Bringing the High Flyers Back to Earth? Sections 120 and 121 of the Bankruptcy Act

★

PENELOPE CARRUTHERS†

Recent publicity regarding 'high flyer' bankruptcies has focused public concern on the adequacy of our current bankruptcy laws. Of particular concern is the fact that frequently only a meagre dividend is available to the unsecured creditors. How can the laws be changed to increase the dividend available to such creditors? One possible solution may be to improve the effectiveness of the operation of sections 120 and 121 of the Bankruptcy Act 1966. This article outlines the operation of the existing sections 120 and 121 and considers the utility of the proposed amendments to the sections contained in the Bankruptcy Legislation Amendment Bill 1995.

INTRODUCTION

In early 1992 Australia's bankruptcy law was 'toughened up' to deal more effectively with so-called 'high flyer' bankrupts.[1] Despite the new laws, recent publicity indicates that 'high flyer' bankrupts continue to flourish, enjoying lavish lifestyles whilst their creditors suffer. However, this state of affairs may be about to change. In March 1995 the Bankruptcy Legislation Amendment Bill 1995 (Cth) ('the Bill') was introduced into Federal Parliament. The Bill includes significant changes to a number of different areas of bankruptcy law. Of particular interest in relation to the 'high flyer' bankrupts are the proposed amendments to sections 120 and 121 of the Bankruptcy Act 1966 (Cth)[2] ('the Act'), the so-called antecedent

---

† Assistant Lecturer, The University of Western Australia.

1. Minister for Justice and Consumer Affairs 'Tougher Laws for "High Flyer" Bankrupts' Media Release 8 Aug 1991; Bankruptcy Amendment Act 1991 (Cth).
2. Also of interest to the 'high flyers' are the proposed amendments to the compulsory

transaction avoidance provisions.[3]

Sections 120 ('Voluntary settlements') and 121 ('Fraudulent dispositions') enable the trustee in bankruptcy to avoid certain transactions made by the bankrupt prior to the commencement of bankruptcy. The typical scenario which is contemplated by the sections occurs when a person, who is either in a perilous financial position or about to embark on a risky business enterprise, disposes of his or her property to friends or relations to prevent the property being distributed amongst creditors in the event of a subsequent bankruptcy. The sections are designed to frustrate these efforts of the bankrupt and enable the trustee in bankruptcy to recover the property, thus increasing the pool of assets available for distribution to creditors. In a nutshell, these provisions operate to ensure justice (to creditors) before generosity (to volunteers).[4]

The object of this article is to consider the utility of the proposed amendments to sections 120 and 121. In order to do this the deficiencies in the operation of the existing sections must first be canvassed.

SECTION 120 — THE PRESENT LAW

1. Conditions of avoidance

A careful analysis of the extracts of sections 120(1) and (2) reproduced below[5] indicates that before a trustee in bankruptcy can avoid a settlement

income contribution regime made necessary by the decision in *Bond v Ramsay* (1994) 125 ALR 399.

3. The other main antecedent transaction avoidance provision is s 122 ('Avoidance of preferences'). This section enables the trustee in bankruptcy to avoid certain transactions in favour of a creditor which gives that creditor an advantage over other creditors. The amendments proposed for s 122 will not be discussed in this article.
4. This notion of justice before generosity is adapted from a comment made by Lord Hatherley LC in *Freeman v Pope* (1870) LR 5 Ch App 538, 540: 'The principle on which the statute of 13 Eliz I c 5 proceeds is thus, that persons must be just before they are generous, and that debts must be paid before gifts can be made'.
5. For the purposes of this article, the important subsections of s 120 are (1) and (2). The relevant parts of s 120(1) are as follows:

   (1) A settlement of property ... not being:

   (a) a settlement ... made in favour of a purchaser or encumbrancer in good faith and for valuable consideration; ... is, if the settler becomes a bankrupt and the settlement came into operation after, or within *two years* before, the commencement of the bankruptcy, void as against the trustee in bankruptcy' (emphasis added).

   Section 120(2) makes void as against the trustee in bankruptcy settlements of property (not being settlements referred to in s 120(1)(a) or (b)) made after, or within *five* years before, the commencement of the bankruptcy unless the parties claiming under the settlement can prove: '(a) that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement; and (b) that the settlor's interest in the property passed to the trustee of the settlement or to under them he or she must establish the following 'conditions of avoidance':

(i) the settlement took place within the relevant time span;

(ii) the transaction sought to be avoided was a 'settlement of property'; and either

(iii) (a) the recipient of the property was not a 'purchaser ... for valuable consideration'; or

(b) the recipient of the property was not a 'purchaser ... in good faith'.[6]

(i) The time of settlement

Section 120(1) enables the trustee in bankruptcy to avoid settlements made after, or within *two* years before, the commencement of bankruptcy. Under section 120(2) the trustee in bankruptcy may avoid settlements made up to *five* years before the commencement of bankruptcy; however, in this case, there is a defence available to the recipient of the settled property if he or she proves the matters contained in sections 120(2)(a) and (b).[7]

The commencement of bankruptcy is regulated by section 115 which provides that in the case of a person who becomes bankrupt on a creditor's petition the commencement of bankruptcy shall relate back to the time of the earliest act of bankruptcy committed by the person within six months preceding the date on which the creditor's petition was presented.[8]

(ii) 'Settlement of property'

The word 'property' is defined in section 5 of the Act to mean:

> Real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.

The meaning of the word 'settlement', however, is not exhaustively defined in the Act[9] and has been the subject of detailed judicial discussion and comment. The view which has come to be entrenched is that a settlement

---

the donee under the settlement on its execution.' Parts of s 120(1)(a) and the whole of s 120(1)(b) are not reproduced here. Neither is s 120(3)–(6).

6. It is to be noted that in relation to s 122 the burden of discharging the 3 conditions contained in the protective provision (s 122(2)(a)) is on the preferred creditor (s 122(3)). In relation to s 120, however, the onus is on the trustee in bankruptcy to establish that the settlement was not made in good faith and for valuable consideration: see *Re Trautwein; Richardson v Trautwein* (1994) 14 ABC 61, 73; *Pt Garuda Indonesia Ltd v Grellman* (1992) 107 ALR 199, 211.

