the relevant person between the commission of a criminal act or civil wrong (depending upon the grounds upon which the order was based) and the date of the s 1323 order. A defence, placing the onus of proof for its components upon the transferee, would apply to any property transferred in good faith for value.

In each case where a transaction was made or might have been made in the shadow of activity which gave rise to the s 1323 order, the appointed receiver would be able to invoke the 'clawback' provisions. As in insolvency, the initial requirement for the receiver to be able to call the transaction into question should be straightforward. For example, the receiver might be required to prove only that the property was that of the relevant person within the 'claw back' period and that it had apparently been transferred for less than full value.

Any recipient of property from the wrongdoer would be able to prevent the property from being subject to the s 1323 order upon establishing the transaction was made bona fide and for valuable consideration. Failure to establish the defence would mean that the property would be subject to the s 1323

order. Placing the onus of proof for the regularity of the transaction upon the transferee would be no more extensive or burdensome than provisions in the present *Bankruptcy Act*, *Corporations Law*, Pt 5.7B Div 2, or their predecessors.[140]

The suggested changes to s 1323 would broaden the scope of a s 1323 order in situations where dishonest directors and officers have dissipated a company's assets. Unlike the *Proceeds of Crime Act* and the United States *RICO* legislation, it is not intended that the reversal of onus of proof should apply in relation to any aspect of potential criminal liability.

Two arguments that may be raised against such proposals are that they would introduce uncertainty into the commercial world and that they would further exagerate the prejudicial effect of such orders on those subject to it. The uncertainty of recipients of property is not of critical importance when one considers that broader provisions already apply to individuals and companies that become insolvent, and this provision will only apply to transfers unsupported by market value consideration. Similarly, the judicial requirements regarding the desirability of the order along with potential civil liability[141] for improper use of this remedy would, hopefully, mitigate against the prejudicial effect of the proposed amendments.

These changes would not, in fact, be a major philosophical change from what has gone before but more an expansion of the concept of 'claw-back' into another area of the law. The arguments for the implementation of such a development are based on the same arguments that support both bankruptcy provisions and the proceeds of crime provisions. The public interest in the need for effective regulation ought, in these circumstances, to prevail over the desire for commercial certainty which such a change, to a certain extent, would override.

What this article proposes is merely a mechanism whereby transactions which were entered into before the invocation of a s 1323 order may be set aside. The inclusion in the *Corporations Law*, s 1323 of such changes, similar to already existing provisions of the *Bankruptcy Act* or of the insolvency provisions of the *Corporations Law* itself, will provide a useful mechanism whereby assets which might now be dissipated by delinquent company directors and officers will be more readily preserved for bona fide creditors and innocent shareholders. While some inconvenience may flow to third party recipients of property (who may in fact be retrospectively deprived of the benevolence of a wrongdoer), this is outweighed by the increased confidence that the commercial community may have that individuals will be less able to divest themselves and the companies with which they are involved of assets in order to limit their liability to genuine creditors and shareholders.

[140] See eg *Bankruptcy Act* 1924–1960 (Cth), s 95.

[141] Either for costs awarded on an unsuccessful application or for statutory damages in the circumstances proposed by the Senate Legal and Constitutional References Committee, as discussed in fn 65 supra.