7. The defences available to recipients of s 120 settlements will be discussed later.

8. Thus if an act of bankruptcy was committed 6 months prior to the presentation of the petition, settlements made up to $2^1/_2$ or $5^1/_2$ years before the presentation of the petition may be avoided.

9 See s 120(8) which provides that a settlement of property includes 'any disposition of property'.

requires more than the mere transfer of property. A disposition of property for the purpose of immediate consumption or disposal by the recipient is not a settlement. Rather, a settlement of property contemplates the permanent retention of property in some form.[10] Thus, according to the traditional tests of settlement, a gift of money which is not intended to be retained or preserved would not be a settlement and would not be recoverable by the trustee in bankruptcy. Clearly this represents a deficiency in the operation of section 120.

Given the policy underlying section 120, namely the equitable treatment of creditors, it is really of no relevance to the creditors what form the disposition takes. The paramount concern of the creditors is the *effect* of the payment, which is the depletion of the assets available for distribution. In the light of the reluctance of the courts to adopt a wider test of what constitutes a 'settlement of property',[11] this aspect of section 120 requires urgent legislative reform.

(iii) (a) 'Purchaser for valuable consideration'

In order to avoid a settlement of property under section 120, a trustee in bankruptcy must establish that the recipient was not a 'purchaser ... in good faith and for valuable consideration'. Although the description of the recipient contains three elements (a purchaser, valuable consideration and good faith), the High Court has noted that the three elements tend to run one into the other and certainly 'purchaser' and 'valuable consideration' overlap considerably.[12] Accordingly, in this article, a purchaser for valuable consideration will be treated as one element.

Once again, as with the term 'settlement of property', there is a long line of authority interpreting the phrase 'purchaser ... for valuable consideration'. The cases indicate that a purchaser for valuable consideration means a 'buyer' in the ordinary commercial sense of the word, not a purchaser in the legal sense of the word.[13] A person may be a purchaser for valuable

---

10. See *Re Pahoff, ex parte Ogilvy* (1961) 20 ABC 17; *Re Williams; Williams v Lloyd* (1934) 50 CLR 341; and *Jack v Smail* (1905) 2 CLR 684.
11. In *Re Ward, ex parte Official Trustee in Bankruptcy v Dabnas* (1984) 55 ALR 395 Willcox J raised the possibility of a wider definition for 'settlement'. This view has been approved in some cases since then: see eg Sweeney and Fisher JJ in *Barton v Official Receiver* (1984) 58 ALR 328, 335-336; White J in *Re Pheon Pty Ltd* (1986) 11 ACLR 142; Woodward and Northrop JJ in *Official Trustee v Arcadiou* (1985) 8 FCR 4, 8. However, generally speaking, the courts have preferred the traditional test: see French J in *Re Kastropil, ex parte Official Trustee* (1991) 33 FCR 135; *Re La Rosa, ex parte Norgard v Rocom* (1990) 21 FCR 270; *Pt Garuda Indonesia Ltd v Grellman* supra n 6, 199; *Official Trustee v Mitchell* (1992) 16 Fam LR 87.
12. *Barton v Official Receiver* (1986) 60 ALJR 556, 559. Their Honours say the words 'purchaser' and 'valuable consideration' should be held together as a single concept.
13. *Re Pumfrey, ex parte Hillman* (1879) 10 Ch D 622, 625.

consideration if he or she has provided a quid pro quo[14] and this may be the case even where the quid pro quo is not money or physical property but rather the release of a right or the compromise of a claim.[15]

Interestingly, the cases also indicate that the consideration need not be provided directly to the settlor.[16] Since the object of section 120 is to prevent the depletion of the bankrupt's estate, it may be thought the consideration should be provided directly to the bankrupt. However, it is submitted the view expressed in the case law represents an appropriate balancing of the different interests involved. A purchaser who has provided consideration for the settlement, albeit not directly to the settlor, should be treated differently from a mere volunteer. Settlements to these purchasers should not be subject to avoidance under section 120 unless, of course, the trustee in bankruptcy can establish a lack of good faith.[17]

The formulation of the current test for a 'purchaser ... for valuable consideration' is now well settled by the joint judgment of the High Court in *Barton v Official Receiver*.[18] Gibbs CJ, Mason, Wilson and Dawson JJ accepted Megarry J's formulation of the test in *Re Abbot (a bankrupt)*[19] and ruled that:

> A 'purchaser ... for valuable consideration' within the meaning of section 120(1) of the Act is one who has given consideration for his purchase 'which has a real and substantial value, and not one which is merely nominal or trivial or colourable'.[20]

Despite the clear definition of the test provided in *Barton's* case,[21] as a matter of practice it may be difficult to determine in a particular situation whether valuable consideration has been supplied. The test indicates that the consideration need not be adequate or equal to the value of the settled property,[22] yet it must be substantial and not merely nominal or trivial or

14. *Hance v Harding* (1888) 20 QBD 732, 739.
15. *Re Pope, ex parte Dicksee* [1908] 2 KB 169. Furthermore though the existence of an antecedent debt is not valuable consideration, a forbearance to sue for an antecedent debt may be valuable consideration: see *Re Pacific Projects Pty Ltd (in liq)* (1990) 2 Qd R 541.
16. See *Re Windle* [1975] 1 WLR 1628, 1637; *Re Abbot (a bankrupt)* [1983] Ch 45, 54, 58 where the alternative view posited by Stamp J in *Re A Debtor, ex Parte Official Receiver v Morrison* [1965] 1 WLR 1498 was discarded as erroneous.
17. Such settlements are prima facie suspicious and may also be able to be avoided by the trustee in bankruptcy if they come within s 121 as dispositions made with intent to defraud creditors.
18. (1986) 60 ALJR 556.
19. Supra n 16.
20. *Barton v Official Receiver* supra n 18.
21. Ibid.
22. In *Official Trustee in Bankruptcy v Mitchell* (1992) 16 Fam LR 87, 93 Burchett, French and Einfeld JJ referred to *Simpson v Grellman* (unreported) Fed Ct 28 June 1990 no

colourable.[23] The application of the test is thus very uncertain.

More importantly, the current law regarding valuable consideration is unjust. Clearly whenever a settlement of property is made for consideration which is less than the value of the settled property there is a depletion in the estate of the settlor. In a subsequent bankruptcy the creditors must bear the shortfall. The current law is therefore at odds with the objective of justice before generosity and requires reform.

(iii)(b) 'Purchaser in good faith'

If the trustee in bankruptcy fails to establish that the recipient of the settled property was not a 'purchaser ... for valuable consideration', the settlement may still be avoided provided the trustee in bankruptcy can prove the recipient was not a 'purchaser ... in good faith'. Although the onus is on the trustee in bankruptcy to prove lack of good faith, there is authority to suggest that only a very slight degree of proof is required by the trustee in bankruptcy to shift that burden to the settlees.[24]

In *Re Hyams; Official Receiver v Hyams*[25] Gibbs J made the preliminary point that the section is directed to the good faith of the settlee and that it is not necessary for both parties to the transaction to act in good faith.[26] His Honour went on to say that 'in good faith' means 'without notice that any fraud or preference contrary to the statute is intended'.[27] A similar meaning of the concept of 'good faith' was provided by Willcox, Gummow and Von

---

315, where it was said: 'The principle of *Barton* is clear. It is not necessary that the consideration given by a purchaser be equal, or even nearly equal, to the value of a property the subject of a s 120 application.'

23. Pincus J has considered 'colourable' to imply that the consideration is 'non-commercial or non-bona fide and that it is of such a kind as would not be agreed in an arm's length transaction': see *Re Osborne, ex parte Trustee of Property of Osborne v Osborne* (1989) 91 ALR 135, 138. Accordingly where settlements are made in favour of family members there is a strong possibility the consideration will be viewed as colourable: see *Re Osborne* supra; *Re Sullivan, ex parte Sullivan* (1987) 16 FCR 405. Cf *Official Trustee v Martin* (1990) 29 FCR 504 and *Official Trustee v Mitchell* supra n 22, where the consideration was proven to be a true reflection of the value, or a significant proportion of the value (two-thirds), respectively, of the settled property. In the 'non-family' cases the consideration is more likely to be viewed as valuable: see *Shirlaw v Malouf* (1989) 97 FLR 382; *Re Ocean Downs Pty Ltd (in liq)* [1989] 1 Qd R 648; *Re Pacific Projects Pty Ltd (in liq)* supra n 15.
24. *Michael v Thompson* (1894) 20 VLR 548, 550. This case concerned a similar requirement in an action by creditors to set aside a marriage settlement made with intention to defraud them: McDonald, Henry & Meek *Australian Bankruptcy Law and Practice* (Sydney: Law Book Co, 1977) 3104 ¶ 656 Presumably once the burden had shifted, the settlee would be under a similar burden to preferred creditors seeking to invoke the protective provisions of s 122(2)(a).
25. (1971) 19 FLR 232.
26. Id, 256. Gibbs J cited *Mackintosh v Pogose* [1895] 1 Ch 505
27. Ibid.

Doussa JJ in *Pt Garuda Indonesia v Grellman*[28] where they held the correct question to be determined was whether the settlee 'had been privy to or party to fraud'.[29]

There have been suggestions in other cases promoting a wider understanding of lack of good faith.[30] However, it may well be that the formulation of a precise meaning of the concept is unnecessary. As noted earlier, the courts tend to view the three inter-related elements of 'a purchaser in good faith and for valuable consideration' as running together. Furthermore, to the extent that the elements are examined separately it is usual for the courts to consider first the issue of valuable consideration. If it is found that there is no valuable consideration, the trustee in bankruptcy has discharged the onus and the question of good faith is not then considered in any detail by the courts.[31] On the other hand, if valuable consideration that is real and substantial is established, then it usually follows that the recipient was also acting in good faith.[32]

The case of *Re Pacific Projects Pty Ltd (in liq)*[33] presents an interesting contrast. In this case, Natwest Bank obtained security from Pacific in return for Natwest forbearing to sue on debts owed to it by G, the principal of Pacific. The court found the forbearance to sue did constitute valuable consideration; however, each of the judges considered that in the circumstances Natwest was not a purchaser in good faith. Natwest was aware that Pacific was unable to pay its debts and was thus put on enquiry to be satisfied that the security provided was a good one.[34] The effect of this decision was that the liquidator was entitled to avoid the security in favour of Natwest even though Natwest had provided consideration.

Although it is not doubted that this decision is correct, one wonders whether the result of the case is desirable as a matter of policy. Broadly

---

28. (1992) 107 ALR 199.
29. Id, 212.
30. See Fisher J in *Barton v Official Receiver* supra n 11. Thus according to Buckley LJ in *Re Pope* [1908] 2 KB 169, 174 the words 'in good faith' exclude 'colourable transactions' and in *Mogridge v Clapp* [1892] 3 Ch 382, 401 Kay LJ said good faith 'must mean or involve a belief that all is being regularly and properly done'. In other cases it has been suggested that the test of lack of good faith contained in s 122(4)(c), relating to the avoidance of preferences under s 122, is applicable to s 120. See *Re Pacific Projects Pty Ltd (in liq)* supra n 15 where Connolly J, with whom Carter J agreed, applied the test in s 122(4)(c) and concluded the settlee, Natwest, was not a purchaser in good faith under s 120. In *Barton v Official Receiver* supra n 12, 328 Fisher J queried the use of a s 122(4)(c) test of good faith in cases on s 120.
31. See eg *Re Hyams; Official Receiver v Hyams* supra n 25; *Barton v Official Receiver* supra n 12, 328.
32. See *Shirlaw v Malouf* supra n 23; and *Official Trustee in Bankruptcy v Martin* (1990) 24 FCR 504.
33. Supra n 15.
34. Id, Connolly J, 547; Moynihan J, 549.

speaking, the purpose of section 120 is to prevent the depletion of a bankrupt's estate by voluntary settlements made on the brink of bankruptcy. If a settlement is made in favour of a person who has actually provided valuable consideration, then theoretically there is no depletion to the estate and the settlement should not be avoided.[35] Accordingly, it is suggested that the requirement of good faith be removed from section 120.[36]

2. Defences

(i) Available to the recipient — section 120(2)

Subject to the comments to be made shortly regarding settlements made pursuant to maintenance agreements or orders, where the trustee in bankruptcy establishes the 'conditions of avoidance' then, under section 120(1), the settlement may be avoided. There is no defence available to the recipient in the section.

Section 120(2), however, provides a defence to recipients in the case of settlements made within five years of the bankruptcy where the parties claiming under the settlement prove: (a) that the settlor was able to pay all his or her debts without the aid of the property comprised in the settlement; and (b) that the settlor's interest in the property passed to the trustee or donee under the settlement. The gist of this defence is self-explanatory. If a bankrupt settled property between two and five years prior to the commencement of bankruptcy and the settlee is able to prove the bankrupt was solvent at the time, then the settlee has a defence.

For the purposes of this article, the important point to note is that the expression 'debts' includes contingent liabilities under guarantees and contingent liabilities arising in tort or contract where the evidence shows there is a 'reasonable possibility' the settlor would have to meet them.[37] This aspect of the section 120(2) defence will be discussed more fully later when the reform proposals are considered.

---

35. It is worthwhile noting here that s 122 operates to enable a trustee in bankruptcy to avoid preferential transactions in favour of creditors made within 6 months of the commencement of bankruptcy. If a preference was made earlier than that it cannot be avoided under s 122. *Re Pacific Projects* supra n 15 illustrates how longstanding preferences may be avoided, via the back door, under s 120.

36. It is conceded that this reform suggestion would diminish a trustee in bankruptcy's ability to recover settled property under s 120. However there is a clear possibility that the same set of facts would give rise to a fraudulent disposition which might be avoided by the trustee under s 121. See eg *Pt Garuda Indonesia v Grellman* supra n 6, 199 and infra n 48. Thus the overall impact on the recovery powers of the trustee in bankruptcy would be minimal.

37. See Gibbs J in *Re Hyams; Official Receiver v Hyams* supra n 25, 257; *Re Saebar; Official Receiver v Saebar* (1971) 18 FLR 317.

(ii) Available to purchasers from the recipient — section 120(7)

Section 120(7) protects third persons who purchase in good faith from the recipient of the settled property.

(iii) Available to the bankrupt's family — section 123(6)

If the settlement was made before the day on which the settlor became a bankrupt,[38] under or in pursuance of a maintenance agreement or order, then under section 123(6) it cannot be avoided by the trustee in bankruptcy under either section 120(1) or (2).[39]

3. Conclusion

As discussed above, there are three main reforms required of section 120. First, the notion of a settlement of property should be widened. Second, the test of valuable consideration should equate with the value of the property removed from the settlor's estate and, finally, the good faith requirement should be deleted.

SECTION 121 - THE PRESENT LAW

Section 121 of the Act[40] enables the trustee in bankruptcy, in certain circumstances, to avoid a disposition of property made with intent to defraud

---

38. S 5 provides that a person becomes a bankrupt either on the day of the sequestration order or on the day the debtor's petition was presented.
39. The policy recognised in s 123(6) favours the bankrupt's family ahead of the bankrupt's creditors. There is obviously scope for an individual on the brink of bankruptcy to salvage something for the family by entering into or becoming subject to a maintenance agreement or order. However, there are two safeguards that may apply to prevent any abuse of the s 123(6) defence. First, the defence does not apply to s 121. Thus, if the trustee in bankruptcy can establish that the settlement was a 'disposition of property ... with intent to defraud creditors', then the settlement will not be protected by s 123(6). Secondly, the courts are reading the limitation, which requires that the settlement was made pursuant to a maintenance order or agreement, strictly and in favour of the creditors: see eg *Re Azoulay, ex parte Andrew v Townsend* (1989) 90 ALR 37; *Commissioner of Taxation v Swain* (1988) 20 FLR 507.
40. The relevant parts of s 121(1) and (3) are as follows:
    (1) [A] disposition of property ... with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person subsequently becomes a bankrupt, void as against the trustee in bankruptcy...
    (3) In this section, 'disposition of property' includes a mortgage of property or a charge on or in respect of property.

    Prior to the enactment of s 121, trustees in bankruptcy relied on various State provisions creditors. There are several differences between sections 120 and 121. First, section 121 refers to a 'disposition' whereas section 120 refers to a 'settlement'. As previously discussed, the term 'settlement' is limited and contemplates that the recipient of the settled property will retain it in some form. There is no such limitation on the term 'disposition'. Furthermore unlike section 120, the trustee in bankruptcy may avoid fraudulent dispositions made at any time. Accordingly, the first two conditions of avoidance which a trustee in bankruptcy must establish under section 120, namely that the settlement occurred within the relevant time span and the transaction was a 'settlement of property', are not relevant under section 121. Instead, the trigger to the operation of section 121 is proof of 'intent to defraud creditors'.

1. Conditions of avoidance

In order for the trustee in bankruptcy to avoid a disposition of property under section 121, he or she must establish that:

(i) the disposition was made with 'intent to defraud creditors'; and either

(ii) (a) the disposition was not for valuable consideration, or

(b) the disposition was not in favour of a person who acted 'in good faith'.

(i) The disposition was made with 'intent to defraud creditors'

There are two interrelated areas of concern arising from the notion of 'intent to defraud'. One is the *onus* of proving fraudulent intent; the other, the *meaning* of intent to defraud.

(i) (a) The onus of proving fraudulent intent

There is no doubt that the onus of proving that the disponor had an 'intent to defraud creditors' is on the trustee in bankruptcy.[41] If there is evidence available that clearly establishes an actual intention to defraud, this task will not be difficult. However, in the usual case, there is no such unequivocal evidence. The question therefore arises as to precisely 'how much' evidence is needed for the trustee in bankruptcy to satisfy the court that the disposition was made with intent to defraud creditors.

The authorities have been confused in relation to this issue. Some of

---

based on the English statute 13 Eliz I c 5, to avoid fraudulent dispositions (ie, s 189 of the Property Law Act 1969 (WA)). The case law regarding these provisions provides guidance in interpreting s 121.

41. *Official Trustee v Marchiori* (1983) 69 FLR 290, 294.

the earlier cases required proof of 'a real intent to defeat or delay creditors'.[42] However, more recently the cases indicate that in certain circumstances an intent to defraud may be presumed. Essentially the presumption of intent to defraud arises upon proof that, at the time of the disposition, the disponor was unable to pay his or her debts without the aid of the property disposed.[43] This interpretation is now widely accepted in Australia.[44]

Clearly this interpretation of the proof required to establish fraudulent intent will be of considerable assistance to trustees in bankruptcy. Indeed, it is suggested that the confusion regarding the proof of fraudulent intent in the past may be a reason why insolvency practitioners have not sought to invoke section 121 more often. For this reason it is suggested the section itself should be amended to provide for the raising of such a presumption, thus clarifying the section's operation.[45]

(i) (b) The meaning of 'intent to defraud'

The 'intent to defraud' mentioned in section 121 is the intent of the person making the disposition.[46] The meaning of 'intent to defraud' does not necessarily require fraud in the ordinary sense of 'deceit'.[47] It is sufficient if an intent to defraud, hinder or delay creditors is established.[48] Section 6 of the Act establishes that an intent to defraud any one or more of the creditors is contemplated by the expression 'intent to defraud creditors'.

42. See Dixon J in *Re Williams* supra n 10, 372; Lord Esher MR in *Ex parte Mercer* (1886) 17 QBD 290.
43. See Lord Hatherley LC in *Freeman v Pope* supra n 4.
44. See *Noakes v J Harvey Holmes & Sons* (1979) 37 FLR 5; *Official Trustee v Marchiori* supra n 41; *Pt Garuda Indonesia Ltd v Grellman* supra n 6, 199.
45. Such an amendment would simply provide legislative affirmation of a position which the courts already regard as the law.
46. See D Rose *Lewis's Australian Bankruptcy Law* 9th edn (Sydney: Law Book Co, 1990) 162. Though note the statement made in McDonald, Henry & Meek supra n 24 ¶ 679 that 'Fraudulent intent on both sides should be expressly proved, unless the assignee gave no consideration (and past consideration is not enough) or unless the intent is capable of being inferred from all the surrounding circumstances'. It is submitted this is a curious comment. The wording of the section indicates the fraudulent intent is that of the disponor ('... a disposition of property ... with intent to defraud creditors'). The disponee's intention or knowledge is of course relevant to the question of good faith, but should be irrelevant to the question of whether the disposition was made with intent to defraud creditors.
47. See *Electrical Enterprises Pty Ltd v Rodgers* (1988) 15 NSWLR 473, 496-498.
48. *Lewis's Australian Bankruptcy Law* supra n 46. An 'intent to defraud' may be inferred where a disposition is made to a creditor so as to stave off action by that creditor if the *necessary consequence* of the disposition is that other creditors are defeated. See *Pt Garuda Indonesia Ltd v Grellman* supra n 6, 208, 210 where counsel for the disponee unsuccessfully argued that although the disposition may have been a voidable preference under s 122 had it been made within 6 months of the commencement of bankruptcy, it was not a fraudulent disposition when made so as to stave off action by the creditor disponee.

Before turning from this section, there is one other matter regarding the meaning of 'intent to defraud' that requires comment. The cases establish that section 121 may be invoked by a trustee in bankruptcy even though the disponor had no creditors at the time of making the disposition, provided the disposition was made with an intention to defeat future creditors.[49] The difficulty for the trustee in bankruptcy in such a situation is proving an intent to defraud creditors. The presumption of intent to defraud creditors, which requires the *insolvency* of the disponor at the time of the disposition, will, of course, not be available.

The typical situation which arises here, as indicated in the introduction to this article, occurs when a disposition of property is made by a solvent disponor to his or her family prior to commencing a risky business venture. The purpose of such a disposition may be described as being to 'conserve family property'[50] or to 'screen and protect (the family) against the unknown risk of the new venture'.[51] Essentially, though, the purpose is also to defeat possible future creditors in the event that the venture is unsuccessful and the disponor becomes bankrupt. Since it is not necessary that an intent to defraud creditors be the sole intent of the disponor,[52] it is clearly arguable that dispositions of property for the stated purpose of 'conserving it' from future creditors are dispositions with intent to defraud creditors which may be recovered by the trustee in bankruptcy under section 121.

A question of policy arises here. Should such dispositions be recoverable? The case law in this area is ambivalent[53] and this is not surprising. The courts are faced with the competing interests of, on the one hand, the disponor's family and indeed the wider public interest of fostering entrepreneurial endeavour and, on the other, with the interests of the creditors. The resolution of this competition is very difficult. For this reason it is imperative that any proposals for the reform of section 121 provide guidelines for the proof of fraudulent intent in such circumstances. It is suggested that some matters which may be relevant are:

- the magnitude of the risk of the new venture;
- the length of time between the disposition and the disponor's insolvency;
- the total value of the disposed property; and
- the extent to which the disponor continues to enjoy the disposed property.

---

49. See *Barton v DCT* (1974) 131 CLR 370, 374; *Pt Garuda Indonesia Ltd v Grellman* supra n 6, 210.
50. See *Williams v Lloyd* [1933] 50 CLR 341, 372.
51. See *Re Butterworth, ex parte Russell* (1882) 14 Ch D 588. Although this case concerned an application by the trustee in liquidation under 13 Eliz I c 5, it is submitted the court's reasoning is equally applicable to the issue of intent to defraud under s 121.
52. *Barton v DCT* supra n 49.
53. In *Williams v Lloyd* supra n 50 the trustee in bankruptcy was unsuccessful, whereas in *Re Butterworth* supra n 51 the trustee in liquidation was successful, on similar facts, in proving an intent to defraud creditors.

(ii) (a) The disposition was not for valuable consideration

As with section 120, in order for the trustee in bankruptcy to avoid a disposition of property under section 121, the trustee in bankruptcy must prove either that the disponee did not provide valuable consideration or that the disponee did not act in good faith.[54] The meaning of 'valuable consideration' is the same in section 120 as in section 121[55] and it is therefore not proposed to consider further the meaning of valuable consideration under section 121.

(ii) (b) The disposition was not in favour of a person who acted in good faith

The meaning of 'in good faith' is broadly the same in sections 120 and 121[56] and will not be considered further.

2. Defences

Where a trustee in bankruptcy establishes that a disposition was made with intent to defraud creditors, and that either valuable consideration was not provided or the disponee lacked good faith, the disposition will be void under section 121. There are no defences available to a disponee. Further, it is also now quite clear that the protection which is provided to maintenance 'settlements' under section 123(6) is not available to dispositions which fall within section 121. However, section 121(2), which is in similar terms to section 120(7), protects third persons who purchase the disposed property in good faith from the disponee.

PROPOSALS FOR REFORM IN THE BANKRUPTCY LEGISLATION AMENDMENT BILL

1. Background

Although the Bankruptcy Legislation Amendment Bill 1995 (Cth) was only introduced into Parliament in March 1995, proposals for the reform of sections 120 and 121 have been under consideration for a considerable time.

---

54. *Official Trustee v Marchiori* supra n 41.
55. See *Pt Garuda Indonesia v Grellman* supra n 6, 214.
56. Fisher J in *Official Trustee v Marchiori* supra n 41, 297 has suggested that there is a slight difference in emphasis regarding good faith in s 120 compared with s 121. The reason for this is that s 121 requires the disponee to have 'acted in good faith' whereas s 120 simply requires the settlement to be 'made in favour of a purchaser .. in good faith'.

In November 1983 the Commonwealth Attorney-General asked the Australian Law Reform Commission ('ALRC') to enquire into the insolvency law of both individuals and bodies corporate. In 1988 the ALRC published its General Insolvency Inquiry[57] report which, amongst other things, recommended changes to sections 120 and 121. The corporate law reform aspects of this report have been addressed and are now contained in Part 5.7B of the Corporations Law, which came into operation on 23 June 1993.[58] Although the amendments to the Corporations Law are not identical to the recommendations made by the ALRC, they are similar.[59] However, somewhat surprisingly, this is not the case with the proposed amendments to sections 120 and 121 contained in the Bill.

Before turning to the specific reforms it should be noted that the amendments to sections 120 and 121 will apply to all bankruptcies that are current on the day on which the Bill commences.[60] The Bill will therefore have a retrospective operation in that it will apply to settlements and dispositions made before the enactment of the amendments.

2. Section 120 — the reforms proposed in the Bill

Clause 82(1) of the Bill repeals section 120 and substitutes a new section 120 entitled 'Undervalued transactions'. The key provisions are section 120(1) ('Transfers that are void against trustee')[61] and section 120(3) ('Transfers that are not void').[62] Under the proposed section 120(1) a trustee

---

57. Infra n 73.
58. For a discussion of the new regime introduced by the Corporate Law Reform Act 1992 (Cth), see J O'Donovan 'Voidable Dispositions and Undue Preferences: The Transition to the New Regime' (1994) 12 C & SL Journ 7; A Herzberg 'Avoidance of Antecedent Transactions' (1992) 4(2) Aust Insolv Bulletin 43; K Bennetts 'Avoidance Powers Under the Corporations Law: Reviewing the Nexus Between Uncommercial and Insolvent Transactions' (1994) 6(2) Aust Insolv Bulletin 36.
59. Despite this, there is a discernible difference in the directions being taken in the Bankruptcy Act 1966 (Cth) and the Corporations Law. For a discussion of this, see M Robinson 'The Interaction of the Corporations Law and the Bankruptcy Act with Particular Reference to Voidable Transactions and Corporate Law Reform' (1993) 5(3) Aust Insolv Bulletin 20.
60. See clause 82(2) of the Bill which also provides that the amendments will not affect any distributions made before the Bill commences.
61. 120(1). A transfer of property by a person who later becomes a bankrupt (the 'transferor') to another person (the 'transferee') is void against the trustee in the transferor's bankruptcy if:
    (a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and
    (b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.'
62. 120(3). Despite subsection (1), a transfer is not void against the trustee if:
    (a) the transfer took place more than 2 years before the commencement of the

in bankruptcy is able to avoid a 'transfer' of property that took place up to five years before the commencement of bankruptcy where the transferee gave either no consideration or consideration that was less than the market value of the property. If the transfer took place between two and five years before the commencement of bankruptcy, then under section 120(3) the transferee will have a defence if he or she is able to prove that the transferor was not 'technically insolvent' at the time of the transfer. The term 'technically insolvent' is defined in the proposed section 5(2) to cover the situation where the person's property and income are insufficient to meet the person's liabilities, including secured liabilities and potential liabilities under a guarantee for another person.

The other sub-sections of the proposed section 120 are not contentious and may be summarised as follows. Section 120(2) ('Exemptions') provides for various exemptions to section 120(1).[63] Section 120(4) ('Claim for consideration given for void transfer') enables a transferee to claim in the transferor's bankruptcy to the extent of any value provided for a void settlement. Section 120(5) ('What is not consideration') essentially provides that love or affection, a promise to marry, or the relationship of the parties has no value as consideration. Section 120(6) ('Protection of successors in title') protects third parties who have acquired the property from a transferee in good faith and by giving consideration. Section 120(7) ('Meaning of "transfer of property" and "market value"') defines market value and provides an expanded definition of transfer of property.

Although the gist of the proposed section 120 is still very much in keeping with the existing section 120,[64] there are some significant changes. Most noticeably, the language of the proposed section is simple and clear and the substance of the provisions contained in the anachronistic existing sections 120(3) – (6) is deleted. This has enabled the substance of the provisions contained in the existing and tortuous sections 120(1) and (2) to be expanded and placed in more logical and easier to read sub-sections. This is definitely a change for the better. There are several other important changes.

---

bankruptcy; and

(b) the transferee proves that, at the time of the transfer, the transferor was not technically insolvent.'

63. The exemptions include: the payment of tax; transfers under maintenance agreements or orders; and transfers under debt agreements or under the regulations.

64. By way of contrast, the reforms made to the Corporations Law are quite different from the present s 120. The most striking difference is the requirement that the impugned transaction be an 'insolvent transaction': see s 582FE(3) and (4) and Bennetts supra n 58, 37. It is submitted this is not a desirable reform and fortunately it has not been included in the proposed s 120.

(i) 'Transfer' not 'settlement'

The word 'transfer' is used in the proposed section 120 in place of 'settlement'. In the Explanatory Memorandum, it is noted that the term 'transfer' does not carry with it any connotation of permanent retention of property and thus overcomes the difficulties in the interpretation of 'settlement'.[65] Furthermore, the proposed section 120(7) provides for an expanded definition of transfer of property. Section 120(7)(a) provides that a transfer of property includes a payment of money. Section 120(7)(b) is a curiously worded provision which defines a transfer in situations where interests in property are created.[66]

It is submitted the substitution of the word 'transfer', with its expanded meaning, for the word 'settlement' overcomes one of the main deficiencies of the present operation of section 120 and is therefore a laudable amendment.

(ii) Market value consideration

Under the proposed section 120(1) transfers of property for less than the market value may be avoided by the trustee in bankruptcy. Section 120(7)(c) defines 'market value' to be the market value of the property at the time of transfer. This requirement for market value consideration is designed to overcome the problems inherent in the test for valuable consideration propounded in *Barton's* case.[67]

On the whole, this is a desirable amendment. If a transfer of property is for less than the market value then the trustee in bankruptcy may avoid it.[68] In such a case the transferee may claim in the transferor's bankruptcy

65. Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 1995 (Cth) 95.
66. Section 120(7)(b) is as follows:

> [A] person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person.

The examples given in the Explanatory Memorandum include: the creation of a mortgage or charge; the conferring of a licence to use a trademark or patented item where no licence to use them existed before; and the building by the bankrupt of a residence on another person's land. See Explanatory Memorandum id, 96

67. *Barton v Official Receiver* supra n 12, 556. The Explanatory Memorandum indicates the expression 'market value' is intended to refer to the value of the property that would be obtained if it were disposed of to an unrelated purchaser on an ordinary commercial basis (id, 97). If there is a range of possible values, then the transfer would only be at an undervalue if it were for less than the lowest value in the range (ibid). An example of the difference between valuable consideration and market value consideration is as follows: A payment of $80 000 for property worth $100 000 is valuable consideration but not market value.
68. Incidentally, this requirement of market value consideration proposed in the Bill is in keeping with the ALRC recommendation AT 5(1) ('Avoidance of transactions at an undervalue') and the Corporations Law s 588FE(3) which focuses on 'uncommercial transactions'.

for the value of any consideration provided pursuant to proposed section 120(4).[69]

(iii) The 'good faith' requirement deleted

The proposed section 120(1) enables the avoidance of transfers that are not made for market value consideration. There is no mention of good faith. Thus, if market value consideration was provided by the transferee, the trustee in bankruptcy will be unable to avoid the transfer even though the transferee did not act in good faith.

The Explanatory Memorandum does not provide a reason for the deletion of good faith from the proposed section 120. However, as observed earlier, where market value consideration has been provided for a transfer of property there is no overall depletion in the bankrupt's estate and accordingly the transfer should be allowed to stand.[70] It is submitted the deletion of the good faith requirement from the Bill is an appropriate reform.

(iv) The section 120(3) defence — transferor not 'technically insolvent'

The proposed section 120(3) provides a defence in relation to transfers that occurred between two and five years before the commencement of bankruptcy where the transferee proves that at the time of the transfer the transferor was not 'technically insolvent'. This defence is very similar indeed to the present defence contained in section 120(2). The main difference, however, is that the proposed definition of 'technically insolvent' requires an examination of all the debtor's liabilities, including contingent liabilities.[71] The present law is that such contingent liabilities should only be taken into account where there is a 'reasonable possibility' that the debtor will have to meet them.[72]

Although this amendment will make it easier for a trustee in bankruptcy to avoid a transfer, it is suggested that as a matter of policy this is not a desirable amendment. The effect of the amendment is that anyone who has, for example, signed a guarantee for more than their net worth is 'technically insolvent'. The definition does not take into account the risk of default by the principal debtor or the solvency or assets of the principal debtor or the

69. It is suggested an additional amendment may be appropriate here which allows the transferee to keep the property and pay to the trustee in bankruptcy the difference between the consideration actually provided and the market value.
70. However, the same set of facts may constitute a transfer which is voidable under the proposed s 121. For, as will be seen, there is no deletion of a good faith type requirement from the proposed s 121.
71. Explanatory Memorandum supra n 65, 98-99.
72. See Gibbs J in *Re Hyams* supra n 25, 257.

other guarantors. Thus, if an otherwise solvent transferor transfers property whilst subject to such a guarantee, and between two and five years later becomes bankrupt, the trustee in bankruptcy may avoid the transfer. Indeed, this will be the case irrespective of whether the transferor's contingent liability on the guarantee, which caused the technical insolvency, matures into actuality.

It is submitted the proposed definition of 'technically insolvent' casts the net too widely. Contingent liabilities should only be taken into account in assessing the solvency of the transferor where there is a 'reasonable possibility' that the contingent liability will mature. Accordingly, the present law should remain.

(v) Comment

The overall effect of the reform proposals contained in the Bill is to improve appreciably the operation of section 120. Any transfer of property, during the relevant time period, from the transferor's estate for less than the market value may be recovered by the trustee in bankruptcy. The deficiencies in the operation of the existing section 120 relating to the meaning of 'settlement' and the test for valuable consideration have been overcome.

However, it is suggested there is an additional reform that would be desirable in the proposed section 120. This is a 'change of position' protection for good faith transferees. This suggestion is based on ALRC recommendation AT5(6)[73] and would enable the court to grant discretionary relief where the transferee:

(a) received the property in good faith; and
(b) has altered his or her position as a result of the transfer.

This suggested reform would allow the court to weigh up the competing interests of creditors and transferees in particular situations and to make such orders as are just.

3. Section 121 — the reforms proposed in the Bill

Clause 82(1) of the Bill also repeals section 121 and substitutes a new section 121 entitled 'Transfers to defeat creditors'. The key provisions are section 121(1) ('Transfers that are void'),[74] section 121(2) ('Showing the

---

73. See ALRC *General Insolvency Inquiry* Rep No 45, vol 1 (Canberra, 1988) ¶ 676

74. 121 (1) A transfer of property by a person who later becomes a bankrupt (the 'transferor') to another person (the 'transferee') is void against the trustee in the transferor's bankruptcy if:

(a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and transferor's main purpose in making a transfer')[75] and section 121(4) ('Transfer not void if transferee acted in good faith').[76]

Under the proposed section 121(1) a transfer of property is void if the property would probably have become part of the bankrupt estate, and the transferor's 'main purpose' in making the transfer was to prevent the transferred property from becoming divisible, or to hinder or delay the division of property, among the creditors.[77] The transferor's 'main purpose' will be 'taken to be' as described above if it can reasonably be inferred that at the time of transfer the transferor was, or was about to become, 'technically insolvent'.[78] However, section 121(3) ('Other ways of showing the transferor's main purpose in making a transfer') provides that section 121(2) does not limit the ways of establishing the transferor's main purpose in making a transfer. Finally, section 121(4) provides that a transfer is not void if market value consideration was given and the transferee essentially acted in good faith. The other provisions of the proposed section 121 are not contentious and equate with corresponding provisions in the proposed section 120.[79]

Once again, the gist of the proposed section 121 is similar to the present section 121.[80] However, there are some important changes.

(b) the transferor's main purpose in making the transfer was:
(i) to prevent the transferred property from becoming divisible among the transferor's creditors; or
(ii) to hinder or delay the process of making property available for division among the transferor's creditors.

75. 121(2). The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances, at the time of the transfer, the transferor was, or was about to become, technically insolvent

76 121(4) Despite subsection (1), a transfer of property is not void against the trustee if: (a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and (b) the transferee did not know that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and (c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, technically insolvent.

77. For the purposes of this article, the main purpose indicated in ss 121(b)(i) and (ii) will be summarised as, to 'prevent' 'hinder or delay' the satisfaction of creditors.

78 S 121(2)

79 The proposed s 121 provisions equate with the proposed s 120 provisions as follows:
S 121(5) ('Claim for consideration given for void transfer') with s 120(4),
S 121(6) ('What is not consideration') with s 120(5),
S 121(7) ('Exemption of transfers of property under debt agreements') with s 120(2)(c),
S 121(8) ('Protection of successors in title') with s 120(6); and
S 121(9) ('Meaning of "transfer of property" and "market value"') with s 120(7).

80 This is not the case with the reforms made to the Corporations Law which are quite different. The most striking difference is the requirement that the impugned transaction be an 'insolvent transaction'· see s 588FE(5) and Bennetts supra n 58, 38. This is not a desirable reform and fortunately has not been included in the proposed s 121.

(i) Focus on 'prevent', 'hinder or delay' and not 'defraud'

Unlike the present section 121, the word 'defraud' is not used. Rather, the words 'prevent' and 'hinder or delay' are used. These words more accurately reflect the current meaning given to 'intent to defraud' in section 121 and are, therefore, an appropriate reform.

(ii) 'Main purpose' to 'prevent', 'hinder or delay' may be presumed

The proposed section 121(2) provides that the 'main purpose' may be 'taken to be' to 'prevent' or 'hinder or delay' the satisfaction of the creditors if the transfer was made at a time when the transferor was 'technically insolvent'.[81] This is similar to the present section 121 where the courts will presume an 'intent to defraud' creditors if the disposition was made at a time when the disponor was insolvent. However, as noted previously in this article, insolvency practitioners are not generally aware of the benefit of this presumption and hence do not use section 121 as frequently as they might.

The insertion of a presumption that the 'main purpose' was to 'prevent', 'hinder or delay' the creditors where the transfer was made at a time when the transferor was technically insolvent is, therefore, another useful reform.

(iii) Market value consideration and 'good faith'

The proposed section 121(4) ('Transfer not void if transferee acted in good faith') provides that transfers will not be void if market value consideration was given and the transferee essentially acted in good faith. Although 'good faith' is used in the title to section 121(4) it is not used in the text of the subsection. Rather, the subsection requires that the transferee did not know that the transferor's main purpose was to 'prevent', 'hinder or delay' creditors and the transferee could not have inferred that the transferor was 'technically insolvent'. This is similar to the current interpretation of 'good faith'.

This is a useful amendment to section 121. Market value consideration, as previously discussed, is used instead of valuable consideration and the

---

81. The term 'technically insolvent' should not include all contingent liabilities but only those where there is a 'reasonable possibility' that the debtor will have to meet them

82. Under the proposed s 121(2) the presumption arises if 'at the time of the transfer, the transferor was, or was about to become, technically insolvent'. Presumably the expression 'about to become technically insolvent' simply means about to become technically insolvent as a result of the transfer.

section clearly specifies what constitutes 'good faith'. It is suggested, however, that the title to section 121(4) would more accurately reflect the contents of the section if the words 'and market value consideration given' were added to the section's title.

(iv) Comment

The proposals for the reform of section 121 contained in the Bill will be very useful indeed. Insolvency practitioners will no longer be in any doubt as to the ease of invoking section 121. If the transferor was technically insolvent at the time of the transfer and the transfer was either not for market value consideration or the transferee lacked 'good faith', then the trustee in bankruptcy will be able to avoid the transfer.

However, where the transferor was *solvent* at the time of the transfer, the section 121(2) presumption will not arise.[82] The proposals to reform section 121 do not include any guidelines as to how a trustee in bankruptcy may prove that a *solvent* transferor's 'main purpose' was to 'prevent' or to 'hinder or delay' the satisfaction of the creditors. Thus, where a solvent transferor embarks on a risky business venture after transferring property to his or her family, it is highly likely that the trustee in bankruptcy will not seek to invoke section 121. This may well lead to an injustice to creditors. It is therefore submitted, as discussed earlier, that guidance for the proof of the 'main purpose' in such cases should be included in the reform of section 121.[83]

Finally, it is submitted that the 'change of position' protection for a good faith transferee should also be included in the proposed reform of section 121.[84]

CONCLUSION

The proposals for the reform of sections 120 and 121 contained in the Bill represent a fairly industrious attempt to rectify the deficiencies in the current law. As such, there is no doubt the reforms will significantly improve a trustee in bankruptcy's ability to recover property for the benefit of the creditors. This is all to the good.

But the reforms in relation to section 121 have not gone nearly far enough. The glaring omission is the failure to provide guidelines to assist in proving that the main purpose of a transfer by a *solvent* transferor was to

83. See p 99 supra for a list of relevant matters.

84. Although the ALRC recommended a change of position protection in relation to s 120 (see AT 5(6)), it did not recommend this protection in relation to s 121. Despite this, it is submitted a change of position protection is also desirable in the reform of s 121.

'prevent', 'hinder or delay' the satisfaction of the creditors. Without the guidelines, proof of the main purpose will be too difficult and trustees in bankruptcy will not invoke the section.

The time has come for this situation to be remedied. Only then can we be confident that justice before generosity, and not vice versa, may finally be achieved.